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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MIGUEL RODRIGUEZ, on behalf of himself, all others similarly situated, and the general public,

Plaintiff,

v.

BUMBLEE BEE FOODS, LLC,

Defendant.

Case No. 17-cv-2447-MMA-WVG

NOTICE OF MOTION FOR APPROVAL OF CLASS ACTION SETTLEMENT

[Fed. R. Civ. P. 23(b)(2), 23(e)]

Judge:	Hon. Michael M. Anello
Hrg. Date:	March 12, 2018
Time:	2:30 p.m.
Location:	Courtroom 3D

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on March 12, 2018, at 2:30 p.m., or as soon thereafter as may be heard, in Courtroom 3D, before the Honorable Michael M. Anello, plaintiff Miguel Rodriguez will, and hereby does respectfully move the Court pursuant to Fed. R. Civ. P. 23(e) for approval of a proposed class action settlement.

The Motion is based on this Notice of Motion, the concurrently-filed Declaration of Jack Fitzgerald, and all prior pleadings and proceedings had in the matter.

Dated: February 1, 2018

/s/ Jack Fitzgerald

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INTRODUCTION

This is a false advertising class action in which plaintiff alleges the packaging of Bumble Bee's Premium Select Medium Red Smoked Salmon Fillets in Oil ("Medium Red Smoked Salmon") deceptively stated or suggested the product was smoked, wild-caught salmon, when it was actually farmed salmon to which liquid smoke flavor had been added.

Shortly after plaintiff raised these issues, Bumble Bee quickly revised the product's packaging in a manner that fairly and reasonably addressed his concerns. Concurrent settlement negotiations made clear that, due to the product's modest sales, the expense of litigating the class's damages claims would likely quickly and substantially outweigh the class's potential recovery. Thus, the parties have taken a reasonable approach to resolving this action expeditiously, in a manner that balances this reality with meaningful relief for the class.

To that end, the action was filed on December 6, 2017 and settled on January 3, 2018, with the assistance of the Honorable Magistrate Judge William V. Gallo. The Settlement Agreement[1] provides reasonable injunctive relief in the form of revised packaging, anticipates payment of modest attorneys' fees and an incentive award for having obtained that relief, and does not require class members to release damages claims.

Accordingly, the Court should certify the settlement class pursuant to Fed. R. Civ. P. 23(b)(2), appoint plaintiff as Class Representative and his counsel as Class Counsel, approve the Settlement,[2] and set a briefing schedule and hearing for motions for fees, costs, and an incentive award.

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[1] The Settlement Agreement is attached as Exhibit 1 to the Fitzgerald Declaration. Capitalized terms used herein have the same meaning as terms defined in paragraph 1 of the Settlement Agreement.

[2] Plaintiff acknowledges that settlement approval is normally a two-step process involving preliminary approval, a period for class members to make claims or react to the settlement, then a final approval hearing. Because this settlement involves injunctive relief only, because no opt-outs are allowed, and because the parties are requesting the Court not

FACTS

I. CASE BACKGROUND & SETTLEMENT NEGOTIATIONS

In September 2017, plaintiff purchased Bumble Bee's Medium Red Smoked Salmon believing, based on the packaging, replicated below, that the product was wild-caught, smoked salmon. (*See* Compl. ¶ 43.)

He alleges that, in contrast to Bumble Bee's express and implicit representations, the product is actually farmed salmon, to which liquid smoke flavor has been added. (*See id.* ¶¶ 21-35.)

On September 25, 2017, plaintiff sent a letter to Bumble Bee advising it of its violations of the California Consumers Legal Remedies Act and breaches of warranty, and demanding that Bumble Bee, *inter alia*, "discontinue representing through any words, pictures or phrases that the Product is wild-caught, smoked, or 'premium'" (Fitzgerald Decl. Ex. 2 at 2-3).

