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8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 SCOTT MILLER, an individual, on behalf of
13 himself, the general public and those similarly
situated, et al.

14 Plaintiffs,

15 v.

16 GHIRARDELLI CHOCOLATE COMPANY;
17

18 Defendant.
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CASE NO: C 12-04936 LB

[PROPOSED] ORDER GRANTING MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT

DATE:
TIME:
CTRM:
JUDGE: Hon. Laurel Beeler

1 Plaintiffs Scott Miller and Steve Leyton (“Class Representatives”) and Defendant
2 Ghirardelli Chocolate Company (“Defendant”) have moved the court for preliminary approval of
3 a proposed class action settlement, the terms and conditions of which are set forth in the
4 settlement agreement filed with the court on August 20, 2014 (Dkt.# 129).

5 This litigation commenced on August 17, 2012, when Plaintiff Scott Miller filed a
6 complaint against Defendant in the Superior Court of California, County of San Francisco, Case
7 No. CGC-12-523375. Miller alleged that Defendant engaged in false advertising, unfair trade
8 practices and fraud in connection with the marketing and sale of the Ghirardelli Classic White
9 Chips (“White Chips”) and several other Ghirardelli-brand products. Miller brought the following
10 statutory and common-law claims: violations of California’s Unfair Competition Law (“UCL”),
11 California Business and Professions Code § 17200 *et seq.*; violations of California’s False
12 Advertising Law, California Business and Professions Code § 17500, *et seq.*; violations of
13 California’s Consumer Legal Remedies Act (“CLRA”), California Civil Code § 1750 *et seq.*; and
14 fraud, deceit and/or misrepresentation. The claims about other products were dismissed on April
15 5, 2013. Docket No. 37.

16 On October 11, 2013, Plaintiff Steve Leyton filed a motion to intervene in the Litigation.
17 In his motion, Leyton sought to make the same claims as those of Miller about the White Chips,
18 and also to make claims that Defendant had falsely labeled the White Chips and certain other
19 products as “All Natural.” On December 20, 2013, the court granted in part and denied in part
20 Leyton’s motion to intervene, permitting him to join in the allegations by Miller about the White
21 Chips but not to make the “All Natural” allegations. On January 15, 2014, Plaintiffs filed a
22 second amended complaint conforming to the court’s order.

23 On March 13, 2014, Leyton gave notice of his intent to file his “All Natural” allegations
24 in a separate complaint. On May 15, 2014, the court held a hearing on Defendant’s motion.
25 Before the court issued its ruling, the parties agreed to stay further proceedings to return to
26 mediation.

27 In summary form, the settlement agreement is as follows. Defendant will pay \$5.25
28 million into a common fund. The fund will be used to pay all costs of notice and administration,

1 any fees and costs awarded to Plaintiffs' counsel and incentive awards to Plaintiffs, as well as
2 claims by class members. Each class member who makes a claim may obtain \$1.50 per purchase
3 of the White Chips and \$0.75 per purchase of any of the other products labeled as "All Natural."
4 There will be no cap on the total amount paid to him or her for claimed purchases that are
5 corroborated by Proof of Purchase,¹ however, a maximum of \$24.00 shall be paid to any
6 Household² for claimed purchases that are not corroborated by Proof of Purchase. Amounts may
7 be reduced pro-rata, if the total value of claims exceeds the amount of the common fund after
8 payment of notice, administration, fees, costs and incentives. Should funds remain in the common
9 fund after paying all claims, incentive awards, and fees and costs, the parties have agreed to
10 donate the money *cy pres*, in equal amounts, to four charitable organizations. Finally, as part of
11 the settlement, Defendant has also agreed to continue with certain label changes it implemented
12 during the litigation to the products at issue. *See* settlement agreement, Declaration of Adam
13 Gutride ("Gutride Decl."), Exh. 1.

14 The settlement agreement will be administered by an independent claims administrator
15 called The Garden City Group, Inc., which will cause the notices to be published, emailed and
16 mailed (as described below), establish a website, distribute funds to class members, and otherwise
17 administer the settlement. *Id.* § IV.

