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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

EMMA BRENNER, JONATHON GRINDELL, ADRIANNE HIRKA, ADDISON HORINE, JESSICA TORRES, CONSTANCE COFFIN, RAY GLASS, HARVEY SITNICK, CINDY PRINCE, KAILEE CENIS, SUZY RAMIREZ, JASON MILLER, TODD COOK, LAURI SINCAVAGE, PATRICK DECOLA, MISTY STEMPLE, TRAVIS WEAVER, RAYONA YOUNG, and MICHAEL MORELLI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KEVITA, INC.,

Defendant.

CASE NO. 56-2017-00502340-CU-FR-VTA

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

ASSIGNED FOR ALL PURPOSES TO:

HON. MARK S. BORRELL

DEPARTMENT 40

HEARING:
Date: January 20, 2021
Time: 8:20 a.m.
Dept: 40

Action Filed: October 4, 2017
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs Emma Brenner, Adrianne Hirka, Addison Horine, Jessica Torres, Constance Coffin, Ray Glass, Harvey Sitnick, Cindy Prince, Kailee Cenis, Suzy Ramirez, Jason Miller, Todd Cook, Lauri Sincavage, Patrick Decola, Misty Stemple, Travis Weaver, Rayona Young, and Michael Morelli ("Plaintiffs") brought this action to rectify and seek reimbursement for what they believed were inaccurate and deceptive product labels for the KeVita Master Brew Kombucha ("Master Brew") manufactured and distributed by defendant KeVita Inc. ("KeVita" or "Defendant")(Plaintiffs and KeVita shall collectively be referred to herein as "Parties"). The settlement includes KeVita's agreement to modify Master Brew labels and affords Class Members the opportunity to recover a cash award of up to Nine Dollars ($9) without proof of purchase and up to Sixty Dollars ($60) with proof of purchase.

While the claims period has not yet expired (but will, at the time of the final approval hearing), the response of Class Members to the settlement thus far has been supportive. There have been no objections or opt-outs and the claims rate is commensurate with the historical rate in consumer class actions. As set forth below, the settlement is an excellent result for the Settlement Class and fulfills the dual purposes of the consumer protection laws: providing equitable relief in the form of labeling changes on a go-forward basis, as well as providing monetary relief to the Settlement Class through cash payments. In all respects the Settlement is fair, adequate and reasonable, and readily meets the standard for final approval.

II. BACKGROUND

A. Brief Overview of Litigation

Before commencing the action, Class Counsel and Plaintiff Brenner conducted a thorough pre-suit investigation which involved calls to KeVita's customer service line, consultations with experts in the fields of pasteurization and fermentation, review of KeVita's marketing materials and research regarding relevant case law. (Declaration of Kiley Lynn Grombacher In Support of Motions for Final Approval of Class Action Settlement and Approval of Attorney's Fees, Costs and Service Payment ("Grombacher Decl.") at ¶11.)

On October 4, 2017, Plaintiff Emma Brenner filed a putative class action lawsuit against KeVita, Inc. and PepsiCo, Inc. in the Superior Court of California for the County of Ventura, Case No. 56-2017-00502340-CU-VTA (the "Action"), which alleged violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*) (the "UCL"), California's False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*) (the "FAL"), California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750) (the "CLRA"), various consumer protection statutes throughout the United States, unjust enrichment, breach of express warranty, breach of implied warranty, and negligent misrepresentation that related to, *inter alia*, the sale, advertising, marketing, labeling, distribution, and manufacturing of KeVita Master Brew Kombucha products (the "Product" or "Products") on behalf of a putative nationwide class of consumers, as well as numerous putative subclasses (the "Initial Complaint"). On June 12, 2018, Plaintiffs filed a Second Amended Complaint adding Jonathon Grindell, Adrianne Hirka, Addison Horine, Jessica Torres, Constance Coffin, Ray Glass, Harvey Sitnick, Cindy Prince, Kailee Cenis, Suzy Ramirez, Jason Miller, Todd Cook, Lauri Sincavage, Patrick DeCola, Misty Stemple, Travis Weaver, Rayona Young, and Michael Morelli as named Plaintiffs, and adding several putative subclasses under the consumer protection laws of various states (the "Second Amended Complaint").

Defendant filed demurrers to Plaintiffs' Second Amended Complaint, which the Court overruled on September 12, 2018. On February 21, 2019, Plaintiffs filed the Third Amended Complaint, which is the operative pleading in the Action and which amended Plaintiffs' alleged class period (the "Third Amended Complaint" or "Complaint").