On October 24, 2017, Bumble Bee responded, denying that it had violated the CLRA, asserting that plaintiff's claims were preempted or that plaintiff was challenging non-

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require notice, the parties do not believe the two-step process is necessary in this case. If the Court disagrees, plaintiff would request that the Court construe this motion as one for preliminary approval, grant the motion, and Court set a final approval hearing date.

actionable puffery with respect to "Premium Quality" and "Premium Select," and providing a number of specific responses to the facts plaintiff asserted. (*See id.* Ex. 3 at 2-7.) Bumble Bee also denied it had violated any warranties or federal food labeling regulations, as plaintiff had asserted. (*See id.* at 7-8.) Nevertheless, Bumble Bee noted it "has reviewed and updated the information on its website,"[3] and that it "intends to review its labels to provide additional clarity that the Product is smoke flavored." (*Id.* at 8.) Finally Bumble Bee noted, "[t]o the extent [plaintiff] ha[s] any genuine concerns, or a colorable claim, [it] seek[s] to resolve it without resort to litigation." (*Id.*)

Following plaintiff's receipt of the letter, the parties spoke and agreed to discuss an early resolution contingent on the exchange of certain information. Plaintiff requested information concerning insurance coverage and the products' sales, while Bumble Bee asked plaintiff to provide any analysis as to an alleged price premium for the product. (Fitzgerald Decl. ¶ 6.)

After Bumble Bee provided sales information and advised that there was no insurance coverage, on November 7, 2017, plaintiff sent a letter setting forth his initial analysis as to a premium for the product, based on a comparator model that used Bumble Bee's other products to show differentiation in features and pricing. So that Bumble Bee could more fully appreciate his claims, plaintiff also provided a draft Complaint. (*Id.* ¶ 7.)

On November 21, Bumble Bee responded, arguing why plaintiff's damages model was flawed, and why his claims would not succeed, but noting its belief that, due to the modest size of the case, it was nevertheless sensible to try to resolve the matter before resorting to litigation. Thus, Bumble Bee made plaintiff an individual offer of settlement. (*Id.* ¶ 8.)

[3] Bumble Bee modified its website by revising the sentence, "these Coho fillets of salmon are *lightly smoked* and ready to serve," to read "these Coho fillets of salmon are *delicious* and ready to serve." (Fitzgerald Decl. ¶ 5 & Ex. 4.)

Plaintiff rejected Bumble Bee's offer and filed the action on December 6, 2017. (Dkt. No. 1.) The parties continued to discuss an early resolution. On December 20, they jointly requested of Magistrate Judge Gallo a pre-Answer Early Neutral Evaluation Conference. (Dkt. No. 4.) They noted their belief that "there is a reasonable possibility that a resolution could be reached in an ENE, with assistance from the Court," and that "substantial party and judicial resources could be conserved if they can reach a resolution before Bumble Bee is obligated to respond to the Complaint in February." (*Id.* at 1.)

Judge Gallo granted the request and scheduled an ENE for January 4, 2018. (Dkt. No. 5.) Pursuant to his Chambers Rules, on December 23, 2017, plaintiff made both a classwide and individual settlement offer, and on January 3, 2018, Bumble Bee countered. The parties exchanged ENE Statements, after which Judge Gallo engaged counsel for both parties in pre-conference telephone calls to get a better understanding of the case and issues relating to settlement. (Fitzgerald Decl. ¶ 9.)

The January 4 ENE lasted several hours (exceeding the two usually allotted for ENEs). Initially, the parties met together in Judge Gallo's chambers and exchanged views of the case, as well as additional information. Then Judge Gallo dealt with the parties separately. Eventually, he was able to bridge their gap with a mediator's proposal, which they each accepted. (*Id.* ¶ 10.) Bumble Bee provided confirmatory discovery regarding sales, and the parties drafted the full Settlement Agreement, which they executed on January 18, 2018. (*Id.* ¶ 11.)

II. SETTLEMENT TERMS

A. Benefits for the Class

i. Injunctive Relief – Revised Labels

Bumble Bee shall, beginning in the second quarter of 2018, begin replacing the current product packaging with Revised Packaging, which is replicated below.

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(Settlement Agreement ¶ 2.2; *see also id.* ¶ 1.18 & Ex. 1.) Bumble Bee is under no obligation to recall existing product bearing the current packaging, which inventory may be allowed to "sell though." (*Id.* ¶ 2.2.)

As shown in the image above, the Revised Packaging (A) states that the product is "Smoke Flavored Salmon Fillets," rather than "Smoked Salmon," (B) no longer claims to be "Premium" or "Medium Red," and (C) revises the packaging to replace the image that plaintiff alleges suggests the product is wild caught, with an image that more fairly portrays the appearance of a farm-raised Coho salmon. (*Compare* Compl. ¶¶ 28-29.) Bumble Bee has also modified its website so that it no longer states the product is "lightly smoked." (*See* Fitzgerald Decl. ¶ 5 & Ex. 4.)

ii. Attorneys' Fees & Incentive Award

The Settlement Agreement provides for Bumble Bee to pay an incentive award, attorneys' fees, and costs awarded by the Court. The Class Representative and Class Counsel will move the Court for such awards, and Bumble Bee has agreed to pay an amount between $30,000 and $85,000, which shall include fees, costs, and an incentive award; Bumble Bee has agreed not to argue that the Court should award less than $30,000 in fees, costs, and an incentive award. (Settlement Agreement ¶ 2.3.)

