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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

JESSICA LITTLEJOHN, on behalf of
herself, all others similarly situated, and
the general public,

Plaintiff,

v.

FERRARA CANDY COMPANY, an
Illinois Corporation,

Defendant.

) Case No. 3:18-cv-00658-AJB-WVG
) **CLASS ACTION**
) **CLASS ACTION SETTLEMENT**
) **AGREEMENT**
)
) Judge: Hon. Anthony J. Battaglia

1 This Class Action Settlement Agreement (the “Agreement”) is made and
2 entered into by and between Plaintiff Jessica Littlejohn, the Representative Plaintiff,
3 on behalf of herself and the proposed class in this action, and Defendant Ferrara
4 Candy Company (“Ferrara” or “Defendant”) (collectively the “Parties”) to settle and
5 compromise this action, and settle, resolve, and discharge the Released Claims, as
6 defined below, according to the terms and conditions herein.

7 **RECITALS**

8 **I. PROCEDURAL BACKGROUND**

9 1.1 WHEREAS, on April 2, 2018, Plaintiff filed an action in the United
10 States District Court for the Southern District of California against Nestle USA, Inc.
11 (“Nestle”) bringing claims for fraud by omission (Civ. Code §§ 1709-1710),
12 negligent misrepresentation (Civ. Code §§ 1709-1710), violations of California’s
13 Consumer Legal Remedies Act, (Civ. Code § 1750, *et seq.* [“CLRA”]), violations of
14 California’s Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq.* [“UCL”]),
15 violations of California’s False Advertising Law (*id.* § 17500, *et seq.* [“FAL”]), and
16 Breach of Express and Implied Warranties relating to various SweeTARTS candy
17 products (Dkt. No. 1).

18 1.2 WHEREAS, on June 6, 2018, Plaintiff and the Ferrara Candy Company
19 filed a Joint Motion to Substitute Ferrara as the Defendant in the action and for leave
20 for Plaintiff to file a First Amended Complaint based on Ferrara’s representations
21 that Ferrara has assumed Nestle’s rights and obligations as to the SweeTARTS
22 brand, including in connection with this lawsuit (Dkt. No. 10).

23 1.3 WHEREAS, on June 7, 2018, the Court granted the Parties’ Joint
24 Motion to substitute Ferrara as the Defendant in this action and granted Plaintiff
25 leave to file a First Amended Complaint (Dkt. No. 11);

26 1.4 WHEREAS, on July 6, 2018, Plaintiff filed a First Amended Complaint
27 against Ferrara bringing substantially similar claims to those previously alleged
28 against Nestle (Dkt. No. 12);

1 1.5 WHEREAS, on October 12, 2018, the Parties attended a full day
2 mediation session before the Honorable Judge Jay C. Gandhi (Ret.) where they
3 agreed to the principal terms of a class action settlement;

4 1.6 WHEREAS, based upon the discovery taken to date, investigation, and
5 evaluation of the facts and law relating to the matters alleged in the pleadings, plus
6 the risks and uncertainties of continued litigation and all factors bearing on the merits
7 of settlement, Plaintiff and Ferrara have agreed to settle the claims asserted in the
8 Action pursuant to the provisions of this Agreement.

9 **NOW THEREFORE**, subject to the final approval of the Court as required
10 herein and by applicable law and rules, the Settling Parties hereby agree, in
11 consideration of the mutual promises and covenants contained herein, and for other
12 good and valuable consideration, the sufficiency of which is hereby acknowledged,
13 that any Released Claims against any Released Parties shall be settled, compromised
14 and forever released upon the following terms and conditions.

15 **TERMS AND CONDITIONS OF SETTLEMENT**

16 **I. DEFINITIONS**

17 As used herein, the following terms have the meanings set forth below.

18 1.1 “CAFA Notice” means the notice of this settlement to the appropriate
19 federal and state officials in the United States, as provided by the Class Action
20 Fairness Act of 2005, 28 U.S.C. § 1715, and as further described in Section 5.5.

21 1.2 “Class” means all United States consumers who purchased
22 SweeTARTS® Products, including those listed below, for household or personal use
23 and not for resale, from January 1, 2012 until the Class is certified:

- 24 • SweeTARTS Original
25 • SweeTARTS Mini Chewy
26 • SweeTARTS Giant Chewy
27 • SweeTARTS Chews
28 • SweeTARTS Extreme Sour Chewy

- 1 • SweeTARTS Chewy Sours
- 2 • SweeTARTS Sour Gummies
- 3 • SweeTARTS Gummies
- 4 • SweeTARTS Whipped & Tangy
- 5 • SweeTARTS Cherry Punch Soft & Chewy Ropes
- 6 • SweeTARTS Tangy Strawberry Soft & Chewy Ropes
- 7 • SweeTARTS Jelly Beans

8 Excluded from the Class are (1) any judicial officer presiding over *Littlejohn*; (2) the
9 Defendant, Defendant’s subsidiaries, parent companies, successors, predecessors,
10 and any entity in which the Defendant or its parents have a controlling interest and
11 their current or former officers, directors, and employees; (3) legal representatives,
12 successors or assigns of any such excluded person; and (4) persons who properly
13 execute and file a timely request for exclusion.

14 1.3 “Class Period” means January 1, 2012 through the date of class
15 certification, as designated by the Court in its Preliminary Approval Order.

