

1 **FITZGERALD MONROE FLYNN PC**

JACK FITZGERALD (SBN 257370)

2 *jfitzgerald@fmfpc.com*

3 MELANIE PERSINGER (SBN 275423)

*mmonroe@fmfpc.com*

4 TREVOR M. FLYNN (SBN 253362)

*tflynn@fmfpc.com*

5 PETER GRAZUL (SBN 342735)

*pgrauzl@fmfpc.com*

6 2341 Jefferson Street, Suite 200

7 San Diego, CA 92110

Phone: (619) 215-1741

8 ***Class Counsel***

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 RALPH MILAN and ELIZABETH ARNOLD on  
13 behalf of themselves, those similarly situated and  
14 the general public,

Plaintiffs,

15 v.

16 CLIF BAR & COMPANY,

17 Defendant.  
18

Case No: 18-cv-02354-JD

**PLAINTIFFS' RENEWED MOTION FOR  
FINAL APPROVAL OF CLASS  
SETTLEMENT**

Judge: Hon. James Donato  
Hearing Date: March 20, 2025 10:00 a.m.  
Location: Courtroom 11, 19th Floor

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1 **NOTICE OF MOTION**

2 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE  
3 NOTICE THAT, pursuant to Fed. R. Civ. P. 23(e), the Northern District of California’s Procedural Guidance  
4 for Class Action Settlements (“Settlement Guidance”), and the Court’s July 12, 2024 Order Granting  
5 Preliminary Approval (Dkt. No. 261, the “PA Order”), on March 20, at 10:00 a.m., or as soon thereafter as  
6 may be heard, Plaintiffs will move the Court, the Honorable James Donato presiding, for an Order (1) finally  
7 certifying the Settlement Class, (2) finally approving the Settlement as fair, reasonable, and adequate to the  
8 Class, (3) directing the parties to undertake the obligations set forth in the Settlement Agreement that arise  
9 out of the Court’s final approval, (4) entering Judgment, and (5) maintaining jurisdiction over for purpose of  
10 enforcing the Judgment.

11 This Motion is based on this Notice of Motion; the below Memorandum; the concurrently-filed  
12 Declaration of Jack Fitzgerald (“Fitzgerald Decl.”) and Second Supplemental Declaration of Brandon  
13 Schwartz (“2d Suppl. Schwartz Decl.”), and all exhibits thereto; the October 31, 2024 Declaration of Brandon  
14 Schwartz (Dkt. No. 268-2, “2024 Schwartz Decl.”); the November 13, 2024 Supplemental Declaration of  
15 Brandon Schwartz (Dkt. No. 274, “Suppl. Schwartz Decl.”); the October 31, 2023 Declaration of Jack  
16 Fitzgerald in Support of Plaintiffs’ Motion for Preliminary Approval (Dkt. No. 252, the “PA Fitzgerald  
17 Decl.”); the June 23, 2022 Declaration of Jack Fitzgerald in Support of Plaintiffs’ (Initial) Motion for  
18 Preliminary Approval (Dkt. No. 226-1, the “2022 PA Fitzgerald Decl.”); the parties’ October 30, 2023  
19 Settlement Agreement (“SA”), Attached as Exhibit 1 to the PA Fitzgerald Decl., *see* Dkt. No. 252-1; all prior  
20 pleadings and proceedings; and any additional evidence and argument submitted in support of the Motion.

21 **ISSUES TO BE DECIDED**

22 Whether to confirm certification of the Settlement Class and finally approve the parties’ Settlement  
23 as fair, reasonable, and adequate to the Class. *See* Fed. R. Civ. P. 23(a), (b), (e).

24 **MEMORANDUM OF POINTS & AUTHORITIES**

25 **I. INTRODUCTION**

26 On July 12, 2024, the Court preliminarily approved a nationwide class action Settlement between  
27 Class Representatives Ralph Milan and Elizabeth Arnold, and Defendant Clif Bar & Co. *See* PA Order ¶ 1  
28 (finding the “terms of the Settlement Agreement . . . fair, reasonable and adequate . . . sufficient to warrant

1 sending Notice to the Settlement Class . . . subject to further consideration at the Final Approval Hearing”).  
 2 The Settlement resolves allegations Clif violated consumer protection laws and breached warranties by  
 3 misleadingly marketing its Clif Bars and Clif Kid ZBars as healthy. *See generally* Dkt. No. 1, Compl.

4 Notice has now been provided to the Class in accordance with the approved Notice Plan. *See* 2024  
 5 Schwartz Decl. ¶¶ 6-24; 2d Suppl. Schwartz Decl. ¶¶ 3-8. This included more than 10 million direct email  
 6 notices to Settlement Class Members who purchased the products at Amazon, Target, Kroger, or Walmart;  
 7 publication notice in *US Weekly*; digital and streaming advertising resulting in 455,685,813 digital  
 8 impressions; a press release through PR Newswire’s US1 and National Hispanic Newslne, which was picked  
 9 up by 588 media outlets for a total potential audience of 119,000,000; and publication in USA Today’s  
 10 California/Arizona region once a week for four consecutive weeks. *See* 2024 Schwartz Decl. ¶¶ 7-17 & Exs.  
 11 B-I; 2d Suppl. Schwartz Decl. ¶¶ 5-7 & Table 1. The Administrator also established a Settlement Website,  
 12 toll-free hotline, and provided mail and email support to Class Members. 2024 Schwartz Decl. ¶¶ 18-24. As  
 13 a result of these efforts, “the Notice Plan achieved a reach of more than 80% with an average frequency of  
 14 2.5”—which “does not include” the direct email notice, nor “account for CLRA [notice], the Settlement  
 15 Website, toll-free hotline, or press release,” which “all . . . enhance the overall reach and frequency of the  
 16 Notice Plan.” *Id.* ¶ 41.

17 The Class’s response to the Settlement was overwhelmingly positive. *See* Settlement Guidance, Final  
 18 Approval ¶ 1. While **506,575** Class Members made valid claims, representing a robust **6.85% claims rate**,  
 19 2d Suppl. Schwartz Decl. ¶ 9 & Table 2, only 93 opted out, and only one objected, and then only to one  
 20 proposed *cy pres* recipient,<sup>1</sup> *see* 2024 Schwartz Decl. ¶¶ 38-39 & Ex J (list of opt-outs); Dkt. No. 266  
 21 (Objection of Scott Dodson). If the Court approves the notice and administration costs, *see* 2d Suppl.  
 22 Schwartz Decl. ¶ 15 & Table 3, and the attorneys’ fees and costs and service awards requested, more than  
 23 half a million claimants are expected to receive an average refund of \$13.32, *see id.* ¶ 18. As reflected by the  
 24 high number of claims, few exclusions (representing just 0.00125% of the class), and dearth of objections,  
 25 this is a fair, reasonable, and adequate Settlement that provides an excellent result for the Class while  
 26

27 \_\_\_\_\_  
 28 <sup>1</sup> The Court has already overruled “class member letters filed on the docket,” styled objections, that “do not  
 express a substantive disagreement with the adequacy of the class settlement,” Dkt. No. 275, Civil Minutes..



1 eliminating the risk and expense of continued litigation and inherent risks of trial.<sup>2</sup> Plaintiffs thus respectfully  
 2 request the Court grant the Settlement final approval and enter Judgment.

## 3 **II. LEGAL STANDARD**

4 “Judicial policy favors settlement in class actions and other forms of complex litigation where  
 5 substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.” *Espinosa*  
 6 *v. Cal. Coll. of San Diego, Inc.*, 2018 WL 1705955, at \*5 (S.D. Cal. Apr. 9, 2018) (citing *In re Wash. Pub.*  
 7 *Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1387 (D. Ariz. 1989)); *see also McMorrow v. Mondelez*  
 8 *Int’l, Inc.*, 2022 WL 1056098, at \*2 (S.D. Cal. Apr. 8, 2022) (“[T]he Ninth Circuit maintains ‘a strong judicial  
 9 policy’ that favors settlements of class actions.” (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,  
 10 1276 (9th Cir. 1992))). A class action settlement must be approved by the court before it is effective. *See*  
 11 *Fed. R. Civ. P. 23(e)*. In making this determination:

12 The factors in a court’s fairness assessment will naturally vary from case to case, but courts  
 13 generally must weigh (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity,  
 14 and likely duration of further litigation; (3) the risk of maintaining class action status  
 15 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed  
 16 and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of  
 a governmental participant; and (8) the reaction of the class members of the proposed  
 settlement.

17 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., L.L.C.*  
 18 *v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)); *see also Arnold v. DMG Mori USA, Inc.*, 2022 WL  
 19 18027883, at \*2 (N.D. Cal. Dec. 30, 2022) (Donato, J.). Further:

20 While considering all these interests, “the court’s intrusion upon what is otherwise a private  
 21 consensual agreement negotiated between the parties to a lawsuit must be limited to the extent  
 22 necessary to reach a reasoned judgment that the agreement is not the product of fraud or  
 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken  
 as a whole, is fair, reasonable and adequate to all concerned.”

23 *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 831 (N.D. Cal. 2017) (quoting *Officers for Justice v. Civil Serv.*  
 24 *Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)).

25  
 26  
 27  
 28 <sup>2</sup> The procedural, litigation, and settlement history was detailed in Plaintiffs’ Motion for Preliminary  
 Approval, *see* Dkt. No. 251 (“PA Mot.”) at 1-3; *see also* 2022 PA Fitzgerald Decl. ¶¶ 3-14.

1 **III. THE COURT SHOULD CONFIRM CERTIFICATION OF THE SETTLEMENT CLASS**

2 The Court previously certified the Settlement Class, finding it “meets the requirements of Fed. R.  
3 Civ. P. 23(a) and (b)(3).” PA Order ¶ 4. “Nothing material has changed on this score since preliminary  
4 approval,” and “[n]o class member or party has challenged the propriety of class certification . . . .” *See*  
5 *Pennington v. Tetra Tech EC, Inc.*, 2022 WL 899843, at \*4 (N.D. Cal. Mar. 28, 2022) (Donato, J.).  
6 Accordingly, the Court should “certif[y] a final settlement class” and “confirm[] the appointment” of the  
7 Class Representatives and Class Counsel. *See id.*

8 **IV. THE SETTLEMENT SHOULD BE FINALLY APPROVED**

9 A consideration of the Rule 23(e)(2) requirements and *Churchill* factors shows the Settlement is fair,  
10 reasonable, and adequate. *See In re Facebook Biometric Info. Privacy Litig.*, 522 F. Supp. 3d 617, 626 (N.D.  
11 Cal. 2021) (Donato, J.) [*In re Facebook*] (“Several of the factors discussed in the *Churchill Village* case  
12 overlap with the Rule 23(e)(2)(C) subfactors, and also go to evaluating the adequacy of relief for the class.”).

13 **A. The Strength of the Case, and Risk, Expense, Complexity, and Likely Duration of**  
14 **Further Litigation**

15 “In determining whether the settlement is fair, reasonable, and adequate” courts first “balance the  
16 risks of continued litigation, including the strengths and weaknesses of plaintiff’s case, against the benefits  
17 afforded to class members, including the immediacy and certainty of recovery.” *Knapp*, 283 F. Supp. 3d at  
18 831-32 (citing *Larsen v. Trader Joe’s Co.*, 2014 WL 3404531, at \*4 (N.D. Cal. July 11, 2014); *LaGarde v.*  
19 *Support.com, Inc.*, 2013 WL 1283325, at \*4 (N.D. Cal. Mar. 26, 2013)). Given “all the normal perils of  
20 litigation as well as the additional uncertainties inherent in complex class actions,” *In re Beef Indus. Antitrust*  
21 *Litig.*, 607 F.2d 167, 179-80 (5th Cir. 1979), “unless [a proposed] settlement is clearly inadequate,” a court  
22 should normally find “its acceptance and approval are preferable to lengthy and expensive litigation with  
23 uncertain results,” *Knapp*, 283 F. Supp. 3d at 832 (citing *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,  
24 221 F.R.D. 523, 526 (C.D. Cal. 2004) (internal quotation marks omitted)); *see also Rojas v. Zaninovich*,  
25 2015 WL 3657172, at \*12 (E.D. Cal. June 11, 2015) (Courts consider, among other things, the “normal perils  
26 of litigation, including the merits of the affirmative defenses asserted by Defendant, the difficulties of  
27 complex litigation, [and] the lengthy process of establishing specific damages . . . .”).

28 Here, “[w]hile the plaintiffs . . . believe their claims are strong, they acknowledge,” as detailed in

1 their Preliminary Approval Motion, “that they would face significant risks should the case proceed through  
2 litigation.” *See Larsen*, 2014 WL 3404531, at \*4 (record citation omitted); PA Mot. at 11-12. Of course, Clif  
3 “vigorously denied liability and challenged all of the plaintiffs’ claims.” *See Larsen*, 2014 WL 3404531, at  
4 \*4 (record citation omitted); *see also, e.g.*, Dkt. No. 106 (Clif motion for summary judgment on all of  
5 Plaintiffs’ claims). For example, Clif disputed that the challenged claims convey a health message, and that  
6 they are material, and supported those arguments with expert evidence from Stanford professor Dr. Itamar  
7 Simonson. PA Fitzgerald Decl. ¶ 30. Clif also disputed that the types of sugar in the bars are as detrimental  
8 to health as Plaintiffs claim. *Id.* Focus group and mock trial results revealed a certain amount of attitudinal  
9 resistance to Plaintiffs’ claims and awarding damages in their favor. *Id.* ¶ 31; *compare* Dkt. Nos. 264, 265,  
10 267. And even if Plaintiff maintained class certification and prevailed at trial, Clif would likely press  
11 numerous issues on appeal. PA Fitzgerald Decl. ¶ 33. Thus, “[t]he record here leaves no doubt that the class  
12 would face substantial hurdles to prevailing at trial, and if successful, preserving the verdict on appeal.” *See*  
13 *In re Facebook*, 522 F. Supp. 3d at 627.

14 The Settlement, by contrast, “achieves a definite and certain result for the benefit of the Settlement  
15 Class[,]” making it “preferable to continuing litigation in which the Settlement Class would necessarily  
16 confront substantial risk, uncertainty, delay, and cost.” *See Donald v. Xanitos, Inc.*, 2017 WL 1508675, at \*2  
17 (N.D. Cal. Apr. 27, 2017). In light of “the significant risks that lie ahead . . . [at] trial, it is reasonable for the  
18 parties at this stage to agree that the actual recovery realized and risks avoided here outweigh the opportunity  
19 to pursue potentially more favorable results.” *See Larsen*, 2014 WL 3404531, at \*4. Because “[t]he  
20 settlement avoids the risks that the [P]laintiffs would not succeed in demonstrating that [Clif] failed to comply  
21 with state consumer protection laws,” “this factor weighs in favor of final approval of the settlement.” *See*  
22 *id.*; *see also Rieckborn v. Velti PLC*, 2015 WL 468329, at \*4-5 (N.D. Cal. Feb. 3, 2015) (the “first two  
23 [Churchill] factors weigh in favor of approval” where “Plaintiffs contend that their claims have significant  
24 merit but acknowledge a number of risks and uncertainties should they proceed,” including that “Defendants  
25 have adamantly denied liability and have asserted from the outset that they possess absolute defenses to all  
26 of plaintiffs’ claims,” and that “[p]roving damages would also entail substantial uncertainty . . . depend[ing]  
27 . . . on which, if any, of the four alleged partial corrective disclosures plaintiffs are ultimately able to rely,”  
28 making “further litigation . . . likely to be costly and time-intensive, with no guarantee of a more beneficial

1 outcome for class members as a result”); *Nguyen v. Radiant Pharms. Corp.*, 2014 WL 1802293, at \*2 (C.D.  
 2 Cal. May 6, 2014) (finding first two *Churchill* factors met where, “although [the plaintiffs’] claims were  
 3 quite strong,” there were factual challenges facing them at trial, including regarding “damages”).

4 **B. The Amount of Settlement**

5 “This factor examines the benefits to class members.” *Larsen*, 2014 WL 3404531, at \*4 (citing  
 6 *Churchill Vill.*, 361 F.3d at 574). “Assessing the fairness, adequacy, and reasonableness of the amount  
 7 offered in settlement is not a matter of applying a ‘particular formula.’” *Knapp*, 283 F. Supp. 3d at 832  
 8 (quoting *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). Instead, “[w]hen considering the  
 9 fairness and adequacy of the amount offered in settlement, ‘it is the complete package taken as a whole,  
 10 rather than the individual component parts, that must be examined for overall fairness.’” *Bellinghausen v.*  
 11 *Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (quoting *Nat’l Rural Telecomms. Coop.*, 221  
 12 F.R.D. at 527). Further, “it is well-settled law that a proposed settlement may be acceptable even though it  
 13 amounts to only a fraction of the potential recovery that might be available to the class members at trial.”  
 14 *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527; *cf. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455  
 15 n.2 (2d Cir. 1974) (“[T]here is no reason, at least in theory, why a satisfactory settlement could not amount  
 16 to a hundredth or even a thousandth part of a single percent of the potential recovery.”). Finally, that a  
 17 “Settlement Agreement also provides for injunctive relief” is an important consideration in evaluating its  
 18 benefit, since “class members that choose to continue doing business with [the defendant] will benefit from  
 19 this aspect as well.” *See Knapp*, 283 F. Supp. 3d at 833.

20 Here, the Settlement’s \$12 million common fund for a nationwide Class of approximately 7.4 million  
 21 households is fair, reasonable, and adequate, especially in light of the injunctive relief obtained for it and the  
 22 public’s benefit, *see* PA Mot. at 7, 13-14. The amount of the cash refunds Class Members are predicted to  
 23 receive if the Court approves the notice and administration costs, attorneys’ fees and costs, and service  
 24 awards requested—between \$4.50 and \$44.20, with an average refund of \$13.32, *see* 2d Suppl. Schwartz  
 25 Decl. ¶ 18 & Table 5—“are substantial in comparison with other low-cost consumer goods false advertising  
 26 cases,” *see McMorrow*, 2022 WL 1056098, and represent significant recoveries in relation to potential trial  
 27 damages, where Plaintiffs would have to show “the difference between the prices customers paid and the  
 28 value of the [products] they bought—in other words, the ‘price premium’ attributable to” the challenged

1 claims, *see Brazil v. Dole Packaged Foods, LLC*, 660 Fed. App'x 531, 534 (9th Cir. 2016); *see also*  
 2 *McMorrow*, 2022 WL 1056098, at \*6 (“Class Members will receive an average refund of \$20.96 (minimum  
 3 \$3.81, maximum \$52.98), which is considered an ‘excellent result’ in the context of low-cost consumer good  
 4 false advertising cases.” (quoting *Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at \*6 (S.D.  
 5 Cal. Jan. 31, 2020) (\$1.00 recovery per bottled purchased was “an excellent result” considering the fraction  
 6 of purchase price recoverable at trial)).