Plaintiffs, by and through their counsel, conducted a robust investigation into the facts and law relating to the matters alleged in their Complaint, including into (i) marketing, advertising, and labeling of the Products; (ii) sales, pricing, consumer, distribution, and financial data; and (iii) Plaintiffs' own documents and information relating to the Products. This investigation included extensive pretrial discovery (including the production of thousands of documents, and written responses to dozens of written discovery requests, including special interrogatories and requests for production); interviews of witnesses and the evaluation of documents and information provided by Defendant; consultation with

experts; as well as legal research as to the strength and sufficiency of their claims and defenses, and appropriateness of class certification.

Defendant has vigorously defended against Plaintiffs' allegations. This defense included collecting and reviewing thousands of documents in response to Plaintiffs' requests for document production; propounding requests for production, interrogatories, and requests for admission on Plaintiffs and evaluating the documents and information provided in response; deposing ten of the Plaintiffs; interviewing numerous witnesses and consulting with experts; and conducting legal research as to the sufficiency of Plaintiffs' claims and the appropriateness of class certification.

The Parties were represented by experienced class action counsel throughout the litigation and in the negotiations resulting in this Settlement. Plaintiffs are represented by Bradley/Grombacher LLP, which employs seasoned class action attorneys who regularly litigate class actions through certification and on the merits, and have considerable experience settling class actions.

Defendant is represented by Gibson, Dunn & Crutcher LLP, a renowned national defense firm.

B. Settlement

The Parties engaged in extensive arms'-length settlement negotiations. After several rounds of bilateral discussions, on June 24, 2019, the Parties attended an in-person mediation with a respected mediator, the Honorable Richard Kramer (Ret.). Judge Kramer helped to manage the Parties' negotiations, and, after more than twelve hours of negotiation, the Parties reached agreement at the mediation. Before and during these settlement discussions and mediation, as described above, the Parties had an arm's-length exchange of information sufficient to permit both Parties and their counsel to evaluate the claims and potential defenses and to meaningfully conduct informed settlement discussions. At all times, the Parties' negotiations were adversarial and non-collusive. The Settlement therefore constitutes a fair, adequate, and reasonable compromise of the claims at issue.

C. Preliminary Approval

After conducting preliminary fairness hearings on August 3, 2020 and August 17, 2020, the Court granted Plaintiffs' motion for preliminary approval. On August 17, 2020, the Court signed the order granting preliminary approval of the proposed settlement, directed the nationwide class notice

program to commence on September 16, 2020, and set the final approval hearing for January 20, 2021 at 8:20 a.m.

D. The Proposed Settlement Fully Resolves Plaintiffs' Claims

1. Composition of the Settlement Class

The proposed Settlement Class consists of all persons and entities in the United States and all U.S. territories (including, but not limited to, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the other territories and possessions of the United States) who purchased one or more bottles of the Products prior to and including the Notice Date (September 16, 2020). Excluded from the Class are (a) all persons who are employees, directors, officers, and agents of KeVita, or its subsidiaries and affiliated companies; (b) persons or entities who purchased the Products primarily for the purposes of resale to consumers or other resellers; (c) governmental entities; (d) persons or entities who timely and properly exclude themselves from the Class as provided in this Settlement; and (e) the Court, the Court's immediate family, and Court staff.

2. Settlement Consideration

The Parties have agreed to settle the underlying claims in exchange for compensation to Class Members who submit Valid Claims and for modifications to the Products' labeling. Defendant has agreed to pay Class Members who submit Valid Claims thirty cents ($0.30) per unit of the Products purchased, for a maximum of thirty (30) units (or up to nine dollars ($9.00)) without valid Proof of Purchase, or a maximum of two hundred (200) units (or up to sixty dollars ($60)) with valid Proof of Purchase. The minimum payment for any Valid Claim is three dollars ($3). There is no cap on the total number of claims KeVita agrees to pay (provided the claims are valid and meet all requirements in the Settlement) and no pro-rata reduction.

Additionally, Defendant agreed to make the following labeling modifications to the Products by no later than December 25, 2020: (i) to the extent Defendant continues to state that the Products contain "LIVE PROBIOTICS," Defendant will also, at its sole discretion, make one of the following statements somewhere on the Products' label: "enhanced with live probiotics," "boosted with live probiotics," or "live probiotics added"; and (ii) to the extent that Defendant continues to utilize

pasteurization during the manufacturing process for the Products, Defendant will reference pasteurization somewhere on the Products' label, as determined in Defendant's sole discretion. Defendant has already implemented these label changes. Grombacher Decl. at ¶46.

