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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS IGLESIAS, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FERRARA CANDY CO., and DOES 1
through 10, inclusive,

Defendants.

) Case No. 3:17-cv-00849-VC

) **[CLASS ACTION]**

) **MOTION FOR PRELIMINARY**
) **APPROVAL OF CLASS ACTION**
) **SETTLEMENT**

) Hon. Judge Vince Chabbria

) Complaint filed: February 21, 2017

) Hearing Date: June 21, 2018

) Hearing Time: 10:00 AM

) Hearing Location: Courtroom 4

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on Thursday, June 21, 2018 at 10:00 am, or as soon thereafter as the matter may be heard, in Courtroom 4, 17th Floor, before the Honorable Judge Vince Chhabria, Plaintiff Thomas Iglesias (“Plaintiff”), on behalf of himself, the general public, and all others similarly situated, by and through his counsel Ryan J. Clarkson, Shireen M. Clarkson, and Bahar Sodaify of Clarkson Law Firm, P.C., shall and hereby does move the Court, pursuant to Federal Rules of Civil Procedure 23(e), for an order as follows:

(1) Preliminarily approving the settlement of this class action as set forth in the class action settlement agreement dated May 10, 2018, attached as Exhibit 1 to the Declaration of Ryan J. Clarkson filed herewith;

(2) Preliminarily approving, for settlement purposes only, a settlement class defined as “All persons who between February 21, 2013 and the date of Preliminary Approval, purchased, in the United States, one or more candy products manufactured by Defendant and packaged for sale or resale to consumers in an opaque cardboard box (including bag-in-a-box products), including Jujufruits®, Jujubes®, Now and Later®, Lemonhead®, Applehead®, Cherryhead®, Grapehead®, RedHots®, Trolli®, Chuckles®, Black Forest®, Jawbuster®, Jawbreaker®, Brach’s®, Boston Baked Beans®, Super Bubble®, Rainblo®, Atomic Fireball®, and all flavors and varieties of those candies.” Excluded Persons are: (1) the Honorable Vince Chhabria (2) Mediator Martin Quinn; (3) the Honorable William Cahill; (4) any member of their immediate family; (5) any government entity, (6) Defendant; (7) any entity in which Defendant has a controlling interest; (8) any of Defendant’s subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (9) counsel for the Parties; and (10) any persons who timely opt-out of the Settlement Class;

(3) Preliminarily approving Plaintiff Thomas Iglesias as the Class Representative, and appointing Clarkson Law Firm, P.C. as Class Counsel for the Settlement Class;

(4) Directing the dissemination of notice in the form and manner set forth in the settlement agreement; and

(5) Setting a date for the final approval hearing.

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A copy of the proposed order granting preliminary approval is filed herewith.

This motion is made on the grounds that preliminary approval of the proposed class action settlement is proper, given that each requirement of Rule 23(e) has been met.

This Motion is based on Federal Rule of Civil Procedure 23, this Notice of Motion, the supporting Memorandum of Points and Authorities, the Declaration of Ryan J. Declaration, the Declaration of Mark Schey, exhibits, the pleadings and papers on file herein, and any other written and oral arguments that may be presented to the Court.

Pursuant to Local Rule 7-4(a)(3), the statement of issue to be decided by the Court is as follows: Whether the Court should preliminarily approve the proposed class action settlement pursuant to Fed. R. Civ. P. 23(e).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties have reached a nationwide settlement of the putative class action filed by Plaintiff Thomas Iglesias (“Plaintiff” or “Mr. Iglesias”) against Defendant Ferrara Candy Co. (“Defendant” or “Ferrara”). Ferrara manufactures confectionary products, including opaque “theater boxes” of candy sold at retail outlets and movie theaters throughout the United States.¹ On February 21, 2017, Plaintiff filed a complaint in this Court alleging that the Products’ oversized opaque packaging deceives consumers into believing they are receiving more candy than they actually receive due to the presence of nonfunctional empty space, or “slack-fill.” In the second amended complaint (“SAC”), Plaintiff alleges claims for unjust enrichment and violations of state and federal packaging laws and consumer protection statutes (Dkt. 71). It is appropriate to certify a nationwide class because Defendant’s challenged packaging is uniform for all purchasers, and the elements of the legal claims are nearly identical in all states. The minor differences among state laws are immaterial to certification particularly because the laws of all 50 states are substantively identical to California.

Due to this litigation, Defendant has agreed to modify its fill level quality control procedures and target fill levels to at least 75% for theater box Products, and at least 50% for bag-in-a-box Products.

Defendant will also pay \$2.5 million into a common fund. Each class member who makes a claim may obtain a cash refund of 50 cents per box purchased. A class member may submit claims for an unlimited number of purchases. Up to 15 claims, for a total of \$7.50, will be paid without Proof of Purchase. Plaintiff may apply for a reasonable incentive award from the common fund not to exceed \$5,000, and his counsel may apply for an award from the common fund to reimburse their costs, and to pay their attorneys’ fees not to exceed 30% of the fund.

¹ The “Products” or “Covered Products” or “Settlement Class Products” means all candy products manufactured by Defendant and packaged for sale or resale to consumers in an opaque cardboard box (including bag-in-a-box products), including Jujufruits®, Jujubes®, Now and Later®, Lemonhead®, Applehead®, Cherryhead®, Grapehead®, RedHots®, Trolli®, Chuckles®, Black Forest®, Jawbuster®, Jawbreaker®, Brach’s®, Boston Baked Beans®, Super Bubble®, Rainblo®, Atomic Fireball®, and all flavors and varieties of those candies (Dkt. 71).

1 Notice is to be provided to the class via several methods, including (1) print publication,
2 (2) internet impression advertising, (3) targeted search term advertising, (4) a press release, and
3 (5) a dedicated settlement website. A well-known third-party claims administrator has designed
4 the notice plan and has attested that notice will reach at least 70% of the class.

5 A copy of the settlement agreement is attached as Exhibit (“Ex.”) 1 to the Declaration of
6 Ryan J. Clarkson (“RJC Decl.”) filed herewith. The proposed class notices can be found at
7 Exhibits D and E. The proposed claim form is attached as Exhibit C.

8 The settlement falls within this Court’s standard for preliminary approval because it is fair,
9 reasonable, and adequate, and will survive the same rigorous level of scrutiny as this Court
10 applied in *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1036 (N.D. Cal. 2016); *Hunt v. VEP*
11 *Healthcare, Inc.*, No. 16-cv04790-VC, 2017 WL 3608297 (N.D. Cal., Aug. 22, 2017); and,
12 *Eddings v. DS Services of America, Inc.*, No. 15-cv-02576-VC, 2016 WL 3390477 (N.D. Cal.
13 May 20, 2016). There is a presumption of fairness because the settlement was reached after
14 substantial discovery, law and motion practice, including a robust class certification motion
15 supported by four retained experts who conducted full expert reports based on a detailed slack-fill
16 analysis and 3,788-participant consumer survey, and after arms-length negotiations. *See Nat’l*
17 *Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

18 Numerous other factors also strongly favor the settlement, including the risks of further
19 litigation and the informed opinion of experienced counsel on all sides who have negotiated and
20 approved it based upon their views of the strengths and weaknesses of the claims and defenses.
21 *See id.* (finding that experienced counsel’s views regarding settlement are entitled to great
22 weight). The proposed Settlement is a product of extended arms-length negotiations between
23 experienced attorneys familiar with the legal and factual issues of this case, including two
24 mediations with experienced neutrals. As a result of these efforts, the parties are fully informed of
25 the merits of this action and the fairness, adequacy, and reasonableness of the proposed settlement.