18 On August 20, 2014, Plaintiffs filed an unopposed motion for an order: (1) conditionally
19 certifying the proposed settlement class and appointing Gutride Safier LLP as class counsel and
20 Plaintiffs as class representatives; (2) preliminarily approving the proposed class settlement; (3)
21 directing the dissemination of notice in the form and manner set forth in the settlement
22 agreement; (4) setting a schedule for the fairness hearing and other remaining procedures; and (5)
23 granting Plaintiffs leave to file their third amended complaint. The court held a hearing on [date],
24

25 ¹ "Proof of Purchase" means an itemized retail sales receipt showing, at a minimum, the
26 purchase of a Product, the purchase price, and the date and place of the purchase. Gutride
Decl., Exh. 1, § 2.26.

27 ² "Household" means any number of persons occupying the same dwelling unit. *Id.* §
28 2.14.

1 and now issues this order granting the motion.
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3
4 **ANALYSIS**

5 **I. JURISDICTION**

6 This court has jurisdiction under 28 U.S.C. § 1332(d)(2).

7 **II. CONDITIONAL CERTIFICATION OF CLASS**

8 For settlement purposes only, the parties propose conditional certification of a class which
9 consists of all persons (other than Excluded Persons) who, between August 17, 2008, and [date of
10 preliminary approval], purchased, in the United States, except for purposes of resale, the
11 Ghirardelli “Classic White” chips or any of the other products labeled as “all natural,” a complete
12 list of which is provided in the Long Form Notice attached as Exhibit B1 to the settlement
13 agreement. Excluded Persons means (1) the Honorable Judge Laurel Beeler and any member of
14 her immediate family; (2) Honorable Judge Edward Infante and any member of his immediate
15 family; (3) any government entity; (4) any of the Released Parties; and (5) any persons who
16 timely opt out of the Settlement Class.

17 The court reviews the propriety of class certification under Federal Rule of Civil
18 Procedure 23(a) and (b). In a settlement context, the court must pay “undiluted, even heightened,
19 attention” to class certification requirements because the court will not have the opportunity to
20 adjust the class based on information revealed at trial. *See Staton v. Boeing*, 327 F.3d 938, 952-53
21 (9th Cir. 2003) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *Hanlon v.*
22 *Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (same). The court finds that the proposed
23 settlement class here meets the requirements of Federal Rule of Civil Procedure 23(a) and (b).

24 **A. Rule 23(a)**

25 Class certification requires the following: (1) the class must be so numerous that joinder
26 of all members individually is “impracticable;” (2) there are questions of law or fact common to
27 the class; (3) the claims or defenses of the class representatives must be typical of the claims or
28 defenses of the class; and (4) the person representing the class must be able to fairly and
adequately protect the interests of all class members. *See Fed. R. Civ. P. 23(a); Staton*, 327 F.3d

1 at 953.

2 Here, the factors support class certification for purposes of settlement. First, Plaintiffs
3 have adduced from Defendant's sales records that the class members number in the millions or
4 more, which makes joinder impracticable. *See Jordan v. County of L.A.*, 669 F.2d 1311, 1319
5 (9th Cir.), vacated on other grounds, *County of L.A. v. Jordan*, 459 U.S. 810 (1982). Second,
6 there exists common issues, including: (1) whether Defendant's marketing and advertising
7 materials were likely to deceive reasonable consumers; (2) whether Defendant violated California
8 Health & Safety Code sections 110100(a), 110380, and 11050 and (3) whether class members are
9 entitled to injunctive and other equitable relief and, if so, what is the nature of such relief. Third,
10 Plaintiff's claims regarding the allegedly deceptive packaging are typical of other class members.
11 *See Hanlon*, 150 F.3d at 1019-20 (claims are typical if they are reasonably coextensive with that
12 of absent class members; they need not be substantially identical). Fourth, the named Plaintiffs
13 are able to fairly and adequately protect the interests of all class members. The factors relevant to
14 a determination of adequacy are as follows: (1) the absence of potential conflict between the
15 named plaintiff and the class members; and (2) counsel chosen by the representative parties is
16 qualified, experienced and able to vigorously conduct the proposed litigation. *Id.* at 1020. The
17 court is satisfied that those factors exist here. As discussed already, the named Plaintiffs have
18 shared claims and interests with the class. Also, Plaintiffs have retained qualified and competent
19 counsel. *See Gutride Decl.*, Ex. 2; *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v.*
20 *Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001); *Brown v. Ticor Title Ins. Co.*, 982
21 F.2d 386, 390 (9th Cir. 1992).