16 1.4 “Class Counsel” means Plaintiff’s counsel of record in the Litigation,
17 the Law Offices of Ronald A. Marron, APLC.

18 1.5 “Class Member” means a Person who falls within the definition of the
19 Class set forth in Section 1.2.

20 1.6 “Court” means the United States District Court for the Southern District
21 of California.

22 1.7 “Defendant” means the Ferrara Candy Company.

23 1.8 “Defense Counsel” means Defendant’s counsel of record in the
24 Litigation, Davis Polk & Wardwell LLP.

25 1.9 “Effective Date” means the first date by which any Judgment entered
26 pursuant to the Agreement becomes Final, except as specifically provided in
27 Sections 1.10 and 9.2 of this Agreement.

28

1 1.10 “Final” means (a) if no appeal from the Judgment is filed, the date of
2 expiration of the time for the filing or noticing of any appeal from the Judgment; or
3 (b) if an appeal from the Judgment is filed, and the Judgment is affirmed or the
4 appeal dismissed, the date of such affirmance or dismissal; or (c) if a petition for a
5 writ of certiorari is filed and denied, the date the petition is denied; or (d) if a petition
6 for a writ of certiorari is filed and granted, the date of final affirmance or final
7 dismissal of the review proceeding initiated by the petition for a writ of certiorari.
8 Any proceeding or order, or any appeal or petition for a writ of certiorari pertaining
9 solely to any application for attorneys’ fees or expenses will not in any way delay or
10 preclude the Judgment from becoming Final, and the Parties’ obligations as set forth
11 in Section 9.2 are not dependent on the Judgment becoming Final.

12 1.11 “Judgment” means the judgment to be entered by the Court pursuant to
13 the Settlement.

14 1.12 “Litigation” means *Littlejohn v. Ferrara Candy Company*, No. 3:18-
15 cv-00658-AJB-WVG, pending in the U.S. District Court for the Southern District of
16 California.

17 1.13 “Notice” means a document, substantially in the form of **Exhibit A**
18 hereto (the “Long Form Notice”), and “Summary Notice” means a document
19 substantially in the form of **Exhibit B** hereto, to be disseminated in accordance with
20 the Preliminary Approval Order, informing Persons who fall within the Class
21 definition of, among other things, the pendency of the Litigation, the material terms
22 of the proposed Settlement and their options with respect thereto.

23 1.14 “Notice Plan” means the method of providing the Class with notice of
24 the Settlement, as approved by the Court.

25 1.15 “Notice Administrator” means the company selected by Plaintiff,
26 Classaura, and approved by the Court to provide notice to the Class and CAFA
27 Notice.

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1 1.16 “Objection Deadline” means the date that is the end of the period to
2 object to the Settlement, as established by the Court in the Preliminary Approval
3 Order and set forth in the Notice and Section 8.5 of this Agreement.

4 1.17 “Parties” means the Representative Plaintiff and Defendant.

5 1.18 “Person” means an individual, corporation, partnership, limited
6 partnership, association, joint stock company, estate, legal representative, trust,
7 unincorporated association, government or any political subdivision or agency
8 thereof, any business or legal entity, and such individual’s or entity’s parents,
9 subsidiaries, spouse, heirs, predecessors, successors, representatives, and assignees.

10 1.19 “Preliminary Approval Order” means an order, providing for, among
11 other things, preliminary approval of the Settlement and dissemination of the Notice
12 to the Class according to the Notice Plan.

13 1.20 “Products” means SweeTARTS products, including those listed below,
14 manufactured and/or distributed by Defendant and sold in any variation, format,
15 weight, or packaging:

- 16 • SweeTARTS Original
- 17 • SweeTARTS Mini Chewy
- 18 • SweeTARTS Giant Chewy
- 19 • SweeTARTS Chews
- 20 • SweeTARTS Extreme Sour Chewy
- 21 • SweeTARTS Chewy Sours
- 22 • SweeTARTS Sour Gummies
- 23 • SweeTARTS Gummies
- 24 • SweeTARTS Whipped & Tangy
- 25 • SweeTARTS Cherry Punch Soft & Chewy Ropes
- 26 • SweeTARTS Tangy Strawberry Soft & Chewy Ropes
- 27 • SweeTARTS Jelly Beans

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1 1.21 “Released Claims” means all rights, actions, causes of action, suits,
2 debts, dues, sums of money, accounts, liabilities, losses, obligations, fees, costs,
3 reckonings, bonds, bills, specialties, controversies, agreements, contracts, variances,
4 trespasses, damages, judgments, extensions, executions, claims, and demands
5 whatsoever, whether known or unknown, contingent or absolute, suspected or
6 unsuspected, disclosed or undisclosed, hidden or concealed, matured or unmatured,
7 that have been or could have been asserted, by or on behalf of the plaintiff or class
8 members, including, without limitation, any claims, whether individual, class, direct,
9 derivative, representative, legal, equitable, or in any other capacity, in any court,
10 tribunal, or proceeding, arising under federal statutory or common law, state
11 statutory or common law, local statutory or common law, or any law, rule or
12 regulation, including the law of any jurisdiction outside the United States, that relate
13 to claims arising out of the allegations of misleading statements or
14 misrepresentations concerning the SweeTARTS Products involving a common
15 factual predicate that is asserted in the Litigation. The Released Claims shall extend
16 to unknown claims pursuant to California Civil Code Section 1542 and like statutes
17 from other states. This release expressly does not extend to personal injury claims
18 regarding the Products.