26 As detailed in Plaintiff’s motion for class certification filed on March 5, 2018 (Dkt. 53-54),
27 the proposed settlement class satisfies Rule 23(a), (b)(2) and (b)(3). Accordingly, Plaintiff’s
28 motion for preliminary approval should be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Litigation History

Plaintiff filed his class action complaint on February 21, 2017, in the U.S. District Court for the Northern District of California, alleging violations of state and federal packaging laws and consumer protections laws (Dkt. 1). On April 19, 2017, Defendant filed a Rule 12(b)(6) motion to dismiss Plaintiff's complaint (Dkt. 14). On May 10, 2017, Plaintiff filed his FAC pursuant to Rule 15(a) to add additional remedies available under the statutes in lieu of an opposition (Dkt. 18).

On May 24, 2017, Defendant filed a Rule 12(b)(6) motion to dismiss the FAC, claiming the Products are not misleading and do not contain nonfunctional slack-fill (Dkt. 28), which Plaintiff opposed on June 7, 2017 (Dkt. 34), to which Defendant replied on June 14, 2017 (Dkt. 37), and the Court denied on July 25, 2017 (Dkt. 40).

On August 8, 2017, Defendant answered Plaintiff's FAC (Dkt. 41). After the completion of substantial discovery described *infra*, Plaintiff moved for class certification on (Dkt. 53-54) on March 5, 2018. The parties settled the case before Defendant filed its opposition (Dkt. 58).

B. Discovery

On June 27, 2017, Plaintiff served Defendant with requests for admissions, requests for production of documents, and special interrogatories. RJC Decl. ¶ 5. In connection with these requests, and Plaintiff's motion to compel further responses, which the Court granted on November 15, 2017, Defendant produced over 6,000 documents totaling tens of thousands of pages of complex information and spreadsheet data. *Id.* On November 13, 2017, Plaintiff's deposition took place in San Francisco, CA. *Id.* ¶ 6. On December 19-20, 2018, Plaintiff deposed Defendant's Rule 30(b)(6) corporate designees in Chicago, Illinois. *Id.* Plaintiff also subpoenaed third parties for sales and marketing data to support his claims. *Id.*

C. Class Certification, Amendment, and Settlement Negotiations

On October 10, 2017, the Parties attended a mediation in San Francisco, CA with mediator Martin Quinn. *Id.* ¶ 7. The parties were unable to reach an agreement. *Id.* On February 2, 2018, the parties held a second mediation with the Honorable William Cahill (Ret.) in San Francisco, CA. *Id.* ¶ 8. Although the case did not settle, Judge Cahill remained involved in ongoing

1 mediation discussions in the weeks and months that followed. *Id.* After Plaintiff filed his motion
 2 for class certification and supporting documents on March 5, 2018, which included supporting
 3 materials from four retained experts who conducted full expert reports based on a detailed slack-
 4 fill analysis and 3,788-participant consumer survey, the case settled. *Id.* ¶ 9. As part of the
 5 settlement, Defendant stipulated to the filing of Plaintiff's SAC which added a cause of action for
 6 unjust enrichment and clarified the class definition (Dkt. 71). *Id.* ¶ 10.

7 **D. The Proposed Settlement**

8 The settlement class consists of all persons who between February 21, 2013 and the date of
 9 Preliminary Approval, purchased, in the United States, one or more candy products manufactured
 10 by Defendant and packaged for sale or resale to consumers in an opaque cardboard box (including
 11 bag-in-a-box products), including Jujufruits®, Jujubes®, Now and Later®, Lemonhead®,
 12 Applehead®, Cherryhead®, Grapehead®, RedHots®, Trolli®, Chuckles®, Black Forest®,
 13 Jawbuster®, Jawbreaker®, Brach's®, Boston Baked Beans®, Super Bubble®, Rainblo®, Atomic
 14 Fireball®, and all flavors and varieties of those candies. Excluded Persons from the class are: (1)
 15 the Honorable Vince Chhabria (2) Mediator Martin Quinn; (3) the Honorable William Cahill; (4)
 16 any member of their immediate families; (5) any government entity, (6) Defendant; (7) any entity
 17 in which Defendant has a controlling interest; (8) any of Defendant's subsidiaries, parents,
 18 affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (9)
 19 counsel for the Parties; and (10) any persons who timely opt-out of the Settlement Class. RJC
 20 Decl. Ex. 1 ¶¶ 1.11, 1.14, 1.40.

21 **1. Monetary Relief**

22 Defendant will pay or cause payment of a total of \$2.5 million in cash to a Claim Fund.
 23 The Claim Fund will be established to pay the following: (1) class members' claims, (2) the costs
 24 of notice and claims administration, (3) Plaintiff's attorneys' fees and costs, and (4) an incentive
 25 award to Plaintiff. *Id.* ¶ 4.21.

26 Each class member who makes a claim may obtain a cash refund of 50 cents per box
 27 purchased. *Id.* ¶ 4.2.2. A class member may submit claims for an unlimited number of purchases.
 28 *Id.* Up to 15 claims, for a total of \$7.50, will be paid without Proof of Purchase. *Id.* There is no

1 cap on the number or amount of claims submitted by class members with Proof of Purchase. *Id.*
 2 These amounts are subject to being increased or decreased, respectively, pro rata to ensure the
 3 Claim Fund is exhausted. *Id.* ¶ 4.2.6. Each class member may submit a claim either electronically
 4 through a settlement website or by mail. *Id.* ¶ 5.1.3.1. The claims process will include an agreed-
 5 upon verification process designed to reduce the risk of fraudulent claims. *Id.* ¶ 4.2.5. There will
 6 be no reversion of money to the Defendant. *Id.* ¶ 4.2.7.

7 The claim form (in English and Spanish versions) is a simple two-page form that can be
 8 completed in a few minutes either online or submitted by mail. *See* RJC Decl. Ex.1, Ex. C (Claim
 9 Form). Proof of Purchase can also be submitted electronically or via U.S. mail.

10 **2. Injunctive Relief**

11 The settlement agreement also includes changed practices. As a result of the litigation,
 12 Defendant will provide the Settlement Class injunctive relief by way of modifying its fill level
 13 quality control procedures and target fill levels to at least 75% for theater box Covered Products,
 14 excluding bag-in-a-box, and 50% for all other Covered Products, including bag-in-a-box. *Id.* ¶ 4.1.
 15 Notably, Plaintiff's packaging design engineering expert estimated the actual fill level for theater
 16 box Products to range from 42.6% to 52.5% and for Trolli bag-in-a-box Products to be 27.2%
 17 (Dkt. 54-18 p. 30 tbl. 11).

18 **3. Administrative Expenses, Attorneys' Fees and Costs, Incentive Awards**

19 All costs of notice and administration of the settlement (approximately \$522,000) will be
 20 paid from the Claim Fund. In addition, Plaintiff's counsel will request payment from the Claim
 21 Fund of an incentive award of \$5,000 for Plaintiff Iglesias. *Id.* ¶ 9.2. The incentive fee is designed
 22 to compensate Plaintiff for the time and risk he took in prosecuting this action (including the risk
 23 of liability for Defendant's costs). Plaintiff's counsel estimates Plaintiff has already contributed at
 24 least 45 hours to this case, including sitting for a full-day deposition. RJC Decl. ¶ 11.

25 The settlement agreement provides that Plaintiff's counsel may apply for reimbursement of
 26 their out of pocket expenses, plus attorneys' fees in an amount not to exceed \$750,000, or 30% of
 27 the Claim Fund, subject to court approval. *Id.* Ex. 1 ¶ 9.1. Any request will be justified by a
 28 lodestar-multiplier analysis and will be in line with standard awards under other common fund

1 settlements, under which fees are awarded as percentage of the fund. *See, e.g., Vizcaino v.*
2 *Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (upholding award of 28% of the common
3 fund); *Miller v. Ghirardelli Chocolate Co.*, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015)
4 (awarding 30% of the common fund in fees in food labeling class action).