While retail prices for the Products are not set by KeVita and vary depending on geographic location, retail channel, and the availability of sales and coupons, the Products ordinarily retail between Two Dollars ($2) and Five Dollars ($5), with Plaintiffs' statistics and economics expert determining that the price generally was right under the three-dollar mark. Class Members' recovery therefore will be approximately ten percent (10%) per unit of the Product(s) purchased. This is a particularly high recovery given that Plaintiffs' expert conducted a conjoint analysis and calculated a 10.5%-13.8% price premium for the representations at issue in the litigation. This recovery is consistent with approved settlements concerning labeling claims on food or beverage products. (*See*, *e.g.*, Order Granting Final Approval at 4, *Fitzhenry-Russell v. Keurig Dr Pepper Inc*. (N.D. Cal. Apr. 10, 2019) No. 5:17-cv-00564, ECF No. 350 [approving settlement providing $0.40 per unit with minimum payment of $2.00 and maximum payment of $5.20 without proof of purchase and $40.00 with proof of purchase]; Order Granting Final Approval at 3, *Kumar v. Salov N. Am. Corp.* (N.D. Cal. July 7, 2017) No. 14-cv-2411, ECF No. 173 [approving settlement providing $0.50 per unit with minimum payment of $2.00 and a maximum payment of $5.00 without proof of purchase], *aff'd* 737 F. App'x 341 (9th Cir. 2018) .

3. Release by the Settlement Class

In exchange for the Settlement Consideration, Plaintiffs and Class Members will agree to release the following Released Claims:

> Any and all claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action under common law or statutory law (federal, state, or local) of every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including known and unknown claims (as described in Paragraph 72 of the Settlement) as of the Claims Form Deadline by all of the Plaintiffs and all Class Members (and, to the extent on behalf of Plaintiffs and Class Members, their respective heirs, guardians, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that were asserted or could have been asserted in this Action against Defendant relating to the Products (including, but not limited to, the naming of the Product(s) as a "kombucha," the Products' probiotic content, the fermentation process for the Products, and the pasteurization of the Products), and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the Action (including but not limited to alleged violations

of state consumer protection, unfair competition, and/or false or deceptive advertising statutes, breach of express or implied warranty, fraud, negligence, product liability, conspiracy, unjust enrichment, restitution, declaratory or injunctive relief, and other equitable claims or claims sounding in contract and tort).

Class Members are not releasing any claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action relating to bodily injuries allegedly caused by the Products.

4. Attorneys' Fees, Service Awards and Administration Fees

Class Counsel has concurrently herewith filed an application to the Court for an award of Attorneys' Fees and Expenses and service payments to the Plaintiffs. The Parties negotiated Class Counsel's attorneys' fees and costs and the class representative service awards only after reaching agreement on the monetary and injunctive relief for the Class. Moreover, this Settlement is not contingent on the award of attorneys' fees and costs or the class representative service awards.

Defendant agreed to pay up to a total of One Hundred and Fifty Thousand Dollars and Zero Cents ($150,000.00) for Service Awards to the Plaintiffs, in individual amounts to be determined by the Court. Pursuant to Rule 3.769(b), Plaintiffs report that Defendant also agreed not to oppose Class Counsel's application for Attorneys' Fees and Expenses or undermine that request or solicit others to do so, to the extent that Class Counsel does not request a total of more than Seven Hundred Thousand Dollars and Zero Cents ($700,000.00). Class Counsel may apply for up to an additional One Hundred and Thirty-Five Thousand Dollars and Zero Cents ($135,000.00) in Attorneys' Fees and Expenses, and Defendant reserved the right to oppose Plaintiffs' application for Attorneys' Fees and Expenses if Plaintiffs request more than $700,000. Class Counsel agreed not to seek or accept more than eight hundred and thirty-five thousand dollars and zero cents ($835,000.00) in Attorneys' Fees and Expenses. Presently, Class Counsel's expenses are approximately one hundred thousand dollars ($100,000). Defendant agreed to pay its own fees and costs incurred in the Action.

KeVita has also agreed to bear the cost of the notice program and claims administration. Presently, Heffler has invoiced counsel $375,000 covering fees and costs associated with administering the Settlement from commencement through completion. Declaration of Joseph J. Hamill ("Hamill Decl."). at ¶ 13.)

5. The Notice Process

The potential Class Members have been targeted through a robust notice process[1]. On or about March 14, 2020, Heffler received Word versions of the Long Form Notice, Summary Notice, and Claim Form from counsel. Hamill Decl.at ¶ 4. Heffler prepared and formatted drafts of the materials that counsel thereafter reviewed and approved. *Id*.

6. Heffler Established a Toll-Free Number for Class Member Inquiries

On March 23, 2020, Heffler established and is still maintaining a toll-free number, 1-844-702-2784, for Class Members to call and obtain additional information regarding the Settlement through an Interactive Voice Response ("IVR") system and/or by being connected to a live agent[2]. (Hamill Decl. at ¶ 5; Finnegan Decl. ¶ 28.) As of December 3, 2020, 123 Class Members have called the IVR system, and 45 Class Members have spoken with a live agent. (Hamill Decl. at ¶ 5.)