III. RELEASE

The settlement class will not be giving up any claims for damages or personal injury, as the released claims are limited to past claims for injunctive and declaratory relief only. (*Id.* ¶¶ 1.15, 3.1.) Plaintiff is the only class member who releases all of his claims, by virtue of his agreement to voluntary dismissal of his claims with prejudice following final approval. (*See id.* ¶ 7.)

IV. CLASS NOTICE

Because the parties are seeking certification of the settlement class under Rule 23(b)(2), and because class members are not waiving damages claims, the parties believe and understand that notice is not required, and ask that the Court not require notice. *See infra* Point II.B. If the Court does require notice, however, Bumble Bee agrees to pay the costs thereof. (*Id.* ¶ 2.4; *see also id.* ¶ 4.4.)

ARGUMENT

I. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

"Courts may certify a class action only if it satisfies all four requirements identified in Federal Rule of Civil Procedure 23(a), and satisfies one of the three subdivisions of Rule 23(b)." *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *1 (C.D. Cal. Jan. 31, 2014). For settlement purposes only, Defendant Bumble Bee does not object to a finding that the class elements are met. (Fitzgerald Decl. ¶ 12.)

A. The Requirements of Rule 23(a) are Satisfied

i. Numerosity

Bumble Bee has provided evidence that the nationwide settlement class includes purchasers of approximately 2.3 million units, for wholesale sales of approximately $5.2 million during the class period nationwide. (*Id.* ¶ 13.) "In determining whether numerosity is satisfied, the Court may draw reasonable inferences from the facts before it." *Kline v. Dymatize Enters., LLC*, 2016 WL 6026330, at *3 (S.D. Cal. Oct. 13, 2016) (citing *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977)). "Although there is no absolute threshold, courts generally find numerosity satisfied when the class

includes at least forty members." *D.C. v. County of San Diego*, 2017 WL 5177028, at *8 (S.D. Cal. Nov. 7, 2017) (Anello, J.) (citations omitted). Here, the evidence demonstrates that substantially more than 40 class members purchased the challenged product, satisfying numerosity. *See Kline*, 2016 WL 6026330, at *3 (although "it is unknown precisely how many members comprise the class," finding numerosity satisfied because "it may be reasonably inferred that there are at least thousands of class members given that over 8 million units of Defendant's products have been sold during the class period").

ii. Commonality

Rule 23(a)(2) is satisfied if "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), which means that "the class members have suffered the same injury," so that their claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "What matters" is "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quotation omitted). Questions "have that capacity" when they have a "close relationship with the . . . underlying substantive legal test." *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).

"The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts," *Hanlon*, 150 F.3d at 1019. "[A] common nucleus of operative fact is usually enough to satisfy the commonality requirement," *Rasario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992), which exists "where a defendant has engaged in standardized conduct toward members of the class." *Hale v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4992504, at *6 (S.D. Ill. Sept. 16, 2016) (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (collecting cases)). To satisfy Rule 23(a)(2), "even a single common question will do." *Dukes*, 564 U.S. at 359 (brackets omitted).

Here, plaintiff contends common questions include whether the challenged representations were warranties, whether they were material, and whether they were likely to mislead. *See Martin v. Monsanto Co.*, 2017 WL 1115167, at *4 (C.D. Cal. Mar. 24,

2017) ("A classwide proceeding in this [false advertising] case has the capacity to generate common answers to common questions apt to drive the resolution of the litigation, including, for example: (1) whether the [challenged labeling claim] is an express warranty; (2) whether Monsanto breached that warranty by selling non-conforming products; (3) whether the [challenged claim] is material, and (4) whether the statement was likely to deceive reasonable consumers."); *see also Kline*, 2016 WL 6026330, at *3 ("In addition to the similarity of factual circumstances giving rise to each class member's claims, many questions of law are common to the class with respect to whether Defendant's packaging represents violations of the consumer protection laws, including whether the packaging constitutes misrepresentations of material facts." (citing *In re Ferrero Litig.*, 278 F.R.D. 552, 560 (S.D. Cal. 2011)).

iii. Typicality

Rule 23(a)(3) is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3). This means plaintiff's claims "are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation omitted); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's legal theory," *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) (citation and internal quotation marks omitted).