19 1.22 “Released Persons” means Defendant Ferrara Candy Company, each,
20 any and all of its respective past, present, and future heirs, executors, estates,
21 administrators, predecessors, including Nestlé USA, Inc., successors, assigns, parent
22 companies, subsidiaries, affiliates, divisions, joint ventures, entities in which the
23 Defendant has a controlling interest, holding companies, employees, agents,
24 consultants, marketing partners, resellers, lead generators, telemarketers,
25 independent contractors, insurers, reinsurers, directors, officers, partners, principals,
26 attorneys, accountants, financial advisors, investors, investment bankers,
27 underwriters, shareholders, auditors, legal representatives; and each and all of the
28 past, present, and future parents, subsidiaries, affiliates, officers, directors,

1 principals, representatives, employees, agents, shareholders, attorneys, successors,
2 executors, and assigns of any of the foregoing entities.

3 1.23 “Representative Plaintiff” means Jessica Littlejohn.

4 1.24 “Settling Parties” means, collectively, Defendant, the Representative
5 Plaintiff, and all Class Members.

6 1.25 The plural of any defined term includes the singular, and the singular
7 of any defined term includes the plural, as the case may be.

8 **II. DENIAL OF WRONGDOING**

9 Defendant denies the material factual allegations and legal claims asserted by
10 the Representative Plaintiff in the Litigation, including any and all charges of
11 wrongdoing or liability arising out of any of the conduct, statements, acts or
12 omissions alleged, or that could have been alleged, in the Litigation. Similarly, this
13 Agreement provides for no admission of wrongdoing or liability by Ferrara, its past,
14 present and future officers, directors, employees, shareholders, subsidiaries, parents,
15 affiliates, accountants, advisers, agents, contractors, legal counsel, successors, heirs,
16 and assigns, including without limitation Nestle. This Settlement is entered solely
17 to eliminate the uncertainties, burdens, and expenses of protracted litigation.

18 **III. THE BENEFITS OF SETTLEMENT**

19 Class Counsel and the Representative Plaintiff recognize and acknowledge
20 the expense and length of continued proceedings that would be necessary to
21 prosecute the Litigation through trial and appeals. Class Counsel also has taken into
22 account the uncertain outcome and the risk of any litigation, especially in complex
23 actions such as this Litigation, as well as the difficulties and delays inherent in such
24 litigation. Class Counsel is mindful of the inherent problems of proof under the
25 claims and possible defenses to the claims asserted in the Litigation. Class Counsel
26 believes that the proposed Settlement confers substantial benefits upon the Class.
27 Based on their evaluation of all of these factors, the Representative Plaintiff and
28

1 Class Counsel have determined that the Settlement is in the best interests of the
2 Representative Plaintiff and the Class.

3 **IV. SETTLEMENT CONSIDERATION**

4 **4.1 Injunctive Relief**

5 Defendant will provide the Class with injunctive relief by way of modification
6 of the label and packaging for the Products as set forth in this Agreement.
7 Specifically, Ferrara will implement the following modifications, for a period of two
8 years following the date of final approval:

9 4.1.1 Defendant will remove the phrase “No Artificial Flavors” from the
10 SweeTARTS Product packaging and promotional materials (unless any such
11 Product ceases to contain dl-malic acid as an ingredient)

12 4.1.2 Defendants will identify “dl-malic acid” as an ingredient on the
13 SweeTARTS Product packaging and promotional materials (for every Product that
14 includes dl-malic acid as an ingredient).

15 4.2 Defendant shall implement the injunctive relief described in Section 4.1
16 on SweeTARTS Product packaging and promotional and marketing material by
17 December 31, 2019.

18 **V. NOTICE**

19 5.1. Within seven (7) calendar days of entry of any Court Order granting
20 preliminary approval to the Settlement, Class Counsel shall pay to the Notice
21 Administrator the sum of \$30,000 for the purpose of providing notice to the Class.

22 5.2. All costs and expenses of providing Notice in accordance with the
23 Preliminary Approval Order (“Notice Costs”) shall be paid by Plaintiff to Classaura
24 (“Notice Administrator”) as approved by the Court through its approval of the Notice
25 Plan.

26 5.3 Notice Costs incurred by the Notice Administrator shall not be
27 chargeable to the Class and shall be borne solely by Defendant if the Settlement does
28 not receive final approval.

1 5.4. Class Counsel shall retain the Notice Administrator (including
2 subcontractors) to help implement the terms of the Settlement Agreement.

3 5.5. The Notice Administrator will facilitate the notice process by assisting
4 the Parties in the implementation of the Notice Plan, as well as CAFA Notice.

5 5.6 The Notice Administrator shall be responsible for providing the Parties
6 with assistance, as necessary, such as by preparing affidavits of work it has
7 performed with respect to implementing the Class Notice, and providing regular
8 updates to the Parties' counsel about the status of the Notice process.