5 As of the filing of this motion, Plaintiff's counsel has spent approximately 1500 hours
6 working on this litigation. RJC Decl. ¶ 12. Its lodestar is greater than the amount it will seek in
7 attorneys' fees. *Id.* Counsel has additionally incurred approximately \$365,000 in unreimbursed
8 expenses. *Id.* The Court need not consider these issues at present; rather it is appropriate to defer
9 them until the final approval hearing, after class members have had an opportunity to comment.
10 Besides, in further consideration of the class' interests, Plaintiff's counsel may apply for an award
11 of attorneys' fees and costs below the maximum amount allowable under the Parties' settlement
12 agreement depending on the number of claims to the Claim Fund. *Id.* ¶ 13. The request for fees,
13 costs, and incentive awards will be the subject of a separate motion to be filed, and posted on the
14 settlement website, at least 42 days before the final approval hearing, which is 14 days before the
15 deadline for class member objections.

16 4. Notice

17 The claims administrator (Digital Settlement Group or "DSG") will establish a settlement
18 website, which shall contain the settlement notices, a contact information page that includes
19 address and telephone numbers for the claim administrator and the parties, the settlement
20 agreement, the signed order of preliminary approval, online and printable versions of the claim
21 form and the opt out forms, answers to frequently asked questions, a Product list, and (when it
22 becomes available) Plaintiff's counsel's application for attorneys' fees, costs, expenses and
23 incentive awards and motion for final approval.

24 Notice will be published in several places, all of which will refer class members to the
25 settlement website. *See* Declaration of Mark Schey ("Schey Decl.") Ex. A. The Published Notice
26 will appear in *Soap Opera Digest*, *Life & Style*, and *National Enquirer*; and be distributed as a
27 press release through PR NewsWire. *Id.* ¶¶ 19-20. Online Notice linking to the Settlement Website
28 will be published for a total of 52 million combined impressions on various websites targeted to

1 individuals interested in candy. *Id.* ¶ 24. Finally, the claims administrator will operate a toll-free
2 information line to provide information about the case and settlement. *Id.* ¶ 11.

3 **III. PRELIMINARY APPROVAL IS WARRANTED**

4 “Approval under [Rule] 23(e) involves a two-step process in which the Court first
5 determines whether a proposed class action settlement deserves preliminary approval and then,
6 after notice is given to class members, whether final approval is warranted.” *DIRECTV, Inc.*, 221
7 F.R.D. at 525 (citing *Manual for Complex Litig., Third*, § 30.41 (1995)). The purpose of
8 preliminary approval is for the Court to determine whether the parties should notify the putative
9 class members of the proposed settlement and proceed with a fairness hearing. See *In re*
10 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Notice of a settlement
11 should be disseminated where “the proposed settlement appears to be the product of serious,
12 informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant
13 preferential treatment to class representatives or segments of the class, and falls within the range
14 of possible approval.” *Id.* (quoting NEWBERG ON CLASS ACTIONS § 11.25 (1992)).

15 Although the standard for reviewing class action settlements at the final approval stage is
16 well settled, the standard required at the preliminary approval stage is not as clear. *Cotter v. Lyft,*
17 *Inc.*, 193 F. Supp. 3d 1030 * 1036, 2016 U.S. Dist. LEXIS 184931 (N.D. Cal. June 23, 2016).
18 However, this Court has clarified the standard, indicating that “district courts should review class
19 action settlements just as carefully at the initial stage as they do at the final stage. At the initial
20 stage, the inquiry should be whether the settlement is ‘fair, reasonable, and adequate,’ based on
21 any information the district court receives from the parties or can obtain through its own
22 research.” *Id.* at *1037. “Determining whether the settlement falls in the range of reasonableness
23 also requires evaluating the relative strengths and weaknesses of the plaintiffs’ case; it may be
24 reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a strong
25 claim for the same amount.” *Id.* Moreover, the fairness and reasonableness of a settlement
26 agreement is presumed where “that agreement was the product of non-collusive, arms’ length
27 negotiations conducted by capable and experienced counsel.” *In re Netflix Privacy Litig.*, No.
28 5:11-CV-00379-EJD, 2013 U.S. Dist. LEXIS 37286, *11 (N.D. Cal. Mar. 18, 2013).

1 To approve a class settlement, a court must determine that the settlement is “fair,
2 reasonable, and adequate.” *Cotter*, 193 F. Supp. 3d at 1035 (quoting Fed. R. Civ. P. 23(e)(2)). This
3 Court “review[s] class action settlements just as carefully at the initial stage” as it does “at the
4 final stage.” *Id.* at 1037. Courts look to the relative value of the settlement and consider plaintiff’s
5 expected recovery balanced against the value of the settlement offer as well as evaluate the
6 relative strengths and weaknesses of plaintiff’s case. *Id.* Moreover, the court also looks at a
7 number of factors: (1) the strength of the plaintiffs’ case; (2) the risk, expense, complexity, and
8 likely duration of further litigation; (3) the risk of maintaining class action status throughout the
9 trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of
10 the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
11 participant; (8) and the reaction of the class members to the proposed settlement. *Id.* at 1035
12 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

13 Here, as discussed *infra*, the balancing of these factors reveals the strengths and weaknesses
14 of Plaintiff’s claims and readily establishes that the proposed settlement should be preliminarily
15 approved.

16 **A. Relative Value of Plaintiff’s Claims**

17 Were Plaintiff to proceed to and succeed at trial, the “best case” recovery may not be better
18 than the settlement remedy. Plaintiff’s retained experts in economics and conjoint analysis, Dr.
19 Justin Lenzo and Dr. Michael Bechtel, respectively, calculated the price premiums attributable to
20 the challenged packaging. Based on the results of a 3,788-participant consumer survey, which
21 were applied to the results of a detailed slack-fill analysis of the Products completed by Plaintiff’s
22 packaging design engineering expert, Dr. Claire Sand (Dkt. 54-18), the price premium attributable
23 to nonfunctional slack-fill in the retail channels equaled 16.1% to 26.4% across the Products (Dkt.
24 54-13 ¶ 145). The price premium for the movie theater channel was slightly less, ranging from
25 9.9% to 16.6% across the Products. *Id.* Based on an average retail price of \$1.00 per unit, the per-
26 unit price premium would equal approximately 10 cents to 26 cents. This settlement, however,
27 provides for a generous refund of 50 cents per box purchased, or a *two- to five-times multiplier* of
28 what class members could potentially recover at trial. RJC Decl. Ex. 1 ¶ 4.2.2. Thus, the cash

1 recovery is far greater on a per box basis than the amount class members could obtain at trial.
 2 Notably, the \$2.5 million Claim Fund will allow for full restitution or better even in the unlikely
 3 event the Claim Fund is oversubscribed and subject to a pro rata reduction of claim payments.

4 The monetary relief provided by this settlement is especially beneficial in a contested
 5 proceeding like this one, where class members who lack proof of purchase—which is likely the
 6 vast majority of class members here—might get nothing at all. *See, e.g., Briseno v. ConAgra*
 7 *Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir.), *cert. denied sub nom. ConAgra Brands, Inc. v.*
 8 *Briseno*, 138 S. Ct. 313 (2017) (explaining that the post-trial claims process by which each
 9 consumers’ affidavits would “force a liability determination” as to that consumer).

10 In addition to the monetary relief, the changed practices will benefit class members and
 11 other consumers by ensuring they receive an amount of candy commensurate with their
 12 expectations going forward. Plaintiff’s experts found that consumers on average expect the
 13 Products to be filled 67% based on the size of the Products’ box (Dkt. 54-13 ¶¶ 25, 99). Due to
 14 this litigation, Defendant has agreed to modify its fill level quality control procedures and target
 15 fill levels to at least 75% for theater box Products.² RJC Decl. Ex. 1 ¶ 4.1.