Here, plaintiff's claims are typical of the Class Members' claims because each purchased Bumble Bee's Medium Red Smoked Salmon and were exposed to the challenged labeling claims. *See Martin*, 2017 WL 1115167, at *4 ("Plaintiffs' claims are sufficiently typical of the class claims" where "Plaintiff alleges that she and all class members were exposed to the same statement . . . and that they were all injured in the same manner . . . ."); *see also Kline*, 2016 WL 6026330, at *4 ("Because the present motion presents no

difference between Plaintiffs' claims and those of the proposed settlement class, the Court finds typicality is satisfied." (citation omitted)); *In re Ferrero Litig.*, 278 F.R.D. at 559 (finding typicality in action alleging false advertising of food label).

iv. Adequacy

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020 (citation omitted).

Here, both plaintiff and his counsel are adequate. Plaintiff has no conflict of interest with other Class Members, and has been and will continue prosecuting the action vigorously on behalf of the Class. (Fitzgerald Decl. ¶ 14.) Plaintiff's counsel are adequate Class Counsel because they are experienced in consumer protection class actions and other false advertising litigation, have no conflicts, and have been and will continue prosecuting the action vigorously on behalf of the Class. (Fitzgerald Decl. ¶ 15 & Ex. 5.)

B. The Requirements of Rule 23(b)(2) are Satisfied

A Rule 23(b)(2) class may be certified when the party against whom relief is sought "has acted or refused to act on grounds that apply generally to the class, so that injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Kline*, 2016 WL 6026330, at *4 ("A class may be certified under Rule 23(b)(2) if broad, class-wide injunctive relief or declaratory relief is necessary to redress group-wide injury." (internal quotation marks omitted; quoting *Meyer v. Portfolio Recovery Assocs., LLC*, 2011 WL 11712610, at *5 (S.D. Cal. Sept. 14, 2011) (quotation omitted))). Thus, Rule 23(b)(2) is "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Roberts v. Marshalls of CA, LLC*, 2017 WL 3314994, at *11 (N.D. Cal. Aug. 3, 2017) (quoting *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014)).

Certification under Rule 23(b)(2) is appropriate here, because "California . . . law . . . provide[s] for injunctive relief, and Plaintiff[] seek[s] such relief in [his] Complaint." *See Kline*, 2016 WL 6026330, at *4 (citations omitted).[4] Moreover "the injunctive relief sought applies generally to the class, as Plaintiff[] seek[s] an order . . . requiring Defendant to comply with the relevant consumer protection laws by making changes to its product packaging," which "redresses the class-wide injury of misleading packaging," and is "relief that would otherwise be unobtainable absent an injunction." *See id.*

II. THE COURT SHOULD APPROVE THE SETTLEMENT

"Judicial policy favors settlement in class actions . . . where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation." *Fontes v. Heritage Operating, L.P.*, 2016 WL 1465158, at *3 (S.D. Cal. Apr. 14, 2016) (Anello, J.) (citation omitted); *accord Smith v. CRST Van Expedited, Inc.*, 2013 WL 163293, at *2 (S.D. Cal. Jan. 14, 2013) ("Voluntary conciliation and settlement are the preferred means of dispute resolution in complex class action litigation." (citing *Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982))).[5]

Pursuant to Rule 23(e), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The purpose of this rule "is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, before a court approves a settlement, it must

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[4] *Compare* Compl. ¶¶ 3, 87b.

[5] *See also Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (Public policy "strong[ly] . . . favors settlements, particularly where complex class action litigation is concerned."); *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) ("[O]verriding public interest in settling and quieting litigation" is "particularly true in class action suits." (internal quotations omitted)); *Ma*, 2014 WL 360196, at *4 ("In general, there is a strong judicial policy favoring class settlements." (citing *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1272 (9th Cir. 1992)).

conclude that the settlement is "fundamentally fair, adequate, and reasonable." *In re Heritage Bond Litig.*, 546 F.3d 667, 674-75 (9th Cir. 2008); *see also In re Wireless Facilities, Inc. Secs. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) ("Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair.").