22 **B. Rule 23(b)(3)**

23 In addition to meeting the prerequisites of Rule 23(a), a proposed class must be
24 appropriate for certification under one of the categories in Rule 23(b). *See Fed. R. Civ. P. 23(b)*;
25 *Hanlon*, 150 F.3d at 1022. The court finds that certification of the settlement class is appropriate
26 under Rule 23(b)(3). Questions of law and fact common to class members predominate over any
27 questions affecting only individual members. *See Fed. R. Civ. P. 23(b)(3)*. The case involves
28 multiple claims for relatively small sums, and a class action is superior to an alternative method

1 for fairly and efficiently adjudicating the claims. *See Amchem Products*, 521 U.S. at 625;
2 *Culinary/Bartender Trust Fund*, 244 F.3d at 1163 (class action appropriate because “if plaintiffs
3 cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because
4 of the disparity between their litigation costs and what they hope to recover”); *Pilgrim v.*
5 *Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011); *cf. Sullivan v. DB Invs.*, 667
6 F.3d 273, 303-04 & n.28 (3d Cir. 2011) (“In light of the Supreme Court’s guidance that a district
7 court ‘[c]onfronted with a request for settlement-only class certification’ need not inquire whether
8 the case ‘would present intractable management problems,’ *Amchem*, 521 U.S. at 620 . . . state law
9 variations are largely ‘irrelevant to certification of a settlement class.’”).

10 C. Conclusion: Provisional Certification is Appropriate

11 Pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), the court conditionally
12 certifies the class set forth above for the purpose of giving the class notice of the proposed
13 settlement in this matter, and conducting a fairness hearing. The court has only examined the
14 propriety of certification for settlement purposes. Should the Effective Date as defined in the
15 settlement agreement fail to occur, then the settlement class will be decertified and the findings
16 and conclusions in this part II of the Order shall be deemed withdrawn.

17 III. APPOINTMENT OF CLASS REPRESENTATIVES, CLASS COUNSEL, 18 AND CLAIMS ADMINISTRATOR

19 For the reasons set forth in the previous section, the court appoints Plaintiffs Scott Miller
20 and Steve Leyton as the class representatives. The court finds provisionally that they have claims
21 that are typical of the claims of class members generally and that they are adequate
22 representatives of the other members of the proposed class. The court also provisionally finds that
23 Gutride Safier LLP has sufficient qualifications, experience, and expertise in prosecuting class
24 action cases and appoints that firm as class counsel for settlement purposes only.

25 The Court designates, and approves, the Garden City Group to serve as Claim
26 Administrator. Responsibility regarding settlement administration, including, but not limited to,
27 notice and related procedures, shall be performed by the Claim Administrator, subject to the
28 oversight of the parties and this Court, as described in the settlement agreement.

1 **IV. PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**

2 Procedurally, the approval of a class action settlement has two stages: (1) the preliminary
3 approval, which authorizes notice to the class; and (2) a final fairness hearing, where the court
4 determines whether the parties should be allowed to settle the class action on the agreed-upon
5 terms. In reviewing the proposed settlement, the court need not address whether the settlement is
6 ideal or the best outcome, but determines only whether the settlement is fair, free of collusion,
7 and consistent with Plaintiffs’ fiduciary obligations to the class. *See Hanlon*, 150 F.3d at 1027.
8 The *Hanlon* court identified factors relevant to assessing a settlement proposal: (1) the strength of
9 the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation;
10 (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in
11 settlement; (5) the extent of discovery completed and the stage of the proceeding; (6) the
12 experience and views of counsel; (7) the presence of a government participant; and (8) the
13 reaction of class members to the proposed settlement. *Id.* at 1026 (citation omitted).

14 The court has evaluated the proposed settlement agreement for overall fairness under the
15 *Hanlon* factors and concludes that preliminary settlement is appropriate.

16 First, an evaluation of the strengths and weaknesses of Plaintiffs’ case militates in favor of
17 settlement. Plaintiffs have represented that they believe that the evidence obtained in discovery
18 showed that Defendant’s White Chips packaging and advertisements were likely to (and did)
19 deceive unsuspecting consumers. Plaintiffs also maintain that Defendant knew of the deceptive
20 nature of the White Chips packaging. On the other hand, Plaintiffs would have been required to
21 prove that the White Chips and “all natural” labeling was likely to deceive or confuse reasonable
22 persons. Plaintiffs could have difficulty obtaining monetary relief because Defendant contended
23 that the challenged labeling had no effect on pricing or sales volume and that pricing and sales
24 were the same before and after it changed its packaging to remove the challenged language. *See*
25 *Gutride Decl.*, ¶ 7. Moreover, a jury might have reasonably concluded that the list of ingredients
26 adequately disclosed that the product did not have cocoa butter and was not white chocolate, and
27 that the challenged aspects of the label were not misleading in light of the ingredient list. While
28 this Court held, following *Williams v. Gerber*, that the ingredient list disclosure was not