16 **B. Risk, Expense, Complexity, and Likely Duration of Continuing Litigation**

17 Proceeding in this litigation in the absence of settlement poses significant risks, such as
 18 failing to certify a class, having summary judgment granted against Plaintiff, or losing at trial.
 19 Such considerations have been found to weigh heavily in favor of settlement. *See*
 20 *Federal Judicial Center, Manual for Complex Litigation* § 21.62, at 316 (4th ed. 2004);
 21 *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *Curtis-Bauer v. Morgan Stanley*
 22 *& Co.*, No. C 06-3903 TEH, 2008 U.S. Dist. LEXIS 85028, at *13 (N.D. Cal. Oct. 22, 2008)
 23 (“Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and
 24 will produce a prompt, certain, and substantial recovery for the Plaintiff class.”). Even assuming
 25 that Plaintiff were to survive certification, he would face the risk of establishing liability at trial if
 26

27 ² Defendant has agreed to modify its fill level quality control procedures and target fill levels to at
 28 least 50% for bag-in-a-box Products like Trolli (RJC Decl. Ex. 1 ¶ 4.1). Plaintiff’s packaging
 design engineering expert estimated the actual fill level for theater box Products to range from
 42.6% to 52.5% and for Trolli bag-in-a-box Products to be 27.2% (Dkt. 54-18 p. 30 tbl. 11).

1 there is any conflicting expert testimony between his own expert witnesses and Defendant's expert
2 witnesses. In this "battle of experts," it is virtually impossible to predict with any certainty which
3 testimony would be credited, and ultimately, which expert version would be accepted by the jury.
4 The experience of Plaintiff's counsel has taught them that these considerations can make the
5 ultimate outcome of a trial highly uncertain.

6 Moreover, even if Plaintiff were to prevail at trial, the class would face additional risks if
7 Defendant appeals or moves for a new trial. See *In re Apple Computer Sec. Litig.*, 1991 U.S. Dist.
8 LEXIS 15608 (N.D. Cal. Sept. 6, 1991) (the jury rendered a verdict for plaintiffs exceeding \$100
9 million, however, the court overturned the verdict and ordered a new trial with respect to the
10 corporate defendant). By settling, Plaintiff and class members avoid these risks, as well as the
11 delays and risks of the appellate process.

12 Plaintiff also faces risks in certifying a class and maintaining that class status through trial.
13 Even assuming that the Court were to grant Plaintiff's March 5, 2018 motion for class
14 certification, the class could still be decertified at any time. See *In re Netflix Privacy Litig.*, 2013
15 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a
16 class at any time is one that weighs in favor of settlement.") (internal citations omitted). From
17 their prior experience, Plaintiff's counsel anticipates that Ferrara would likely move for
18 reconsideration, attempt to appeal the Court's decision pursuant to Rule 23(f), and/or move for
19 decertification at a later date. Here, the Settlement Agreement eliminates these risks by ensuring
20 class members a recovery that is "certain and immediate, eliminating the risk that class members
21 would be left without any recovery... at all." *Fulford v. Logitech, Inc.*, 2010 U.S. Dist. LEXIS
22 29042, at *8 (N.D. Cal. Mar. 5, 2010).

23 In addition, the expense to prosecute this case has been substantial in light of the need for
24 expert testimony from multiple disciplines, including packaging design engineering, economics,
25 conjoint analysis, and marketing. RJC Decl. ¶ 14. In order to present a robust case for class
26 certification, Plaintiff retained an expert in each of these fields. *Id.* Undoubtedly, the quality of
27 Plaintiff's expert declarations, expert reports, and studies proffered by his retained experts in
28 support of class certification was a substantial factor in persuading Defendant to agree to this

1 settlement. *Id.* ¶ 15. Were this case to proceed, additional expert costs would quickly accumulate
2 as a result of expert depositions, rebuttal reports, oppositions to any *Daubert* challenges,
3 testimony, and any associated costs such as travel expenses. *Id.* ¶ 16. The additional accumulation
4 of such costs could quickly lead to a scenario in which settlement might not be economically
5 feasible for either party. *Id.*

6 Finally, given the fact that a scheduling order has not yet been entered in this case, a trial
7 date would likely not be scheduled to commence until sometime in early 2019 or later. Thus, any
8 monetary and injunctive relief, which is not guaranteed and likely would not be as substantial as
9 what Plaintiff has achieved with this settlement, would probably be delayed by at least a year. RJC
10 Decl. ¶ 17. In the meantime, Defendant would be permitted to continue to deceptively package the
11 Products with impunity to the financial detriment of class members and consumers. *Id.*

12 C. The Amount Offered in Settlement

13 This factor “assess[es] the consideration obtained by the class members in a class action
14 settlement.” *DIRECTV*, 221 F.R.D. at 527. “[I]t is the complete package taken as a whole, rather
15 than the individual component parts, that must be examined for overall fairness.” *Officers for*
16 *Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 628 (9th Cir. 1982). “In this regard, it is well settled
17 law that a proposed settlement may be acceptable even though it amounts to only a fraction of the
18 potential recovery that might be available to the class members at trial.” *DIRECTV*, 221 F.R.D. at
19 527 (citing *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998)).

20 Plaintiff’s best-case recovery would be the average “premium” for the alleged consumer
21 deception attributable to the presence of alleged nonfunctional slack-fill (Dkt. 54-13 ¶ 145).
22 Plaintiff believes that his likely “best case” recovery at trial would be approximately \$20 million,
23 based on applying Drs. Lenzo and Bechtel’s damages analysis (Dkt. 54-13) to nationwide sales
24 figures. RJC Decl. ¶ 18. At final approval, Plaintiff will provide further testimony from Drs.
25 Lenzo and Bechtel to support this damages estimate. *Id.* ¶ 19. However, Defendant disputes that
26 any such premium exists, and expert testimony on the subject is likely to diverge wildly. *Id.*

27 The settlement amount of \$2.5 million, which does not include the value of the changed
28 practices, may appear to be a small portion of the total amount of damages at trial, but Plaintiff

1 believes this recovery to be fair in light of the risks discussed above, as well as the risk of not
 2 being able to collect such a large award. *Id.* ¶ 20. Further, the per-claim amount of 50 cents per
 3 box purchased, with no cap on claims with Proof of Purchase, and a 15 box/\$7.50 cap on claims
 4 without Proof of Purchase, is a good result compared to the possible result in a contested
 5 proceeding, as discussed above. *Id.* Indeed, these amounts will likely result in recoveries to class
 6 members on a per-box basis well in excess of the price premium damages calculated by Plaintiff’s
 7 experts to be available at trial. *See* Section III(A), *supra*. Defendant’s changed practices are also
 8 likely to benefit class members. At the time of final approval, Plaintiff’s economics expert, Dr.
 9 Justin Lenzo, will opine as to some amounts class members will save due to the packaging
 10 changes. The value of injunctive relief—including the benefit to consumers in the form of an
 11 improved marketplace that is not skewed by false advertising—can properly be considered when
 12 evaluating a settlement’s fairness. *See, e.g., Allen v. Bedolla*, 787F.3d 1218, 1224 (9th Cir. 2015)
 13 (explaining that in evaluating the fairness of a settlement, district courts should “make express
 14 findings about the value of the injunctive relief”); *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th
 15 Cir. 2012) (noting that a “judicially-enforceable agreement” to maintain changed practices may be
 16 considered in a fairness inquiry).