7 Moreover, the amounts claimants will receive here are similar to what Settlement Class Members in  
 8 *Hadley and Krommenhock* received. *See* Fitzgerald Decl. ¶¶ 2-3; *see also Hadley v. Kellogg Sales Co.*, 2021  
 9 WL 5706967, at \*2 (N.D. Cal. Nov. 23, 2021) (Granting final approval where “[t]he[ir] efforts allowed Class  
 10 Counsel to obtain a significant monetary recovery for the class as well as injunctive relief that provides health  
 11 benefits to all purchasers of Defendant’s products.”); *Krommenhock v. Post Foods, LLC*, 2021 WL 2910205,  
 12 at \*2 (N.D. Cal. June 25, 2021) (granting final approval after finding that “the terms [of the Settlement]  
 13 constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members”).<sup>3</sup>

14 Using conjoint analysis, Plaintiffs’ damages experts, Steven Gaskin and Colin Weir, calculated a  
 15 3.8% price premium for Clif Bars’ “Nutrition for Sustained Energy” claim, equivalent to 30¢ for a \$7.99 six-  
 16 pack of Clif Bars, or about 5¢ in damages per bar. Fitzgerald Decl. ¶ 4. Based on this premium, claimants  
 17 are predicted to receive damages for between 90 and 884 Clif Bars (and 266 on average). Plaintiffs’ experts  
 18 calculated damages of 7.8% for Clif Kid Z Bar’s “Nourishing Kids in Motion” claim, equivalent to 53¢ for  
 19 a \$6.79 six-pack of Clif Kid Z Bars, or 8.8¢ per bar. *Id.* Based on this premium, claimants are expected to  
 20 receive damages for between 51 and 502 Kid Z Bars (151 on average). Since, during the relevant time period,  
 21

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22 <sup>3</sup> *Cf. Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at \*9 (N.D. Cal. Feb. 5, 2020) (approving  
 23 settlement where Class Members would receive \$1.25 to \$2.75 per unit purchased for up to \$10 without proof  
 24 of purchase); *Fitzhenry-Russell v. Coca-Cola Co.*, 2019 WL 11557486, at \*6 (N.D. Cal. Oct. 3, 2019)  
 25 (approving settlement fund of \$2,450,000 that would pay restitution of \$0.80 per unit, up to \$10.40 (13 units)  
 26 without proof of purchase); *Hendricks v. Starkist Co.*, 2016 WL 5462423, at \*5 (N.D. Cal. Sept. 29, 2016)  
 27 (approving settlement in which class members would receive \$1.97 cash or \$4.43 voucher per claim, and  
 28 noting that the “settlement amount, while constituting only a single-digit percentage of the maximum  
 potential exposure, is reasonable given the stage of the proceedings and the defenses asserted”); *cf. De Leon  
 v. Ricoh USA, Inc.*, 2020 WL 1531331, at \*9 (N.D. Cal. Mar. 31, 2020) (granting final approval where “[i]n  
 granting preliminary approval the Court concluded that the estimated payout to class members was fair in  
 relation to the risks of continued litigation . . . and there [wa]s nothing in the final approval materials that  
 change[d] the Court’s analysis on that score” (record citations omitted)).

1 typical buy rates for the heaviest users of both bars were below 100 bars per year, *id.* ¶ 5, claimants are being  
2 reimbursed for damages covering the equivalent of years of purchases.

3 Because the Settlement amount is a fair, reasonable, and adequate result for the Class, this factor  
4 weighs in favor of approval.

5 **C. Extent of Discovery Completed and Stage of Proceedings**

6 “The extent of discovery completed and the state of the proceedings at the time of settlement is a  
7 strong indicator of whether the parties have sufficient understanding of each other’s cases to make an  
8 informed judgment about their likelihood of prevailing.” *Lane v. Brown*, 166 F. Supp. 3d 1180, 1190 (D. Or.  
9 2016). “A court is more likely to approve a settlement if most of the discovery is completed because it  
10 suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues  
11 surrounding the case.” *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 527 (internal quotation marks and  
12 citation omitted). “For that reason, ‘[a] settlement following sufficient discovery and genuine arms-length  
13 negotiation is *presumed fair*.’” *Lane*, 166 F. Supp. 3d at 1190 (emphasis added) (quoting *Nat’l Rural*  
14 *Telecomms. Coop.*, 221 F.R.D. at 528).

15 Here, the parties litigated for more than four years, including extensive motion practice regarding the  
16 pleadings, class certification, expert reports, and summary judgment. Fact and expert discovery were both  
17 complete and extensive. *See* 2022 PA Fitzgerald Decl. ¶¶ 3-9. Moreover, the Settlement was only reached  
18 through multiple arms’ length mediations—two with Judicate West mediator, Jill R. Sperber, Esq.; a  
19 settlement conference with Magistrate Judge Joseph C. Spero, *see id.* ¶¶ 10-14; and a final mediation with  
20 JAMS mediator, Hon. Andrew J. Guilford (Ret.), *see* Dkt. No. 262-1, PA Fitzgerald Decl. Ex. 1 at 161, 164,  
21 167 (May 2, 2023 time entries). “The assistance of an experienced mediator in the settlement process supports  
22 the finding that the Settlement is non-collusive.” *Huntsman v. Sw. Airlines, Co.*, 2018 WL 11371114, at \*2 (N.D.  
23 Cal. Dec. 5, 2018) (Donato, J.); *see also Arnold*, 2022 WL 18027883, at \*2 (where “the parties participated in  
24 two days of private mediation, and ultimately reached a settlement in principle after a full-day conference  
25 facilitated by a magistrate judge,” this “establishes that the settlement agreement was negotiated at arm’s length,  
26 which weighs in favor of final approval” (internal record citations omitted)); *Gaudin v. Saxon Mortg. Servs.,*  
27 *Inc.*, 2015 WL 7454183, at \*6 (N.D. Cal. Nov. 23, 2015) (factor supported final approval where plaintiff  
28 “conduct[ed] ‘extensive discovery and investigation (before and after class certification),’ reviewing

1 ‘approximately 25,000 pages of [Defendant’s] documents,’ and participating in ‘three separate rounds of  
 2 settlement negotiations’” (record citations omitted)). In sum, because “[t]he case was on the cusp of trial and  
 3 so was fully developed, and counsel on both sides had a mature understanding of the issues and risks on both  
 4 sides,” *see In re Facebook*, 522 F. Supp. 3d at 628, this factor “strongly favors approval,” *see Lane*, 166 F.  
 5 Supp. 3d at 1185 (granting final approval where “[a]fter almost four years of litigation, extensive fact and  
 6 expert discovery, and prior unsuccessful efforts to resolve the dispute, the parties engaged in lengthy  
 7 settlement negotiations a few months before trial and signed a Proposed Settlement Agreement”).

8 **D. The Experience and Views of Class Counsel**

9 The Ninth Circuit “ha[s] held that ‘[p]arties represented by competent counsel are better positioned  
 10 than courts to produce a settlement that fairly reflects each party’s expected outcome in litigation,’”  
 11 *Rodriguez*, 563 F.3d at 967 (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)). In  
 12 determining whether a settlement is fair and reasonable, “[t]he judgment of experienced counsel regarding  
 13 the settlement is [therefore] entitled to great weight.” *White v. Experian Info. Solutions, Inc.*, 2009 WL  
 14 10670553, at \*12 (C.D. Cal. May 7, 2009) (citing *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671  
 15 F. Supp. 819, 822 (D. Mass 1987); *Linney v. Cellular Alaska P’ship*, 1997 WL 450064, at \*5 (N.D. Cal.  
 16 1997); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980)). As a result, “[t]he  
 17 recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *Id.* (quoting *Boyd*  
 18 *v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).

19 Here, Class Counsel has considerable experience in consumer class actions, and particularly those  
 20 involving the false advertising of foods and beverages as healthy. During the pendency of this action, Class  
 21 Counsel litigated a series similar cases concerning the advertising of sugary foods and beverages as healthy,  
 22 and has therefore been exposed to a wide variety of information about the claims and defenses, and ultimately  
 23 the potential upside and risks attendant to this case. PA Fitzgerald Decl. ¶¶ 36-38. Because Class Counsel  
 24 has substantial experience with complex class actions generally, and an intimate understanding of the  
 25 relevant facts and issues here particularly, and strongly endorses the Settlement, this factor favors final  
 26 approval. *See McMorrow*, 2022 WL 1506098, at \*4 (“Here, due especially to the experience and knowledge  
 27 of Class Counsel, their recommendations are presumed to be reasonable, and this factor accordingly favors  
 28 approval.”); *Larsen*, 2014 WL 3404531, at \*5 (factor favored final approval where “Plaintiffs’ counsel ha[d]

1 successfully represented consumers both as litigation class and settlement class counsel numerous times,  
 2 including cases involving food mislabeling,” and “believe[d] approval [wa]s in the best interests of the  
 3 putative settlement class.”).

#### 4 **1. The Presence of a Governmental Participant**

5 “There is no governmental participant here.” *See Knapp*, 283 F. Supp. 3d at 833. Because, however,  
 6 P&N “notified officials of the proposed settlement pursuant to CAFA, and no government entity has raised  
 7 an objection,” this factor “favors settlement.” *See id.* (internal record citation omitted) (citing *Schuchardt v.*  
 8 *Law Office of Rory W. Clark*, 314 F.R.D. 673, 685 (N.D. Cal. 2016); *Holman v. Experian Info. Sols., Inc.*,  
 9 2014 WL 7186207, at \*3 (N.D. Cal. Dec. 12, 2014); *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL  
 10 1687832, at \*14 (N.D. Cal. Apr. 22, 2010)); 2024 Schwartz Decl. ¶ 6 (no state attorney general objections).

#### 11 **E. The Reactions of the Class Members**

12 The reaction of the class to the settlement is overwhelmingly positive, with 506,575 valid claims  
 13 filed, representing a 6.85% claims rate compared to the 3% rate predicted, *see* PA Fitzgerald Decl. ¶ 51, only  
 14 93 opt-outs (representing just 0.00125% of the Class), and just one objection.<sup>4</sup> This factor thus “strongly  
 15 favors final approval.” *See Edwards v. Nat’l Milk Producers Fed’n*, 2017 WL 3623734, at \*2, \*8 (N.D. Cal.  
 16 June 26, 2017) (Factor favored approval where “307,396 class members had submitted claims online, and an  
 17 additional 125 class members had submitted paper claim forms,” yet “only eight objections and one request  
 18 for exclusion were received out of the millions of class members receiving notice.”), *aff’d sub nom.*, *Edwards*  
 19 *v. Andrews*, 846 Fed. App’x 538 (9th Cir. 2021); *see also McMorrow*, 2022 WL 1056098, at \*6 (“the Claims  
 20 Administrator’s notice program achieved an overwhelmingly positive reaction from the class” where “[o]nly  
 21 46 exclusions and one objection were filed” (record citation omitted)); *Purple Mountain Tr. v. Wells Fargo*  
 22 *& Co.*, 2023 WL 11872699, at \*5-6 (N.D. Cal. Sept. 26, 2023) (Donato, J.) (approving settlement with 76  
 23 opt-outs); *cf. Norcia v. Samsung Telecomms. Am., LLC*, 2021 WL 3053018, at \*3 (N.D. Cal. July 20, 2021)  
 24 (Donato, J.) (“While the claims rate of approximately 2.035% . . . is not necessarily something to write home  
 25 about, it is on par with similar cases.”). That is because “[a] low number of opt-outs and objections in  
 26

27 <sup>4</sup> Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Service Awards and supporting Declarations (Dkt. Nos.  
 28 262, 262-1, 262-2, and 262-3) were publicly filed on September 6, 2024 and posted to the Settlement Website  
 the same day. Class Members thus had full access to the motion for 46 days prior the objection deadline, but  
 no Class Member objected to any aspect of the Motion. Fitzgerald Decl. ¶ 6.



1 comparison to class size is typically a factor that supports settlement approval.” *Noll v. eBay, Inc.*, 309 F.R.D.  
2 593, 608 (N.D. Cal. 2015) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“[T]he  
3 fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents  
4 at least some objective positive commentary as to its fairness”)); *see also Larsen*, 2014 WL 3404531, at \*5  
5 (“The participation rate and positive response of the class weigh[ed] in favor of finding that the settlement is  
6 favorable to the class members” where “a total of 59,830 class members [ ] submitted claim forms, twenty-  
7 three [ ] opted out, and sixteen [ ] objected”); *Zepeda v. PayPal, Inc.*, 2017 WL 1113293, at \*15 (N.D. Cal.  
8 Mar. 24, 2017) (“The Ninth Circuit has held that the number of class members who object to a proposed  
9 settlement is a factor to be considered.” (citing *Mandujano v. Basic Vegetable Prods. Inc.*, 541 F.2d 832, 837  
10 (9th Cir. 1976))).

11 “[T]he absence of a large number of objections to a proposed class action settlement raises a strong  
12 presumption that the terms of a proposed class settlement action are favorable to the class members,” *Larsen*,  
13 2014 WL 3404531, at \*5 (quoting *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 529), and courts  
14 “appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members  
15 object to it,” *id.* (quoting *Create-A-Card, Inc. v. Intuit, Inc.*, 2009 WL 3073920, at \*15 (N.D. Cal. Sept. 22,  
16 2009)). “This ‘strong presumption’ of fairness arises here, because . . . [only one] objection[] and [93]  
17 request[s] for exclusion were received out of the millions of class members receiving notice.” *See Edwards*,  
18 2017 WL 3623734, at \*8 (footnotes omitted); *see also* Schwartz Decl. ¶¶ 38-39 & Ex. J.

19 The sole objection only questioned the propriety of the *cy pres* recipients. Dkt. No. 266 (“Dodson  
20 Obj.”) at 2. During the November 14 hearing, the Court found that “the Resnick Center for Food Law and  
21 Policy at UCLA School of Law is appropriate pursuant to *In re Easysaver Rewards Litigation*, 906 F.3d 747  
22 (9th Cir. 2018), but Class Counsel may wish to consider alternatives to the Tufts Friedman School.” Dkt. No.  
23 275, Civil Minutes. Consistent with the Court’s Order, the Parties have now agreed, subject to the Court’s  
24 approval, to distribute any residual funds *cy pres* in equal parts to the Resnick Center, the National Food  
25 Museum, and the National Consumers League. Fitzgerald Decl. ¶ 7. Each of these is a proper recipient, as  
26 each is a nonprofit that advocates for and educates consumers about proper food labeling and healthy eating.  
27 *See id.* & Exs. 1-3.

1 The lack of objections and low opt-out rate favors final approval here, since “[t]hese statistics indicate  
 2 a favorable reaction by class members and their overall satisfaction with the Settlement.” *See Noll*, 309  
 3 F.R.D. at 608 (factor favored approval where “of over 1,188,000 potential Class Members, only 97 have  
 4 opted out” and “only three objections were filed (including one that was not timely), translating into an  
 5 objection rate of 0.00025%” (citing *Custom LED LLC v. eBay, Inc.*, 2013 WL 6114379, at \*9 (N.D. Cal.  
 6 Nov. 20, 2013) (granting final approval and characterizing 0.04% exclusion rate, with one objection, as  
 7 “overwhelmingly positive” reaction); *Chun–Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D.  
 8 Cal. 2010) (4.86% opt-out rate strongly supported approval)); *see also Knapp*, 283 F. Supp. 3d at 834 (factor  
 9 favored final approval where “[t]he settlement administrator received valid opt-outs from 452 class members,  
 10 which amount[ed] to less than .03 percent of the class members who received notice,” making it “apparent  
 11 that the ‘overwhelming majority of the class’ had nothing to say about the fairness of the settlement.”  
 12 (quotation omitted)).

13 While the low opt-out and objection rates indicate the majority of the Class approved of the  
 14 Settlement and chose to remain in the Settlement Class, the 6.85% claims rate is also quite strong for a  
 15 settlement of this type, as demonstrated by comparing it to claims rates in similar cases, including those  
 16 Plaintiffs used to estimate the claims rate here, per the requirements of the Settlement Guidelines.

Case	Est. Class Size	Claims Rate
<i>Milan v. Clif Bar &amp; Co.</i>	7.4 million	6.85%
<i>Hanson v. Welch Foods Inc.</i>	3.2 million	4.87%
<i>McMorrow v. Mondelez International, Inc</i>	5.7 million	4.40%
<i>Pettit v. Proctor &amp; Gamble</i>	3.9 million	3.53%
<i>Fitzhenry-Russell v. Keurig Dr. Pepper Inc.</i>	2.4 million	3.32%
<i>Hadley v. Kellogg Sales Co.</i>	16.0 million	3.17%
<i>Krommenhock v. Post Foods LLC</i>	20.9 million	1.61%
<b>Avg. Claims Rate =</b>		<b>3.96%</b>

17 See PA Fitzgerald Decl. ¶¶ 51-56.

18 Indeed, a 2021 analysis by Jones Day of “20 consumer fraud class action settlements for which there  
 19 was sufficient data to assess the participation rate of class members” found that “[t]he average take rate was  
 20 4.91%, and the median take rate was 3.90%,” with only “three settlement ha[ving] a rate higher than 10%,”  
 21  
 22  
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 28

1 and only two . . . higher than 15%.” Fitzgerald Decl. Ex. 4, Jones Day, “Update: An Empirical Analysis of  
 2 Federal Consumer Fraud Class Action Settlements (2019-2020) (July 2021), at 3. The rate in this case is  
 3 roughly 75% higher than the median and 40% higher than the average claims rate Jones Day found.

4 “[C]onsumer class actions tend to result in claims rates in the low single digits,” *Rael v. Children’s*  
 5 *Place, Inc.*, 2020 WL 434482, at \*9 (S.D. Cal. Jan. 28, 2020) (citations omitted). The Court should find the  
 6 strong claims rate supports final approval here, particularly in light of the low opt-out rate and sole objection.  
 7 *See Touhey v. United States*, 2011 WL 3179036, at \*7-8 (C.D. Cal. July 25, 2011) (approving settlement  
 8 where only 38 claims were filed, which was “approximately 2%” claims rate, based in part on “the lack of  
 9 objections”); *see also Keil v. Lopez*, 862 F.3d 685, 696-97 (8th Cir. 2017) (“a claim rate as low as 3 percent  
 10 is hardly unusual in consumer class actions and does not suggest unfairness”); *Schneider v. Chipotle Mexican*  
 11 *Grill, Inc.*, 336 F.R.D. 588, 599 (N.D. Cal. 2020) (Approving settlement with 0.83% claims rate and noting  
 12 it is “on par with other consumer cases, and does not otherwise weigh against approval.” (citing *Broomfield*,  
 13 2020 WL 1972505, at \*7 (approving settlement with response rate of “about two percent”))).

#### 14 **F. The Risk of Maintaining Class Action Status Through Trial**

15 “This factor, which concerns the risk of maintaining class certification, also favors settlement.”  
 16 *Larsen*, 2014 WL 3404531, at \*4. “An order that grants or denies class certification may be altered or  
 17 amended before final judgment.” Fed. R. Civ. P. 23(c)(1)(C). This means that “‘if future decisions or  
 18 circumstances’ warrant, the ‘district court can decertify the class.’” *In re Capacitors Antitrust Litig.*, 2020 WL  
 19 870927, at \*3 (N.D. Cal. Feb. 21, 2020) (Donato, J.) (quoting *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1276 (9th  
 20 Cir. 2019)). Thus, while “[t]he Court already granted class certification” “and conditionally certified a class  
 21 for settlement purposes,” and “Plaintiffs believe they would be successful in maintaining class action status  
 22 through trial and appeal,” because Cliff “vigorously opposed class certification, previously filed a [23(f)  
 23 petition to appeal certification], and indicated its intention to challenge certification again,” “the risk that  
 24 Defendant may prove successful in attacking class certification . . . favors final approval of the Settlement  
 25 Agreement.” *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4685536, at \*4 (C.D. Cal. May 8,  
 26 2017); *In re Facebook*, 522 F. Supp. 3d at 628 (finding factor supported final approval).