7. Publication of Settlement Website

Heffler created and is currently hosting a dedicated website entitled www.Masterbrewsettlement.com (the "Settlement Website"). (Hamill. Decl. at ¶ 7; Finnegan Decl. at ¶27.) The Settlement Website went live on September 16, 2020. Hamill Decl. at ¶7. The Settlement Website contains a summary of the Settlement, a summary of Class Members' legal rights and options, frequently asked questions, relevant documents including: the Complaint, the First Amended Complaint, the Second Amended Complaint, the Third Amended Complaint, the Settlement Agreement, the Preliminary Approval Order, the Long Form Notice, the Summary Notice, the Claim Form, information on claim filing/exclusion/objection deadlines and whom to contact with any

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[1] Because there was list detailing each member of the settlement class, Heffler performed research and analysis to generate a target audience definition for the notice. This target is anticipated to be overinclusive in that it contains more individuals than those who fall within the definition of "Class Member" and includes all those who drink organic and 'other brands' of tea (*i.e.,* brands other than Lipton, Red Rose, Celestial Seasoning, etc.). This target consists of a population of 2.5 million people. While the actual class may be much smaller, as conservative measure, the Notice Plan was calculated to reach the larger population.

[2] A Spanish language operator was also available to speak with Class Members if necessary. Finnegan Decl.at ¶ 33.

questions, and allows Class Members the opportunity to register and file a claim online. Hamill Decl. at ¶7; Finnegan Decl. at ¶ 32.

8. Print Publication Notice

In order to comply with California's class member notice and CLRA requirements, notice was published in the following various media[3]:

- People Magazine, which was selected for its coverage against the target audience characteristics (alone this magazine reaches 15% of the target audience[4]):
- Ventura County Star
- Territory newspapers including Guam Pacific Daily News, Saipan Tribune, El Vocero, Samoa News and the U.S. Virgin Island Daily News.

Additionally, a press release was issued in both English and Spanish across PR Newswire's US Newslines and to the U.S. Territories[5]. Finnegan Decl. at ¶30. Approximately 222 news mentions of the settlement have resulted thus far from the press releases. Id.

9. Online Display Notice

This campaign employed a programmatic approach across multi-channel and inventory sources including a collection of premium quality partner web properties targeting "tea purchasers who are also natural or organic food or beverage purchasers." Nearly 21 million online display and social media impressions were served to this target group across a whitelist of pre-vetted websites and the social media platforms Facebook, Instagram and Twitter.

10. Total Reach

Heffler's outreach efforts described above reflect an appropriate, highly-targeted, and contemporary way to provide notice to the Class. Through a multi-media channel approach to notice, which employed direct notice, print, digital, social and mobile media, an estimated 77% of targeted Class Members were reached by the Notice Plan. The efforts used in this Notice Plan are based on the

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[3] Finnegan Decl. at ¶¶8-21.

[4] Finnegan Decl. at ¶9.

[5] Although the press release did not issue at the inception of the notice period, it issued as a reminder to the Settlement Class Members with a month remaining on the claims period.

highest modern communication standards, reasonably calculated to provide notice, and consistent with best practicable court-approved notice programs in similar matters. Finnegan Decl. at ¶3.

11. Class Member Response

Presently, there have been no requests for exclusion or objections to the settlement. Eight Thousand Seven Hundred and Eight (8,708) claim forms have been received as of the date of filing, with additional claims expected to be filed before the close of the Claims Period in January 2021[6]. Hamill Decl. ¶11. The conversion rate is currently 27% of visitors to the Settlement website, which is extraordinarily high[7].

III. ARGUMENT

A. Class Notice Has Been Properly Disseminated.

1. The Class Notice Documents Sufficiently Apprise the Class Members of the Terms of the Settlement and the Options Open to Dissenting Class Members.

To comport with due process, notice provided to class members "must fairly apprise the class members of the terms of the proposed compromise and of the options open to the dissenting class members." (*Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal.App.4th 734, 746, 99 Cal.Rptr.3d 436.) Specifically, the California Rules of Court provide that, "notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain: (1) A brief explanation of the case, including the basic contentions or denials of the parties; (2) A statement that the court will exclude the member from the class if the member so requests by a specified date; (3) A procedure for the member to follow in requesting exclusion from the class; (4) A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel." (Cal. Rules of Court, rule 3.769(d).)

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[6] 197 claim forms were submitted via mail and 8,511 forms were filed electronically. Hamill Decl. at ¶11.