17 **D. The Extent of Discovery Conducted and the Information Obtained**

18 Class settlements are presumed fair when they are reached “following sufficient discovery
 19 and genuine arms-length negotiation.” *DIRECTV*, 221 F.R.D. at 528; 4 Newberg at § 11.24. Under
 20 this factor, courts evaluate whether class counsel had sufficient information to make an informed
 21 decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459
 22 (9th Cir. 2000). Here, this matter has fully progressed through class and merits discovery.
 23 Accordingly, as discussed above, Plaintiff’s counsel has received, examined, and analyzed
 24 information, documents, and materials that enabled them to assess the likelihood of success on the
 25 merits. RJC Decl. ¶ 21. These efforts include rounds of interrogatories and requests for
 26 production, reviewing over 6,000 documents totaling thousands of pages,³ taking the depositions

27 _____
 28 ³ In fact, the actual amount of discovery materials exceeds this amount because many of these documents are actually voluminous Excel spreadsheets with multiple tabs of information and some of which are dozens if not hundreds of pages long when printed. RJC Decl. ¶ 24.

1 of Defendant’s Rule 30(b)(6) corporate designees, serving third party subpoenas, extensive
 2 discussions with Plaintiff’s four experts who conducted in-depth studies and analyses, produced
 3 thorough expert reports on product packaging design, marketing, and conjoint analysis/damages,
 4 as well as a large-scale survey of 3,788 participants, and significant legal research and briefing. *Id.*
 5 ¶ 22. The parties also attended two in-person mediations in San Francisco, CA. *Id.* The settlement
 6 agreement is the result of fully-informed negotiations based on a well of information obtained
 7 during discovery. *Id.* ¶ 23.

8 E. Experience and Views of Counsel

9 “The recommendations of plaintiffs’ counsel should be given a presumption of
 10 reasonableness.” *In re Omnivision Techns., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).
 11 Deference to Plaintiff’s counsel’s evaluation of the Settlement is appropriate because “[p]arties
 12 represented by competent counsel are better positioned than courts to produce a settlement that
 13 fairly reflects each party’s expected outcome in litigation.” *Rodriguez*, 563 F.3d at 967 (citing *In*
 14 *re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

15 Here, the settlement was negotiated by counsel with extensive experience in consumer
 16 class action litigation. *See* RJC Decl. Ex. 2 (CLF firm resume.). Specifically, in anticipation of the
 17 mediation sessions with respected mediators Martin Quinn and Judge Cahill, both parties
 18 submitted comprehensive mediation briefs extensively detailing their legal and factual support.
 19 RJC Decl. ¶ 25. When the case still did not settle, Plaintiff filed a robust motion for class
 20 certification and supporting materials, including four expert declarations. *Id.* ¶ 26. The case settled
 21 shortly thereafter with the continued assistance of mediator Judge Cahill. *Id.*

22 The settlement reflects the realities of each side’s case and the information obtained during
 23 the discovery process. *Id.* ¶ 27. The proposed settlement is the result of extensive, informed, arms-
 24 length negotiations between counsel with substantial litigation experience, who are fully familiar
 25 with the legal and factual issues in this case, and who have specific experience litigating and
 26 settling complex and class action cases. *Id.*

27 ///

28 ///

1 Accordingly, based on their collective experience, Plaintiff's counsel concluded that the
2 settlement agreement provides exceptional results for the class while sparing the class from the
3 uncertainties of continued and protracted litigation. *Id.* ¶ 28.

4 **IV. THE COURT SHOULD PROVISIONALLY CERTIFY THE SETTLEMENT CLASS**

5 The Ninth Circuit has recognized that certifying a settlement class to resolve consumer
6 lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed
7 settlement prior to the class certification stage, a court must determine whether the putative
8 settlement class satisfies the requirements for class certification under Rule 23. See Fed. R. Civ. P.
9 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or
10 compromised only with the court's approval."). In assessing those class certification requirements,
11 a court may properly consider that there will be no trial. See *Amchem Prods. v. Windsor*, 521 U.S.
12 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court
13 need not inquire whether the case, if tried, would present intractable management problems ... for
14 the proposal is that there be no trial.").

15 On March 5, 2018, Plaintiff filed his motion for class certification with substantial
16 supporting materials explaining why class certification is appropriate under Rule 23(a), (b)(2), and
17 (b)(3) (Dkt. 53-54). As set forth below, the same common questions of fact predominate
18 nationwide, and certification of nationwide classes is consistent with *In re Hyundai & Kia Fuel*
19 *Econ. Litig.*, 881 F.3d 679, 689 (9th Cir. 2018) ("*Hyundai*").

20 **A. The Nationwide Settlement Class Should Be Conditionally Certified**

21 The SAC (Dkt. 71) pleads violations of California's consumer protection statutes and
22 unjust enrichment on behalf of a nationwide class. Common questions of law and fact
23 predominate on these claims. To the extent there are variations in state laws, the variations are
24 immaterial.

25 **1. Nationwide Class Members Are Victims of the Same Misconduct as Plaintiff**

26 Defendant sold the same Products nationwide with the allegedly deceptive packaging,
27 using the same manufacturing. Just as is the case for all Californians, the basis for the alleged
28 misconduct is the violation of a federal regulation: 21 C.F.R. Section 100.100 which considers

1 opaque packaging which contains nonfunctional slack-fill deceptive as a matter of law (Dkt. 71).
 2 And just as is the case for all Californians, the claims of false advertising will present uniform
 3 issues of material fact for class members nationwide, including whether the labeling was likely to
 4 deceive, whether the Products contain nonfunctional empty space, and whether a price premium
 5 can be demonstrated using common evidence. (Dkt 71.)

6 **2. A Fifty-State Consumer Protection Class Can Be Certified**

7 In light of the uniform alleged misconduct, the elements that need to be proven under the
 8 consumer protection laws of the fifty states and the District of Columbia (collectively, “States”) are
 9 substantively identical. To the extent differences exist, they are immaterial. Were this case to
 10 proceed to trial, the jury could be asked to provide special verdicts as to whether Plaintiff had
 11 proved various facts—for example, that the Products’ packaging is likely to deceive reasonable
 12 consumers or contains nonfunctional slack-fill. It would then be a relatively simple matter to
 13 compare the proven elements to the required elements in each state, to determine whether the case
 14 had been successful. To put it another way, Plaintiff has the incentive, in proving the violations of
 15 his own state laws, to prove all the elements of all the state laws. Filed herewith as Appendix A
 16 and B are, respectively, (1) a summary chart of the elements of the relevant state laws and (2) a
 17 more detailed discussion of the same, including statutory and case citations in support thereof.
 18 These charts demonstrate predominance of common issues. To wit:

19 **Right of Action.** All states have established a private right of action to challenge false
 20 advertising.⁴ In addition, class treatment is available for violations of all the state laws.⁵

21 _____
 22 ⁴ Alabama, California, Florida, Illinois Indiana, Louisiana, Maine, Maryland, Minnesota, and
 23 Tennessee require pre-suit notice. Before suing under the law of California, Plaintiff provided
 notice.