1 **V. CONCLUSION**

2 Each of the *Churchill* factors favors granting the Settlement final approval. Plaintiffs respectfully  
3 request that the Court grant the Settlement final approval, and enter Judgment.

4  
5 Date: February 12, 2025

Respectfully submitted,

6 /s/ Jack Fitzgerald

7 **FITZGERALD MONROE FLYNN PC**

JACK FITZGERALD

8 *jfitzgerald@fmfpc.com*

MELANIE R. MONROE

9 *mmonroe@fmfpc.com*

TREVOR FLYNN

10 *tflynn@fmfpc.com*

PETER GRAZUL

11 *pgrzul@fmfpc.com*

12 2341 Jefferson St., Suite 200

San Diego, CA 92110

13 Phone: (619) 215-1741

14 ***Class Counsel***

1 **FITZGERALD MONROE FLYNN PC**

JACK FITZGERALD (SBN 257370)

2 *jfitzgerald@fmfpc.com*

3 MELANIE PERSINGER (SBN 275423)

*mmonroe@fmfpc.com*

4 TREVOR M. FLYNN (SBN 253362)

*tflynn@fmfpc.com*

5 PETER GRAZUL (SBN 342735)

*pgrauzl@fmfpc.com*

6 2341 Jefferson Street, Suite 200

7 San Diego, CA 92110

Phone: (619) 215-1741

8 ***Class Counsel***

9  
10  
11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13  
14 RALPH MILAN and ELIZABETH ARNOLD on  
15 behalf of themselves, those similarly situated and  
16 the general public,

Plaintiffs,

17 v.

18 CLIF BAR & COMPANY,

19 Defendant.

Case No: 18-cv-02354-JD

**DECLARATION OF JACK FITZGERALD IN  
SUPPORT OF RENEWED MOTION FOR  
FINAL APPROVAL**

Judge: Hon. James Donato

Hearing Date: March 20, 2025, 10:00 a.m.

Location: Courtroom 11, 19th Floor

1 I, Jack Fitzgerald, declare:

2 1. I am a member in good standing of the State Bars of California and New York; and of the  
3 United States District Courts for the Northern, Central and Southern Districts of California, the Southern  
4 and Eastern Districts of New York, and the Western District of Wisconsin; and of the United States Courts  
5 of Appeal for the Second, Eighth, and Ninth Circuits. I make this declaration based on my own personal  
6 knowledge, in support of Plaintiffs' Renewed Motion for Final Approval.

7 2. I was Class Counsel in *Hadley v. Kellogg Sales Co.*, No. 16-cv-4955-LHK (N.D. Cal.). As  
8 indicated in that action's Post-Distribution Accounting, *Hadley* Dkt. No. 410, payments to 507,121 Class  
9 Member claimants varied from between \$2.35 and \$89.94, with the median payment \$11.94 and the average  
10 payment \$14.28.

11 3. I was also Class Counsel in *Krommenhock v. Post Foods, LLC*, No. 16-cv-4958-WHO (N.D.  
12 Cal.). As indicated in that action's Post-Distribution Accounting, *Krommenhock* Dkt. No. 306, payments to  
13 331,978 Class Member claimants varied from between \$3.29 and \$180.84, with the median payment \$16.42  
14 and the average payment \$27.07.

15 4. Using conjoint analysis, Plaintiffs' damages experts, Steven Gaskin and Colin Weir,  
16 calculated a 3.8% price premium for Clif Bars' "Nutrition for Sustained Energy" claim, equivalent to 30¢  
17 for a \$7.99 six-pack of Clif Bars, or about 5¢ damages per bar. Plaintiffs' experts calculated damages of  
18 7.8% for Clif Kid Z Bar's " ", equivalent to 53¢ for a \$6.79 six-pack of Clif Kid Z Bars, or 8.8¢ per bar.<sup>1</sup>

19 5. Discovery showed that, during the relevant time period, typical buy rates for the heaviest Clif  
20 Bar and Kid Z Bar users were just below 100 bars per year.

21 6. Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards (Dkt. No. 262), and the  
22 supporting Declarations (Dkt. Nos. 262-1, 262-2, and 262-3) were publicly filed on September 6, 2024 and  
23 posted to the Settlement Website the same day. Class Members thus had full access to the motion for 46  
24 days prior to the objection deadline, but no Class Member has objected to any aspect of the motion.

25 7. Since the November 14, 2024 Hearing in this matter, the Parties have agreed that, in addition  
26 to the Resnick Center for Food Law and Policy at UCLA School of Law, the following entities should,  
27

28 <sup>1</sup> The experts tested two additional claims for Z Bars, but each resulted in a lower premium.

1 subject to the Court's approval, receive *cy pres*, a proportional share of any residual funds remaining after  
2 the time for Settlement Class Member claimants to cash their checks has expired:

3 a. **Entity No. 1 – National Food Museum.** Headquartered in Washington, D.C., the  
4 National Food Museum will be the first nationally significant museum that explores America and  
5 Americans through the lens of food: what we eat, what influence our food choices, food's enormous  
6 effects on our health and the environment, and more. Through highly interactive and experiential  
7 exhibits, the nonprofit museum will help visitors make connections between the food they eat and  
8 the impact of those choices on themselves and our planet. To accelerate progress toward a physical  
9 facility, the museum will start as an online version and later occupy a 60,000 square foot building  
10 where guests will be able, for example, to take a walk through the digestive tract. The museum's  
11 founder, board of directors, and advisory council come from a wide variety of philanthropic and  
12 advocacy backgrounds, and include such nutrition luminaries as Walter Willet, at Harvard's School  
13 of Public Health, and Marion Nestle, NYU Professor Emerita of Nutrition, Food Studies, and Public  
14 Health. Attached hereto as Exhibits 1 and 2 are materials released by the National Food Museum  
15 providing more information about the project. More information can be found at  
16 <http://nationalfoodmuseum.org> (or, alternatively, <http://food.museum>).

17 b. **Entity No. 2 – National Consumers League.** Headquartered in Washington, D.C.,  
18 the National Consumers League (NCL) is America's oldest consumer advocacy organization,  
19 dedicated to protecting and promoting social and economic justice for consumers since 1899. NCL  
20 provides government, businesses, and other organizations with the consumer's perspective on key  
21 issues, including food safety. In particular, NCL's nutrition and food safety work aims to protect  
22 assistance programs, help consumers understanding labeling and make informed decisions, and keep  
23 companies accountable for claims made on food products. As an example of its relevant work,  
24 attached hereto as Exhibit 3 is a true and correct copy of a November 7, 2022 article written by  
25 Nancy Glick, NCL's Direct of Food and Nutrition Policy, titled "At last: FDA is updating the  
26 definition of a 'healthy' food."<sup>2</sup> More information about NCL can be found at <http://nclnet.org>. More  
27

28 <sup>2</sup> Available at <https://nclnet.org/fda-updating-definition-healthy-food>.

1 information about its work in the area of Food and Nutrition can be found at <https://nclnet.org/our->  
2 work/food-nutrition.

3 8. I am unaware of any association between any party or any party's attorney and these  
4 additional *cy pres* recipients, and believe none exist. Neither I nor anyone else associated with this litigation  
5 has received anything of value in exchange for suggesting these entities as *cy pres* recipients.

6 9. Attached hereto as Exhibit 4 is a true and correct copy of Jones Day, "Update: An Empirical  
7 Analysis of Federal Consumer Fraud Class Action Settlements (2019-2020) (July 2021).

8  
9 I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.  
10 Executed this 12th day of February, 2025, in San Diego, California.

11 By: /s/ Jack Fitzgerald  
12 Jack Fitzgerald  
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# **Exhibit 1**

# NATIONAL FOOD MUSEUM



## Everyone Eats!

**The National Food Museum will be the first** national museum that explores America and Americans through the lens of food: what we eat, what influences our choices, food's impact on our health and the environment, and more. Through interactive and immersive exhibits, the Museum will help visitors make connections between their diet, their health, their culture, and their planet.

**Visitors may walk through a giant digestive tract;** watch an animation of farm animals' contribution to climate change; and enjoy hilarious snippets from old food ads on a wall-size screen. The Museum will help visitors take greater control over their food choices, and enable them to participate in solving food-related problems, both locally and across the nation. The Museum also will add to the vibrancy of the civic life of its host city.

## Food Impacts People & Our Planet

**American farms are extraordinarily productive,** feeding the nation and the world. But our food system accounts for at least one-fourth of greenhouse gas emissions and contributes to global warming, air and water pollution, and soil erosion.

**Food provides nutrients essential for life,** but the typical American diet has created a health crisis: 42% of adults are obese, 13% have diabetes, up to 100,000 die annually due to high-sodium diets. Total annual costs: half a million preventable deaths and hundreds of billions of dollars.

## The Need

- 1 FOOD AND CULTURE**  
Literally everyone on the planet enjoys eating, but few truly appreciate how deeply food shapes their culture, health, and daily lives.
- 2 THE FOOD/HEALTH/ ENVIRONMENT CHALLENGE**  
It is vital to educate youths about the enormous impact, for better and worse, that food has on their health...and how what we eat and how that food is grown affect global warming and the broader environment.
- 3 FILLING THE INFORMATION AND ACTION GAPS**  
The Museum will inspire in kids and adults both a deeper understanding of the importance of food in their lives and ways to get involved in improving America's food system.

## Our Mission

**To celebrate and explore the transformative power of food to nourish people and our planet.**



## About Us

**The National Food Museum will serve as a** permanent flagship for the diverse “food movement.” Its building, located in Washington or other major city, will have exhibits and other activities (at the museum, online, in the community) on interesting and vitally important food issues, especially the impact of food and farming on health and the environment. Other topics may include the history of the human diet from the Stone Age to 2100, the role of food in religion, the contributions of people of color, global cuisines, and the challenge of ending hunger in the United States and globally.

Reflecting the wide-ranging enthusiasm that the Museum has elicited, the **Museum’s Advisory Council** includes two former U.S. Secretaries of Agriculture, prominent nutrition researchers, environmentalists, creative chefs, a former Smithsonian curator, and other academics, farmers, and activists.

As the Museum develops it will expand its activities with outreach to its neighboring communities, webinars and interviews with prominent experts, cooking classes for children and adults, debates on the farm bill and other legislation, and cooperation with local food activists.

As steppingstones to the brick-and-mortar facility, the Museum will create a **virtual “online” museum** and then a traveling exhibit.

**The Museum is currently seeking gifts** from individuals and foundations for those activities and then larger gifts to hire core staff members, choose a location, and build the actual museum.

## Leadership

### Michael F. Jacobson, Ph.D.

Museum Founder and Food Activist



Michael F. Jacobson, who holds a PhD in microbiology from the Massachusetts Institute of Technology, co-founded and then led the Washington-based health-advocacy organization, Center for Science in the Public Interest, for four decades.

For his achievements in promoting health, Jacobson has been honored with the Food and Drug Administration’s Commissioner’s Special Citation and Harvey W. Wiley Medal, Food Marketing Institute’s Consumer Service Award, American Diabetes Association’s Medal for Health Promotion and Awareness, CDC Foundation’s Hero award, and American Public Health Association’s Award for Advocacy in Public Health.

Jacobson has loved museums since his childhood in Chicago, so after he left CSPI he has continued his work related to food by founding the National Food Museum. He and his wife, along with their wonderful pooch Oliver, live in Washington, DC.

### NATIONAL FOOD MUSEUM

4401A Connecticut Avenue NW, #300  
Washington, DC 20008

[www.food.museum](http://www.food.museum)  
[info@food.museum](mailto:info@food.museum)

# Exhibit 2

# NATIONAL FOOD MUSEUM

*Viewing the World Through Food*



**A Vision for the Future**



# Welcome to the National Food Museum

The National Food Museum's interactive exhibits and innovative programming explore everything about food—from the history of the human diet to roles in movies and TV shows to its relationship to human health to farming's effects on climate—all in a fun environment.

The Museum spurs visitors to see food in a new light, inspires them to make better-informed dietary decisions, and involves them in helping solve some of the world's most pressing problems. The museum will start as an online version and later occupy a building.

To accelerate progress toward the ultimate physical facility, the Museum will first appear in the form of a virtual (online) museum or traveling exhibition.

# A Tale of Two Challenges

The Museum serves as a beacon, spotlighting the enormous **impacts of diets and farming on both health and the environment.**



Taste, joy, nourishment, sociability—there’s so much to celebrate about food. But we also need to recognize that American diets have contributed to the tripling of obesity rates since 1980 and to the 500,000 annual diet-related deaths due to heart disease and other chronic diseases.

Also, the global food system, especially the raising of cattle, generates as much as one-third of the greenhouse gases that are heating up our planet.

**However, the Museum does not just decry serious problems. It is also a *solutions* hub, suggesting personal actions and policy measures that would promote health and protect the environment.**

## Vision

---

A world where food and how it is grown contribute to healthy people, a sustainable planet, and a more vibrant culture.

## Mission

---

To celebrate and explore the transformative power of food to enrich our lives, nourish our bodies, and protect our planet.

## Values

The core principles that guide our actions and direct how we achieve our Mission and Vision.



# Core Values

## Empowerment

We encourage our visitors to improve their health, community, and planet.

## Sustainability

We are committed to sustainable practices, from stocking our café with healthful foods to minimizing waste and energy consumption.

## Scientific Integrity

The museum's exhibits, programs, and choices are based on science.

## Dialogue

We foster a community of diverse stakeholders who share a passion for food, culture, health, and the environment.

## Innovation

We think creatively about our relationship with food and encourage innovative problem-solving to address challenges.

## Diversity, Equity, Inclusion

We collaborate with people of all skills and backgrounds to create experiences that are accessible to all.

## Fun!

We create a joyful environment that mirrors the joy of eating delicious meals with family and friends.



# Exhibits

Visitors will be captivated by immersive and interactive displays that decode the complexities of food systems.

---

## Primary Exhibit Audiences

- Children Ages 8-14
- Families
- Informed Public
- Policy Makers

# Themes and Topics

## Themes

---

### Deliciousness

Highlighting the fun of food and the exotic delights at restaurants

### Health

Investigating the links between diet, health, and disease

### Justice

Shedding light on the struggles faced by low-income consumers, food-chain workers, and farm animals

### Climate Crisis

Gaining insight into the impact of our food choices on climate change and other environmental concerns

### History & Anthropology

Revealing the interplay of agricultural and cultural traditions

### Industry

Exploring the consequences of industrial food systems on climate, diets, and health

### Culture

Examining the influence of family,, heritages, and media on diets

### Policy

Explaining how government actions influence what shows up on our plates

## Topics

---

- Food, Farming, Global Warming
- Food Packaging: From Plastic to Bioplastic
- Food Laws: Sausage-Making on Capitol Hill
- History of the Human Diet: 15,000 B.C.E.–2100
- People of Color: Authors, Chefs, Scientists
- Eating at the White House: 1789–2024
- Pathogens, Food Additives, Contaminants
- The Role of Food in Religion
- Food and Art
- Booze: The Pleasures and Sorrows
- Foodways of Nearby Ethnic Communities
- Kitchens, Cooking Gear, & Cookbooks Over the Centuries
- Diet, Health, and Chronic Disease
- Food Comedy in Movies and on TV
- Global and Domestic Hunger
- Agricultural Research and Food Technology
- Obesity Crisis
- The Science of Cooking
- The Enormous Costs of Wasting Food

INTERPRETIVE FRAMEWORK

# Floor Plan

The National Food Museum will make its home in a 60,000-square-foot facility.

### CORE AND TEMPORARY EXHIBIT GALLERIES

Over 25,000 square feet of exhibition space engage, delight, challenge, and inform visitors.

### LOBBY AND EVENT SPACE

A space for welcoming visitors, small displays, and special events

### EDUCATION SUITE

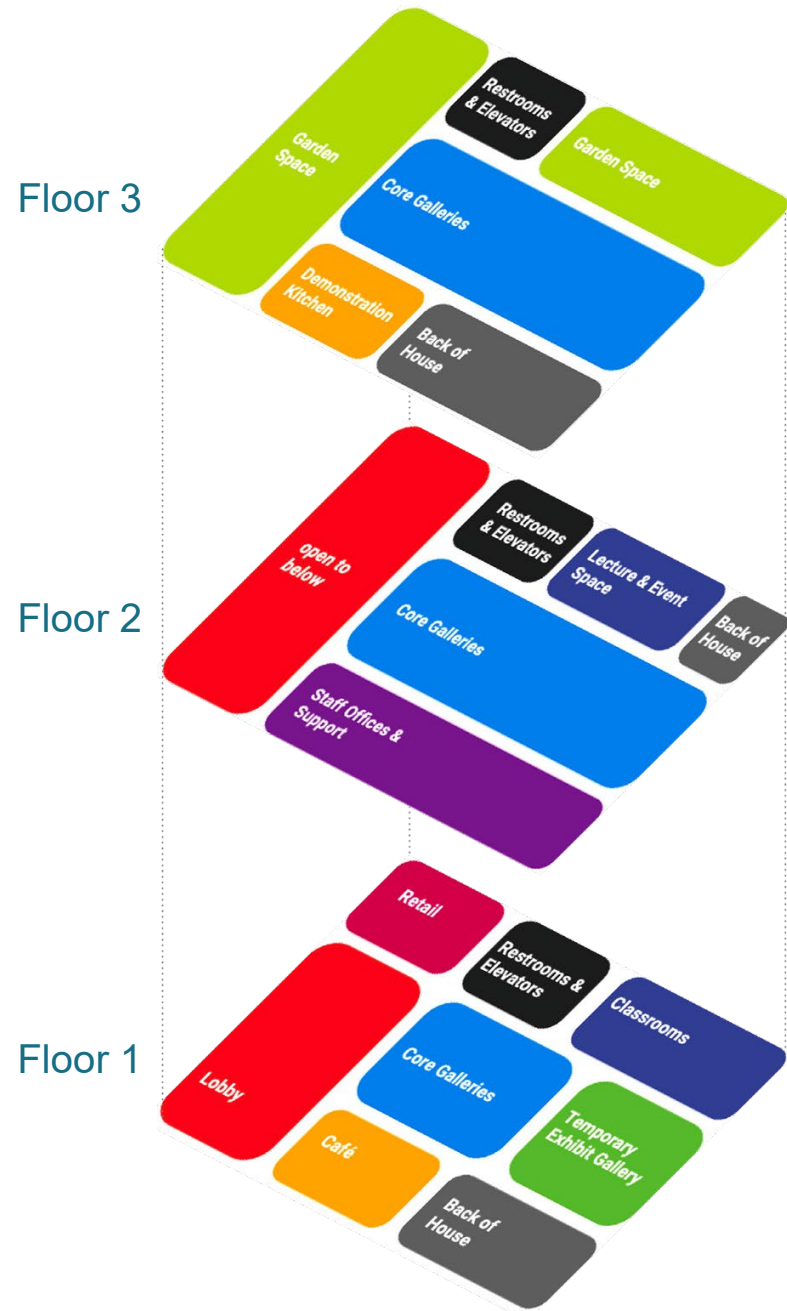
Dedicated classrooms and a demonstration kitchen