9 **5.7 Class Settlement Website**

10 5.7.1 The Notice Administrator will create and maintain a class settlement
11 website (the "Class Settlement Website"), to be activated within fifteen (15) calendar
12 days of its receipt of the Preliminary Approval Order. The Notice Administrator's
13 responsibilities will also include securing an appropriate URL, such as
14 www.SweetartsClassAction.com. The Class Settlement Website will contain
15 Settlement information and case-related documents such as the Agreement, the
16 Long-Form Notice, Preliminary Approval Order, and notices from the Court. In
17 addition, the Class Settlement Website will include procedural information
18 regarding the status of the Court-approval process, such as an announcement of the
19 Final Approval Hearing date, as described in Section 8.1, when the Final Approval
20 Order and Judgment have been entered, and when the Effective Date has been
21 reached, including any appeal(s), if any.

22 5.7.2 The Class Settlement Website will terminate (be removed from the
23 internet) and no longer be maintained by the Notice Administrator thirty (30) days
24 after either (a) the Effective Date or (b) the date on which the Agreement is
25 terminated or otherwise not approved by a court, whichever is later.

26 **5.8 CAFA Notice**

27 5.8.1 The Parties agree that the Notice Administrator shall serve notice of the
28 Settlement Agreement that meets the requirements of CAFA, 28 U.S.C. § 1715, on

1 the appropriate federal and state officials no later than ten (10) days after the filing
2 of this Settlement Agreement with the Court.

3 5.8.2 The Notice Administrator will file a certification with the Court stating
4 the date or dates on which the CAFA Notice was sent. Defendant will provide Class
5 Counsel with any substantive responses received in response to any CAFA Notice.

6 **5.9 Notice Plan**

7 5.9.1 The Class Notice shall conform to all applicable requirements of the
8 Federal Rules of Civil Procedure, the United States Constitution (including the Due
9 Process Clauses), and any other applicable law, and shall otherwise be in the manner
10 and form agreed upon by the Parties and approved by the Court.

11 5.9.2 No later than thirty (30) days after preliminary approval by the Court
12 of this Settlement, the Notice Administrator shall commence providing Notice to the
13 Class according to the Notice Plan as attached in **Exhibit C**, except that the Class
14 Settlement Website shall require earlier publication, as discussed in Section 5.7.

15 5.9.3 The Parties agree to the content of the Notice, substantially in the forms
16 attached to this Agreement as **Exhibit A** (Long Form Notice) and **Exhibit B**
17 (Summary Notice), and as approved by the Court.

18 5.9.4 The Notice Administrator shall also publish the Summary Notice in a
19 newspaper in a manner sufficient to meet California Government Code § 6064 and
20 Civil Code § 1781.

21 **VI. RELEASES**

22 6.1 Upon the Effective Date, the Representative Plaintiff and the Class fully
23 and forever release the Released Parties from all rights, actions, causes of action,
24 suits, debts, dues, sums of money, accounts, liabilities, losses, obligations, fees,
25 costs, reckonings, bonds, bills, specialties, controversies, agreements, contracts,
26 variances, trespasses, damages, judgments, extensions, executions, claims, and
27 demands whatsoever, whether known or unknown, contingent or absolute, suspected
28 or unsuspected, disclosed or undisclosed, hidden or concealed, matured or

1 unmatured, that have been or could have been asserted, by or on behalf of the
2 plaintiff or class members, including, without limitation, any claims, whether
3 individual, class, direct, derivative, representative, legal, equitable, or in any other
4 capacity, in any court, tribunal, or proceeding, arising under federal statutory or
5 common law, state statutory or common law, local statutory or common law, or any
6 law, rule or regulation, including the law of any jurisdiction outside the United
7 States, that relate to claims arising out of the allegations of misleading statements or
8 misrepresentations concerning the SweeTARTS Products involving a common
9 factual predicate that is asserted in the Litigation. The Released Claims shall extend
10 to unknown claims pursuant to California Civil Code Section 1542 and like statutes
11 from other states. This release expressly does not extend to personal injury claims
12 regarding the Products.

13 6.2 After entering into this Settlement Agreement, Plaintiff or the Class
14 Members may discover facts other than, different from, or in addition to, those that
15 they know or believe to be true with respect to the Released Claims. Plaintiff and
16 the Class Members expressly waive and fully, finally, and forever settle and release
17 any known or unknown, suspected or unsuspected, contingent or noncontingent
18 claim, whether or not concealed or hidden, without regard to the subsequent
19 discovery or existence of such other, different, or additional facts.

20 6.3 All Parties to this Settlement Agreement, including the Class Members,
21 specifically acknowledge that they have been informed by their legal counsel, via
22 the Notice, of Section 1542 of the California Civil Code (and any similar State laws)
23 and they expressly waive and relinquish any rights or benefits available to them
24 under this statute (and any similar State laws). California Civil Code § 1542
25 provides:

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
27 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
28 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING

1 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
2 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
3 WITH THE DEBTOR.

4 6.4 Notwithstanding Section 1542 of the California Civil Code, or any
5 other federal or state statute or rule of law of similar effect, this Agreement shall be
6 given full force and effect according to each and all of its expressed terms and
7 provisions, including those related to any unknown or unsuspected claims, liabilities,
8 demands, or causes of action which are based on, arise from or are in any way
9 connected with the Litigation.