24 ⁵ While seven states’ statutes (Arkansas, Alabama, Georgia, Louisiana, Tennessee, Montana, and
 25 South Carolina) prohibit class actions, numerous district courts have found that that these
 26 prohibitions are not enforceable in federal court and that classes may still be certified under Rule
 27 23 in light of *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). *See,*
 28 *e.g., Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331 (11th Cir. 2015) (allowing
 Alabama class actions); *Mounce v. CHSPSC, LLC*, 2017 WL 4392048, at *7 (W.D. Ark. Sept. 29,
 2017) (allowing Arkansas class actions); *In re Hydroxycut Marketing & Sales Practices Litig.*,
 299 F.R.D. 648 (S.D. Cal. 2014) (allowing Georgia, Louisiana, Montana, South Carolina, and
 Tennessee class actions); *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, 2015 WL 5166014
 (E.D. Tenn. June 24, 2015) (allowing South Carolina and Montana class actions); *Wittman v. CBI*,

1 **Prohibition of Deceptive Conduct.** All the states prohibit the alleged misconduct in one
 2 of two ways. Forty-five states have statutes similar to the California UCL in that they have broad
 3 and general prohibitions against any kind of deceptive conduct.⁶ Plaintiff will represent the
 4 interests of consumers in these states. The remaining five states—Colorado, Mississippi, Oregon,
 5 Tennessee, and Texas—have narrower statutes that, like the CLRA, prohibit specific deceptive
 6 acts, including misrepresentations as to the “characteristics . . . or quantities” or “[a]dvertising
 7 goods . . . with intent not to sell them as advertised.” *See, e.g.* Cal. Civ. Code 1770(a)(5), (9);
 8 Colo. Rev. Stat. § 6-1-105 (1)(e), (i); MS Code § 75-24-5(e), (i); OR Rev. Stat. § 646.608(e), (i);
 9 Tenn. Com. Code § 47-18-104(b)(5), (9); Tex. Bus & Com. Code § 17.46(5), (9).⁷ Plaintiff will
 10 prove the elements of these claims as they are at the heart of the allegations about the “quantities”
 11 of the Products.

12 **Knowledge and Intent.** Thirty-three states, including California, Florida, New York, and
 13 North Carolina do not require a showing of either knowledge or intent, and thus, Plaintiff can
 14 represent the interests of the class members from 28 other states that also impose no such
 15 requirement.⁸ New Jersey, Arizona, and Delaware require a showing of knowledge and intent in

16 _____
 17 *Inc.*, 2016 WL 3093427 (D. Mont. June 1, 2016) (allowing Montana class actions); *In re Optical*
 18 *Disk Drive Antitrust Litig.*, 2012 WL 1366718 (N.D. Cal. Apr. 19, 2012) (allowing South Carolina
 19 class actions); *Reed v. Dynamic Pet Prods.*, 2016 WL 3996715 (S.D. Cal. July 21, 2016) (allowing
 20 Louisiana class actions); *Andren v. Alere, Inc.*, 2017 WL 6509550 (S.D. Cal. Dec. 20, 2017)
 21 (allowing Georgia class action). *But see Beard v. Honeywell Int’l, Inc.*, 2010 WL 3239285
 22 (M.D. Tenn. Aug. 16, 2010) (disallowing Tennessee class actions); *Fejzulai v. Sam’s West, Inc.*,
 23 205 F. Supp. 3d 723 (D.S.C. 2015) (disallowing South Carolina class actions). To the extent this
 24 Court has concerns about any states’ inclusion in the class with respect to consumer protection
 25 statutory claims, they can be included in the nationwide class solely with respect to unjust
 26 enrichment claims.

27 ⁶ These states are Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware,
 28 District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky,
 Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska,
 Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota,
 Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont,
 Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

⁷ Arkansas’ statute also specifically prohibits most of these same activities, but goes on to note
 that the practices made unlawful under the act are “not limited to” the specific activities identified
 in the statute. Ark. Bus. & Com. Code § 4-88-107(a).

⁸ These additional states are Alabama, Alaska, Connecticut, District of Columbia, Georgia,
 Hawaii, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri,
 Montana, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota,

1 cases involving a concealment of a material fact; Plaintiff has obtained in discovery evidence,
 2 including customer complaints, that demonstrate Defendant was informed of and aware of the
 3 issue and can represent these class members.⁹

4 **Reliance.** Differing state rules on reliance also pose no bar to certification. The statutes in
 5 New York and New Jersey, like 29 other states, do not require a showing of “reliance” but instead
 6 only proximate causation (which some states refer to as “ascertainable loss”). Here, Plaintiff’s
 7 theory of loss causation is the same for each class member, namely that Defendant’s misconduct
 8 led to a price premium. Plaintiff can thus represent class members on this question in the other
 9 similar 29 states.¹⁰

10 The law of California requires reliance by the named plaintiff, as do 13 other states.¹¹ Two
 11 of those eleven Colorado and Maryland—have expressly held, as has California, that there need
 12 not be any showing of reliance by absent class members.¹² Others have not answered the
 13 question.¹³ Alternatively, consumers in these states can be excluded from the consumer protection
 14 class and permitted to pursue only their unjust enrichment claims.

15
 16 Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Similarly,
 17 neither the UCL nor the CLRA require proof that a violation was knowing. The UCL also does not
 18 require a showing of intent, while the CLRA requires it for some of its prohibited activities, but
 19 not all.

20 ⁹ Colorado, Indiana, Kansas, Maryland, Nevada, New Hampshire, New Mexico, South Carolina,
 21 Utah, and Wyoming have statutes similar to the CLRA and like Arkansas, requiring a showing of
 22 knowledge and/or intent for some or all of the key provisions at issue in this case. Arizona,
 23 Illinois, Iowa, Minnesota, and North Dakota require a showing that the defendant intended for the
 24 plaintiff to rely on the misrepresentation, which is a lesser level of intent and thus would be
 25 necessarily proven if there is violation of the Arkansas law.

26 ¹⁰ Alaska, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Kentucky,
 27 Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New
 28 Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota,
 Tennessee, Utah, Vermont, Washington, and Wisconsin.

¹¹ These states are Colorado, Georgia, Indiana, Maryland, Nevada, Pennsylvania, Texas, Virginia,
 West Virginia, and Wyoming. In addition, Michigan requires a showing of reliance for some kinds
 of violations.

¹² *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009); *Patterson v. BP Am. Prod. Co.*, 240 P.3d 456,
 469 (Colo. App. 2010), *aff’d*, 263 P.3d 103 (Colo. 2011); *Luskin’s, Inc. v. Consumer Prot.*
Div., 353 Md. 335, 358–59, 726 A.2d 702 (1999); *Pitts v. Am. Sec. Ins. Co.*, 144 N.C. App. 1, 14
 (2001), *aff’d*, 356 N.C. 292 (2002).

¹³ These states are Georgia, Indiana, Virginia, West Virginia, and Wyoming.

1 **Remedies.** Differences among the states’ remedial schemes also do not bar certification.
 2 Once the jury answers the special verdict questions, the Court can easily determine whether a
 3 violation has been proven under each state’s laws, and if so, it can order the Defendant to provide
 4 the residents of that state the remedy authorized by the state law. For example, all states provide
 5 for compensatory damages, the amount of which here will be the price premium determined by the
 6 jury, i.e., the percentage by which the price was inflated due to the misconduct. Moreover, all but
 7 twelve state statutes also provide for injunctive relief; thus, if the elements found by the jury
 8 equate to a violation of these states’ laws, and Plaintiff additionally shows the likelihood of future
 9 harm to consumers, the Court can fashion an injunction to prohibit the challenged conduct in these
 10 38 states.¹⁴

11 **3. Plaintiff’s Unjust Enrichment Claim Can Be Pursued on a Nationwide Basis.**

12 Most courts agree that the laws of the fifty states regarding unjust enrichment do not differ
 13 materially, so a nationwide class may be certified. *See, e.g., In re Abbott Labs. Norvir Anti-Tr.*
 14 *Litig.*, 2007 WL 1689899, at *9 (N.D. Cal. June 11, 2007) (certifying nationwide class; holding
 15 that the “variations among some States’ unjust enrichment laws do not significantly alter the
 16 central issue or the manner of proof”); *In re Checking Account Overdraft Litig.*, 307 F.R.D.
 17 630,647 (S.D. Fla. 2015) (“There is general agreement among courts that the “minor variations in
 18 the elements of unjust enrichment under the laws of the various states . . . are not material and do
 19 not create an actual conflict.”) (quoting *Pennsylvania Emp., Benefit Trust Fund v. Zeneca, Inc.*,
 20 710 F.Supp.2d 458, 477 (D. Del. 2010)); *In re Mercedes-Benz Tele Aid Contract Litig.*, 257
 21 F.R.D. 46 (D.N.J. 2009) (“While there are minor variations in the elements of unjust enrichment
 22 under the laws of the various states, those differences are not material and do not create an actual
 23 conflict.”); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004) (“In
 24 looking at claims for unjust enrichment, we must keep in mind that the very nature of such claims
 25 requires a focus on the gains of the defendants, not the losses of the plaintiffs. That is a universal
 26

27 ¹⁴ The state statutes that do not provide for injunctive relief in a consumer action are Alabama,
 28 Arkansas, Colorado, Louisiana, Maryland, Mississippi, Montana, North Dakota, Oregon, South
 Carolina, Virginia, and Wyoming. The other 38 states’ statutes specifically authorize consumers to
 obtain injunctions.