[7] https://www.wordstream.com/blog/ws/2014/03/17/what-is-a-good-conversion-rate

Here, the Class notice documents consist of a Summary Notice and a Long Form Notice. *Hamill Decl*., ¶4, Exs. A1-A3, respectively. The Court approved these notice documents in granting preliminary approval. Preliminary Approval Order at ¶8.

These notice documents are written in simple, straightforward language, adequately apprised Class Members of the material terms of the Settlement and enabled them to make an informed decision about how to proceed under the Settlement.

2. The Notice Plan Was Successfully Implemented

In assessing notice in a class action settlement, "[t]he standard is whether the notice has a 'reasonable chance of reaching a substantial percentage of the class members.' " **(***Wershba*, 91 Cal.App.4th at 251.**)** However, it is not necessary to show that notice reached each member of a nationwide class. **(***Id*.**)**

As the Court determined in granting preliminary approval, the class notice for this action more than meets the applicable due process requirements[8]. As set forth in greater detail above, the initial notice plan was executed in accordance with the Court's Preliminary Approval Order. *Finnegan Decl at ¶¶8-33; Hamill Decl*. at ¶¶ 5-7. The Plan, as executed, reached approximately 77% of the Settlement Class and it fully complied with the terms of the Settlement. (See *Finnegan Decl*. at ¶3; Settlement Agreement at ¶¶56-61.)

In order to augment the notice that was provided to the class in accordance with the Settlement Agreement, the Parties agreed to undertake a supplemental notice program above and beyond the court-ordered notice. In connection with the supplemental notice plan, Heffler re-issued targeted digital media impressions to potential Class Members who had previously visited the Settlement Website but had not submitted a claim, and also issued new impressions to potential Class Members. Finnegan Decl. at 34-36. This supplemental notice program was designed to augment the notice provided to Class Members and to encourage interested Class Members to submit a Claim Form before the end of the Claims Period. The court-approved notice program and the supplemental notice program together

[8] The costs of notice and settlement administration ($375,000) were born entirely by KeVita separate and apart from any settlement payments to class members. (Hamill Decl at ¶13; Settlement Agreement at ¶79.)

generated 34,987 visits with 96,145-page views to the Settlement Website. *Hamill Decl.*. at ¶ 7. These factors weigh in favor of final approval.

Based thereon, the Court can be satisfied that the Notice process comports with due process and grant final approval of the proposed class action settlement.

B. The Proposed Settlement is Fair, Reasonable and Adequate

1. Legal Standard for Final Approval

In complex class litigation, "[v]oluntary conciliation and settlement are the preferred means of dispute resolution." (*7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1151 quoting *Officers for Justice v. Civil Service Com*. (9th Cir. 1982) 688 F.2d 615, 625; see also *In re Microsoft,* 135 Cal.App.4th at 723 n. 14 ("Public policy generally favors the compromise of complex class action litigation."); and 2 NEWBERG ON CLASS ACTIONS, Settlement of Class Actions § 11.41 (citing cases).)

Rule 3.769 of the California Rules of Court sets forth the procedures for settlement of class actions in California. (*Cellphone Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009).) At final approval, the trial court confirms its preliminary determination "whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-35; see also *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723; and *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.)

Courts bear the responsibility of ensuring that the settlement is a reasonable compromise, "given the magnitude and apparent merit of the claims being released, discounted by the risks and expense of attempting to establish and collect on those claims by pursuing the litigation." (*Kullar, supra*, 168 Cal.App.4th at p. 127.) When considering the fairness of a proposed settlement, courts consider a number of factors including, but not limited to: (a) the strength of plaintiff's case; (b) the risk, expense, complexity, and likely duration of further litigation; (c) the risk of maintaining class action status through trial; (d) the benefits conferred by the settlement; (e) the experience and views of plaintiff's counsel; (f) the extent of discovery completed and the state of the proceedings; and (g) the reaction of class members to the proposed settlement. (E.g., *Dunk, supra,* 48 Cal.App.4th at p. 1802.)

In reviewing a class action settlement, the trial court need not "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." (*7-Eleven Owners*, 85 Cal.App.4th at 1145.) As such, "the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits" of Plaintiffs claims. (*Id*.; see also *Wershba*, 91 Cal.App.4th at 246.) The focus is on whether the proposed settlement is fair, reasonable, and adequate under the circumstances of the case at bar. (See *In re Microsoft,* 135 Cal.App.4th at 723; see also *Dunk*, 48 Cal.App.4th at 1801.)

While the proponent of the settlement bears the burden of showing that the proposed settlement is fair and reasonable, California courts generally recognize a presumption of fairness where (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Chavez v. Netflix, Inc*., 162 Cal.App.4th 43, 52-53 (2008); *Kullar v. Foot Locker Retail, Inc*., 168 Cal.App.4th 116, 128 (2008).)