Because notice is not required, class members may not opt out, and class members do not waive damages claims, the parties believe the Court has the discretion and necessary information to grant the settlement final approval on the basis of the present motion.

A. The Settlement is Fair, Reasonable, and Adequate

"The Court may issue final approval of a class settlement 'only after a hearing and on finding that it is fair, reasonable, and adequate.'" *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *3 (C.D. Cal. July 27, 2015) (citing Fed. R. Civ. P. 23(e)(2); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)). In making this determination, a court considers a number of factors, including: (1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Tait*, 2015 WL 4537463, at *4 (citing *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 556, 575 (9th Cir. 2004)). "This list is not exhaustive, and different factors may predominate in different factual contexts." *Elliott v. Rolling Frito-Lay Sales, LP*, 2014 WL 2761316, at *3 (C.D. Cal. June 12, 2014) (quoting *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993)).

"The Court may also consider the procedure by which the parties arrived at the settlement to determine whether the settlement is truly the product of arm's length bargaining, rather than the product of collusion or fraud." *Id*. (citing *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010)). "Where, as here, a proposed class settlement has been reached after meaningful discovery and arm's length bargaining, conducted by capable counsel, and the proponents of the settlement are counsel experienced

in similar litigation, the settlement should be entitled to a presumption of fairness." *White v. Experian Info. Sols., Inc.*, 2009 WL 10670553, at *13 (C.D. Cal. May 7, 2009) (citation omitted).

i. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations Following Sufficient Investigation & Discovery

The settlement is the result of the parties' exchange of numerous letters detailing their positions on the facts and law; their exchange of information about sales and damages; numerous telephone calls between the parties' counsel further discussing the case and negotiating a resolution; and an in-person ENE conference with Magistrate Judge Gallo, which included a session during which counsel and the parties, including Mr. Rodriguez and Bumble Bee's in-house counsel, spoke to each other directly about their views of the case. *See Hanlon*, 150 F.3d at 1027 (affirming settlement approval where there was "no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiffs' claims"); *see also Kline*, 2016 WL 6026330, at *5 ("That the settlement was reached with the assistance of an experienced mediator further suggest that the settlement is fair and reasonable." (citation omitted)). Following settlement, Bumble Bee provided confirmatory discovery concerning sales. Although the parties did not engage in extensive discovery or litigation, given the straightforward claims in the case, this was unnecessary to reach the reasonable resolution embodied in the proposed Settlement Agreement.

ii. The Strength of Plaintiff's Case; the Risk, Expense, Complexity, and Duration of Further Litigation; and the Risk of Maintaining Class Certification Through Trial

While plaintiff and his counsel believe this is a relatively strong case on the merits, Bumble Bee did present certain defenses that, if valid, would reduce or eliminate the strength and value of those claims. For example, while plaintiff alleges that Bumble Bee uses artificial smoke flavor, such that its calling the product "Smoked Salmon" renders the product misbranded under 21 C.F.R. § 101.22(h)(6) (*see* Compl. ¶¶ 37-40), Bumble Bee has

asserted it uses natural smoke flavor, in which case that section may not apply, and plaintiff would not have viable claims under the UCL's "unlawful" prong.

Similarly, nothing on the challenged packaging expressly states that the product is wild-caught; plaintiff alleges that message is suggested primarily though the prominent front-of-package image. Bumble Bee has argued, however, that the image is typical of the Chilean region where the product is farmed.

More importantly, the likely expense, complexity, duration, and risk of obtaining and maintaining class certification through trial substantially outweigh the class's potential upside in terms of a monetary judgment. First, while the parties disagree whether Bumble Bee adequately and timely responded, Bumble Bee has argued that plaintiff's CLRA claims for damages are barred in light of its taking the remedial measures of modifying its website and product packaging. (Fitzgerald Decl. ¶ 17.) Second, proving a price premium will require substantial and expensive discovery and expert analysis. (*Id.* ¶ 16.) Third, obtaining a nationwide class may be difficult in light of recent case law, even though Bumble Bee is headquartered in San Diego. *See*, *e.g.*, *Andren v. Alere, Inc.*, 2017 WL 6509550, at *14-20 (S.D. Cal. Dec. 20, 2017).