1 thread throughout all common law causes of action for unjust enrichment.”). In distilling the
 2 various states’ laws down to two common elements, one court explained:

3 At the core of each state’s law are two fundamental elements—***the defendant received***
 4 ***a benefit from the plaintiff and it would be inequitable for the defendant to retain***
 5 ***that benefit without compensating the plaintiff.*** The focus of the inquiry is the same in
 6 each state. Application of another variation of the cause of action than that subscribed
 to by a state will not frustrate or infringe upon that state’s interests. In other words,
 regardless of which state’s unjust enrichment elements are applied, the result is the
 same. Thus, there is no real conflict surrounding the elements of the cause of action.

7 *Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007) (emphasis added), *rev’d on*
 8 *other grounds*, 2009 WL 826842, 328 Fed. Appx. 121 (3d Cir. 2009). These two elements are the
 9 same for all class members, regardless of their state of residence, as all paid a price premium to
 10 Defendant to purchase the Products—thus, all conferred a benefit on Defendant—and none
 11 received a Product without nonfunctional slack-fill, therefore rendering it inequitable for
 12 Defendant to retain the benefit. Thus, the same legal questions predominate for all class members’
 13 unjust enrichment claims.

14 There are no material differences among state laws regarding unjust enrichment. Plaintiff
 15 is aware of one case that found a material difference in that half the states “do not allow claims for
 16 unjust enrichment where the plaintiff has received the benefit of the bargain.” *Andren v. Alere,*
 17 *Inc.*, 2017 WL 6509550, at *17 (S.D. Cal. Dec. 20, 2017). But that court did not explain the basis
 18 for its holding, and it was mistaken, because the “benefit of the bargain” test is no different from
 19 the determination in every state of whether it would be “inequitable for the defendant to retain [the
 20 amount received from plaintiff] without compensating the plaintiff.”¹⁵ *See, e.g., Peterson v. Cellco*
 21 *P’ship*, 164 Cal. App. 4th 1583, 1591 (2008) (“Rather, they received the benefit of their bargain,
 22 having obtained the bargained for insurance at the bargained for price.”); *One Step Up, Ltd. v.*
 23 *Webster Bus. Credit Corp.*, 87 A.D.3d 1, 14 (N.Y. App. Div. 2011) (“Moreover, defendant was in
 24 no way unjustly enriched. It merely received what it was entitled to under the express contracts at
 25 issue, while plaintiff received the benefit of its bargain.”). The lack of any difference is especially
 26 evident here, as the essence of the claim by Plaintiff is that no purchaser got the bargained-for
 27

28 ¹⁵ Instead, the Court merely relied upon a lengthy chart prepared by the Defendant, that also did
 not contain any discussion. *See* Case No. 16-cv-1255, Dkt. 100-2, pp. 95-122.

1 product at the bargained-for price, because of the price premium. *Cf. In re Anthem, Inc. Data*
 2 *Breach Litig.*, 162 F. Supp. 3d 953, 985 (N.D. Cal. 2016) (explaining that “benefit of the bargain”
 3 losses are the difference between the price you paid and the value of what you received) (citing
 4 *Kwikset v. Superior Court*, 51 Cal. 4th 310, 321-22 (2011)).¹⁶

5 There may be one difference among the laws in that seven states, including Florida, have
 6 limited the remedy of unjust enrichment to situations where the victim has no other remedy, but
 7 again, this difference does not matter. Courts in those states have barred unjust enrichment claims
 8 only where there is a contract between the parties that would give rise to claims for breach of
 9 contract.¹⁷

10 Here, there is no contract. *Cf. Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1195
 11 (N.D. Cal. 2014) (explaining that the absence of privity prevents a plaintiff from alleging breach
 12 of contract in a food labeling lawsuit). Moreover, if Plaintiff fails to prove the elements of his
 13 consumer protection claim he will have “no other remedy” and thus will be left only with his
 14 unjust enrichment claim. Likewise, if the Court concludes, based on the jury’s special verdict
 15 answers, that the elements for the consumer claim in a particular state have not been proven, then
 16 there is “no other remedy” for the class members in that state.

17 **B. Nationwide Settlement Classes Are Still Permitted After *Hyundai*.**

18 This Court may be concerned that 50-state settlement classes are no longer available under
 19 the Ninth Circuit’s recent ruling in *Hyundai*. It need not have that concern. *Hyundai* did not bar

20 _____
 21 ¹⁶ Alternatively, if this Court chose to include “did not receive benefit of the bargain” as an
 22 independent element of the unjust enrichment claim, the Plaintiff would prove that element on
 23 behalf of class members in all states with such a requirement.

24 ¹⁷ *See, e.g., In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 955 F.
 25 Supp. 2d 1311, 1338 (S.D. Fla. 2013) (holding that Florida plaintiffs may pursue claims for unjust
 26 enrichment and false advertising because there was not “an express contract between the parties
 27 that precludes recovery”); *Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *6
 28 (Del. Ch. Feb. 27, 2009), *aff’d sub nom. Metcap Sec. LLC v. Pearl Sr. Care, Inc.*, 977 A.2d 899
 (Del. 2009) (holding that in Delaware, “[b]ecause there is no contract. . . [plaintiff] does not have
 an adequate remedy at law”). *See also Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz.
 535, 542 (Ct. App. 2002), *as corrected* (June 19, 2002) (holding that the doctrine of unjust
 enrichment does not apply in Arizona where there is “a specific contract”). *Accord Porter v. Hu*,
 116 Haw. 42, 54 (Ct. App. 2007); *Am. Towers Owners Ass’n, Inc. v. CCI Mech., Inc.*, 930 P.2d
 1182, 1193 (Utah 1996); *Daugherty v. Sony Elecs., Inc.*, 2006 WL 197090, at *6 (Tenn. Ct. App.
 Jan. 26, 2006); *Schroeder v. Buchholz*, 622 N.W.2d 202, 207–08 (N.D. 2001).

1 nationwide settlement classes; and it reversed certification of the class there only because of
2 myriad and profound factual and legal differences among class members that do not exist here. In
3 *Hyundai*, the plaintiffs challenged allegedly fraudulent representations made by hundreds of
4 independent new and used car dealers across the country, in connection with 76 different models
5 of cars. 881 F.3d at 704. The evidence showed wide variations among the statements made by the
6 dealers and among the true features of the car models. Prior to settlement, the district court denied
7 Plaintiff’s class certification motion due to these differences. *Id.* at 695. Around the same time,
8 numerous other class actions were filed around the country alleging similar misconduct under
9 their own states’ laws. *Id.* at 697. In response, plaintiffs’ counsel in the California action, where
10 certification had been denied, conspired with the defendant to settle out from under the plaintiffs
11 and counsel from other states, by agreeing to a nationwide settlement class, under California law.
12 *Id.* at 697-700. Although the plaintiffs and counsel from the other states objected, the district court
13 certified the nationwide settlement class, without making any new findings about commonality or
14 predominance, let alone why California law should apply to class members in all states when it
15 had previously held that it could not even apply uniformly to class members in California. *Id.* at
16 700. The objector plaintiffs from the other states appealed, and the Ninth Circuit reversed.