1 dispositive at the pleading stage (*see* Docket No. 20 at page 17), satisfying the pleading standard
2 does not mean that Plaintiffs would necessarily have won at trial. Settling the case to secure
3 some relief, rather than risking a complete loss at trial, is often a reasonable approach.

4 Second, the litigation poses risks. The court is familiar with the lengthy, hard-fought
5 nature of the proceeding, and there is a risk of continued, expensive litigation. Defendant
6 strenuously opposed certification of a class, particularly a nationwide class, and the issue of
7 certification had not yet been decided. Defendant argued throughout the litigation that its
8 customers purchase its products for a variety of different reasons and that many choose
9 Ghirardelli products because of their flavor and don't care about the specific product name or
10 ingredients. *See* Docket No. 39. With regards to the White Chips specifically, Defendant argued
11 that the ingredient list discloses the absence of cocoa butter and chocolate so consumers who read
12 the ingredients could not have been misled into believing the product contained cocoa butter or
13 chocolate. *Id.* Defendant could be expected to argue that these factors show a lack of
14 commonality, as well as providing a potential defense on the merits. Finally, any judgment in
15 Plaintiffs' favor would likely be appealed. Thus, Plaintiffs have represented that even in the best
16 case, it could take years to get relief for class members. *See id.*

17 Third, the settlement appears to treat all class members fairly. Having a claim process is
18 necessary because there is no central repository of information identifying class members, and
19 because purchases for purpose of resale are excluded from the class. The claim process also
20 directs available funds to those who most care about the alleged deception and thus are willing to
21 file a claim. The parties estimate that the \$1.50 per bag of White Chips equates to approximately
22 35 to 60% of the retail purchase price, and the \$0.75 per other Product represents varying
23 percentages of the retail price, depending on specific Product and retailer. *See id.* at ¶ 8. Plaintiffs
24 have explained that there is a greater recovery for White Chips purchasers because of the stronger
25 claims and evidence regarding the White Chips –which concerned not just the “all natural”
26 labeling but also language suggesting that the product contained white chocolate. *See id.* Further,
27 in addition to the monetary relief, Plaintiffs believe that the changed practices will benefit class
28 members and other consumers. *See id.* And the \$5,000 incentive awards Plaintiffs plan to request

1 also appear to be within a range of reasonableness to compensate Plaintiffs for their time and
2 effort and for the risk they undertook in prosecuting the case against Defendant. The court will
3 consider the amount of any such incentive awards at the final approval hearing, after further
4 motion practice and considering any objections by class members.

5 The settlement is also the product of serious, non-collusive, arms' length negotiations and
6 was reached after a months-long mediation process, including two in-person mediation sessions,
7 before an experienced mediator, a retired Federal Magistrate Judge. *See id.* at ¶¶ 4-5. In sum, the
8 court finds that viewed as a whole, the proposed settlement is sufficiently "fair, adequate, and
9 reasonable" such that preliminary approval of the settlement is warranted. *See Officers for Justice*
10 *v. Civil Serv. Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir.
11 1982). The court thus approves the settlement agreement preliminarily.

12 The class notices state that plaintiffs will request an award, from the common fund, of
13 attorney's fees of up to \$1,575,000.00, plus out of pocket expenses of up to \$90,000, for a total of
14 \$1,665,000.00. Plaintiffs state that the fee request will be justified both as a percentage of the
15 common fund (which appears to be 30%) and on the basis of their lodestar. The record that the
16 court has now is not sufficient to determine whether the amounts and percentages requested are
17 appropriate, but this issue will be determined at final approval. *Cf. Hanlon*, 150 F.3d at 1029
18 (twenty-five percent is considered a benchmark in common fund cases); *Vizcaino v. Microsoft*
19 *Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (twenty-five percent benchmark, though a starting
20 point for analysis, may be inappropriate in some cases; fees must be supported by findings). The
21 settlement agreement further provides that any awarded attorneys' fees, costs and expenses shall
22 be paid to class counsel within seven days after (a) the Court issues an order of Final Approval
23 that includes an award of attorneys' fees and/or expenses to Plaintiffs' Counsel and (b) Adam
24 Gutride and Seth Safier have executed the Undertaking attached hereto as Exhibit E to the
25 settlement agreement.³ *See* Gutride Decl., Exh. 1, § 6.4 and Sub-Exh. E. Such "quick pay"
26