Bumble Bee has argued that, if plaintiff is unable to certify a nationwide class, it will be able to obtain dismissal for lack of CAFA jurisdiction since its sales in California during the class period were approximately just $400,000. In that case, Bumble Bee argues, plaintiff would need to file a new action in state court, which—unlike federal court following the decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017)—has an ascertainability requirement to obtain certification. (Fitzgerald Decl. ¶ 18.) Each of these factors weighs in favor of finding the Settlement Agreement fair, reasonable, and adequate. *See Kline*, 2016 WL 6026330, at *5 ("[W]hile confident in the merits of their case, Plaintiffs are cognizant of the inherent risks of lengthy litigation. Defendant adamantly denies liability and Plaintiffs' ability to obtain class certification. The proposed settlement adequately accounts for these risks."); *Lilly v. Jamba Juice Co.*, 2015 WL 1248027, at *7-8 (N.D. Cal. Mar. 18, 2015) (

> In light of the difficulty Plaintiffs would face establishing damages on a classwide basis and the relatively small amount of money individual class members would be entitled to, the risk, expense, complexity, and likely duration of further litigation also support the conclusion that the settlement is substantively fair. In order to achieve this outcome in the absence of the settlement, Plaintiffs would first need to succeed in establishing liability—which Defendant still contests—at trial. This would take a considerable amount of time and expense and Plaintiffs would not be certain to succeed.
>
> Even if Plaintiffs were to succeed in establishing liability and the Court were to grant injunctive relief, Plaintiffs would face further difficulty in obtaining monetary compensation for class members . . . . It is unclear whether Plaintiffs would have been able to certify a class for damages at a later stage of the litigation, exposing Plaintiffs to a risk of losing class status at a later stage of the litigation. If such status were to be lost, the monetary reward individual Plaintiffs would be entitled to would likely be quite small.)

If, however, any class members disagree that the complexity and expense of the case compared to its potential upside favor settlement on the present terms, they remain free to pursue such damages claims, which are not waived.

iii. The Amount of Settlement

The Settlement Agreement provides meaningful injunctive relief and does not bar class members from seeking monetary relief. The injunctive relief "comports with the purpose of [California's consumer protection statutes] because it protects consumers from" misleading advertising, and "is consistent with the injunctive relief approved in . . . cases involving similar facts," *see Bee, Denning, Inc.*, 2016 WL 3952153, at *8 (citations omitted); *compare In re Ferrero Litig.*, 2012 WL 2802051, at *4 (S.D. Cal. July 9, 2012) ("Defendant agreed to modify the product label to address the fundamental claim raised in Plaintiffs' complaint. . . . The Court concludes that the proposed settlement provides an appropriate remedy to class members. It both takes into account the strength of Defendant's defenses and obstacles to class-wide recovery, while also addressing the concerns in Plaintiff's complaint.), *aff'd*, 583 Fed. Appx. 665 (9th Cir. 2014).

iv. The Experience & Views of Counsel

In contemplating the preliminary approval of a proposed settlement, "[t]he recommendations of plaintiff['s] counsel should be given a presumption of reasonableness." *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *11 (N.D. Cal. Feb. 2, 2009) (citation omitted). Here, plaintiff's counsel has substantial experience in class action litigation relating to California's consumer protection statutes, and in particular relating to the false advertising of food products. (*See* Fitzgerald Decl. ¶ 15 & Ex. 5.) Based on a number of factors, plaintiff's counsel believes it is reasonable, appropriate, and in the class's interest to settle this matter now and in this manner. (*Id.* ¶ 16.) "Given Plaintiff['s] counsels' experience with similar consumer protection class action litigation," the Court should "find[] that affording deference to their decision to settle the case, as well as the terms of that settlement is appropriate." *See Kline*, 2016 WL 6026330, at *6.

v. The Settlement Does Not Grant Preferential Treatment to the Class Representative or any Class Members

Because there is no monetary distribution, but instead all class members benefit from Bumble Bee's Revised Packaging, the Settlement does not grant preferential treatment to the Class Representative or any group of Class Members. *See Hart v. Colvin*, 2016 WL 6611002, at *9 (N.D. Cal. Nov. 9, 2016) ("When . . . 'the settlement provides for only injunctive relief . . . there is no potential for the named plaintiffs to benefit at the expense of the rest of the class" (quoting *Green v. Am. Express Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001))). Although a monetary incentive award for the Class Representative may be "more valuable than the . . . injunctive relief received by the unnamed class members," "'[i]ncentive payments to class representatives do not, by themselves, create an impermissible conflict between class members and their representatives.'" *Campbell v. Facebook Inc.*, 2017 WL 3581179, at *7-8 (N.D. Cal. Aug. 18, 2017) (quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015)). Here, the Court should not find the prospect of an incentive award problematic because, unlike absent class members,

plaintiff is waiving his claim for damages, and his participation in the litigation was crucial in convincing Bumble Bee to benefit the class by revising its labels. *See id.*, at *8.