"Ultimately, the court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." (*Dunk*. at p. 1801.)

Ultimately, the trial court has broad discretion in reviewing a proposed class settlement for approval. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235; *Kullar v. Footlocker Retail, Inc.* (2008) 168 Cal.App.4th 116, 127-128.) In exercising its discretion, "[d]ue regard ... should be given to what is otherwise a private consensual agreement between the parties." (*7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1145.)

2. The Settlement Is Entitled to a Presumption of Fairness

i. The Settlement Is the Product of Arm's Length Negotiations

The negotiations that ultimately resulted in the proposed settlement were hard fought and at arms-length. Grombacher Decl. ¶ 20. The parties, represented by experienced class action counsel, heavily negotiated every aspect of the proposed settlement. *Id*. The parties also participated in a mediation before the Hon. Richard Kramer, an experienced mediator, who helped manage the Parties' negotiations and provided a useful, neutral analysis of the issues and risks to both sides. (*See In re*

Apple Comput., Inc. Derivative Litig., No. C 06-4128 JF (HRL) (N.D. Cal. Nov. 5, 2008) 2008 WL 4820784 [mediator's participation weighs considerably against any inference of a collusive settlement]; *D'Amato v. Deutsche Bank* (2d Cir. 2001) 236 F.3d 78, 85 [a "mediator's involvement in precertification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"].) These negotiations were contentious, adversarial and at all times at arms-length. Grombacher Decl. ¶ 20.

Counsel for both parties has weighed the strengths and weaknesses of the case, examined all of the issues and, as a result, endorse the proposed settlement. Id. at ¶12. Thus, the evidence demonstrates that the proposed settlement is the product of serious, informed, non-collusive negotiations that were assisted by a seasoned and highly respected mediator.

ii. Sufficient Investigation and Discovery Has Been Conducted

Generally, the status of discovery is considered when determining whether a settlement is fair, reasonable and adequate. (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801.) The parties to the Litigation had engaged in a significant amount of motion practice and discovery prior to attending private mediation. Even prior to filing, Class counsel conducted a robust investigation into the facts and law relating to the matters alleged in the Complaint, including into marketing, advertising, and labeling of the Products and Plaintiffs' own documents and information relating to the Products. Plaintiff's counsel also consulted with a third-party expert in the field of fermentation and pasteurization in regards to the claims of the litigation.

Plaintiffs' written discovery requests led to the production of considerable evidence, including thousands of documents and written responses to dozens of written discovery requests, including special interrogatories and requests for production. These discovery responses led Class Counsel to conduct informal surveys of thousands of potential witnesses and interviews of nearly 100 members of the putative class, evaluate documents and information provided by Defendant, consult with additional experts (including statisticians and marketing experts), and conduct legal research as to the strength and sufficiency of the parties' claims and defenses, and appropriateness of class certification. Plaintiffs likewise responded to multiple sets of written discovery propounded by Defendant which included the

production of documents and evidence including sales receipts, purchase history, products, and packaging.

Class Counsel defended the depositions of ten of the Plaintiffs, which provided considerable evidence concerning, *inter alia*, the strengths and weaknesses of Plaintiffs' claims on a class-wide and individual basis. In addition to these depositions, Defendant also served extensive written discovery requests on plaintiffs, seeking the production of Plaintiffs' documents as well as responses to interrogatories relating to their claims.

In summary, by engaging in such a thorough investigation and evaluation of Plaintiffs' claims—including through their participation in affirmative as well as defensive discovery—Class Counsel can opine that the Settlement, for the consideration and on the terms set forth in the Settlement Agreement, is fair, reasonable, and adequate, and is in the best interests of Class Members in light of all known facts and circumstances, including the risk of significant delay and uncertainty associated with litigation, and various defenses asserted by Defendant.

iii. Counsel is Experienced in Similar Litigation & There are No Objectors

Class Counsel is well versed in class action litigation including complex consumer class actions. Grombacher Decl. at ¶49. In fact, Class Counsel has handled well over 100 class and representative actions. (Id at ¶48.) Based on Class Counsel's experience in litigating matters similar to this Litigation, they are of the opinion that the Settlement represents a favorable resolution for members of the Settlement Class since it provides significant recovery and eliminates the risk and expense of further litigation. (Id. at ¶40.)