27 ³ If Final Approval or the award of attorneys' fees, costs or expenses is later reversed on appeal
28 then, within seven (7) days of such order, class counsel shall repay to the Settlement Fund
Account the amount received, plus interest that would have accrued had the money remained in
the Settlement Fund Account. If class counsel fails to do so, Defendants may ex parte obtain a

1 provisions are routinely approved by courts in this District. *See, e.g., In re TFT-LCD (Flat Panel)*
2 *Antitrust Litig.*, 2011 WL 7575004 (N.D. Cal. Dec. 27, 2011) (citing cases).

3 **V. APPROVAL OF CLASS NOTICE**

4 The court approves the proposed notice. The Claim Administrator will establish a
5 settlement website, which shall contain the long form and email settlement notices, a contact
6 information page that includes address and telephone numbers for the claim administrator and the
7 parties, the settlement agreement, the signed order of preliminary approval, the motion papers in
8 support of the order for preliminary approval, online and printable versions of the claim form and
9 the opt out forms, answers to frequently asked questions, a Product list, and (when it becomes
10 available) Plaintiffs' counsel's application for attorneys' fees, costs, expenses and incentive
11 awards and motion for final approval.

12 Notice will be published in several places, all of which will refer class members to the
13 settlement website. One half-page ad will be taken out in People Magazine. An additional 1/8
14 page ad will be published once a week for four successive weeks in the Oakland Tribune. Online
15 notice will be published for a total of 280 million impressions on various websites, including
16 Facebook, Yahoo network, MSN network, and several website groups that include cooking and
17 baking websites. The ad will also appear 1.4 million times through an MSN ad mobile service.

18 The Claim Administrator also will send direct notice to each of the approximately 23,250
19 settlement class members for whom Defendant has names and addresses because they purchased
20 through the Ghirardelli website or phone system. An email notice will describe the settlement
21 and provide a link to the settlement website. By clicking on the link provided in the email, it will
22 bring the class members to a pre-populated claim form with the records of their purchases and
23 inform them that Proof of Purchase for those items has been submitted. The email notice will be
24 sent twice. If an email address is not available or the initial email notice is returned as
25 undeliverable, the Claim Administrator will send a postcard notice via first class mail to the
26 settlement class member's address based on Defendant's records as updated through the National
27

28 judgment against class counsel and Adam Gutride and Seth Safier personally for the amount
owed by class counsel, plus interest, as further set forth in the Undertaking.

1 Change of Address Database.

2 Class members will have until 28 days prior to the fairness hearing, or [] days from the
3 date the class notice program begins, to request exclusion or object to the settlement. This gives
4 class members sufficient time to consider their options and make a fully informed decision. *See,*
5 *e.g., Torrasi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent
6 31 days before the deadline for objections and 45 days before the hearing).

7 The court also finds that the forms of notice attached as Exhibit B1 to B4 of the settlement
8 agreement fairly, plainly, accurately, and reasonably inform class members of the following: (1)
9 the nature of the litigation, the settlement class, the identity of class counsel, and the essential
10 terms of the settlement agreement; (2) the amounts that will be requested as attorney's fees, costs,
11 and class representative incentive awards; (3) how to challenge or opt out of the settlement, and
12 the effect of failing to do so; (4) the time and place of the fairness hearing; and (5) how to obtain
13 additional information regarding this litigation, the settlement agreement and the approval
14 process. In addition, the online banner ad attached as Exhibit B5 to the settlement is appropriate
15 in that it alerts class members to the settlement and links to the settlement website which will
16 contain the long form notice attached as Exhibit B1 to the settlement agreement. *See* Gutride
17 Decl., Ex. 1, § 4.6.

18 In sum, the court approves, as to form and content, the Claim Form and the Notices,
19 substantially similar to the forms attached as Exhibits A and B1 to B5 to the settlement
20 agreement. The Court also approves the manner of distributing the class notice. The parties shall
21 have discretion to jointly make non-material minor revisions to the Notices before emailing,
22 mailing and publishing.