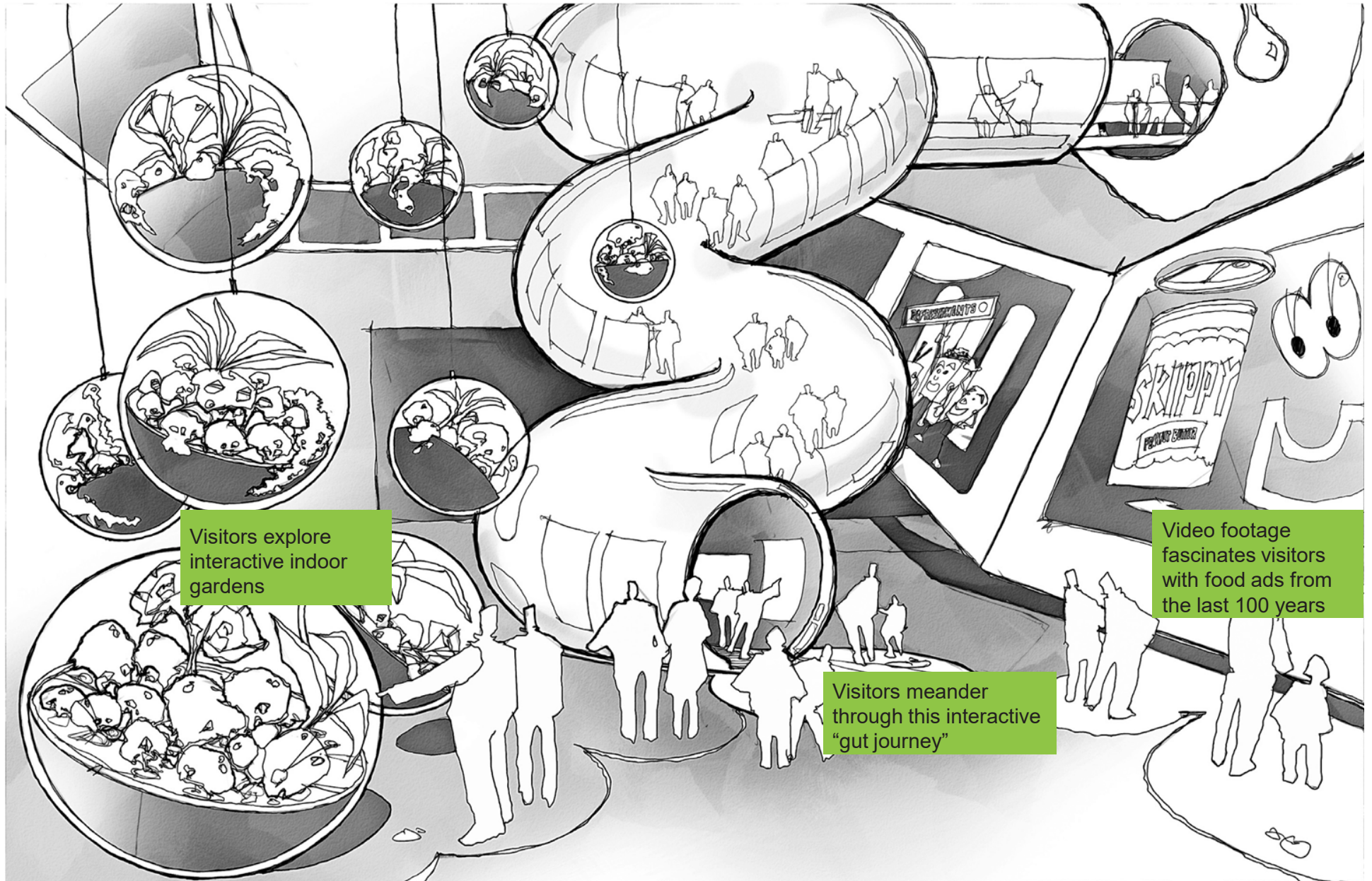
### CAFÉ AND RETAIL

The café will offer scrumptious meals and snacks. The store will feature cookbooks, kitchen gadgets, clothing, novels, and non-fiction books.

### GARDEN

Rooftop and indoor gardens encourage home gardens and a love of nature.





Visitors explore interactive indoor gardens

Video footage fascinates visitors with food ads from the last 100 years

Visitors meander through this interactive "gut journey"

# Programming

The Museum's public engagement events and online resources encourage critical thinking and a deeper understanding of food issues.

---

## Program Audiences

- Educators & School Groups
- Underserved & Underrepresented Communities
- Seniors
- Ethnic Communities
- High School & College-age Students
- Foodies

# Programs

# Audiences

## Learning Programs

Educational programs cater to various school grades and demographics.

- Youth and Teens
- Teachers
- Schools

## Family & Public Engagement

Speaker series, panel discussions, and cooking and gardening classes provide education and fulfillment.

- Families
- Public Leaders
- Ethnic Communities
- Food Enthusiasts
- BIPOC
- Seniors

## Special Events

Food festivals and cooking contests create visibility for the Museum and stronger ties to the local community.

- Families
- Ethnic Communities
- BIPOC
- Seniors
- Food Enthusiasts

## Outreach Programs

Educational activities reach deep into local communities and sometimes across the country.

- Youth and Teens
- Teachers
- Schools

## Virtual Resources

The website offers accessible educational content about culture, nutrition, and sustainability.

- Families
- Public Leaders
- Youth/Teens
- Food Enthusiasts
- Teachers

## Center for Research & Advocacy

The Museum's advocacy component helps shape policies and empower communities.

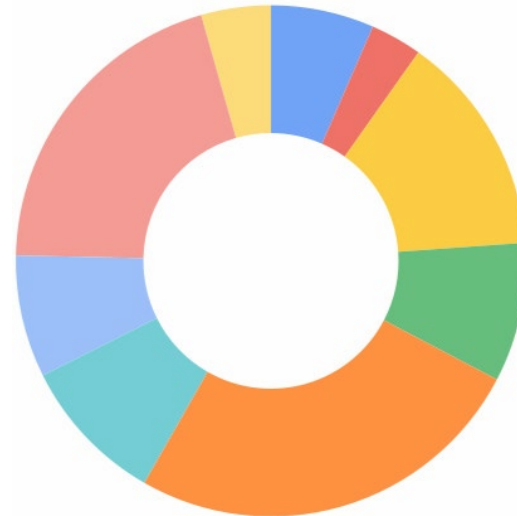
- Public Leaders
- Teachers
- Schools



# Operations & Business Model

## Annual Budget

The Museum will operate with a **\$5.6 million annual budget.**



- **EXECUTIVE 7%**  
\$401,000
- **ADMINISTRATIVE & OFFICE EXPENSES 4%**  
\$200,000
- **EDUCATION, RESEARCH & ADVOCACY 15%**  
\$860,000
- **CURATORIAL & EXHIBITIONS 10%**  
\$540,000
- **FINANCE & OPERATIONS 28%**  
\$1,564,000
- **FACILITY-RELATED 22%**  
\$1,238,000
- **DEVELOPMENT 8%**  
\$473,000
- **MARKETING & EXTERNAL AFFAIRS 10%**  
\$572,000
- **OTHER 5%**  
\$270,000





# Strategic Roadmap

## The Path Forward

Our strategic goals are a roadmap for bringing the organization, the facility, and our programming to life. Our challenges are to:

- Expand the Board of Directors
- Engage the Advisory Council
- Reach Our Phase II Fundraising Goal
- Develop a Virtual Museum or Traveling Exhibition
- Hire a Staff Leadership Team
- Search For and Secure a Site
- Initiate a Capital Campaign for the Phase III Goal
- Develop Content and a Roll-Out Strategy

## Board of Directors

**MICHAEL F. JACOBSON, PHD**

Museum Founder and Nutrition Activist

**ROBERTA BASKIN**

Nonprofit Director &  
Former Investigative Reporter

**DAN BUETTNER**

Award-winning Blue Zones author

**TOM GEGAX**

Nonprofit Leader, Former Businessman

**SUZANNE HESS**

Health Advocate

**PETER KAYE, MBA**

Food Industry Executive

**SARAH A. KLEIN, JD, MA**

Consumer/Food Safety Advocate

**TAMBRA RAYE STEVENSON, MPH, MA**

Founder/CEO, WANDA: Women Advancing  
Nutrition, Dietetics, and Agriculture

# Museum Advisory Council

Honorary Co-chairs: **DAN GLICKMAN & ANN VENEMAN**, Former U.S. Secretaries of Agriculture

**AMELIA CHO**

Student, McLean (VA) High School

**SHERYLL DURRANT**

Just Food, Board President

**RON ESTRADA**

CEO, Farmworker Justice

**JESSICA FANZO**

Professor of Climate; Director of  
the Food for Humanity Initiative,  
Columbia Climate School

**DAISY FREUND**

Vice President, Farm Animal  
Welfare – ASPCA

**JOHNELLA HOLMES**

Executive Director, Kansas Black  
Farmers Association

**JENNIFER JACQUET**

Professor of Environmental  
Science & Policy  
University of Miami

**A.G. KAWAMURA**

Produce farmer, former California  
Secretary of Agriculture

**ELLIE KRIEGER**

Cookbook author, *Washington Post*  
cooking columnist

**ART MOLELLA**

Curator Emeritus and Founding  
Director, Smithsonian's Lemelson  
Center

**BONNIE MOORE**

Executive Director, Real Food for Kids

**MICHAEL MOSS**

Author of *Hooked* and *Salt, Sugar, Fat*  
and former *New York Times* writer

**MARION NESTLE**

Professor of Nutrition, Food Studies, and  
Public Health, Emerita, New York University

**DANIELLE NIERENBERG**

President, Food Tank

**DEAN ORNISH**

Founder & President, Preventive Medicine  
Research Institute

**DAVID ORTEGA**

Professor of Food Economics & Policy,  
Michigan State University

**FABIO PARASECOLI**

Professor of Food Studies, New York University

**NORA POUILLON**

Chef, owner of the America's first certified-  
organic restaurant

**PAMELA RONALD**

Distinguished Professor of Plant Pathology  
and Genome Center, University of California,  
Davis

**RICARDO SALVADOR**

Former Director and Senior Scientist, Food &  
Environment Program, Union of Concerned  
Scientists

**ERIC SCHLOSSER**

Journalist; author of *Fast Food Nation*

**SEAN SHERMAN**

Founder, Sioux Chef; co-founder, NAIFS  
(North American Indigenous Food  
Systems) and the restaurant Owamni

**NAOMI STARKMAN**

Founder and editor-in-chief, Civil Eats

**ALICE WATERS**

Founder, Chez Panisse Restaurant and  
The Edible Schoolyard Project

**STEPHEN WHISNANT**

Philanthropic advisor

**WALTER WILLETT**

Professor of Epidemiology and Nutrition,  
Harvard School of Public Health

**PAUL WILLIS**

Co-Founder, Niman Ranch

**BILL YOSSES**

Former White House pastry chef



# Join Us!

## Together we can create a great Museum!

Your generous tax-deductible contribution will help turn the *idea* of the National Food Museum into a *reality*. Mail your donation to the address below or donate via our website. Thank you!

### **National Food Museum**

4401A Connecticut Avenue NW, #300  
Washington, DC 20008

[www.food.museum](http://www.food.museum)  
[info@food.museum](mailto:info@food.museum)



Food is culture, it is health, it is the environment, and it is community. The new Food Museum will celebrate the power of food to uplift, nourish, and inspire—and encourage us to come together to promote good health and protect our planet.”

**CHEF JOSÉ ANDRÉS**

Founder, World Central Kitchen  
and Food Systems Advocate

**NATIONAL  
FOOD  
MUSEUM**



# Exhibit 3



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# At last: FDA is updating the definition of a “healthy” food

November 7, 2022 / in Blog, Blogs, food, Featured Home - Food & Nutrition, Food, Food policy fda, food, food policy Blog Post



**By Nancy Glick, Director of Food and Nutrition Policy**

It is rare when new regulations from the Food and Drug Administration (FDA) warrant a song. But borrowing a phrase from Sam Cooke, FDA’s recent proposed rule changing the meaning of the term “healthy” has been a long time coming – 28 years to be exact. Yet, as the song goes “a change is gonna come.”

Why is this a good thing? Simply put, the term “healthy” is out-of-date, both with the state of nutrition science today and with the latest *Dietary Guidelines for Americans*, recommendations from experts on what to eat and drink to meet nutrient needs, promote health, and prevent disease.

Going back to 1994 when FDA’s old definition of “healthy” went into effect, the agency focused on individual nutrients in a food, not the actual foods we eat. Accordingly, foods now qualify as

## NCL in the News

Consumer Affairs : [Trump names Treasury Secretary Bessent to run consumer watchdog CFPB](#) – February 3, 2025

Consumer Affairs : [The Trump administration could roll back key consumer protections; advocates are monitoring](#) – January 28, 2024

WTOP: [DC Mayor Bowser signs off on child marriage ban](#) – January 25, 2025

MSN: [Looking for a new place in 2025? How to know if a rental listing is a scam, fraud experts say](#) – January 23, 2025



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covers about 5 percent of foods, including white bread, highly sweetened yogurt, and sugary cereals.

The problem is that many healthy foods do not qualify for the use of a “healthy” claim based on FDA’s outdated standards. This includes avocados, nuts, seeds, olive oil, and salmon because they are high in fats now known to be heart healthy. And right now, plain, non-carbonated water and plain, carbonated water cannot be labeled as “healthy,” which makes no sense.

These absurdities have been apparent to consumer organizations for decades, but the impetus for change was the introduction of the KIND bar in 2015. KIND advertised its bars as healthy because they contain whole foods like nuts and grains, but because the nuts have more fat than what FDA now allows for a “healthy” claim, the agency sent a warning letter about the use of the claim. When KIND responded with a Citizen Petition that documented the healthfulness of nuts, FDA permitted KIND to use the term “healthy” and issued a proposed rule change in 2016, signaling its intention to revise the definition.

New York Times :  
[F.D.A. Proposes  
New Food Labels  
to Detail Sugar,  
Fat and Salt  
Levels](#) – January  
14, 2024

Christianity Today:  
[Your Pastor Won’t  
Text You to Ask for  
Gift Cards](#) –  
January 9, 2025

National  
Consumer Law  
Center: [CFPB Rule  
Removes Medical  
Debts from Credit  
Reports](#) – January  
7, 2025

The Washington  
Informer: [Airbnb  
Hosts in D.C.  
Protest Trump’s  
Inauguration  
While Travelers  
Face Record Hotel  
Prices](#) – January 6,  
2025

Medical xPress:  
[Exploring options  
to keep costs in  
focus when buying  
new glasses](#) –



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patterns. This understanding is especially noteworthy because more than 80 percent of Americans consume too much added sugars, saturated fat and sodium but aren't eating enough vegetables, fruit and dairy, according to the *Dietary Guidelines for America, 2020-2025*.

Based on these developments, FDA's proposed rule will do away with counting individual nutrients in a food. Instead, FDA's plan is to define the term "healthy" on food packaging based on two criteria:

1. The product must contain a certain "meaningful amount" of food from at least one of the food groups recommended by the Dietary Guidelines, such as fruits, vegetables, or dairy; and
2. The food must stay within specified limits for certain ingredients, such as saturated fat, sodium and added sugar, based on a percent of the Daily Value (DV) of the nutrient. This includes a limit for sodium of 230 milligrams (mg) per day, or 10 percent of DV per serving – an important action by itself since Americans on average consume 50 percent more sodium per day than is recommended in the Dietary Guidelines.





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Applying these criteria, a cereal could only carry a “healthy” claim if contained  $\frac{3}{4}$  ounces of whole grains and no more than 1 gram of saturated fat, 230 milligrams of sodium and 2.5 grams of added sugars. This would disqualify almost all breakfast cereals now marketed to children.

To help make the new “healthy” claim meaningful for consumers, the FDA is also researching a symbol that food manufacturers can use on the front of the package. The symbol would act as a quick signal that the food contributes to a healthy dietary pattern and is part of a labeling system the National Consumers League has long supported.

FDA’s proposed rule addresses several of NCL’s food policy issues. For many years, we have been pressing for a new definition of the term “healthy” that aligns with the latest nutrition science and we support a “Traffic Light” symbol to depict “healthy” foods on the front of the package. We also have been at the forefront in pressing for ways to lower excess sodium in the diet.

But while we believe FDA’s plan is a significant step forward for consumers, there are still some shortcomings. Although the Dietary Guidelines



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products from being loaded with artificial colors and will have the unintended consequence of incentivizing food processors to replace natural sugar with questionable artificial sweeteners and sugar alcohols without disclosing these ingredients. Even as NCL has advocated for a modernized definition of the term “healthy,” we have been supporting a Citizen Petition to ensure transparent labeling of substitute sweeteners, which have surged in use by more than 300 percent in the last five years and can produce digestive effects. The Citizen Petition asks FDA to add the term “sweetener” in parentheses after the name of all non-nutritive sweeteners in the ingredient list, and for children’s food and beverages, to indicate the type and quantity of non-nutritive sweeteners, in milligrams per serving, on the front of food packages.

FDA published its proposed rule, *Food Labeling: Nutrient Content Claims; Definition of Term “Healthy,”* in the Federal Register on September 29, 2022, and is encouraging anyone interested in the topic to submit written comments by December 22. NCL plans to use this opportunity to ensure the consumer’s voice is heard and to offer solutions that will advance better food and beverage choices. We all have a stake in labeling



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Share this entry



## Our Programs



About NCL

About Us

Our Work

Where We Stand

Thought Leadership Media

National Consumers League



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2024	Food &	Consumer
Legal Work	Nutrition	Education
Careers	Workers	Workers
	Rights	Rights
	Consumer	Consumer
	Protection	Protection

# **Exhibit 4**



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## WHITE PAPER

July 2021

### Update: An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2019–2020)

Class action settlements in consumer fraud cases have generated significant controversy. Critics opine that these settlements primarily benefit lawyers, and that class members have often suffered little or no injury to begin with. These criticisms frequently turn to calls for legal reform. Our Jones Day *White Paper* published in April 2020, “[An Empirical Analysis of Federal Consumer Fraud Class Action Settlements \(2010–2018\)](#),” analyzed data showing that lawyers—not class members—frequently are the ones primarily benefitting from monetary settlement awards.