Moreover, the response to the Settlement has been extremely positive as the Settlement Administrator has yet to receive a single objection to or request for exclusion from the Settlement. (Hamlin Decl. at ¶¶.) Moreover, consumers are making claims with a claims rate that is consistent for consumer class actions over the last decade. According to a study completed by respected class administrator, Kurtzman Carson Consultants, the median claims rate in consumer class actions is 0.023% and other courts have observed that "the expected claims rate in a consumer class action ... is less than 1%." See *Poertner v. The Gillette Company, et al.,* Case No. 6:12-cv-00803-GAP-DAP, Doc. 168, fn. 9 (M.D. Fla. Aug. 21, 2014) (granting final approval of settlement following a claims rate of

0.076%). Indeed, courts routinely grant approval in consumer class actions to cases with claims rates under 1%. *In re Apple iPhone 4 Products Liab. Litig.,* No. 10-md-2188 RMW, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012) (granting final approval to class settlement with a claims rate of 0.28%); *Poertner* v. *The Gillette Company,* 618 F.App'x 618 (11th Cir. 2015)(affirming approval of settlement where only 55,346 of 7.26 million class members—less than 1%—filed claims).

3. The Settlement Properly Weighs the Benefits of the Proposed Settlement Against the Risks Associated with Continued Litigation

In seeking approval, a settling party must provide sufficient information to "enable the court to make an independent assessment of the adequacy of the settlement terms." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 131-32.) "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." (*Id.* at p. 625.) "Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." (*In re Toys R Us-Del., Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.* (C.D. Cal. 2014) 295 F.R.D. 438, 453.) In other words, in valuing the claims within a realistic *range* of outcomes, the settling plaintiffs should discount the value of the settled claims for risks such as changes in the law, the probability of success at class certification and on the merits, and other factors, such as the length of time necessary to bring a case to resolution, including potential appeals.[9]

[9] Federal district courts also recognize that there is an inherent "range of reasonableness" in determining whether to approve a settlement "which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." (*Frank v. Eastman Kodak Co.* (W.D.N.Y. 2005) 228 F.R.D. 174, 186 [quoting *Newman v. Stein* (2d Cir. 1972) 464 F. 2d 689, 693]; *see also In re Omnivision Tech., Inc.* (N.D. Cal. 2008) 559 F. Supp. 2d 1036; *Nat'l Rural Telecomm. Coop. v. Directv, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527 ["well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"]; *In re Global Crossing Sec. & ERISA Litig.* (S.D.N.Y. 2004) 225 F.R.D. 436, 460 ["settlement amount's ratio to the maximum potential recovery need not be the sole, or even dominant, consideration when assessing settlement's fairness"]; *In re IKON Office Solutions, Inc. Sec. Litig.*, (E.D. Pa. 2000) 194 F.R.D. 166, 184 ["the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather the percentage should be considered in light of strength of the claims"]; *Officers for Justice*, 688 F.2d at 628 [it is "the complete package, taken as a whole rather than the individual component parts, that must be examined for overall fairness"].)

Moreover, settling parties are not required to partake in a hypothetical accounting exercise: "*Kullar* does not… require any such explicit statement of [maximum] value; it requires a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.'" (*Munoz v. BCI Coca-Cola Bottling Co.* (2010) 186 Cal. App. 4th 399, 409-10 [quoting *Kullar*, 168 Cal. App. 4th at p. 120].) Overall, "the most important factor" in determining "whether a settlement is fair and reasonable" is the "strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement." (*Id*. at p. 409 n.6 [quoting *Kullar*, 168 Cal. App. 4th at p. 130].) Because settlements are inherently a compromise, once the parties have provided it with the requisite "basic information," the trial court must only "satisfy itself that the class settlement is within the 'ballpark' of reasonableness." (*Tech-Bilt, Inc. v. Woodward-Clyde & Assoc*. (1985) 38 Cal.3d 488, 499-500.)

Throughout this litigation, Defendant has vigorously disputed the merits of Plaintiffs' claims and denied that it has made any misrepresentations or incurred any liability based on the Products' labeling.

Although Plaintiffs and Class Counsel had confidence in their claims, a favorable outcome was not assured. (Grombacher Decl. at ¶ 38.) Plaintiffs recognize that they would face risks at class certification, summary judgment, trial and, if successful, on appeal. (*Id*. at ¶¶ 39-41.) For example, Plaintiffs had begun conducting an informal survey of consumers and had to accept the risk that establishing a shared understanding of kombucha and/or a shared interpretation of the challenged representations may prove difficult. Moreover, Plaintiffs understood they would face the risk of establishing liability at trial in light of conflicting expert testimony between their own expert witnesses and Defendants' anticipated expert witnesses. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert version would be accepted by the jury at trial.

During this litigation, Defendant produced sales data. Such data, coupled with research conducted by Plaintiff's expert, formed the basis of Class Counsel's valuation of Defendant's maximum theoretical exposure for the claims at issue. Class Counsel determined an appropriate range of recovery for settlement purposes by offsetting Defendant's maximum theoretical exposure by: (i) the

strength of Defendant's defenses; (ii) the risk of certification being denied as to the proposed classes; (iii) the risk of losing on any of a number of dispositive motions that could have been brought between certification and trial (e.g., motions to decertify the class or motions for summary judgment) which may have eliminated all or some of Plaintiffs' claims, or barred evidence necessary to prove their claims; and (iv) the risk of losing at trial or prevailing on only some of the claims (collectively, the "Discount Factors").