23 **VI. CY PRES AWARDS**

24 If, after payment of notice, administration, fees, costs, incentives and valid claims, there
25 remains a balance in the common fund, Plaintiffs will ask the Court to approve a list of charitable
26 organizations to receive any balance remaining in the settlement fund. Gutride Decl. Ex. 1, § 3.4.
27 The parties have selected the following organizations: Consumers Union, Yonkers, NY; National
28 Consumer Law Center, Washington, DC; University of California, Davis, Food Science &

1 Technology Department; and Florida State University, Food & Nutrition Science Department. *Id.*

2 Plaintiffs have represented that the proposed charitable organizations are reasonably
3 connected to this litigation, in that they work on advancing the rights of consumers and the
4 information available to food consumers. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th
5 Cir. 2011) (holding that courts “may employ the *cy pres* doctrine to ‘put the unclaimed fund to its
6 next best compensation use, *e.g.*, for the aggregate, indirect, prospective benefit of the class”)
7 (citing *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir.2007)).

8 The court provisionally accepts these organizations as acceptable and will defer final
9 approval until the fairness hearing. *See, e.g., Bolton v. U.S. Nursing Corp.*, 2013 WL 2456564,
10 *2 (N.D. Cal. June 6, 2013) (in order granting preliminary approval, deferring approval of
11 proposed *cy pres* recipients until final approval).

12 **VII. COMPLIANCE WITH CLASS ACTION FAIRNESS ACT**

13 On [date], Plaintiff filed a declaration of _____ showing compliance with the Class
14 Action Fairness Act of 2005, 28 U.S.C. § 1715. That declaration establishes that on [date],
15 Garden City Group mailed notice of the settlement agreement to the Attorney General of the
16 United States and the appropriate California state official. *Id.* According to the declaration, the
17 notice contains the documentation required by 28 U.S.C. § 1715(b)(1-8). *See id.* Any final
18 settlement approval will be more than 90 days after service as required by 28 U.S.C. § 1715.

19 **VIII. LEAVE TO AMEND COMPLAINT**

20 As part of the settlement agreement, Defendant has agreed to stipulate to permit Plaintiffs
21 to file a third amended complaint in the form attached as Exhibit F to the settlement agreement.
22 *See Gutride Decl.*, Ex. 1, § V; Sub-Ex. F. In the amended complaint, Plaintiff Leyton adds to this
23 case the “all natural” allegations that were to be a part of his separate lawsuit. The parties have
24 represented that the amended complaint will streamline the settlement process and ensure that
25 more money can be refunded to class members by saving the costs of two separate notice and
26 approval processes. This court agrees.

27 Federal Rule 15(a)(2) permits a plaintiff to amend its pleading with the opposing party’s
28 written consent, and thus, leave to file the complaint should be granted here. *See, e.g., Alsabur v.*

1 *Autozone, Inc.*, 2014 WL 1340730, *1 (N.D. Cal. Apr. 3, 2014) (granting leave to amend where
 2 defendant stipulated to the amendment). In addition, it is appropriate to grant leave to amend in
 3 this context, where the parties have agreed to the filing of an amended complaint as part of a class
 4 settlement. *See, e.g., Harris v. Vector Mktg. Corp.*, 2011 WL 1627973. *6 (N.D. Cal. Apr. 29,
 5 2011) (approving stipulation and granting leave to amend complaint as part of order granting
 6 preliminary approval); *Ching v. Siemens Indus., Inc.*, 2013 WL 6200190 (N.D. Cal. Nov. 27,
 7 2013) (same). This order is subject to the conditions set forth in Section X of this ruling.

8 **IX. PROCEDURES FOR FINAL APPROVAL OF SETTLEMENT**

9 The schedule for dates and deadlines is set forth in the table below and discussed in the
 10 sections that follow.

12 <u>Event</u>	13 <u>Date</u>
14 Initiate Notice	14 days after issuance of this order
15 Motion for final approval; Plaintiffs' Motion for Attorneys' Fees, Costs and Incentive Award	42 days before fairness hearing
16 Objections, Requests to Appear, opt-outs	28 days before fairness hearing
17 Replies in support of final approval and motion for attorneys' fees, costs and incentive awards; response to objections	14 days before fairness hearing
18 Fairness Hearing	February __, 2015
19 End of Claim Period	30 days after final approval

21 **A. Fairness Hearing**

22 At the hearing, the court will determine whether to grant final certification of the settlement
 23 class, confirm the appointment of Gutride Safier LLP as class counsel and the Plaintiffs as class
 24 representatives, finally approve the settlement agreement, and award the requested incentive
 25 awards to the class representatives and attorneys' fees and costs to class counsel.