This *White Paper* updates our 2020 study with data drawn from 31 cases in which federal courts approved consumer class action settlements in 2019 and 2020. We analyzed data regarding class member participation rates and the allocation of monetary benefits among class members, class counsel, and other recipients—all in light of amendments made to Federal Rule of Civil Procedure 23. Those amendments went into effect in December 2018, after the settlements in our previous study were finalized. Based on the number of settlements approved in the two years since, there is sufficient data to meaningfully consider the 2018 amendments’ effects on consumer fraud class action settlements.

The new data show that: (i) typically only a small fraction of class members receive any monetary benefits from the settlements; (ii) after the amendments to Rule 23, some courts continue to approve class action settlements without key data about take rates; and (iii) in claims-made settlements, class members as a whole receive on average less than 30% of any monetary award.

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## EXECUTIVE SUMMARY

In our previous *White Paper*, we analyzed a set of 110 consumer fraud class action settlements approved by federal courts from 2010 to 2018.<sup>1</sup> Our analysis of the data yielded three main takeaways:

- **Typically only a small fraction of class members receive monetary benefits from the settlements;**
- **Some settlements did not redress class members' alleged economic harms in a meaningful way at all but awarded class counsel hundreds of thousands or millions of dollars in attorneys' fees; and**
- **On average, class members receive 30% or less of a monetary award.**

In that study, we noted that our dataset comprised settlements that were approved before new amendments to Federal Rule of Civil Procedure 23 were implemented on December 1, 2018. We observed that those amendments seek to improve class member participation rates (“claims rates” or “take rates”) by focusing on effective notice strategies, and attempt to improve class settlements by adding a list of factors for courts to consider before approval.<sup>2</sup> However, we also pointed out that the amendments did not address the underlying problem of lack of injury or interest in the suit among class members.

This *White Paper* seeks to assess whether the data from consumer fraud class action settlements from 2019–2020 meaningfully differ from the 2010–2018 settlements. The data reflects that they do not.

The data suggest that amendments to Rule 23 have not made a measurable difference in take rates or the allocation of settlement funds. Despite the Rule 23 amendments, courts continue to approve settlements with very low take rates and continue to permit significant payouts to plaintiffs' lawyers even when the class relief is miniscule—in one case, only \$3.92 per class member.<sup>3</sup>

Ultimately, while class actions do play a legitimate role in our legal system, the data suggests the need for reform in consumer fraud class actions. In particular, our analysis of the data from 2019–2020 consumer fraud class action settlements reflects that:

- **Typically only a small fraction of class members received monetary benefits from the settlements.** Across 20 settlements in which class members were required to submit claim forms, the average participation rate was 4.91% and the median participation rate was 3.90%, with only two cases having rates higher than 15%. That range is consistent with what we found in the 2010–2018 data, and it suggests that the claims of economic harm or loss continue to be overstated from the start, with the vast majority of consumers having little or no interest in participating in the settlements regardless of what benefits they stand to receive. Indeed, one of the lowest take rates we observed (0.10%) was in a case where class members could receive up to \$400.<sup>4</sup> Low take rates also may suggest that there are superior means of compensating genuinely dissatisfied consumers, such as through money-back guarantees or other customer satisfaction programs where consumers can receive a full refund of their purchase price rather than the more likely outcome of a delayed recovery of only a fraction of the price through a class action settlement.
- **Some courts continued to approve class action settlements without key data about take rates.** Key data, such as an estimated class size or claims rate, continues to be missing from many of the cases in our 2019–2020 dataset. That is so even though Rule 23 added criteria that district courts must consider before determining a settlement is “fair, reasonable, and adequate.”
- **On average, particularly in claims-made settlements, class members received less than 30% of any monetary award.** Across seven claims-made settlements (where the settlement award paid to class members was based on the number of claims submitted rather than a set fund) where the amount paid to class members is compared to the amount paid for attorneys' fees, expenses, or other non-class distributions, class members received on average only 23.89% of the settlement amount. Across 16 settlements of all types, more than half of the settlement on average went to attorneys or others who were not class members.

The first section of this report briefly discusses the previous *White Paper*, analyzing data from consumer fraud class action settlements from 2010 to 2018. Section two reviews the December 2018 amendments to Federal Rule of Civil Procedure 23. Section three presents our empirical findings regarding take rates and settlement award allocations, as well



as the implications of those findings for the 2019–2020 data. Section four presents potential areas for additional changes to Rule 23. Section five summarizes conclusions drawn from the data.

## THE JONES DAY 2010–2018 WHITE PAPER

Our first study analyzed eight years of consumer fraud class action settlements.<sup>5</sup> Our data came from 110 cases in which federal courts approved class settlements between 2010 and 2018.<sup>6</sup> Those settlements were finalized before the 2018 amendments to Rule 23 went into effect.<sup>7</sup>

Based on that dataset, a number of conclusions may be drawn about consumer fraud class action settlements. First, the data showed that only a small fraction of class members received monetary benefits from the settlements. “Across 40 settlements in which class members were required to submit claim forms, the average participation rate was 6.99% and the median participation rate was 3.40%, with only four cases having a rate higher than 15%.”<sup>8</sup> The low rates suggested that the severity or extent of economic harms may be overstated.

Second, the data showed that class counsel took away hundreds of thousands or millions of dollars even when settlements failed to redress class members’ alleged economic harms. In eight injunctive relief cases, for example, “class counsel received an average amount of \$491,717, while class members received no monetary relief.”<sup>9</sup>

Finally and relatedly, the data showed that the bulk of cash settlements went to paying attorneys’ fees, expenses, or *cy pres* awards rather than to class members. The dataset included 44 cases between 2010 and 2018 in which there was had sufficient information to compare the amount received by counsel with that paid to class members.<sup>10</sup> Although the average total amount paid to the class was approximately 1.7 times the average amount paid to class counsel, there were 16 cases in which the amount paid to class counsel exceeded that paid to class members.<sup>11</sup> Overall, across the 44 cases, “an average of 38.42% of the settlement award was paid to class members” and an “average of 33.20% of the settlement award was paid to class counsel.”<sup>12</sup> In other words, the data showed that class members received less than half of the settlement

awards in consumer fraud class action settlements during the years under review.

## DECEMBER 2018 AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 23

Our previous study was based on settlements finalized before December 1, 2018. On December 1, 2018, amendments to Federal Rule of Civil Procedure 23 went into effect.<sup>13</sup> Those amendments, while important, have been characterized by some as “modest.”<sup>14</sup> In this section, we explain those changes. We limit this discussion to the changes to Rule 23(e) and Rule 23(c), because we identified those changes as most likely to affect the trends observed in the data on 2010–2018 consumer fraud class action settlements: low take rates and a settlement allocation skewed toward plaintiffs’ lawyers rather than class members.

First, before 2018, Rule 23 did not provide district courts with a process for deciding motions for preliminary approval of class action settlements.<sup>15</sup> District courts’ treatment of preliminary approval therefore varied,<sup>16</sup> and some described this level of review as “just enough to ensure that sending notice to the class is not a complete waste of time.”<sup>17</sup> As a result of the lack of guidance at this stage, courts “rarely denied” preliminary approval.<sup>18</sup>

The amendments to Rule 23(e) now require that, before directing notice, the court must conclude “that the prospect of class certification and approval of the proposed settlement justifies giving notice.”<sup>19</sup> The Rule requires the parties to submit a “solid record,” and the Advisory Committee’s commentary suggests that parties should submit “all available materials they intend to submit to support approval under Rule 23(e)(2).”<sup>20</sup> The commentary provides a non-exhaustive list of such materials, which should include the anticipated claims rate, the claims process, and a plan for distributing unclaimed funds (for example, *cy pres* or pro rata redistribution).<sup>21</sup> Further, the parties should address how attorneys’ fees will be handled, and the commentary stresses that “it will be important to relate the amount of an award of attorneys’ fees to the expected benefits to the class.”<sup>22</sup> The commentary suggests—but the Rule does not require—“defer[ring] some or all of the award of attorney’s fees until the court is advised of the actual claims rate and results.”<sup>23</sup>

Second, before 2018, Rule 23(e)(2) required only that a proposed class action settlement be “fair, reasonable, and adequate” without providing additional factors for that evaluation.<sup>24</sup> As a result, the courts of appeals developed “an intricate jurisprudence on their own.”<sup>25</sup> The changes to Rule 23(e) largely codified that jurisprudence, and so are “unlikely to generate a significant change in the settlement process or outcome.”<sup>26</sup> The Rule now requires a focus on “core concerns” for approval, including the effectiveness of distributing relief and the timing of payment of an attorneys’ fee award.<sup>27</sup> As noted, however, the amendments do not require that the parties present data on the claims rate to the court before it determines the fee award.

Finally, after the Supreme Court decided *Eisen v. Carlisle & Jacquelin* in 1974 and signaled a preference for mailed notice to members of 23(b)(3) settlement classes, “many courts . . . read [Rule 23(c)] to require notice by first class mail in every case.”<sup>28</sup> Amended Rule 23(c)(2) now requires district courts to consider “appropriate” notice, not only “best practicable” notice, and the Rule now authorizes class notice to be made by “electronic means.”<sup>29</sup> However, the focus remains on “the means or combination of means most likely to be effective,” and the Advisory Committee notes that in some cases, “a significant portion of class members . . . may have limited or no access to email or the Internet.”<sup>30</sup> Indeed, a 2019 Federal Trade Commission (“FTC”) study suggests that email may be less effective at notifying class members, due to recipient skepticism.<sup>31</sup>

In sum, these changes largely codify tests or criteria that federal courts had already developed on their own. Below, we assess whether these changes to the rules had an impact on the trends observed in our previous *White Paper* by analyzing consumer fraud class action settlements finalized over the last two years.

## FINDINGS AND ANALYSIS: 2019–2020 CONSUMER FRAUD CLASS ACTION SETTLEMENTS

As in our previous study, we reviewed consumer fraud class action settlements in which class members allege only economic loss due to alleged misrepresentations or false advertising.<sup>32</sup> We analyzed: (i) the take rates and (ii) the settlement allocations, to the extent that the cases we collected included sufficient information about those points. For each of these

analyses, we also provide the data drawn from the full 2010–2020 dataset.

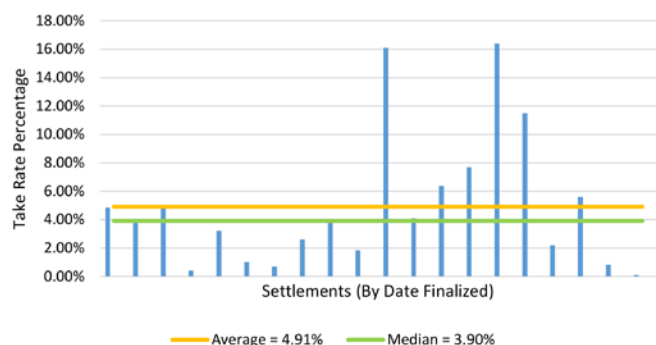
Notably, despite Rule 23’s new preliminary approval procedures and analysis of the “core factors” for approval, it is still frequently the case that basic information about class size, take rates, and relief to the settlement class is missing from public dockets. Thus, there were some cases upon which we could rely in our claims rate analysis but not in our allocation analysis, and others that enabled an assessment of the relative allocations between class members and class counsel while not providing sufficient detail to estimate the take rates in those cases.<sup>33</sup>

### Take Rate Analysis

We found 20 consumer fraud class action settlements for which there was sufficient data to assess the participation rate of class members. We excluded cases in which the class size was undisclosed or only vaguely estimated (such as: “potentially millions”).<sup>34</sup> For this preliminary review, we used the take rate for valid claims where that data was available.

Across those 20 cases, the majority featured take rates below 10%. Despite robust notice campaigns by class administrators, the vast majority of class members continued to decline to participate in settlements. **The average take rate was 4.91%, and the median take rate was 3.90%. Only three settlements had a rate higher than 10%, and only two had a rate higher than 15%.**<sup>35</sup> Figure 1 presents this data.

**Figure 1: Take Rates Across All 20 Settlements, 2019–2020**



Additionally, when combined with our 2010–2018 data to analyze the entire 2010–2020 dataset, the average take rate was only 6.30%, and the median was 3.74%.

**Table 1: Take Rates Across All Settlements, 2010–2020**

	TAKE RATE
Average	6.30%
Median	3.74%
Minimum	0.01%
Maximum	48.99%

And when we removed three outliers<sup>36</sup> from the dataset, the average and median of our 2010–2020 dataset were even lower, 4.55% and 3.22% respectively.

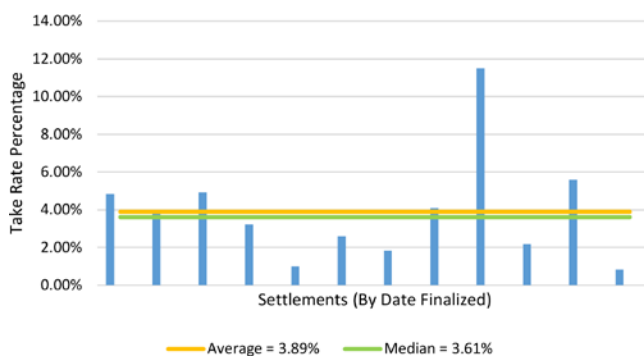
**Table 2: Take Rates Across All Settlement Excluding Three Outliers, 2010–2020**

	TAKE RATE
Average	4.55%
Median	3.22%
Minimum	0.01%
Maximum	25.53%

**General Public Notice Settlements: 2019–2020.** Twelve of the 20 take-rate cases involved general public notice. Class members in those cases received notice of the settlement by general publication in magazines, newspapers, and internet advertisements rather than by direct mail or email. This general public notice subcategory also included cases in which the defendants sent direct notice to some members, as long as the percentage of class members receiving direct notice was less than 50% of the entire estimated class.

Across the general public notice cases, take rates ranged from 0.83% to 11.50%. The average was 3.89%, and the median was 3.61%. These percentages are presented in Figure 2.

**Figure 2: Take Rates Across General Public Notice Settlements, 2019–2020**



**General Public Notice Settlements: 2010–2020.** When combined with our 2010–2018 data to analyze the entire 2010–2020 dataset, the percentages were similar. The average take rate was only 4.27%, and the median was 2.80%.

**Table 3: Take Rates Across General Public Notice Settlements, 2010–2020**

	TAKE RATE
Average	4.27%
Median	2.80%
Minimum	0.01%
Maximum	32.45%

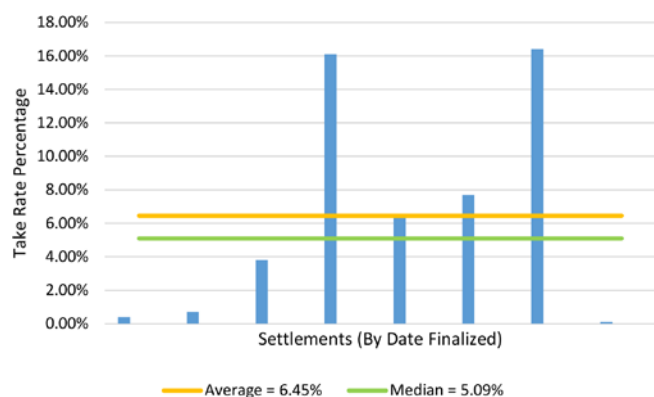
When we excluded one outlier,<sup>37</sup> the take rates were even lower: The average take rate was only 3.30%, and the median was 2.60%.

**Table 4: Take Rates Across General Public Notice Settlements Excluding One Outlier, 2010–2020**

	TAKE RATE
Average	3.30%
Median	2.60%
Minimum	0.01%
Maximum	11.50%

**Direct Notice Settlements: 2019–2020.** Our dataset included eight cases in which at least 50% of the estimated settlement class members received direct notice of the settlement, by mail or email. The average take rate was 6.45%, and the median take rate was 5.09%. These percentages are presented in Figure 3.

**Figure 3: Take Rates Across Direct Notice Settlements, 2019–2020**



**Direct Notice Settlements: 2010–2020.** When combined with our 2010–2018 data to analyze the entire 2010–2020 dataset for direct notice settlements, the average take rate was 8.32%, and the median take rate was 4.45%.

**Table 5: Take Rates Across Direct Notice Settlements, 2010–2020**

	TAKE RATE
Average	8.32%
Median	4.45%
Minimum	0.10%
Maximum	48.99%

But when we removed two outliers,<sup>38</sup> the take rates for direct settlements across the 2010–2020 dataset were only slightly higher than the general public notice settlements, with an average 5.85% take rate.

**Table 6: Take Rates Across Direct Notice Settlements Excluding Two Outliers, 2010–2020**

	TAKE RATE
Average	5.85%
Median	4.04%
Minimum	0.10%
Maximum	25.53%

**Claims Rates Analysis Takeaways.** As in our previous study, our data from consumer fraud class action settlements in 2019 and 2020 suggest that settlement awards reach only a small share of class members. The vast majority of class members receive no benefits from settlements.

The low take rate persists even when Direct Notice is given to a majority of potential class members. Although slightly higher than in general public notice cases, the average take rate for direct notice settlements was still just 6.5% across the eight cases in our 2019–2020 dataset.

In our 2010–2018 report, we proposed several possible explanations for the low take rates in consumer fraud class actions. Those proposals continue to appear valid based on the 2019–2020 data.<sup>39</sup> First, many class members may not

consider themselves to have been injured by the alleged fraud. It is possible—perhaps even likely—that most potential class members did not base their purchasing decisions on the misrepresentations alleged in the class actions, and that they therefore do not feel aggrieved enough to participate in the class. That would explain why, as the FTC recently observed, in consumer class actions, “[t]here does not appear to be a statistically significant relationship between median compensation and claims rates.”<sup>40</sup> Indeed, even in a case where some settlement members who had incurred out-of-pocket expenses for repairs to their truck doors were eligible for a \$400 award, the take rate was only 0.10%.<sup>41</sup>

Second, perhaps potential class members are simply uninterested in participating in settlements that promise only miniscule awards. When potential awards are as low as \$0.60 per product purchased (as was the case in *Pettit v. Procter & Gamble Company*),<sup>42</sup> the opportunity costs of participating may be too high. Where potential class members must locate proof of purchase, even where proof (such as receipts) may be available, the time required to locate that proof of purchase may be seen as far outweighing the sometimes-paltry awards. What is more, some manufacturers may already offer a money-back guarantee program, providing a full refund to dissatisfied customers. Many consumers may see this as a superior means of addressing their concerns, as they prefer to receive a refund by contacting the manufacturer directly rather than participate in a class action where relief may be delayed or less than a full refund.<sup>43</sup>

Finally, it is possible that existing class notice methods could be improved upon. The FTC reports that “[t]here are marked difference in the claims rates across notice methods,” with regular mail notice resulting in “a median claims rate of 16%” and email notice resulting in a median claims rate of just 3%.<sup>44</sup> It is entirely possible that a majority of class members are simply unaware of ongoing class action settlements in which they could participate.

Whatever the reason, take rates remained low in 2019 and 2020. As a result, relatively few potential class members received any compensation from settlement awards. If class relief is the main objective of consumer fraud cases, class actions are apparently an inefficient tool for obtaining that relief.

