**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| **IN RE CONAGRA FOODS, INC.** | **Case No.: CV 11-05379-CJC(AGRx)**<br><br>**MDL No. 2291** |
| **ROBERT BRISEÑO, et al., individually and on behalf of all others similarly situated,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**CONAGRA FOODS, INC.,**<br><br>**Defendants.** | **ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [Dkt. 650]** |

## I. INTRODUCTION & BACKGROUND

From at least June 27, 2007 until July 1, 2017, every bottle of Defendant Conagra Foods, Inc.'s Wesson Oil carried a front label stating that the product was "100%

Natural."[1] Plaintiffs in this action, residents of eleven different states, filed a complaint alleging that the "natural" claim on Wesson Oil bottles was false and misleading because the products contain genetically modified organisms (GMOs). The Court subsequently certified eleven classes of consumers who purchased Wesson Oils during the applicable statute of limitations periods in California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, or Texas. Defendant appealed the class certification order to the Ninth Circuit, who subsequently affirmed. *See Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); *Briseño v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017).

On January 29, 2018, the parties held an all-day mediation session before retired Judge Edward A. Infante. (Dkt. 652 [Joint Declaration of Henry J. Kelson & Adam J. Levitt, hereinafter "Kelson-Levitt Decl."] ¶ 51.) Between January 29 and March 19, Judge Infante engaged in extensive correspondence and held numerous telephone conferences with each party, but he was ultimately unable to forge a settlement. (*Id.*) On June 8, 2018, this Court referred the parties to Magistrate Judge McCormick for further settlement discussions. (*Id.* ¶ 52.) Judge McCormick met with both parties at that time and held another in-person settlement conference on August 30, 2018. (*Id.*) In mid-October 2018, the parties reached an agreement in principle regarding the monetary relief to class members and the provisions of injunctive relief. (*Id.*) The parties continued to negotiate the value of injunctive relief, the amount of attorneys' fees, and the selection of a settlement administrator. (*Id.* ¶ 53.) The parties ultimately accepted a "mediator's proposal" on the value of injunctive relief and the amount of attorneys' fees. (*Id.*) Judge McCormick then accepted proposals for settlement administrators from both sides to ultimately select a settlement administrator. (*Id.* ¶¶ 64–65.)

[1] In July 2017, Conagra Foods, Inc. removed the "100% Natural" claim from all Wesson labels.

Plaintiffs now seek preliminary approval of the proposed Settlement Agreement. (Dkt. 650.) The proposed Settlement Agreement provides that Defendant will not label, advertise, or market Wesson Oils as "natural," absent future legislation or regulation. (Dkt. 652 Ex. 1 [Settlement Agreement and Release, hereinafter "Settlement Agreement"] ¶ 3.3.) The parties value this injunctive relief at $27 million. The Settlement Agreement further provides the following monetary benefits to class members: (a) $0.15 for each unit of Wesson Oils purchased by members of each of the eleven classes to households submitting valid claim forms (to a maximum of thirty units without proof of purchase, and unlimited units with proof of purchase), (b) an additional fund of $575,000 to be allocated to members of the New York and Oregon state classes who submit valid claim forms, as compensation for the statutory damages in those states' consumer protection laws, and (c) an additional fund of $10,000 to compensate those in all classes who submit valid proof of purchase receipts for more than thirty purchases, at $0.15 for each such purchase above thirty. (*Id.* ¶ 3.1.) For the following reasons, Plaintiff's motion for preliminary approval of the class action settlement is **GRANTED**.[2]

## II. ANALYSIS

Where plaintiffs seek to settle a lawsuit on behalf of a certified class, Federal Rule of Civil Procedure 23(e) "requires the district court to determine whether a proposed settlement is fundamentally fair, reasonable, and accurate." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). To determine whether this standard is met, a district court must consider a number of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action

[2] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for April 15, 2019, at 1:30 p.m. is hereby vacated and off calendar.

status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; . . . and the reaction of the class members to the proposed settlement." *Id.* (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). At the preliminary approval stage, a full "fairness hearing" is not required. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Rather, the inquiry is whether the settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.*

Having reviewed the arms-length negotiation process and substantive terms of the Settlement Agreement, the Court finds no obvious deficiencies or grounds to doubt its fairness. The parties did not settle until after the parties engaged in eight years of litigation, the Ninth Circuit upheld class certification, the parties conducted significant discovery, and the parties attended multiple settlement conferences before two neutral mediators. *See In re Heritage Bond Litig.*, 2005 WL 1594403, at *9 (C.D. Cal. June 10, 2005) ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." (internal quotation and citations omitted)). There is no evidence of collusion during the parties' settlement negotiations. Indeed, "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007).