The concept of "advertising injury" is a hotly contested issue in false advertising suits, and, a "price premium" traceable to certain deceptive advertising claims can often be very difficult to establish and calculate. Even if Plaintiffs were ultimately successful in establishing liability, calculation of restitution and damages would likely not amount to a return of the full purchase price for the Products. (See *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal.4th 1134, 1149 (2003); *Shersher v. Sup. Ct*., 154 Cal.App.4th 1491, 1498 (2007). The difficulties of establishing advertising injury are magnified in a case such as this one where the Defendant made multiple claims for the products (e.g., "kombucha", "live probiotics" etc.) See *Colgan v. Leatherman Tool Grp., Inc*., 135 Cal. App. 4th 663, 700 (Ct. App. 2006) (rejecting restitutionary award for products "Made in U.S.A." where expert "did not attempt to quantify either the dollar value of the consumer impact").

As noted above, in preparation for mediation, Plaintiff retained a statics and economics expert, Stefan Boedeker. Mr. Boedeker conducted a conjoint analysis, and calculated a 10.5%-13.8% price premium for a non-pasteurized kombucha product. Taking into account the Discount Factors and the risks of continued litigation, Plaintiffs determined that the Settlement, which provides to Class Members who submit Valid Claims approximately 6 to 15% of the retail price of the Product, was clearly fair and reasonable.[10] (*See, e.g.*, *In re Warfarin Sodium Antitrust Litig.* (D. Del. 2002) 212 F.R.D. 231, 256-58 [recognizing that a reasonable settlement amount can be 1.6% to 14% of the total estimated damages]; *In Re Four Seasons Secs. Laws Litig.* (W.D. Okla. 1972) 58 F.R.D. 19, 37

[10] Such estimate does not include the value of the injunctive relief component. (*See Relente v. Viator, Inc*. (N.D. Cal. June 9, 2015) No. 12-CV-05868-JD, 2015 WL 3613713, at *3 [it is well recognized that "injunctive relief in a consumer case alleging misleading advertising is almost always likely to be an important remedy."].)

[approving 8% of damages]; *Balderas v. Massage Envy Franchising, LLP* (N.D. Cal. July 21, 2014) 2014 WL 3610945, at *5 [finding that settlement which amounted to 8% of maximum recovery "[fell] within the range of possible initial approval based on the strength of plaintiff's case and the risk and expense of continued litigation."]; *In re Omnivision Techs., Inc.* (N.D. Cal. 2008) 559 F. Supp. 2d 1036, 1042 [approving settlement for 6% to 8% of estimated damages].)

The labeling changes that KeVita have implemented in accordance with the Settlement provide a substantial benefit to the Settlement class. KeVita has agreed to modify its label and to add a disclosure that the product is "Pasteurized". KeVita has also agreed to include the statement "live probiotics added" on the Product label, thus alerting the consumer to what plaintiffs contend is critical information regarding the manufacturing processes at the point of sale. Plaintiffs believe that such modification will permit consumers to make more informed choices about their purchases going forward. Indeed, Plaintiffs' expert has determined that the monetary value of this injunctive relief range between $26,200,446.76 and $34,397,145.69. *Declaration of Stefan Boedeker* ("*Boedeker Decl*.") at ¶17.

C. Reaffirmation of Conditional Certification Is Proper

1. The California Standard for Class Certification

Pursuant to Code of Civil Procedure § 382, a class may be certified if: (1) it is ascertainable and its members are too numerous for joinder to be practical; (2) the representative and absent class members share a community of interest and questions of law and facts common to the class predominate over questions unique to individual class members; (3) the representative's claims are typical of the members of the class; and (4) the representative will fairly and adequately represent the interest of the class. (See e.g., *Richmond v. Dart Industries, Inc*. (1981) 29 Cal.3d 462, 470.)

In granting preliminary approval of the settlement on August 17, 2020, this Court determined that for settlement purposes only, the defined class set forth in the Settlement Agreement meets all of the requirements for class certification. There have been no subsequent events that would cast doubt on this determination. Accordingly, Plaintiffs request that the Court reaffirm its prior conditional grant of class certification for settlement purposes.

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IV. CONCLUSION

The Parties have negotiated a fair and reasonable settlement of claims. Having appropriately presented the materials and information necessary for final approval, the Parties request that the Court grant final approval of the Settlement.

DATED: December 15, 2020

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