### Settlement Allocation Analysis

Our analysis of settlement allocations yields a similar conclusion. The data establishes that the entire class receives, on average, less than half of a settlement award. The majority—and in some cases the vast majority—of settlement awards are used to pay for attorneys’ fees, litigation costs, and other administrative expenses. As in our previous study, we examined how consumer fraud class action settlements allocated money, especially between class members and class counsel.<sup>45</sup>

#### Range of Amounts Paid to the Class Members and Class Counsel: 2019–2020.

Our dataset included 16 settlements in which we had sufficient information to compare the amounts allocated to the settlement class and class counsel in attorneys’ fees and expenses. The calculations for all 16 cases are presented in Table 7.<sup>46</sup>

**Table 7: Comparison of Settlement Amount Paid to Settlement Class and Class Counsel, 2019–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$1,802,891.03	\$1,984,645.72
Median	\$1,221,758.80	\$1,268,039.06
Lowest Value	\$164,060.00	\$386,321.56
Highest Value	\$7,867,518.00	\$7,065,940.93

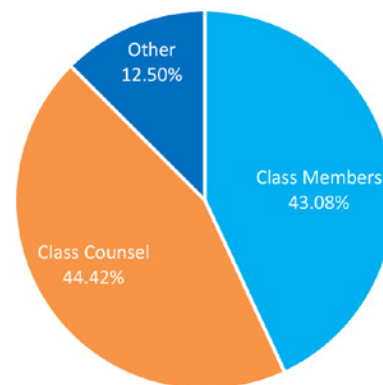
The amount paid to class counsel exceeded that paid to the settlement class in nine of 16 cases, a fact that is also reflected in the relative averages above. The average amount paid to class counsel was approximately 10% higher than the amount paid to the class.

Our dataset included a range of cases with sometimes wildly different amounts allocated between class members and class counsel. For example, in *Brickman v. Fitbit* (a case in which the defendant allegedly misrepresented the ability of Fitbit watches to accurately track users’ sleep), class counsel received \$7,065,940.93 in attorneys’ fees and litigation costs while only \$1,768,625 was allocated to the settlement class.<sup>47</sup> In other words, class counsel received almost four times as much as class members in that case.

Across our cases, an average of 43.08% of the settlement award was paid to class members (see Figure 4), and the median amount was 46.51%. An average of 44.42% of the settlement award was paid to class counsel (see Figure 4), and the median amount was 38.03%.

Our dataset included seven cases in which the amounts awarded to class counsel exceeded 35% of the total settlement award.

**Figure 4: Average Percentages Paid to Class Members and Class Counsel Overall, 2019–2020<sup>48</sup>**



#### Range of Amounts Paid to the Class Members and Class Counsel: 2010–2020.

When combined with our 2010–2018 data to analyze the entire 2010–2020 dataset for all cases, the amount paid to the class was slightly higher than the amount paid to class counsel. However, when we removed one outlier,<sup>49</sup> the average amount paid to class counsel was almost as high as the amount paid to the class.

**Table 8: Allocation Analysis Across All Cases, 2010–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$2,966,358.93	\$1,963,024.25
Median	\$1,004,256.61	\$990,837.22
Lowest Value	\$11,913.00	\$54,194.00
Highest Value	\$68,000,000.00	\$10,200,000.00

**Table 9: Allocation Analysis Across All Cases Excluding One Outlier, 2010–2020**

	AMOUNTS PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$1,864,093.82	\$1,823,414.49
Median	\$937,718.21	\$982,500.00
Lowest Value	\$11,913.00	\$54,194.00
Highest Value	\$16,739,712.00	\$10,000,000.00

**Settlement Allocation in Claims-Made Settlements: 2019–2010.** Within the 16 cases in our settlement allocation dataset, seven settlements were “claims-made” settlements. In these cases, the amount paid to class members was based on the number of valid claims submitted by class members. Our calculations for these settlements are presented in Table 10.

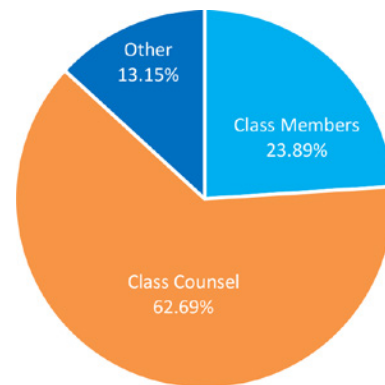
**Table 10: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel in Claims-Made Settlements, 2019–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$1,024,606.05	\$2,895,674.76
Median	\$537,879.00	\$3,221,468.26
Lowest Value	\$164,060.00	\$3,415,761.91
Highest Value	\$2,472,940.07	\$7,065,940.93

The average, median, lowest, and highest values paid to class counsel far exceeded that paid to the class in claims-made settlements. The average amount paid to class counsel was approximately 2.8 times that paid to class members in these cases.

In claims-made settlements, the average amount paid to class counsel was 62.96% of the total settlement award (the median was 63.90%), and the average amount paid to class members was 23.89% (the median was 18.84%). Figure 5 presents this comparison.

**Figure 5: Average Percentage Paid to Class Members and Class Counsel in Claims-Made Cases, 2019–2020<sup>50</sup>**



**Settlement Allocation in Claims-Made Settlements: 2010–2020.** When combined with our 2010–2018 data to analyze the entire 2010–2020 dataset for all claims-made cases, the average amount paid to class counsel was more than \$1,000,000 higher than the amount paid to the class.

**Table 11: Allocation Analysis Across Claims-Made Settlements, 2010–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$1,406,990.48	\$2,512,593.52
Median	\$522,387.66	\$1,500,000.00
Lowest Value	\$11,913.00	\$54,194.00
Highest Value	\$9,202,862.67	\$7,065,940.93

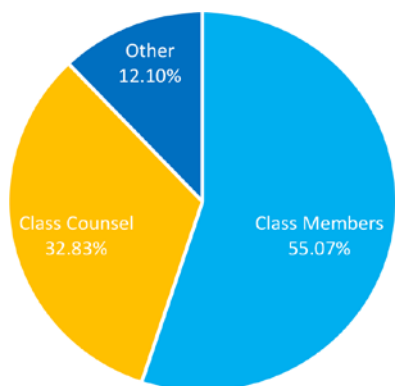
**Settlement Allocations in Non-Reversionary Fund Settlements: 2019–2020.** The remaining nine settlements in our dataset featured “non-reversionary funds.” The settlements in these cases established set funds from which the class members—and occasionally attorneys’ fees, expenses, and settlement administration costs—are paid. Any funds remaining after the initial payouts to class members would either be directed to *cy pres* recipients or be reallocated among class members that submitted valid claims. Our calculations for the nine non-reversionary fund cases are presented in Table 12.

**Table 12: Comparison of Settlement Amounts Paid to Settlement Class and Class Counsel in Non-Reversionary Fund Settlements, 2019–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$2,408,223.78	\$1,276,067.58
Median	\$1,300,000.00	\$808,821.15
Lowest Value	\$490,420.00	\$386,321.56
Highest Value	\$7,867,518.00	\$4,149,585.00

The average percentage of the total settlement award paid to the settlement class was 55.07% (the median was 57.79%), and the average percentage paid in attorneys’ fees and expenses was 32.83% (the median was 32.68%). Figure 6 presents this comparison.

**Figure 6: Average Percentage Paid to Class Members and Class Counsel in Non-Reversionary Settlement Fund Cases, 2019–2020<sup>51</sup>**



**Settlement Allocations in Non-Reversionary Fund Settlements: 2010–2020.** When combined with our 2010–2018 data to analyze the entire 2010–2020 dataset for non-reversionary fund settlements, the average amount paid to the settlement class was higher than class counsel. However, that gap shrank when we removed one outlier.<sup>52</sup> From 2010–2020, excluding one outlier, the amount paid to the entire class was only slightly higher than the amount paid to class counsel.

**Table 13: Allocation Analysis Across Non-Reversionary Fund Settlements, 2010–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$3,582,853.43	\$1,745,752.68
Median	\$1,143,517.60	\$950,000.00
Lowest Value	\$24,682.00	\$69,563.46
Highest Value	\$68,000,000.00	\$10,200,000.00

**Table 14: Allocation Analysis Across Non-Reversionary Fund Settlements Excluding One Outlier, 2010–2020**

	AMOUNT PAID TO SETTLEMENT CLASS	AMOUNT PAID TO CLASS COUNSEL
Average	\$2,049,111.84	\$1,544,461.07
Median	\$1,109,363.37	\$936,000.00
Lowest Value	\$24,682.00	\$69,563.46
Highest Value	\$16,739,712.00	\$10,000,000.00

**Settlement Award Allocation Analysis Takeaways.** Across the dataset of cases from 2019 to 2020 for which we had sufficient information to compare the amounts allocated to the settlement class to those allocated to other costs including attorneys’ fees, class members received on average less than half of total settlement amounts. Even in non-reversionary fund settlements—in which we would expect a greater amount of settlement funds to be allocated to class members—just 55.07% of settlement funds (on average) was paid to the class. In claims-made settlements, almost two thirds of the average settlement went to attorneys’ fees and litigation costs.

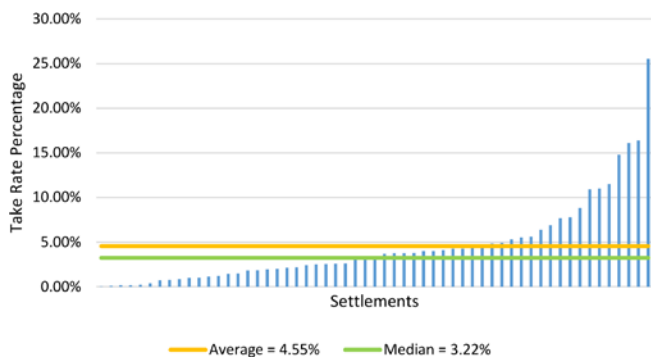
As in the previous study, the data demonstrate that the lion’s share of consumer fraud class action awards do not go to class members. As with the take rate analysis, this fact suggests that class actions are an inefficient tool for redressing alleged consumer fraud.

**Key Takeaways: The Decade in Review**

Across 10 years of class action settlements, our analysis yields a clear finding: Consumer fraud class actions frequently yield relatively little for a small percentage of the settlement class but promise substantial awards for the lawyers who take on those cases. When we merged the data from 2019 and 2020 with that from 2010–2018, our analyses produced similar results.

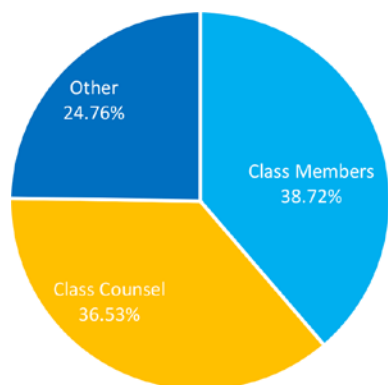
In an aggregate 57 cases for which we had data about class participation,<sup>53</sup> the average take rate was 4.55%, and the median was 3.22%. Eleven settlements had take rates at or below 1%, and 42—the vast majority of settlements—had take rates below 5%.

**Figure 7: Take Rates, 2010–2020**



Likewise, across 59 cases,<sup>54</sup> the data reflects that class members received an average of \$1,864,093.82 (with a median of \$937,718.21) and class counsel received \$1,823,414.49 (with a median of \$982,500.00). Class counsel received an average of 36.53% of settlement awards across over the last decade—more than a third of the average award.<sup>55</sup>

**Figure 8: Settlement Allocations, 2010–2020**



**POSSIBLE AREAS FOR FUTURE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE**

As our analysis confirms, the 2018 amendments to the Federal Rules of Civil Procedure are an important start but largely codified what many federal courts were already doing or merely acknowledged the realities of technology’s effect on notice. As reflected in the data on 2019–2020 settlements, it appears the amendments have had little effect on the trends observed in 2010–2018. As one district court put it, the “changes are mostly form over substance.”<sup>56</sup>

There are additional possible changes that could have a significant impact on the trends observed from 2010–2020, including the low take rates and the allocation of relief to the class as compared to the attorneys’ fee award.

First, in light of low take rates for consumer fraud class action settlements, the Rules could provide further guidance for how courts determine “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy” in cases of consumer complaints or dissatisfaction with a product.<sup>57</sup> In particular, if a defendant offers a money-back guarantee for customer satisfaction, that program may offer more meaningful relief to potential class members than protracted litigation where class members likely stand to recover some fraction of the price they paid for the product or services.<sup>58</sup>

Second, the Advisory Committee’s suggestion that the attorneys’ fee award cannot be determined until all class data is submitted could be made part of Rule 23(e)(2)’s criteria, rather than a suggestion for implementing Rule 23(e)(2)(C)(iii). Some courts are already using this approach.<sup>59</sup> Additionally, approval of class relief should be untethered from approval of attorneys’ fees, to ensure that appeals of attorneys’ fee awards do not jeopardize or delay relief for the class members. Again, provisions like this one are already included in many class action settlements. Including these two procedural mechanisms in the Rule will benefit consumers and ensure uniformity.



Third, the Rules could also provide more specific guidance for *how* courts should calculate attorneys' fee awards. Currently, the Rules do not impose any "rigid limits ... for such awards."<sup>60</sup> Additional changes to the Rules could provide criteria linking attorneys' fee awards to the overall claims rates, for instance, or guidelines for an allocation of settlement funds that would avoid some of the extreme examples observed in the data. Any evaluation of the potential efficacy of such proposals is beyond the scope of this paper; however, the trends observed show that consumer fraud class action settlements merit further study and review.

## CONCLUSION

The findings in this study align with the view of many that consumer fraud class action settlements often do not provide meaningful relief to consumers and instead primarily benefit class counsel. While it is generally true that the average percentage of settlement awards paid to the class exceeds the average percentage paid to class counsel, that is not always the case, and typically only a small fraction of class members actually receive monetary relief due to low take rates.

Although the 2018 amendments to Federal Rule of Civil Procedure 23 are designed to increase take rates and improve transparency in the settlement process, the 2019–2020 data does not reflect significant changes post-amendment. That accords with the observation that low take rates may actually reflect that the claims of economic harm were overstated to begin with, or that some companies already make full refunds available to dissatisfied customers. This may be why consumers have little interest in participating in settlements regardless of the benefits they stand to receive.

## LAWYER CONTACTS

### **Darren K. Cottriel**

Irvine

+1.949.553.7548

[dcottriel@jonesday.com](mailto:dcottriel@jonesday.com)

### **Robert N. Stander**

Washington

+1.202.879.7628

[rstander@jonesday.com](mailto:rstander@jonesday.com)

### **Craig E. Stewart**

San Francisco

+1.415.875.5714

[cestewart@jonesday.com](mailto:cestewart@jonesday.com)

*Amelia A. DeGory and Justin D. Rattey, associates in the Washington Office, contributed to this White Paper.*

## APPENDIX A: METHODOLOGY

In building our dataset, we replicated many of the collection procedures we used for our previous study. Our objective was to collect consumer fraud or false advertising cases in which a class action settlement was approved by a federal court in 2019 and 2020. We utilized two strategies to select our pool of settlements:

1. **We reviewed issues of the *BNA Class Action Litigation Reporter*, the *Mealey's Class Action Litigation Reporter*, and the *Westlaw Journal Class Action Litigation Reporter* from 2019 and 2020 to identify settlements approved by a federal court during the past two years.** These reporters allowed us to skim the descriptions of settlements receiving final approval to determine whether we could include them.
2. **We ran term searches on Bloomberg, Westlaw, Lexis, and Docket Alarm.** Our searches included various combinations of search terms such as: false advertising, consumer fraud, settlement, class action, final approval, preliminary approval, deceptive, unfair, and misrepresentation.

Through these two research approaches, we collected a total of 31 cases.

In empirically analyzing the 31 cases, we used the public case dockets available on Docket Alarm and Westlaw to examine case filings and court orders. In particular, we looked to the complaints, the parties' motions for preliminary and final settlement approval, court orders granting preliminary and final settlement approval, settlement administrator declarations, motions for attorneys' fees and costs, and orders granting motions for attorneys' fees and costs. Often, exhibits to these documents included the settlement agreements themselves, as well as Class Action Fairness Act notices (some of which contained the estimated settlement class sizes). We collected the following information for each case, to the extent it was available:

- Date filed
- Case number
- Jurisdiction
- Defendant(s)
- Whether the settlement class was a national or state class
- Description of consumer fraud claims
- Products or services involved
- Total monetary relief under settlement
- Non-monetary or injunctive relief under settlement
- Whether there were any coupon payments
- Whether there were any charitable contributions up front (rather than *cy pres*)
- Whether the settlement involved a non-reversionary settlement fund or was based on claims made by class members
- Date of preliminary approval
- Date of final approval
- Estimated settlement class size
- Whether relief was automatic or required claim form submissions
- Number of claims submitted
- Claims rate
- Amount paid or available to each class member
- Total amount allocated to the class
- Total amount and percentage of the settlement actually paid to the class
- Total amount and percentage of the settlement paid to *cy pres*
- Total amount and percentage of the settlement paid to class counsel
- Total amount and percentage of the settlement paid to settlement administration costs
- Where the court records lacked information
- Whether the settlement involved general public notice or direct notice to class members

Because our data was based on the information available in public court records, it was limited in scope. First, not every case docket contained all the information we sought. As a result, we could not use all 31 cases to analyze both take rates and settlement award allocations. We found that 20 case dockets provided information sufficient to calculate take rates, and 16 case dockets provided information sufficient to calculate settlement award allocations.

Further, the dockets often did not contain the most updated information. For example, if the most recent claims rate information available was a settlement administrator's declaration accompanying a Motion for Final Settlement Approval, and the settlement administrator had not yet determined which of the claims received were valid and nonduplicative, then the claims rate for that particular case likely was lower than reflected in the declaration and in this report. Additionally, even if court records specified the cash amount to class members, they rarely indicated how many class members actually received and cashed their settlement checks once the checks were distributed. Therefore, the settlement award percentages paid to class members may be lower than reported here.