B. Notice and Opt-Out Rights Are Not Required

"[A] 23(b)(2) class requires neither notice or opt-out rights because the purpose of the latter is 'to provide broad injunctive relief to large and amorphous classes not capable of certification under Rule 23(b)(3),'" *Bee, Denning, Inc.*, 2016 WL 3952153, at *4 (quoting *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 116-17 (E.D.N.Y. 2012) (quotations omitted)); *see also id.*, at *9 ("Because the relief requested in a (b)(2) class is prophylactic, inures to the benefit of each class member, and is based on accused conduct that applies uniformly to the class, notice to absent class members and an opportunity to opt out is not required." (citing *Dukes*, 564 U.S. at 362); *accord Kline*, 2016 WL 6026330, at *6 ("When a class is certified under Rule 23(b)(2) and only provides for injunctive relief, no notice of class certification is required." (citing *Kim v. Space Pencil, Inc.*, 2012 WL 5948951, at *4 (N.D. Cal. Nov. 28, 2012)).

In *Kline*, a court in this district found that "notice to the class of the settlement is not necessary because under the settlement, Plaintiffs and the class release only those claims they may have for injunctive relief—relief they will receive through the settlement—but not claims for statutory damages or other monetary awards." 2016 WL 6026330, at *6; *see also Lilly*, 2015 WL 1248027, at *8-9 (notice of settlement unnecessary because "even if notified . . . the settlement class would not have the right to opt out from the injunctive settlement and the settlement does not release the monetary claims of class member").

Here, the facts are similar to *Bee, Denning, Inc.*, *Kline*, and *Lilly*. The Settlement Agreement provides injunctive relief only and does not waive class members' claims to monetary damages. Accordingly, the Court should "exercise[] its discretion and . . . not direct notice," *see Kline*, 2016 WL 6026330, at *6.

CONCLUSION

The Court should grant the motion, appoint plaintiff as Class Representative, appoint his counsel as Class Counsel, certify the settlement class under Rule 23(b)(2), waive notice

requirements, and grant final approval of the proposed Settlement. The Court should also set a briefing schedule and hearing date for a motion by plaintiff and his counsel for an incentive award, attorneys' fees, and costs.

Dated: February 1, 2018

Respectfully Submitted,

/s/ Jack Fitzgerald

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MIGUEL RODRIGUEZ, on behalf of himself, all others similarly situated, and the general public,

Plaintiff,

v.

BUMBLEE BEE FOODS, LLC,

Defendant.

Case No. 17-cv-2447-MMA-WVG

DECLARATION OF JACK FITZGERALD IN SUPPORT OF MOTION FOR APPROVAL OF CLASS ACTION SETTLEMENT

Judge:	Hon. Michael M. Anello
Hrg. Date:	March 12, 2018
Time:	2:30 p.m.
Location:	Courtroom 3D

I, Jack Fitzgerald, declare:

1. I am a member in good standing of the State Bars of California and New York; and of the United States District Courts for the Northern, Eastern, Central, and Southern Districts of California, the Southern and Eastern Districts of New York, and the Western District of Wisconsin; and of the United States Court of Appeals for the Ninth Circuit. I make this Declaration based on my own personal knowledge in support of plaintiffs' motion for preliminary approval of a proposed class action settlement.

2. Attached hereto as Exhibit 1 is a true and correct copy of the parties' proposed Class Action Settlement Agreement.

3. Attached hereto as Exhibit 2 is a true and correct copy of a letter I sent to Bumble Bee on September 25, 2017, on behalf of plaintiff, Miguel Rodriguez.

4. Attached hereto as Exhibit 3 is a true and correct copy of an October 24, 2017 letter I received from Bumble Bee, by its counsel, responding to my September 25 letter.

5. Attached hereto as Exhibit 4 are true and correct copies of the webpage for Bumble Bee's Premium Select Medium Red Smoked Salmon Fillets in Oil. The first version, which I accessed and saved on August 24, 2017, states, "A favorite among seafood lovers, these Coho fillets of salmon are lightly smoked and ready to serve." The second version, which I accessed and saved on October 26, 2017, states, "A favorite among seafood lovers, these Coho fillets of salmon are delicious and ready to serve."