26 The court may, for good cause, extend any of the deadlines set forth in this Order without
 27 further notice to the Settlement Class Members. The fairness hearing may, from time to time and
 28 without further notice to the Settlement Class Members, be continued by Order of the court.

1 **B. Initiation of Notice by No Later Than 14 Days From Today**

2 The court orders the parties (through the claim administrator) to send the notice in the
3 form approved by this order within 14 days of this order as discussed in Section V.

4 Class counsel shall file proof of distribution of notice at or before the final hearing.

5 **C. Requests for Exclusion from the Settlement**

6 Class members may exclude themselves from the class settlement, and that request for
7 exclusion must be made in the following manner: any member of the Settlement Class who
8 desires to be excluded from the Settlement Class, and therefore not be bound by the terms of the
9 settlement agreement, must submit an online request for exclusion by _____, 2014 [28 days
10 prior to Fairness Hearing] or mail to the Claim Administrator, pursuant to the instructions set
11 forth in the Long Form Notice, a timely and valid written request for exclusion, received (not
12 postmarked) no later than _____, 2014 [28 days prior to Fairness Hearing]. No one shall be
13 permitted to exercise any exclusion rights on behalf of any other person, whether as an agent or
14 representative of another or otherwise, except upon proof of a legal power of attorney,
15 conservatorship, trusteeship, or other legal authorization and no one may exclude other persons
16 within the Settlement Class as a group, class, or in the aggregate.

17 **D. Objections to the Settlement**

18 Any class member who wishes to object to the Settlement and/or to be heard at the Fairness
19 Hearing must electronically file with or deliver to the Clerk of the Court a written notice of
20 objection by [] [28 days before Fairness Hearing]. Each such objection must include the name,
21 address and telephone number of the Settlement Class Member; shall provide documents or
22 testimony sufficient to establish membership in the Settlement Class; and shall provide a detailed
23 statement of any objection asserted, including the grounds therefor and reasons, if any, and for
24 requesting the opportunity to appear and be heard at the fairness hearing. Failure to include the
25 foregoing information shall constitute grounds for striking an objection.

26 **E. Deadline for Submitting Motion for Seeking Final Approval and**
27 **Petition for Attorneys' Fees, Costs, and Expenses**

28 Plaintiff shall file a motion for final approval of the settlement and settlement agreement at

1 least 42 days before the fairness hearing. Pursuant to *In re Mercury Interactive Corp. Sec. Litig.*,
2 618 F.3d 988, 944-95 (9th Cir. 2010), class counsel shall file with this court their petition for an
3 award of attorneys’ fees and reimbursement of costs at the same time. Both motions shall be
4 heard at the time of the fairness hearing.

5 **F. Plaintiffs’ and Class Members’ Release**

6 If, at the fairness hearing, this court grants final approval to the settlement and the
7 settlement agreement, the named Plaintiffs and each individual settlement class member who does
8 not timely opt out will release claims, as set forth in the settlement agreement, by operation of this
9 court’s entry of the judgment and final approval.

10 **X. EFFECT OF THIS ORDER**

11 This Order shall not be construed as an admission or concession by Defendant of the truth
12 of any allegations made by the Plaintiffs or of liability or fault of any kind.

13 In the event that the proposed Settlement is not finally approved by the court, or in the
14 event that the settlement agreement becomes null and void pursuant to its terms, this Preliminary
15 Approval Order and all orders entered in connection herewith shall become null and void, shall be
16 of no further force and effect, and shall not be used or referred to for any purposes whatsoever in
17 this Action or in any other case or controversy; in such event the settlement agreement and all
18 negotiations and proceedings directly related thereto shall be deemed to be without prejudice to
19 the rights of any and all of the parties, who shall be restored to their respective positions as of the
20 date and time immediately preceding the execution of the settlement agreement and the Third
21 Amended Complaint shall be stricken from the record.

22 This disposes of Docket No. 129.

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24 **IT IS SO ORDERED** this ____ day of _____, 2014.

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HON. LAUREL BEELER
UNITED STATES DISTRICT COURT

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