10 **VII. CLASS CERTIFICATION**

11 7.1. The Parties agree that, for settlement purposes only, this Litigation shall
12 be certified as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) or
13 23(b)(3), or both, with Representative Plaintiff as the Class Representative and
14 Plaintiff's counsel as Class Counsel, defined as follows:

15 All purchasers of SweeTARTS Products, including those listed below,
16 in the United States on or after January 1, 2012 and until the Class is
17 certified, for personal use and not for resale (the "Class Period"):

- 18 • SweeTARTS Original
- 19 • SweeTARTS Mini Chewy
- 20 • SweeTARTS Giant Chewy
- 21 • SweeTARTS Chews
- 22 • SweeTARTS Extreme Sour Chewy
- 23 • SweeTARTS Chewy Sours
- 24 • SweeTARTS Sour Gummies
- 25 • SweeTARTS Gummies
- 26 • SweeTARTS Whipped & Tangy
- 27 • SweeTARTS Cherry Punch Soft & Chewy Ropes

- 1 • SweeTARTS Tangy Strawberry Soft & Chewy Ropes
- 2 • SweeTARTS Jelly Beans

3 Excluded from the Settlement Class are (1) any judicial officer presiding over
4 *Littlejohn*; (2) the Defendant, Defendant’s subsidiaries, parent companies,
5 successors, predecessors, and any entity in which the Defendant or its parents have
6 a controlling interest and their current or former officers, directors, and employees;
7 (3) legal representatives, successors or assigns of any such excluded person; and (4)
8 persons who properly execute and file a timely request for exclusion.

9 7.2 In the event the Settlement is terminated or for any reason the
10 Settlement is not effectuated, the certification of the Class shall be vacated and the
11 Litigation shall proceed as if the Class had not been certified.

12 **VIII. SETTLEMENT HEARING**

13 8.1 Promptly after execution of this Agreement, the Parties will submit the
14 Agreement together with its exhibits to the Court and will request that the Court
15 grant preliminary approval of the Settlement, as of the date of which the Settlement
16 shall be deemed “filed” within the meaning of 28 U.S.C. § 1715; issue the
17 Preliminary Approval Order; and schedule a hearing on whether the Settlement
18 should be granted final approval and whether Class Counsel’s application for fee
19 award and expenses, and for an incentive award to the Representative Plaintiff (“Fee
20 Application”) should be granted (“Final Approval Hearing”). The Parties shall
21 request the Court schedule the Fee Application to be filed no later than fourteen (14)
22 calendar days prior to the Objection Deadline, or earlier, if the Court deems it
23 necessary.

24 8.2 Defendant shall cooperate in good faith in Plaintiff’s preparation of the
25 joint motion for preliminary approval of the Settlement, including by providing
26 Class Counsel with information that is reasonably available about SweeTARTS
27 sales, product packaging and promotional materials as reasonably necessary to
28 obtain preliminary and final approval of the Settlement.

1 8.3 Defendant shall not oppose Plaintiff's assertion, in papers filed in
2 furtherance of this Settlement, that the Class satisfies each of the elements required
3 under Federal Rules of Civil Procedure 23(a), (b)(2), and/or (b)(3): The Class is so
4 numerous that joinder of all members is impracticable; there are questions of law or
5 fact common to the Class; the claims of Plaintiff Littlejohn are typical of the Class;
6 Plaintiff and Class Counsel will fairly and adequately protect the interests of the
7 Class; the questions of law or fact common to Class members predominate over any
8 questions affecting only individual members; and class treatment is the superior
9 means to adjudicate Plaintiff's claims.

10 8.4 The Parties agree to the form and substance of the proposed Preliminary
11 Approval Order, attached hereto as **Exhibit D**, to be lodged with the Court with the
12 joint motion for preliminary approval of the Settlement Agreement.

13 **8.5 Procedures for Objecting to the Settlement**

14 8.5.1. Class Members shall have the right to appear and show cause, if they
15 have any reason why the terms of this Agreement should not be given final approval,
16 subject to each of the sub-provisions contained in this Section 8.5. Any objection to
17 this Agreement, including any of its terms or provisions, must be in writing, filed
18 with the Court, with a copy served on Class Counsel, Defense Counsel, and the
19 Notice Administrator at the addresses set forth in the Notice, and postmarked no
20 later than thirty (30) calendar days prior to the Final Approval Hearing date. Class
21 Members may object either on their own or through an attorney hired at their own
22 expense.

23 8.5.2 If a Class Member hires an attorney to represent him or her at the Final
24 Approval Hearing, he or she must do so at his or her own expense. No Class Member
25 represented by an attorney shall be deemed to have objected to the Agreement unless
26 an objection signed by the Class Member is also filed with the Court and served
27 upon Class Counsel, Defense Counsel, and the Notice Administrator at the addresses
28

1 set forth in the Notice thirty (30) days before the Final Approval Hearing (unless the
2 Court sets a different deadline for any such objection).

3 8.5.3 Any objection regarding or related to the Agreement shall contain a
4 caption or title that identifies it as “Objection to Class Settlement in *Littlejohn v.*
5 *Ferrara Candy Company*, No. 3:18-cv-00658-AJB-WVG” and also shall contain
6 information sufficient to identify and contact the objecting Class Member (or his or
7 her attorney, if any), as well as a clear and concise statement of the Class Member’s
8 objection, documents sufficient to establish the basis for their standing as a Class
9 Member, i.e., verification under oath as to the approximate date(s) and location(s)
10 of their purchase(s) of the Products, the facts supporting the objection, and the legal
11 grounds on which the objection is based. Any objections not submitted to the Court
12 at least thirty (30) days prior to the Final Approval Hearing are deemed waived
13 (unless the Court sets a different deadline for any such objection). If an objecting
14 party chooses to appear at the hearing, that party must file with the Court, at least
15 thirty (30) days before the Final Approval Hearing, a notice of intent to appear and
16 that notice must list the name, address and telephone number of the attorney, if any,
17 who will appear on behalf of that party (unless the Court sets a different deadline for
18 any such notice of intent to appear).