The Settlement Agreement also presents a fair compromise in light of the risks and expense of continued litigation. Defendant vigorously opposed class certification and the parties already spent several years litigating the issue before the Ninth Circuit. The parties, after substantial discovery, substantive briefing, and the assistance of two mediators, were able to realistically value Defendant's liability and assess the risk of

moving forward with possible motions to decertify the class, possible *Daubert* motions, motions for summary judgment, and potentially trial. (Kelson-Levitt Decl. ¶¶ 32–50, 60.) Litigation had reached a stage where the parties had a clear view of the strengths and weaknesses of their positions to reach a fair and reasonable settlement. In particular, Plaintiffs would have difficulty proving that all class members purchased Wesson Oils during the relevant time period and that they paid a premium because Wesson Oils were labeled and advertised as "100% Natural."

Given these risks, the amount and terms of the settlement are reasonable. The parties jointly estimate the value of the injunctive relief, in which Defendant agrees to stop labeling, advertising, or marketing Wesson Oils as "natural," at $27 million. (Kelson-Levitt Decl. ¶ 10.) The Settlement Agreement provides monetary compensation of $0.15 per unit to class members. (*Id.* ¶ 17.) This monetary compensation is approximately 36% higher than what class members could obtain at trial, which is approximately 10.2 cents per unit, according to Plaintiffs' own expert. (*Id.* ¶ 18.) The Settlement Agreement further provides a $575,000 fund to be allocated solely among New York and Oregon Class Members who submit valid claim forms, in proportion to the number of units they purchased during the relevant time period. (*Id.*; Mot. at 15.) This fund is intended to compensate the New York and Oregon Class Members for the statutory damages provided in the consumer protection laws of those states. *See* N.Y. Gen. Bus. Law § 349(h) (enabling individuals to recover actual damages or statutory damages of $50 per purchase, whichever is greater); Or. Rev. Stat. § 646.638 (allowing plaintiffs to recover actual damages, or statutory damages of $200, whichever is greater). In light of the significant hurdles to recovery if litigation were to continue, the classes' recovery is a fair result.

The settlement amount is also well within the range of reasonableness when compared to the settlements in similar cases where plaintiffs alleged it was misleading to

label and market products as "natural" when the products contained GMOs. *See, e.g.*, *Pappas v. Naked Juice Co. of Glendora, Inc.*, 2014 WL 12382279, at *19 (C.D. Cal. Jan. 2, 2014) (approving class settlement valued at total of $10.4 million where defendants allegedly misrepresented beverage products as "All Natural" and "Non-GMO").

### A. Attorneys' Fees and Incentive Award

Plaintiffs' counsel also intend to seek attorneys' fees in a total amount of $6,850,000. Any attorneys' fees and costs will be paid by Defendant separate from and in addition to the benefits provided to class members. The Ninth Circuit has established 25% of the common fund as the "benchmark" award for attorney fees. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). The parties do not estimate the total value of the monetary benefits, but the Ninth Circuit has held that district courts should also "take into account the present nonmonetary benefit bestowed upon plaintiffs' class" in determining the appropriateness of a fee award. *Loring v. City of Scottsdale*, 721 F.2d 274, 275 (9th Cir. 1983); *see also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392–93 (1970) (concluding that attorneys' fees may be awarded when the litigation has conferred a substantial benefit on the class even where a suit "has not yet produced, and may never produce, a monetary recovery" under the "common fund" doctrine). Here, the requested total for attorneys' fees represents approximately 25.4% of the parties' estimated present value of the injunctive relief or 23% of Plaintiffs' conservative estimated value of injunctive relief.[3] Class counsel estimate that this award is approximately 50% of class

[3] The conservative estimate of the total value of the labeling and marketing changes is $30,600,000. (Kelson-Levitt Decl. ¶ 63.) Plaintiffs' damages expert calculates the value of the labeling change from July 1, 2017 to February 25, 2019 as approximately $19,080,000. (*Id.* ¶ 12.) Defendant sold its Wesson Oil brand to Richardson International on February 25, 2019, and it is highly unlikely that Richardson International will resume labeling the products as "natural" without affirmative legislative or regulatory authorization. (*Id.* ¶¶ 10, 14.) Assuming one additional year passes without "natural" claims being restored to Wesson Oil labels, the value of the labeling change would reach approximately $30,600,000. (*Id.* ¶ 16.)

counsel's actual total combined lodestar and unreimbursed expenses. (Kelson-Levitt Decl. ¶ 63.) The Court finds the request for attorneys' fees is reasonable.