6. Following plaintiff's receipt of Bumble Bee's October 24 letter, the parties' counsel spoke and agreed to discuss an early resolution contingent on the exchange of certain information. Plaintiff requested information concerning insurance coverage and the products' sales, while Bumble Bee asked plaintiff to provide any analysis as to an alleged price premium for the product.

7. After Bumble Bee provided sales and advised that there was no insurance coverage, on November 7, 2017, plaintiff sent a letter setting forth his initial analysis as to a premium for the product, based on a comparator model that used Bumble Bee's other products

to show differentiation in features and pricing. So that Bumble Bee could more fully appreciate his claims, plaintiff also provided it with a draft Complaint.

8. On November 21, Bumble Bee responded, arguing why plaintiff's damages model was flawed, and why his claims would not succeed, but noting its belief nevertheless that, due to the modest size of the case, it was sensible to try to resolve the matter before resorting to litigation. Thus, Bumble Bee made plaintiff an individual offer of settlement.

9. Pursuant to the Chambers Rules of the Honorable Magistrate Judge William V. Gallo, on December 23, 2017, plaintiff made both a classwide and individual settlement offer, and on January 3, Bumble Bee countered. The also parties exchanged ENE Statements, after which Judge Gallo engaged counsel for both parties in pre-conference calls to get a better understanding of the case and issues relating to settlement.

10. The parties' January 4, 2018 ENE with Judge Gallo lasted several hours (exceeding the two usually allotted for ENEs). Initially, the parties, including Mr. Rodriguez and Bumble Bee's in-house counsel, met together in Judge Gallo's chambers, spoke to each other directly about their views of the case, and exchanged additional information. Then Judge Gallo dealt with the parties separately. Eventually, Judge Gallo was able to bridge the parties' gap with a mediator's proposal, which they each accepted.

11. Bumble Bee provided confirmatory discovery regarding sales, and the parties drafted the full Settlement Agreement, which they executed on January 18, 2018.

12. Bumble Bee has advised me that, for settlement purposes only, it does not object to a finding that the class elements are met.

13. Bumble Bee has provided evidence that the nationwide settlement class includes purchasers of approximately 2.3 million units, for wholesale sales of approximately $5.2 million during the class period nationwide.

14. I have worked on this matter with plaintiff Miguel Rodriguez since approximately September 2017. Mr. Rodriguez has been actively involved, staying in regular communication with me and attending the ENE that led to the settlement. I do not believe

Mr. Rodriguez has any conflict with the Class, and believe he has, and will continue to prosecute this action vigorously on its behalf.

15. I and my firm have substantial experience prosecuting class actions, particularly those involving false advertising and other consumer fraud, and even more particularly including false representations on foods, beverages, and dietary supplements. Attached hereto as Exhibit 5 is a firm biography detailing the experience of the firm and its attorneys.

16. Based on the totality of the information I have learned while negotiating an early resolution with Bumble Bee, I believe it is in the class's best interest to settle now. The primary reasons for this are Bumble Bee's moving quickly and in good faith to rectify the packaging plaintiff alleges is misleading, and the likely expense of continued litigation balanced against the potential upside for the class of pursuing monetary damages. For example, this year my firm filed two certification motions against makers of coconut oil that allegedly deceptively promote their products as healthy. I and my co-counsel in these cases spent approximately $150,000 in each case on expert analysis and testimony to support a damages model for class certification. Here, Bumble Bee's California sales of the product are less than $400,000 during the class period. Although retail sales would be marked up from there, class members would be limited to the premium attributable to the misrepresentations. Thus, unless plaintiff obtained a nationwide class, the cost of proving damages could easily be higher than the damages the class could obtain. The cost of distributing those damages would further dilute class members' recovery.

17. There are other risks to proceeding. While plaintiff disagrees, Bumble Bee has taken the position that its remedial actions satisfy the CLRA such that plaintiff is prohibited from seeking damages.

18. Bumble Bee has argued that, if plaintiff is unable to certify a nationwide class, it will be able to obtain dismissal for lack of CAFA jurisdiction since its sales in California during the class period were less than $400,000. In that case, Bumble Bee argues, plaintiff would need to file a new action in state court, which—unlike federal court following the

decision in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017)—has an ascertainability requirement to obtain certification.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 1st day of February, 2018, in San Diego, California.

/s/ Jack Fitzgerald
Jack Fitzgerald