19 8.5.4 Any Class Member who does not object to the Agreement in
20 compliance with the provisions set forth herein, is deemed to be a Class Member and
21 bound by the Agreement upon final approval of the Settlement.

22 **8.6 Right to Respond to Objections**

23 Class Counsel and Defendant shall have the right, but not the obligation, to
24 respond to any objection, by filing opposition papers no later than seven (7) calendar
25 days prior to the Final Approval Hearing, or on such other date as set forth in the
26 Preliminary Approval Order, or any subsequent Court order(s) modifying the
27 briefing schedule for the Final Approval Hearing. The Party responding shall file a
28 copy of the response with the Court, and shall serve a copy, by regular mail, hand or

1 overnight delivery, in the Party’s discretion, to the objector (or counsel for the
2 objector), Class Counsel and Defense Counsel, to the extent the objector or their
3 counsel do not receive notice of electronic filing via the Court’s ECF filing system.

4 **8.7 Opt Outs**

5 8.7.1 Any Class Member who does not wish to participate in the Settlement
6 must write to the Notice Administrator, stating an intent to be “excluded” from this
7 Settlement (“Request for Exclusion”). The written Request for Exclusion must be
8 sent via first class United States mail to the Notice Administrator at the address set
9 forth in the Class Notice and postmarked no later than thirty (30) calendar days
10 before the date set for the Final Approval Hearing (“Opt-Out Date”) (unless the
11 Court sets a different deadline for any such Request for Exclusion). The Request for
12 Exclusion must be personally signed by the Class Member and may only be on
13 behalf of such signing Class Member. So-called “mass” or “class” opt-outs shall not
14 be allowed.

15 8.7.2 Any Class Member who does not request exclusion from the Settlement
16 has the right to object to the Settlement. Any Class Member who wishes to object
17 must timely submit an objection, as set forth in Section 8.5 above. If a Class Member
18 submits an objection and a written Request for Exclusion, he or she shall be deemed
19 to have complied with the terms of this Opt-Out procedure and shall not be bound
20 by the Agreement if approved by the Court. However, any objector who has not
21 timely requested exclusion from the Settlement will be bound by the terms of the
22 Agreement upon final approval of the Settlement.

23 **IX. ATTORNEYS’ FEES AND EXPENSES AND INCENTIVE AWARD**

24 9.1 In accord with Federal Rule of Civil Procedure 23(h) and relevant case
25 law, Plaintiff will petition the Court for attorneys’ fees and costs in the total amount
26 of \$272,000 (including the costs of notice to the Class as provided herein), and a
27 Class Representative incentive award in the amount of \$3,000 to Plaintiff Littlejohn.
28 Defendant shall not object or oppose any such petition, including by contesting any

1 fees, expenses, or incentive award requested, to the extent the petition does not
2 request more than the amounts set forth above.

3 9.2 Upon appropriate Court Order so providing, all attorneys' fees and
4 costs awarded to Class Counsel, and the incentive award to the Class Representative,
5 as set forth in Section 9.1 above, shall be paid by Defendant to Class Counsel within
6 thirty (30) days of the date of the Court's Final Approval Order, notwithstanding the
7 existence of any timely filed objections thereto, or appeal (actual or potential)
8 therefrom, or collateral attack on the Settlement or any part thereof. Any such
9 payment will be subject to Class Counsel's obligation to make appropriate refunds
10 or repayments if, and when, as a result of any appeal and/or further proceedings on
11 remand, or successful collateral attack, the award is lowered, or the Settlement is
12 disapproved, by a final order not subject to further review.

13 9.3 Defendant shall bear its own attorneys' fees and costs. Defendant bears
14 all risk of an objector's success and shall reimburse Class Counsel for the costs of
15 notice to the class if such an objection to the settlement is successful.

16 9.4 If so ordered by the Court upon final approval, Class Counsel shall be
17 entitled to provisional reimbursement from Defendant of 100% of its expenses
18 incurred, including the costs of class notice and other litigation related expenses,
19 subject to the Class Counsel's obligation to deduct any amounts paid from the agreed
20 upon attorney's fees and expenses of \$272,000, to be paid by Defendant as set forth
21 in Sections 9.1 and 9.2 above.

22 **X. MOTION FOR FINAL JUDGMENT AND ORDER**

23 10.1 In accord with the Court's schedule for the Final Approval Hearing, as
24 set in the Preliminary Approval Order, the Class Representative shall file a motion
25 for final approval of the Settlement Agreement, in consultation with Defendant, and
26 Defendant agrees not to oppose such motion.

27 10.2 Defendant shall cooperate in good faith with Plaintiff's preparation of
28 the motion for final approval of the Settlement Agreement, including by providing

1 Class Counsel with then-available information about SweeTARTS sales, product
2 packaging and promotional materials and providing signed declaration(s) of
3 appropriate corporate officers of Ferrara if the Parties, in good faith, deem such
4 declaration(s) reasonably necessary.