## APPENDIX B: LIST OF CASES IN 2019–2020 DATASET

CASE NAME	CASE NUMBER	JURISDICTION	DATE OF FINAL APPROVAL	INCLUDED IN TAKE RATE ANALYSIS	INCLUDED IN SETTLEMENT ALLOCATION ANALYSIS	INCLUDED IN NEITHER
<i>Pettit v. Procter &amp; Gamble Company</i>	3:15-cv-02150	N.D. Cal.	3/29/2019	X	X	
<i>Jackie Fitzhenry-Russell et al. v. Keurig Dr. Pepper Inc.</i>	5:17-cv-00564	N.D. Cal.	4/10/2019	X	X	
<i>Lori Cowen et al. v. Lenny &amp; Larry's, Inc.</i>	1:17-cv-01530	N.D. Ill.	5/2/2019		X	
<i>Mednick v. Precor, Inc.</i>	1:14-cv-03624	N.D. Ill.	6/12/2019			X
<i>Littlejohn v. Ferrara Candy Co.</i>	3:18-cv-00658	S.D. Cal.	6/17/2019			X
<i>Dashnaw et al. v. New Balance Athletics, Inc. et al.</i>	3:17-cv-00159	S.D. Cal.	7/29/2019	X	X	
<i>McKnight v. Uber Techs., Inc.</i>	3:14-cv-05615	N.D. Cal.	8/13/2019	X		
<i>Grant McKee v. Audible, Inc. et al.</i>	2:17-cv-01941	C.D. Cal.	8/16/2019			X
<i>Jackie Fitzhenry-Russell v. The Coca-Cola Company</i>	5:17-cv-00603	N.D. Cal.	10/3/2019	X	X	
<i>Bayol v. Health-Ade LLC</i>	3:18-cv-01462	N.D. Cal.	10/11/2019	X		
<i>Woodard et al. v. Labrada et al.</i>	5:16-cv-00189	C.D. Cal.	10/17/2019		X	
<i>Miller v. O'Reilly Automotive, Inc.</i>	4:18-cv-00687	W.D. Mo.	12/16/2019	X		
<i>Carter v. Gen. Nutrition Ctrs., Inc.</i>	2:16-cv-00633	W.D. Pa.	12/19/2019	X		
<i>Hunter v. Nature's Way Prods.</i>	3:16-cv-532	S.D. Cal.	1/6/2020			X
<i>Shin v. Plantronics, Inc.</i>	5:18-cv-05626	N.D. Cal.	1/31/2020	X		
<i>Theodore Broomfield, et al. v. Craft Brew Alliance, Inc.</i>	5:17-cv-01027	N.D. Cal.	2/5/2020	X	X	
<i>Miller et al. v. Wise Company, Inc.</i>	5:17-cv-00616	C.D. Cal.	2/20/2020	X	X	
<i>Dickey v. Advanced Micro Devices, Inc.</i>	4:15-cv-04922	N.D. Cal.	2/21/2020	X		
<i>Rodriguez v. It's Just Lunch Int'l</i>	1:07-cv-09227	S.D.N.Y.	3/2/2020	X		
<i>Brickman v. Fitbit, Inc.</i>	3:15-cv-2077	N.D. Cal.	3/20/2020	X	X	

continued on next page

CASE NAME	CASE NUMBER	JURISDICTION	DATE OF FINAL APPROVAL	INCLUDED IN TAKE RATE ANALYSIS	INCLUDED IN SETTLEMENT ALLOCATION ANALYSIS	INCLUDED IN NEITHER
<i>Wolf v. Hewlett Packard Co.</i>	5:15-cv-01221	C.D. Cal.	3/29/2020	X	X	
<i>Megan Schmitt v. Younique LLC et al.</i>	8:17-cv-01397	C.D. Cal.	4/9/2020	X	X	
<i>Crane v. Sexy Hair Concepts, LLC</i>	1:17-cv-10300	D. Mass.	5/14/2020	X	X	
<i>Cicciarella, et al. v. Califia Farms LLC</i>	7:19-cv-08785	S.D.N.Y.	7/9/2020			X
<i>Belfiore v. Procter &amp; Gamble Company</i>	2:14-cv-04090	E.D.N.Y.	7/27/2020			X
<i>Hilsley v. Ocean Spray Cranberries, Inc.</i>	3:17-cv-2335	S.D. Cal.	8/3/2020		X	
<i>Hart v. BHH, LLC</i>	1:15-cv-04804	S.D.N.Y.	9/22/2020		X	
<i>Ang et al. v. Bimbo Bakeries USA, Inc.</i>	4:13-cv-01196	N.D. Cal.	9/29/2020			
<i>Clay v. Cytosport, Inc.</i>	3:15-cv-00165	S.D. Cal.	10/29/2020	X	X	
<i>Schneider v. Chipotle Mexican Grill, Inc.</i>	3:16-cv-02200	N.D. Cal.	11/4/2020	X		
<i>Kommer v. Ford Motor Co.</i>	1:17-cv-00296	N.D.N.Y.	12/15/2020	X	X	

## ENDNOTES

- 1 Jones Day, *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010–2018)* (April 2020) (hereinafter “2010–2018 White Paper”).
- 2 *Id.* at 13.
- 3 See *Pettit v. Procter & Gamble Co.*, 2:14-cv-04090 (E.D.N.Y. 2020).
- 4 See *Kommer v. Ford Motor Co.*, 1:17-cv-00296 (N.D.N.Y. 2020).
- 5 See 2010–2018 White Paper, *supra* n. 1.
- 6 See *id.* at 1 & Appendix B.
- 7 See *id.* at 13.
- 8 *Id.* at 1.
- 9 *Id.*
- 10 *Id.*
- 11 *Id.* at 8.
- 12 *Id.* at 9.
- 13 See Fed. R. Civ. P. 23 (2018).
- 14 Rhonda Wasserman, *The New, Improved Class Action Rule: The December 2018 Amendments to Rule 23*, 90 Pa. B. Ass’n Q. 182, 182 (Oct. 2019).
- 15 See William B. Rubenstein, *Newberg on Class Actions* § 13:10 (5th ed., Dec. 2020).
- 16 *Id.*
- 17 *Nieberding v. Barrette Outdoor Living, Inc.*, No. 12-CV-2353-DDC-TJJ, 2015 WL 1645798, at \*4 (D. Kan. Apr. 14, 2015) (quoting *Newberg*, *supra* n. 15).
- 18 Dan Donovan et al., *Class Action Settlement Approval in an Era of Heightened Judicial Scrutiny*, N.Y.L.J. Online (Feb. 27, 2019).
- 19 Fed. R. Civ. P. 23(e)(c)(2), advisory committee’s note to 2018 amendment.
- 20 Fed. R. Civ. P. 23(e)(1), advisory committee’s note to 2018 amendment.
- 21 See *id.*
- 22 *Id.*
- 23 *Id.*
- 24 See Fed. R. Civ. P. 23(e)(2) (amended 2012).
- 25 See *Newberg*, *supra* n. 15, § 13.13.
- 26 *Id.*
- 27 See Fed. R. Civ. P. 23(e)(2).
- 28 Fed. R. Civ. P. 23(c)(2), advisory committee’s note to 2018 amendment.
- 29 See Fed. R. Civ. P. 23(c)(2).
- 30 See Fed. R. Civ. P. 23(c)(2)(B), advisory committee’s note to 2018 amendment.
- 31 FTC Staff Report, *Consumer and Class Actions: A Retrospective and Analysis of Settlement Campaigns 2* (Sept. 2019).
- 32 For a description of our methodology in selecting settlements, see Appendix A.
- 33 See Appendix B.
- 34 See *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-cv-2335 (Dkt. 260) (final approval hearing) (S.D. Cal. July 31, 2020).
- 35 In *Dickey v. Advanced Micro Devices, Inc.*, 4:15-cv-04922 (N.D. Cal. 2020), the court announced in its final approval of the settlement that the claims rate was 27.4%. See *id.* (Dkt. 165). But the court had erroneously calculated that claims rate using only the class members who received direct notice. When calculated using the total class of “6,713,000 potential purchasers,” *id.* (Dkt. 154), the actual claims rate in that case was 4.09%.
- 36 Because there were no outliers in the 2019–2020 settlements, this analysis reflects the 2010–2020 data excluding the three outliers from the 2010–2018 dataset.
- 37 Because there were no outliers in the 2019–2020 settlements, this analysis reflects the 2010–2020 data excluding the one outlier from the 2010–2018 dataset.
- 38 Because there were no outliers in the 2019–2020 settlements, this analysis reflects the 2010–2020 data excluding the two outliers from the 2010–2018 dataset.
- 39 See 2010–2018 White Paper, *supra* n. 1, at 7.
- 40 FTC Staff Report, *Consumer and Class Actions: A Retrospective and Analysis of Settlement Campaigns* 11-12 (Sept. 2019).
- 41 See *Kommer v. Ford Motor Co.*, No. 1:17-cv-00296 (Dkt. 70) (N.D.N.Y. 2020).
- 42 *Pettit v. Procter & Gamble Co.*, 2:14-cv-04090 (Dkt. 129) (E.D.N.Y. 2020).
- 43 See, e.g., *Conrad v. Boiron, Inc.*, 869 F.3d 536, 540-41 (7th Cir. 2017) (affirming district court’s denial of class certification because refund option for disappointed consumers was already in place and no “significant extra value” could be attained for class members).
- 44 FTC Staff Report, *Consumer and Class Actions: A Retrospective and Analysis of Settlement Campaigns* 25 (Sept. 2019).
- 45 Unlike our previous study, we did not identify enough cases allocating amounts to *cy pres* recipients to meaningfully analyze that allocation separately. It is possible that, for several settlements, data about *cy pres* distributions will be available at some point in the future, once the claims period has run. It is also possible that fewer recent settlements were structured to include *cy pres* due to the Supreme Court’s signal, by granting certiorari in *Frank v. Gaos* (No. 17-961), that such settlements may face increased scrutiny.
- 46 In *Schmitt v. Younique*, 8:17-cv-01397 (C.D. Cal. 2020), we assume that the amount paid to cover settlement administration costs was exactly \$175,000 (the maximum amount set by the court (Dkt. 255)) and calculated the amount paid to the settlement class based on that assumption. In *Brickman v. Fitbit, Inc.*, 3:15-cv-2077-JD (N.D. Cal. 2020), we assume the amount paid to cover settlement administration costs was \$548,292.35, the estimated total (Dkt. 292). In *Pettit v. Procter & Gamble Co.*, 2:14-cv-04090 (E.D.N.Y. 2020), we assume the amount paid to cover settlement administration costs was \$677,122.48 (Dkt. 139).
- 47 *Brickman v. Fitbit, Inc.*, 3:15-cv-2077-JD (Dkt. 292) (N.D. Cal. 2020).
- 48 The “Other” section consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable. Because of missing information related to some of these other factors, the dataset for this table includes only 13 settlements.
- 49 Because there were no outliers in the 2019–2020 settlements, this analysis reflects the 2010–2020 data excluding the outlier from the 2010–2018 dataset. For a brief description of the outlier case, see *infra* note 54.
- 50 The “Other” section consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable. Because of missing information related to some of these other factors, the dataset for this table includes only five settlements.
- 51 The “Other” section consists of settlement administration and notice costs, incentive awards for class representatives, and *cy pres* distribution, if applicable. Because of missing information related to some of these other factors, the dataset for this table includes only eight settlements.
- 52 Because there were no outliers in the 2019–2020 settlements, this analysis reflects the 2010–2020 data excluding the outlier from the 2010–2018 dataset. For a brief description of the outlier case, see *infra* note 54.
- 53 We excluded three outlier cases with take rates above 30%. All three outliers were settlements finalized between 2010 and 2018 and were treated as outliers in our previous study.
- 54 We excluded *Ebarle v. LifeLock, Inc.*, 4:15-cv-00258 (N.D. Cal. 2016) in our analysis, as we had in the previous study, because that case is apparently an outlier. In that case, the court awarded the class \$68,000,000 (84.15% of the total settlement award) and awarded class counsel \$10,200,000 (12.62% of the total settlement award).
- 55 Because of missing information about other expenses—such as administration costs—in several cases, our analysis of the allocation percentages draws on information from 50 settlements.
- 56 *Swinton v. SquareTrade, Inc.*, No. 418CV00144SMRSBJ, 2019 WL 617791, at \*5 (S.D. Iowa Feb. 14, 2019).

- 57 Fed. R. Civ. P. 23(b)(3).
- 58 See, e.g., *Turcios v. Carma Labs., Inc.*, 296 F.R.D. 638, 648 (C.D. Cal. 2014) (holding that a class action mechanism was not superior when the defendant manufacturer already provided a full refund, which is greater than the relief the plaintiff sought); *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (affirming the district court's denial of class certification where the requested relief was duplicative of the refund option that was already offered).
- 59 See, e.g., N.D. Cal., *Procedural Guidance for Class Action Settlements*, (updated Dec. 5, 2018).
- 60 See Rule 23(e)(2), advisory committee's note to 2018 amendment.

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

RALPH MILAN and ELIZABETH ARNOLD on  
behalf of themselves, those similarly situated and  
the general public,

Plaintiffs,

v.

CLIF BAR & COMPANY,

Defendant.

Case No. 18-cv-02354-JD

**SECOND SUPPLEMENTAL DECLARATION  
OF BRANDON SCHWARTZ REGARDING  
NOTICE PLAN IMPLEMENTATION AND  
SETTLEMENT ADMINISTRATION**



1 I, Brandon Schwartz, declare as follows:

2 1. I am the Director of Legal Notice for Postlethwaite & Netterville (“P&N”)<sup>1</sup>, a full-service  
3 administration firm providing legal administration services, including the design, development, and  
4 implementation of unbiased complex legal notification programs.

5 2. In the *Declaration of Brandon Schwartz Regarding Notice Plan Implementation and*  
6 *Settlement Administration* (Dkt. 268-2) filed on October 31, 2024, I detailed the implementation of the  
7 Notice Plan and Settlement Administration. In the *Supplemental Declaration of Brandon Schwartz*  
8 *Regarding Notice Plan Implementation and Settlement Administration* (Dkt. 274) filed on November 13,  
9 2024, I reported on the efforts to obtain Class Member data from Kroger and Walmart to effectuate Direct  
10 Notice and provided an update to Claim activity. The Court held the Final Approval Hearing on November  
11 14, 2024, and the Court ordered the claims period to extend through February 1, 2025. I submit this  
12 supplemental declaration to report on the additional notice implemented and provide an update to claims  
13 activity.

14 **Updates on Direct Notice from Retailer Database**

15 3. On or about November 21, 2024, Kroger provided sales and contact details for Class  
16 Members who purchased the Class Products from their online or retail stores. P&N de-duplicated the data  
17 records based on name and email address and determined that 5,738,406 unique Class Members existed.  
18 Further, P&N identified 4,784,432 Class Members with a facially valid email address sufficient to attempt  
19 notice (“Clif Bar Kroger Notice List”).

20 4. On or about November 25, 2024, Walmart provided sales and contact details for Class  
21 Members who purchased the Class Products from their online or retail stores. P&N de-duplicated the data  
22 records based on name and email address and determined that 1,975,583 unique Class Members existed.  
23 Further, P&N identified 1,754,953 Class Members with a facially valid email address sufficient to attempt  
24 notice (“Clif Bar Walmart Notice List”).

25  
26  
27  
28 <sup>1</sup> As of May 21, 2023, the Directors & employees of Postlethwaite & Netterville (P&N), APAC joined  
EisnerAmper as EAG Gulf Coast, LLC.

**Email Notice and Direct Notice Results**

5. Beginning on November 22, 2024, P&N sent the Short-form Class Notice via email to 4,784,432 facially valid email addresses on the Clif Bar Kroger Notice List, achieving a 95.71% delivery rate (4,579,315 emails). On November 26, 2024, P&N sent the same notice to 1,754,953 facially valid email addresses on the Clif Bar Walmart Notice List, with a 94.71% delivery rate (1,662,078 emails). A true and correct copy of the Email Notice is attached hereto as **Exhibit A**.

6. In the *Declaration of Brandon Schwartz Regarding Notice Plan Implementation and Settlement Administration* (Dkt. 268-2), I detailed the initial Email Notice sent to the Clif Bar Target Notice List. Beginning on December 9, 2024, P&N executed a supplemental Email Notice to 2,916,971 Class Members on the Clif Bar Target Notice List whose initial emails were delivered but had not filed a claim. The supplemental Email Notice notified the Class Members of the Claims Deadline extension to February 1, 2025. The supplemental Email Notice achieved a 96.26% delivery rate (2,807,751 emails). A true and correct copy of the supplemental Email Notice is attached hereto as **Exhibit B**.

7. Table 1 below provides an overview of the dissemination results and reach statistics for the Direct Notice Program.

**Table 1**

<b>Direct Notice Program Dissemination &amp; Reach – Target, Kroger, and Walmart</b>						
<b>Description</b>	<b>Amazon Notice List<sup>2</sup></b>	<b>Target Notice List</b>	<b>Kroger Notice List</b>	<b>Walmart Notice List</b>	<b>Volume of Notice Lists</b>	<b>Percentage of Notice Lists</b>
Class Member Emails	1,401,101	3,176,888	5,738,406	1,975,583	12,291,978	-
<b>Email Notice</b>						
Total Email Notices Sent	1,401,101	2,988,558	4,784,432	1,754,953	10,929,044	88.91%
(-) Total Email Notices Bounced/Undelivered	2	64,617	205,117	92,875	362,611	2.95%
<b>Direct Notice Program Reach</b>						
Total Received Direct Notice	1,401,099	2,923,941	4,579,315	1,662,078	10,566,433	85.96%

**Additional Digital Notice**

8. On or about January 13, 2025, at the request of Class Counsel, P&N coordinated with Top Class Actions to feature the case on its website homepage ([www.topclassactions.com](http://www.topclassactions.com)) and in its email

<sup>2</sup> The Court permitted Amazon to issue Class Notice directly to Class Members for whom its records indicated a purchase of the Class Products during the Class Period.

1 newsletter, and to post on its social media accounts. Screenshots of the digital notice are attached as **Exhibit**  
2 **C**.

### Claim Form Submissions

3  
4 9. As of February 10, 2025, P&N has received 506,575 valid Claim submissions (representing  
5 a claims rate of 6.85% of the estimated 7.4 million member Class), 41,321 of which included documentation,  
6 accounting for 708,783,820 total products claimed. Of these, 387,880 valid Claimants (76.57%) have elected  
7 to receive a digital payment. P&N will continue to analyze Claims already received, as well as any additional  
8 timely Claims mailed to the P.O. Box and postmarked by the Claims Deadline, but does not expect any non-  
9 de minimis changes. Table 2 below provides summary statistics of Claim submissions and current  
10 dispositions.

11 **Table 2**

12 <b>Claims Statistics Summary</b> (as of February 10, 2025)	
13 <b>Description</b>	13 <b>Volume (#)</b>
14 Non-Documented Claims Received	6,243,054
14 Documented Claims Received	92,455
15 <b>Total Claims Received</b>	<b>6,335,509</b>
16 (-) Duplicate Claims	70,978
16 (-) Household Duplicate Claims	101,449
17 (-) Invalid Claims: Suspected Fraud	493,687
18 (-) Invalid Claims: High Confidence Fraud	5,162,820
19 <b>Net Valid Claims Received</b>	<b>506,575</b>

20 10. In the *Declaration of Brandon Schwartz Regarding Notice Plan Implementation and*  
21 *Settlement Administration* (Dkt. 268-2), I detailed the categorization of all Claims into the four distinct tiers  
22 presented in Table 2 above.

23 11. In instances of duplicate claims, P&N counts only the Claim with the highest calculated base  
24 refund.

25 12. In instances of duplicate household claims, P&N will send an email notice to each Claimant  
26 within a duplicate household, providing 21 days to submit documentation demonstrating that the units  
27 claimed do not overlap.

28 13. In instances of suspected fraud, P&N will send an email notice to each Claimant informing

1 them that additional information is required to verify their Claim. The notice will provide instructions for  
 2 verifying the Claim. Suspected fraud Claimants will have 21 days to complete the verification process, and  
 3 any Claim not verified by the 21-day deadline will be denied. P&N will send a reminder email to those  
 4 Claimants who have not verified their Claim at least seven (7) days prior to the deadline. The final valid  
 5 Claims volume could increase based on the verification responses from suspected fraud claimants; however,  
 6 P&N anticipates that any such increase would be de minimis.