17 Notably, *Hyundai* does not hold that a nationwide class can never be certified. Rather, as
18 the Ninth Circuit explained, the district court must consider “whether the consumer-protection
19 laws of the affected States vary in *material* ways.” *Id.* at 702 (internal citations omitted) (emphasis
20 added). While the district court must undertake a choice of law analysis and look to whether
21 “common questions outweigh individual questions,” *id.*, the Ninth Circuit reconfirmed that when
22 “[c]onfronted with a request for settlement-only class certification, a district court need not inquire
23 whether the case, if tried, would present intractable management problems, for the proposal is that
24 there be no trial.” *Id.* at 693 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624, 117
25 S.Ct. 2231, 138 L.Ed.2d 689 (1997)).

26 This case presents none of the problems that led the Ninth Circuit to reject the approval of
27 a nationwide settlement class in *Hyundai*. Here, unlike *Hyundai*, the Court *did not* rule on
28 Plaintiff’s class certification motion let alone deny certification. *Cf. id.* at 696. And Plaintiff is not

1 seeking to apply California law to class members in all states, but to apply the law of each state to
2 the residents of that state; which is possible because the laws are substantively identical, and to the
3 extent there are differences, they are immaterial. *Cf. id.* at 692.20

4 **V. THE PROPOSED NOTICE IS ADEQUATE**

5 The proposed notice plan and claim form comport with the procedural and substantive
6 requirements of Rule 23. Under Rule 23, due process requires that class members receive notice of
7 the settlement and an opportunity to be heard and participate in the litigation. *See* Fed. R. Civ.
8 Proc., Rule 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle*
9 *and Jacquelin*, 417 U.S. 156, 175-76 (1974) (“individual notice must be provided to those class
10 members who are identifiable through reasonable effort”). The mechanics of the notice process are
11 left to the discretion of the Court, subject only to the broad “reasonableness” standards imposed by
12 due process. *See* 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1786 (3d ed. 2008);
13 *see also Rosenberg v. I.B.M.*, 2007 WL 128232 at *5 (N.D. Cal. 2007) (notice should inform class
14 members of essential terms of settlement including claims procedure and their rights to accept,
15 object or opt-out of settlement).

16 Notice of the settlement is to be provided to the class as follows: (1) publication in the
17 *Soap Opera Digest*; (2) publication in *Life & Style*; (3) publication in *National Enquirer*; (4) 52
18 million combined impressions of online advertising; (5) a press release through a national wire
19 service; and (6) a dedicated settlement website. *See* Schey Decl. Ex. A. In addition, the Settlement
20 Website shall contain the Long Form Notice in both downloadable PDF format and HTML format
21 with a clickable table of contents; answers to frequently asked questions; a Contact Information
22 page that includes the address for the Claims Administrator and addresses and telephone numbers
23 for Plaintiff’s Counsel and Defendant’s Counsel; the Agreement; the signed order of Preliminary
24 Approval and the publicly filed motion papers and declarations in support thereof; a downloadable
25 and online version of the Claim Form (in English and Spanish versions); a downloadable and
26 online version of the form by which Settlement Class Members may exclude themselves from the
27 Settlement Class; and (when they become available) the publicly filed motion for final approval
28 and Plaintiff’s application for Attorneys’ Fees, Costs and an Incentive Award, with supporting

1 declarations. *Id.* As explained in the declaration from the claims administrator, this multi-
2 communication method is the best notice practicable and is reasonably designed to reach the
3 settlement class members. *Id.*; *See, e.g., Simpao v. Gov't of Guam*, 369 Fed. Appx. 837, 838 (9th
4 Cir. 2010) (notice plan was “best notice practicable” where direct notice was mailed to class
5 members and supplemented by published notice); *In re Google Referrer Header Privacy Litig.*,
6 2014 WL 1266091, *7 (N.D. Cal. Mar. 26, 2014) (where direct individual notice not practical,
7 “publication or something similar is sufficient to provide notice to the individuals that will be
8 bound by the judgment”); *see also; In re Netflix Privacy Litig.*, 2012 WL 2598819, *5 (N.D. Cal.
9 July 5, 2012) (approving notice procedure that included emailing customers at last known email
10 address, publication in People Magazine, and advertising on Facebook.com).

11 The proposed notices inform class members about the proposed settlement; their right to
12 opt out or object; the need to file a claim; a summary of settlement benefits; the prospective
13 request for attorneys’ fees, costs, and incentives; and the fact that they will be bound by the
14 judgment if they do not opt out. The notices refer class members to the settlement website where
15 they can obtain the long-form notice, which provides more details about the case and the
16 settlement, the procedures for opting out or objecting, and methods to obtain additional
17 information. The settlement website will also contain a copy of the full settlement agreement and
18 will contain the fee application when filed. RJC Decl. Ex. 1 Exs. A, C, D, E. Settlement class
19 members who seek benefits under the Settlement need to fill out a simple Claim Form online.
20 They also have the option to print copies and mail the Claim Form to the Claim Administrator.
21 The claim form requires them to certify under the penalty of perjury (1) their name and address
22 and (2) basic information about the Products purchased. RJC Decl. Ex. 1 Ex. C. The claim form
23 can be completed in a few minutes. *Id.*

24 VI. DATES FOR THE FINAL APPROVAL PROCESS

25 Plaintiff requests that in connection with preliminary approval, this Court set a date for a
26 final approval hearing to consider the fairness of the Settlement and to hear any comments from
27 the Settlement Class Members, as well as dates for mailing and publishing Notice and deadlines
28 for objections and opting out of the settlement class. Plaintiff proposes the following schedule:

Clarkson Law Firm, P.C.
 9255 Sunset Blvd., Suite 804
 Los Angeles, CA 90069

1	Deadline for Claim Administrator to cause notice to be published in <i>Soap Opera Digest</i> per the Notice Plan	August 8, 2018 issue
2		
3	Deadline for Claim Administrator to cause notice to be published in <i>Life & Style</i> per the Notice Plan	August 8, 2018 issue
4		
5	Deadline for Claim Administrator to cause notice to be published in <i>National Enquirer</i> per the Notice Plan	August 13, 2018 issue
6		
7	Deadline for Claim Administrator to cause online notice to be published on internet sites per the Notice Plan	July 21, 2018 issue
8		
9	Deadline to file motion for attorneys' fees, costs and incentive awards	September 6, 2018
10		
11	Deadline to file motion for final approval; response to objections	September 20, 2018
12		
13	Deadline for Claim Administrator to submit a declaration to the Court attesting to the number of impressions delivered and the number of click-throughs to the Settlement Website	September 20, 2018
14		
15	Claim deadline	September 20, 2018
16		
17	Opt-outs (date of online submission, or if mailed, date of receipt, not postmarking)	September 20, 2018
18		
19	Objections, Requests to Appear (filing date, not postmarking)	September 20, 2018
20		
21	Replies in support of final approval and motion for attorneys' fees, costs and incentive awards; response to objections	October 4, 2018
22		
23	Deadline for Plaintiff/Claims Administrator to file list of optouts, objections, and supporting documentation with the Court	October 4, 2018
24		
25	Deadline for the Claim Administrator to provide a declaration to the Court regarding the number and dollar amount of claims received to date	October 4, 2018
26		
27	Final approval hearing	October 18, 2018
28		
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1 **VII. CONCLUSION**

2 For the reasons stated above, Plaintiff respectfully requests that this Honorable Court
3 GRANT preliminary approval of the proposed class action settlement.

4
5 DATED: May 10, 2018

CLARKSON LAW FIRM, P.C.

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