5 10.3 Defendant shall not oppose Plaintiffs' assertion, in papers filed in
6 furtherance of the Settlement Agreement, that the Court should affirm its rulings
7 granting Preliminary Approval of the Settlement and grant final approval of the
8 Settlement.

9 10.4 The Parties agree to the form and substance of the proposed Final
10 Judgment and Order, attached hereto as **Exhibit E**, to be lodged with the Court with
11 the motion for final approval of the Settlement Agreement.

12 **XI. CONDITIONS FOR EFFECTIVE DATE; EFFECT OF**
13 **TERMINATION**

14 11.1 The Effective Date of this Agreement shall be the date the Judgment
15 has become Final, as defined in Section 1.10.

16 11.2 If this Agreement is not approved by the Court or the Settlement is
17 terminated or fails to become effective in accordance with the terms of this
18 Agreement, the Settling Parties will be restored to their respective positions in the
19 Litigation as of the date the Motion for Preliminary Approval was filed. In such
20 event, except with respect to the Notice Administrator's fees, costs and expenses as
21 provided in Article V herein, the terms and provisions of this Agreement will have
22 no further force and effect with respect to the Settling Parties and will not be used in
23 this Litigation or in any other proceeding for any purpose, and any Judgment or order
24 entered by the Court in accordance with the terms of this Agreement will be treated
25 as vacated.

26 11.3 No order of the Court or modification or reversal on appeal of any order
27 of the Court concerning any award of attorneys' fees, expenses, or costs to Class
28

1 Counsel, or incentive award to the Class Representative, will constitute grounds for
2 cancellation or termination of this Agreement.

3 **XII. MISCELLANEOUS PROVISIONS**

4 12.1 The Parties acknowledge that it is their intent to consummate this
5 Agreement, and they agree to cooperate to the extent reasonably necessary to
6 effectuate and implement all terms and conditions of this Agreement and to exercise
7 their best efforts to accomplish the foregoing terms and conditions of this
8 Agreement.

9 12.2 The Parties intend the Settlement to be a final and complete resolution
10 of all disputes between them with respect to the Litigation. The Settlement
11 compromises claims that are contested and will not be deemed an admission by any
12 Settling Party as to the merits of any claim or defense.

13 12.3 The Parties agree that the consideration provided to the Class and the
14 other terms of the Settlement were negotiated at arm's length, in good faith by the
15 Parties, and reflect a settlement that was reached voluntarily, after consultation with
16 competent legal counsel, and with the extensive assistance of an independent, neutral
17 mediator, Judge Jay C. Gandhi (Ret.) of JAMS. The Litigation was filed in good
18 faith, was not frivolous and was in compliance with Rule 11 of the Federal Rules of
19 Civil Procedure. This Agreement is entered solely to eliminate the uncertainties,
20 burdens and expenses of protracted litigation.

21 12.4 Neither this Agreement nor the Settlement, nor any act performed or
22 document executed pursuant to or in furtherance of this Agreement or the Settlement
23 is or may be deemed to be or may be used as an admission of, or evidence of, the
24 validity of any Released Claims, or of any wrongdoing or liability of Defendant or
25 any other Released Person; or is or may be deemed to be or may be used as an
26 admission of, or evidence of, any fault or omission of Defendant or any other
27 Released Person in any civil, criminal, or administrative proceeding in any court,
28 administrative agency or other tribunal. Any party to this Litigation or any other

1 Released Person may file this Agreement and/or the Judgment in any action that may
2 be brought against it in order to support any defense or counterclaim, including
3 without limitation those based on principles of res judicata, collateral estoppel,
4 release, good faith settlement, judgment bar or reduction, or any other theory of
5 claim preclusion or issue preclusion or similar defense or counterclaim.

6 12.5 All agreements made and orders entered during the course of the
7 Litigation relating to the confidentiality of information will survive this Agreement.
8 Further, other than as specifically permitted by this Section, the Parties, Class
9 Counsel, and counsel for Defendants agree not to issue a press release or make any
10 other statement regarding the Litigation, this Agreement, or the subject matter
11 hereof, including in any attorney advertising or commentary on the Internet by
12 Plaintiff or Class Co-Counsel using the title of this Litigation, the names of
13 Defendants, or the Products at issue in this Litigation, other than (i) as required to
14 carry out the terms of this Agreement; and (ii) Class Counsel shall be permitted to
15 refer to this Action in documents filed with a court in connection with Class
16 Counsel's efforts to become Class Counsel and/or obtain attorneys' fees in any other
17 action(s).

18 12.6 Confirmatory Discovery: Defendant agrees to make reasonable efforts
19 to provide confirmatory discovery upon request relating to the average retail price
20 of the SweeTARTS Products, total sales of the SweeTARTS Products during the
21 Class Period, and labels for the SweeTARTS Products in use during the Class
22 Period.

23 12.7 Any and all Exhibits to this Agreement are material and integral parts
24 hereof and are fully incorporated herein by this reference.

25 12.8 This Agreement may be amended or modified only by a written
26 instrument signed by or on behalf of all Parties or their respective successors-in-
27 interest.

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1 12.9 This Agreement and any exhibits attached hereto constitute the entire
2 agreement among the Parties, and no representations, warranties, or inducements
3 have been made to any Party concerning this Agreement or its exhibits other than
4 the representations, warranties, and covenants covered and memorialized in such
5 documents. Except as otherwise provided herein, the Parties will bear their own
6 respective costs.