7 14. Claims flagged as high confidence fraud will be denied and will not receive any further  
 8 notice.

9 **Notice and Administration Expenses**

10 15. As of February 10, 2025, P&N has incurred \$640,410.48 in fees and costs completing the  
 11 Notice Plan and administering the Settlement, and anticipates incurring \$146,023.77 in additional fees and  
 12 costs for administration for a total cost of \$786,434.25 for the Notice Plan and Settlement Administration.<sup>3</sup>

13 Table 3 below provides an overview of the Notice and Administration Costs.

14 **Table 3**

<b>Notice and Administration Expense Summary</b>	
Claims Administration & Distribution	\$289,103.50
Postage	\$80,595.94
Cost of Administration	\$369,699.44
Cost of Notice	\$416,734.81
<b>Total Notice &amp; Administration</b>	<b>\$786,434.25</b>

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19  
20 **Settlement Fund Summary**

21 16. If the Court awards the requested attorneys’ fees, costs, incentive awards, and administrative  
 22 costs, the Settlement Class recovery amount will be \$6,742,228.75 as shown in Table 4 below.

23  
24  
25 <sup>3</sup> The extension of the Claims Deadline resulted in an increase in both the number of submitted and valid  
 26 claims, surpassing previous assumptions of approximately 5,900,000 total claims and 400,000 valid claims.  
 27 The additional Claims received increased the administration costs, while the rise in valid Claims led to  
 28 additional distribution and postage costs. Additionally, costs were incurred related to Top Class Actions and  
 the supplemental Email Notice to the Clif Bar Target Class List (approximately \$8,825 and \$9,163,  
 respectively).

**Table 4**

<b>Settlement Fund Summary</b> (as of February 10, 2025)	
<b>Total Settlement Fund</b>	<b>\$12,000,000.00</b>
(-) Attorney's Fees & Expenses	\$4,444,651.00
(-) Service Awards	\$10,000.00
(-) P&N Admin Fees	\$786,434.25
<b>Net Settlement Fund Available for Pro Rata</b>	<b>\$6,758,914.75</b>

17. The Settlement Agreement provides that valid Claims, whether or not Proof of Purchase is provided, would initially (before any necessary *pro rata* adjustment) be awarded an allocation of \$5.00 for up to 30 Class Products purchased, \$10.00 for 31 to 60 Class Products purchased, and \$15.00 for more than 60 Class Products purchased. Additionally, the Settlement Agreement provides that valid Claims with Proof of Purchase would initially be awarded an allocation of \$15.00 for the first 60 Class Products plus \$0.25 for each additional Class Product up to a maximum recovery of \$50.00.

18. The total value of approved Claims currently exceeds the funds available for distribution to Class Members; therefore, cash awards are expected to be decreased *pro rata*. After *pro rata* adjustment, the current allocation of Class Products is estimated to be \$4.50 for up to 30 Class Products purchased, \$8.40 for 31 to 60 Class Products purchased, and \$12.00 for more than 60 Class Products purchased; and Claims with Proof of Purchase, \$12.00 for the first 60 Class Products plus \$0.23 for each additional Class Product. As of February 10, 2025, P&N anticipates an overall average payment of \$13.32. The highest payment is estimated to be \$44.20. Table 5 below provides a summary of the award allocation as of February 10, 2025.

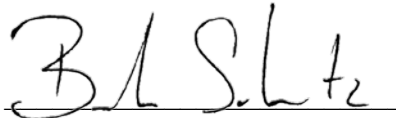
**Table 5**

<b>Award Allocation Summary</b> (as of February 10, 2025)		
<b>Description</b>	<b>Claim Volume (#)</b>	<b>Amount (\$)</b>
Up to 30 Bars	34,243	\$154,093.50
Between 31 – 60 Bars	41,582	\$349,288.80
More than 60 Bars (No Documentation)	393,363	\$4,720,356.00
More than 60 Bars (Documentation)	37,387	\$1,526,996.01
<b>Total<sup>4</sup></b>	<b>506,575</b>	<b>\$6,750,734.31</b>

<sup>4</sup> The variance from the net settlement fund available for *pro rata* is due to the rounding of the cash awards to the nearest penny.

**Certification**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 12th day of February 2025 in Portland, Oregon.

A handwritten signature in black ink, appearing to read "B. Schwartz", written over a horizontal line.

Brandon Schwartz



## Exhibit A: Email Notice to Kroger and Walmart Notice Lists

Subject: Legal Notice - Ralph Milan et al. v. Clif Bar & Company  
Preheader: Claim Deadline Extended  
From: Bars Class Action Administrator notice@pnclassaction.com  
Reply-To: info@barsclassaction.com  
To: Test@email.com

### LEGAL NOTICE

*Ralph Milan et al. v. Clif Bar & Company, Case No. 18-CV-2354-JD (N.D. Cal.)*

## **If You Purchased Certain Clif Bar Products Since April 2014 You Could Receive a Cash Payment as Part of a Class Action Settlement**

**Claim deadline extended. Visit [www.BarsClassAction.com](http://www.BarsClassAction.com) to file a claim by February 1, 2025.**

### **What is the lawsuit about?**

The lawsuit contends that Clif Bar & Company (“Clif Bar”) made certain statements on the labels of various original Clif Bars and Clif Kid ZBars (“Class Products”) that are allegedly misleading because the statements suggested the bars are healthy, whereas Plaintiffs allege the bars are unhealthy because of their added sugar. Clif Bar maintains that these products are not unhealthy due to the presence of added sugars, and that the statements on its bars are true and not misleading. The Court has not determined whether Plaintiffs or Clif Bar is correct. The parties have agreed to a Settlement, which will allow both sides to avoid the risk and cost of further litigation.

### **Who is included?**

You are a Class Member if you bought one of the Class Products for household use, and not for resale or distribution, between April 2014 and March 2023 in California or New York, or between March 2019 and March 2023 in any other State. The Class Products include Original Clif Bars in packaging stating “Nutrition for Sustained Energy,” and Clif Kid ZBars in packaging stating “Nourishing Kids in Motion” and similar Challenged Claims (as identified in the Complaint in the Action).

### **What does the settlement provide?**

Clif Bar has agreed pay \$12,000,000 to settle the case and pay all Settlement expenses, including the costs of class notice and administration, attorneys’ fees and costs, service awards for the Class Representatives, and cash refunds for Class Members who make valid Claims. Your legal rights will be affected if you are a Class Member and do not exclude yourself.

### **What are your options?**

**Submit A Claim:** To receive Settlement benefits, you must complete and submit a Claim Form. Claim Forms are available at the Settlement Website, [www.BarsClassAction.com](http://www.BarsClassAction.com), and can be submitted electronically or mailed to the Class Administrator. A Claim Form must be **submitted online or postmarked by February 1, 2025.**



**Do Nothing:** If you do nothing, you will not be eligible to receive any benefits and will be bound by the terms of the Settlement Agreement and Final Judgment.

This is only a summary of the key Settlement terms. A full copy of the Settlement Agreement is available at [www.BarsClassAction.com](http://www.BarsClassAction.com), or by calling 1-844-537-1156.

Please do not contact the Court to inquire about this settlement or the claim process. If you have additional questions, you can visit [www.BarsClassAction.com](http://www.BarsClassAction.com) or contact the Settlement Administrator by email at [info@barsclassaction.com](mailto:info@barsclassaction.com) or by phone at 1-844-537-1156.

Bars Class Action Administrator

P.O. Box 671

Baton Rouge, LA 70821

[Unsubscribe](#) - [Unsubscribe Preferences](#)



Exhibit B: Supplemental Email Notice to Target Notice List

Subject: Legal Notice - Ralph Milan et al. v. Clif Bar & Company  
From: Bars Class Action Administrator notice@pnclassaction.com  
Reply-To: info@barsclassaction.com  
To: Test@email.com

### LEGAL NOTICE

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Bars Class Action Administrator

P.O. Box 671

Baton Rouge, LA 70821

If you do not wish to receive future emails [Click here to opt out](#)



## Exhibit C: Additional Digital Notice - Top Class Actions

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Document 277-2 Filed 0  
"I missed the deadline" 🙄

## Class Action Settlement Deadlines pt.2

Subaru cracked  
windshield 1/31

\$12M Clif Bar 2/1

\$5.5M Quick Box 2/5

\$3.25M Progressive data  
breach 2/18

\$8.85M Breyers Ice Cream 2/19

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Featured Settlement 



**\$12M Clif Bar class action settlement**

354-JD

Document 277-2

Filed 02/12/25

## Featured Articles



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action lawsuit**



**\$12M Clif Bar class action  
settlement**



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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

RALPH MILAN and ELIZABETH ARNOLD  
on behalf of themselves, those similarly  
situated and the general public,

Plaintiffs,

v.

CLIF BAR & COMPANY,

Defendant.

Case No. 18-cv-02354-JD

CLASS ACTION

**[PROPOSED] ORDER GRANTING  
FINAL APPROVAL OF CLASS  
SETTLEMENT**

Judge: Hon. James Donato

Complaint Filed: April 19, 2018

1 The Court has considered the Settlement Agreement filed on October 31, 2023 (the  
2 “Settlement Agreement”). An opportunity to be heard having been given to all other persons  
3 desiring to be heard as provided in the Notice and having considered all of the submissions and  
4 arguments, and good cause appearing therefore;

5 IT IS HEREBY ORDERED AS FOLLOWS:

6 1. This Final Order incorporates herein and makes a part hereof the Settlement  
7 Agreement, including the Exhibits thereto, and incorporates by reference the definitions in the  
8 Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the  
9 Settlement Agreement unless set forth differently herein.

10 2. The Court has jurisdiction over the subject matter of this action, and all Parties to the  
11 action for purpose of settlement, including all Settlement Class Members.

12 3. Pursuant to Federal Rule of Civil Procedure 23, the Court certifies the following  
13 Settlement Class for settlement purposes, only:

14 All persons who, during the “Class Period” as defined in Section 2.13 of the  
15 Settlement Agreement, purchased in the United States, for household use and not  
16 for resale or distribution, original Clif Bars in packaging bearing the phrase  
17 “Nutrition for Sustained Energy,” and Clif Kid ZBars in packaging bearing the  
18 Challenged Claims (as identified in the Complaint in the Action).<sup>1</sup>

19 4. Pursuant to Federal Rule of Civil Procedure 23(a), the Court finds Plaintiffs Ralph  
20 Milan and Elizabeth Arnold are members of the Settlement Class, their claims are typical of the  
21 Settlement Class, and they fairly and adequately protected the interests of the Settlement Class  
22 throughout their involvement in this action. Accordingly, the Court hereby appoints Ralph Milan  
23 and Elizabeth Arnold as Class Representatives for the Settlement Class.

24 5. The Court finds that the Settlement Class meets all requirements of Federal Rules of  
25 Civil Procedure 23(a) and (b)(3) for certification of the claims alleged in the Class Action  
26 Complaint, including: (a) numerosity; (b) commonality; (c) typicality; (d) adequacy of the class

27 <sup>1</sup> Excluded from the Settlement Class are: (a) Clif Bar’s board members or executive-level officers  
28 including its attorneys; (b) governmental entities; (c) the Court, the Court’s immediate family, and  
the Court’s staff; and (d) any person that timely and properly excluded himself or herself from the  
Settlement Class.

1 representative and Class Counsel; (e) predominance of common questions of fact and law among  
2 the Settlement Class; and (f) superiority.

3 6. Having considered the factors set forth in Federal Rule of Civil Procedure 23(g)(1),  
4 the Court makes final its appointment of Fitzgerald Monroe Flynn PC as Class Counsel to represent  
5 the Class Members.

6 7. The Court finds that the persons excluded from the Settlement Class because they  
7 filed valid Requests for Exclusion (“Opt-Outs”) are identified in Exhibit J to the Declaration of  
8 Brandon Schwartz submitted in support of Plaintiffs’ Motion for Final Approval (Dkt. No. 268-2).  
9 These Class Members who filed timely, completed Opt-Outs are not bound by this Order and the  
10 accompanying Final Judgment or the terms of the Settlement Agreement and may pursue their own  
11 individual remedies against Defendant. However, such persons are not entitled to any rights or  
12 benefits provided to Class Members by the terms of the Settlement Agreement.

13 8. The Court directed that Class Notice be given to the Class Members pursuant to the  
14 notice program proposed by the Parties and approved by the Court. In accordance with the Court’s  
15 Preliminary Approval Order and the Court-approved notice program, the Settlement Administrator  
16 caused the forms of Class Notice to be disseminated as ordered. The Long-form Class Notice  
17 advised Class Members of the terms of the Settlement Agreement; the Final Approval Hearing, and  
18 their right to appear at such hearing; their rights to remain in, or opt out of, the Settlement Class and  
19 to object to the Settlement Agreement; procedures for exercising such rights; and the binding effect  
20 of this Order and accompanying Final Judgment, whether favorable or unfavorable, to the  
21 Settlement Class.

22 9. The distribution of the Class Notice pursuant to the Class Notice Program constituted  
23 the best notice practicable under the circumstances, and fully satisfies the requirements of Federal  
24 Rule of Civil Procedure 23, the requirements of due process, 28 U.S.C. § 1715, and any other  
25 applicable law.

26 10. Pursuant to Federal Rule of Civil Procedure 23(e)(2), the Court finds after a hearing  
27 and based upon all submissions of the Parties and interested persons, the Settlement Agreement  
28 proposed by the Parties is fair, reasonable, and adequate. In reaching this conclusion, the Court

1 considered the record in its entirety and heard the arguments of counsel for the Parties and all other  
2 persons seeking to comment on the proposed Settlement Agreement. In addition, the Court has  
3 considered a number of factors, including: (1) the complexity, expense, and likely duration of the  
4 litigation; (2) the reaction of the Class Members to the Settlement Agreement; (3) the stage of the  
5 proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the  
6 risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the  
7 ability of Defendant to withstand a greater judgment; and (8) the reasonableness of the relief  
8 provided by the Settlement Agreement in light of the best possible recovery.

9 11. The terms and provisions of the Settlement Agreement are the product of lengthy,  
10 arm's length negotiations conducted in good faith and with the assistance of experienced mediators.  
11 Approval of the Settlement Agreement will result in substantial savings of time, money and effort  
12 to the Court and the Parties, and will further the interests of justice.

13 12. All Class Members who have not timely and validly opted out are Class Members  
14 who are bound by this Order and accompanying Final Judgment and by the terms of the Settlement  
15 Agreement.

16 13. Nothing in the Settlement Agreement, this Order, the accompanying Final Judgment,  
17 or the fact of the settlement constitutes any admission by any of the Parties of any liability,  
18 wrongdoing or violation of law, damages or lack thereof, or of the validity or invalidity of any claim  
19 or defense asserted in the action.

20 14. The Court has considered the submissions by the Parties and all other relevant  
21 factors, including the result achieved and the efforts of Class Counsel in prosecuting the claims on  
22 behalf of the Settlement Class. The efforts of Class Counsel have produced the Settlement  
23 Agreement entered into in good faith, and which provides a fair, reasonable, adequate, and certain  
24 result for the Settlement Class. Class Counsel have made application for an award of attorneys' fees  
25 and reimbursement of expenses in connection with the prosecution of the action on behalf of  
26 themselves. The fee award requested is 30% of the Common Fund. The Court hereby awards  
27 \$ \_\_\_\_\_ [\$3,600,000 requested] as attorneys' fees to be paid in accordance with the terms  
28 of the Settlement Agreement. This amount is fair, reasonable, and adequate under the common fund

1 doctrine, the range of awards ordered in this District and Circuit, the excellent results obtained, the  
2 substantial risk borne by Class Counsel in litigating this matter, the degree of skill and quality of  
3 work performed, the financial burden imposed by the contingency basis of Class Counsel's  
4 representation of Plaintiffs and the Class, and the additional work required of Class Counsel to bring  
5 this Settlement to conclusion. The Court finds the fee award is further supported by a lodestar  
6 crosscheck, whereby it finds that the hourly rates of Plaintiffs' Counsel are reasonable, and that the  
7 estimated hours expended are reasonable.

8 15. Class Counsel have also made application for reimbursement of litigation expenses.  
9 Finding that such expenses were reasonably and necessarily incurred in prosecuting the action on  
10 behalf of the Settlement Class, the Court finally approves Class Counsel's request for litigation  
11 expenses in the amount of \$ \_\_\_\_\_ [\$844,651 requested], to be paid in accordance with  
12 the terms of the Settlement Agreement.

13 16. Further, the Court approves service awards of \$ \_\_\_\_\_ each [\$5,000 requested] for  
14 Ralph Milan and Elizabeth Arnold. The Class Representatives participated in the action, acted to  
15 protect the Settlement Class, and assisted their counsel. These service awards, which are fair,  
16 reasonable, and justified, are to be paid in accordance with the terms of the Settlement Agreement.

17 17. The Court has considered all relevant factors and hereby approves the Resnick Center  
18 for Food Law and Policy at the University of California, Los Angeles, School of Law, the National  
19 Food Museum, and the National Consumers League as the designated *cy pres* recipients of any  
20 monies (if any) remaining after the negotiation period of the Cash Payments in accordance with the  
21 Agreement.

22 18. The Court hereby dismisses with prejudice this action, and all Released Claims  
23 against each and all Released Parties, and without costs to any of the Parties as against the others.

24 19. Pursuant to the Northern District of California's Procedural Guidance for Class  
25 Actions, within twenty-one (21) days after the distribution of the settlement funds, the Parties shall  
26 file a Post-Distribution Accounting detailing when cash payments were sent to Class Members, the  
27 number of Class Members who were sent payments, the total amount of payments paid out to Class  
28 Members, the average and median recovery per Class Member, the largest and smallest amounts of

1 cash payments paid to Class Members, the number and value of cashed and uncashed checks, the  
2 amount distributed to any *cy pres* recipient, any significant or recurring concerns communicated by  
3 Class Members to the Settlement Administrator and counsel since final approval, and any other  
4 issues in settlement administration since final approval, and how any concerns or issues were  
5 resolved.

6 20. Without affecting the finality of this Order and the Final Judgment, the Court  
7 reserves jurisdiction over the implementation, administration, and enforcement of this Order, the  
8 Final Judgment and the Settlement Agreement, and all matters ancillary thereto.

9 21. The Court finding that no reason exists for delay in entering this Order and the Final  
10 Judgment pursuant to Federal Rules of Civil Procedure, Rule 54(b), the Clerk is hereby directed to  
11 enter the Final Judgment forthwith.

12 22. The Parties and the Settlement Administrator are hereby directed and authorized to  
13 implement and consummate the Settlement according to the terms and provisions of the Settlement  
14 Agreement. In addition, the Parties, without further approval of the Court, are authorized to agree  
15 to and adopt such amendments and modifications to the Settlement Agreement so long as they are:  
16 (i) consistent in all material respects with this Final Order and the Final Judgment; and (ii) do not  
17 limit the rights of the Settlement Class.

18 **IT IS SO ORDERED.**

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HONORABLE JAMES DONATO  
UNITED STATES DISTRICT JUDGE