Class counsel also request service rewards of up to $3,000 for each of the six class representatives who were deposed (Robert Briseño, Michele Andrade, Jill Crouch, Pauline Michael, Necla Musat, and Maureen Towey) and up to $1,000 for each of the seven class representatives who were not deposed (Julie Palmer, Cherie Shafstall, Dee Hooper-Kercheval, Kelly McFadden, Erika Heins, Rona Johnston, and Anita Willman). These awards are separate from and in addition to the other settlement benefits. Plaintiffs have been involved in this litigation for more than eight years, including responding to discovery requests seeking detailed information regarding their dietary and food purchasing habits and requesting empty food containers in their homes. The awards are within the range of incentive awards typically approved by district courts. *See In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014) (explaining that California district courts typically approve incentive awards between $3,000 and $5,000). The Court finds the request for incentive awards is reasonable.

**B. Settlement Administrator**

Plaintiff requests appointment of JND Legal Administration as the settlement administrator and approval of an amount no more than $660,00 to be paid by Defendant separate from and in addition to the other settlement benefits provided to class members. (Mot. at 23; Kelson-Levitt Decl. ¶ 66.) The parties each solicited confidential bids from companies to provide notice and administration services in conjunction with the proposed settlement. (*Id.* ¶ 64.) The bids were submitted to Judge McCormick, who ultimately chose JND Legal Administration to propose to the Court to serve as the settlement administrator. (*Id.* ¶ 65.) In addition to being selected by a neutral third party, JND

Legal Administration appears to be well qualified to administer the claims in this case. JND Legal Administration has administered hundreds of class action settlements, including the $20 billion Gulf Coast Claims Facility, the $10 billion Deepwater Horizon BP Settlement, and the $6.15 billion WorldCom Securities Settlement. (Settlement Agreement Ex. A-4 [Declaration of Jennifer M. Keough, hereinafter "Keough Decl."] ¶¶ 3, 9.) The Court appoints JND Legal Administration as Settlement Administrator.

### C. Notice of the Proposed Settlement

Finally, Plaintiff seeks approval of the proposed manner and form of the notice that will be sent to the Class Members. Rule 23(c)(2)(B) provides that for Rule 23(b)(3) classes, as here, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The proposed manner of notice outlined in the Settlement Agreement satisfies this standard. (*See* Settlement Agreement ¶ 4.3; *id.* Ex. A-2 [Publication Notice], *id.* Ex. A-3 [Posted Notice]; *id.* Ex. A-4 [Notice Plan].) Since class members' contact information is not readily known, JND Legal Administration will reach class members through a consumer media campaign, including a national print effort in *People* magazine, a digital effort targeting consumers in the relevant states through Google Display Network and Facebook, newspaper notice placements in the *Los Angeles Daily News*, and an internet search effort on Google. (Keough Decl. ¶ 14.) JND Legal Administration will also distribute press releases to media outlets nationwide and establish a settlement website and toll-free phone number. (*Id.*) The print and digital media effort is designed to reach 70% of the potential class members. (*Id.*) The newspaper notice placements, internet search effort, and press release distribution are intended to enhance the notice's reach beyond the estimated 70%. (*Id.*)

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The form of notice also meets the requirements of Rule 23(c)(2)(B). Notice to Class Members must "clearly and concisely state, in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that the class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion, and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). Here, the proposed Class Notice provides clear information about the definition of the class and nature of the action, a summary of the terms of the proposed settlement, the process of objecting to the settlement, and the consequences of inaction. (Settlement Agreement Ex. A-2 [Publication Notice], *id.* Ex. A-3 [Posted Notice].) The Class Notice will also provide specific details regarding the date, time, and place of the Final Approval Hearing and inform Class Members that they may enter an appearance. (*See id.*)

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## III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** preliminary approval of the Settlement Agreement. The Court hereby **APPOINTS** Milberg Tadler Phillips Grossman LLP and DiCello Levitt Gutzler LLC as class counsel and the following persons as class representatives: Robert Briseño and Michele Andrade for the California Class, Jill Crouch for the Colorado Class, Julie Palmer for the Florida Class, Pauline Michael for the Illinois Class, Cheri Shafstall for the Indiana Class, Dee Hooper-Kercheval for the Nebraska Class, Kelly McFadden and Necla Musat for the New York Class, Maureen Towey for the Ohio Class, Erika Heins for the Oregon Class, Rona Johnston for the South Dakota Class, and Anita Willman for the Texas Class.[4] The Court **APPOINTS** JND Legal Administration as Settlement Administrator. The Court also **APPROVES** the proposed Class Notice and orders that it be disseminated to the class as provided in the Settlement Agreement. The final approval hearing shall be held on **Monday, October 7, 2019, at 1:30 p.m.**

DATED: April 4, 2019

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[4] The Court previously appointed Milberg LLP and Wolf Haldenstein Adler Freeman & Herz LLC as interim class counsel. (Dkt. 48.) In the class certification order, the Court ruled that the "named plaintiffs and class counsel satisfy Rule 23(a)'s adequacy requirement," but did not expressly appoint class representatives or class counsel. (Dkt. 545 at 57.)