7 12.10 Class Counsel, on behalf of the Class, is expressly authorized by the
8 Representative Plaintiff to take all appropriate action required or permitted to be
9 taken by the Class pursuant to this Agreement to effectuate its terms, and is expressly
10 authorized to enter into any modifications or amendments to this Agreement on
11 behalf of the Class that Class Counsel deems appropriate.

12 12.11 The Representative Plaintiff will not object to motions filed by
13 Defendant seeking to continue the obligation to respond to the Complaint, or any
14 amendments thereto, during the pendency of Settlement-related proceedings.

15 12.12 Each counsel or other Person executing this Agreement or any of its
16 Exhibits on behalf of any Party hereby warrants that such Person has the full
17 authority to do so.

18 12.13 This Agreement may be executed in one or more counterparts. All
19 executed counterparts and each of them will be deemed to be one and the same
20 instrument. A complete set of original counterparts will be filed with the Court.

21 12.14 This Agreement will be binding upon, and inure to the benefit of, the
22 successors and assigns of the Settling Parties.

23 12.15 The Court will retain jurisdiction with respect to implementation and
24 enforcement of the terms of this Agreement, and all parties hereto submit to the
25 jurisdiction of the Court for purposes of implementing and enforcing the Settlement.

26 12.16 None of the Settling Parties, or their respective counsel, will be deemed
27 the drafter of this Agreement or its exhibits for purposes of construing the provisions
28 thereof. The language in all parts of this Agreement and its exhibits will be

1 interpreted according to its fair meaning, and will not be interpreted for or against
2 any of the Settling Parties as the drafter thereof.

3 12.17 This Agreement shall be deemed the “proposed agreement” filed with
4 the Court within the meaning of 28 U.S.C. § 1715 as of the date on which preliminary
5 approval is granted by the Court.

6 12.18 This Agreement and any exhibits hereto will be construed and enforced
7 in accordance with, and governed by, the internal, substantive laws of the State of
8 California without giving effect to that State’s choice-of-law principles. Any
9 provision of California Evidence Code §§ 1115-1128 notwithstanding, this
10 Agreement may be enforced by any Party hereto by a motion under Code of Civil
11 Procedure § 664.6 or by any other procedure permitted by California law. The
12 provisions of the confidentiality agreement entered into with respect to the mediation
13 process concerning this matter are waived solely for purposes of such enforcement.

14 12.19 If the Agreement is rejected by the Court, the Parties agree to negotiate
15 in good faith including through the engagement of a mediator, regarding the
16 elimination or revision of any provisions in the Agreement that resulted in Court
17 rejection, with the goal of reaching a formal settlement agreement that will be
18 accepted by the Court and thereafter to immediately submit a revised settlement
19 agreement to the Court for approval, and all other terms and conditions herein shall
20 continue in full force and effect until approval by the Court of the revised settlement
21 agreement. The fees and expenses of the mediator incurred pursuant to this
22 provision shall be shared equally between Defendant and the Class. Each Party shall
23 bear its own attorneys’ fees and costs of such renegotiation.

24 IN WITNESS WHEREOF, the Parties have executed and caused this
25 Agreement to be executed by themselves, approved as to form and content by their
26 respective attorneys.

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Dated: _____

Name: _____

Title: _____

On Behalf of Defendant Ferrara Candy
Company

Dated: 12/20/18

J Littlejohn

Jessica Littlejohn
Plaintiff

APPROVED AS TO FORM AND CONTENT:

Dated: 12/20/18

Michael Houchin

Michael Houchin
LAW OFFICES OF RONALD MARRON
Counsel for Plaintiff and the Class

Dated: _____

Neal A. Potischman

DAVIS POLK & WARDWELL LLP
Counsel for Defendant Ferrara Candy
Company

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Dated: 12/21/18

Joyce M. Carthy

Name: Joyce M. Carthy

Title: General Counsel

On Behalf of Defendant Ferrara Candy Company

Dated: _____

Jessica Littlejohn
Plaintiff

APPROVED AS TO FORM AND CONTENT:

Dated: _____

Michael Houchin
LAW OFFICES OF RONALD MARRON
Counsel for Plaintiff and the Class

Dated: _____

Neal A. Potischman
DAVIS POLK & WARDWELL LLP
Counsel for Defendant Ferrara Candy Company

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Dated: _____

Name: _____

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On Behalf of Defendant Ferrara Candy
Company

Dated: _____

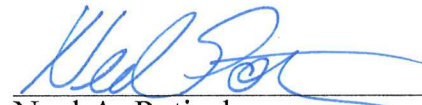
Jessica Littlejohn
Plaintiff

APPROVED AS TO FORM AND CONTENT:

Dated: _____

Michael Houchin
LAW OFFICES OF RONALD MARRON
Counsel for Plaintiff and the Class

Dated: 12/21/2018



Neal A. Potischman
DAVIS POLK & WARDWELL LLP
Counsel for Defendant Ferrara Candy
Company

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EXHIBIT LIST

- Exhibit A Long Form Notice to the Class
- Exhibit B Summary Notice to the Class
- Exhibit C Notice Plan
- Exhibit D Proposed Preliminary Approval Order
- Exhibit E Proposed Final Approval Order