**FITZGERALD JOSEPH LLP**
JACK FITZGERALD (SBN 257370)
*jack@fitzgeraldjoseph.com*
PAUL K. JOSEPH (SBN 287057)
*paul@fitzgeraldjoseph.com*
MELANIE PERSINGER (SBN 275423)
*melanie@fitzgeraldjoseph.com*
TREVOR M. FLYNN (SBN 253362)
*trevor@fitzgeraldjoseph.com*
CAROLINE S. EMHARDT (SBN 321222)
*caroline@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741
***Counsel for Plaintiff***

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

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NEXTFOODS, INC.,

Defendant.

Case No.: 21-cv-1446-BTM-MSB

**MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Judge: Hon. Barry Ted Moskowitz
Hearing Date: Oct. 27, 2023, 11:00 a.m.

PER CHAMBERS, NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Rules**

**Other Authorities**

## INTRODUCTION

After two years of litigation, the parties have settled this action and a related one filed in New York,[1] on a nationwide class basis. Defendant NextFoods, Inc. has agreed to establish a non-reversionary common fund of $1.25 million for the Settlement Class and to make significant labeling changes—even though Plaintiff Evlyn Andrade-Heymsfield's claim for injunctive relief had been dismissed. Given this relief, especially in light of some key risks the Class faced at trial, the Court should find that the proposed Settlement falls within the range of reasonableness and grant preliminary approval.

## PROCEDURAL HISTORY AND SETTLEMENT NEGOTIATIONS

Ms. Andrade-Heymsfield filed this action in August 2021 alleging NextFoods "sells a line of fruit juices . . . 'that expressly or implicitly convey the message that the JuiceDrinks are healthy,'" which she alleged was "deceptive . . . because they contain 'excessive amounts of free sugar.'" *Andrade-Heymsfield v. NextFoods, Inc.*, 2023 WL 2576770, at *1 (S.D. Cal. Mar. 20, 2023) ["*Andrade-Heymsfield II*"] (Moskowitz, J.) (quoting Dkt. No. 1, Compl., ¶¶ 1, 10, 78). As a result, she alleged NextFoods' "violations of the Unfair Competition Law ('UCL'); False Advertising Law ('FAL'); and Consumers Legal Remedies Act ('CLRA'); and breaches of express and implied warranties." *Id.* (internal citations omitted).

In October 2021, NextFoods moved to dismiss the Complaint. Dkt. No. 7. In April 2022, the Court granted the motion without prejudice. *Andrade-Heymsfield v. NextFoods, Inc.*, 2022 WL 1772262 (S.D. Cal. Apr. 27, 2022) ["*Andrade-Heymsfield I*"] (Moskowitz, J.).

In May 2022, Ms. Andrade-Heymsfield filed a First Amended Complaint, Dkt. No. 14 ("FAC"), and in July 2022, NextFoods moved to dismiss it, Dkt. No. 18. In March 2023, the Court denied the motion. *Andrade-Heymsfield II*, 2023 WL 2576770. Shortly thereafter, NextFoods filed its Answer. Dkt. No. 25.

[1] *Gates v. NextFoods, Inc.*, No. 5:23-cv-00530-FJS-ATB (N.D.N.Y., filed April 27, 2023). On August 22, 2023, Plaintiff Valerie Gates voluntarily dismissed the action without prejudice in light of the proposed Settlement, in which she is named as a Class Representative. *See* Gates Decl. ¶ 2 & Exs. 1-2 (Complaint and Notice of Dismissal).

On March 24, 2023, the parties conducted their Rule 26(f) Conference, *see* Dkt. No. 27, Joint R. 26(f) Discovery Plan at 1, and three days later, Plaintiff served a first set of Interrogatories and Document Requests on NextFoods, *see* Declaration of Jack Fitzgerald ("Fitzgerald Decl.") ¶ 3.

On April 17, 2023, NextFoods moved for reconsideration of the Court's Order denying its Motion to Dismiss the First Amended Complaint. Dkt. No. 30. On April 26, it served its responses to Plaintiff's first discovery requests. *See* Fitzgerald Decl. ¶ 3.

On April 27, 2023, the parties attended an Early Neutral Evaluation with Magistrate Judge Michael S. Berg. Dkt. No. 35. With NextFoods' motion pending, the parties were far apart and the case did not settle. *See id.*; *see also* Fitzgerald Decl. ¶ 9. The day before the ENE, however, NextFoods had produced an insurance policy under which, Plaintiff learned, it had tendered its defense of the action. *Id.* ¶ 10. On June 9, Plaintiff's counsel sent NextFoods' insurer a 13-page policy limit demand letter that discussed the merits of the case and damages; the likelihood of class certification; the extent to which the policy covered the claims; and the bad-faith implications if the insurer refused to settle. *Id.* ¶ 11.

Shortly before Plaintiff sent the letter, the Court denied NextFoods' Motion for Reconsideration. *Andrade-Heymsfield v. NextFoods, Inc.*, 2023 WL 3880076 (S.D. Cal. June 5, 2023) (Moskowitz, J.). At around the same time, the parties began discussing labeling changes on which they might be able to agree to settle the action. When those discussions were productive, the parties scheduled a Settlement Conference with Judge Berg, this time to include the insurer. *See* Fitzgerald Decl. ¶ 12 (citing Dkt. No. 48). To conserve resources that might go toward a settlement, the parties requested the pending deadlines be continued until after the Settlement Conference. *Id.* (citing Dkt. No. 49). Given these advancements, the parties were able to reach the proposed settlement during an August 18, 2023 Settlement Conference with Judge Berg. *Id.* ¶ 13 (citing Dkt. No. 51).

# THE SETTLEMENT

## I. The Settlement Class

The Settlement Class is comprised of all persons in the United States who, between August 13, 2017 and the Settlement Notice Date (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, one of the Class Products, that is, any flavor of NextFoods' GoodBelly Probiotic JuiceDrink sold in a 1 Quart (32 oz.) container *See* Fitzgerald Decl. Ex. 1, Settlement Agreement ("SA") ¶¶ 1.6, 1.11, 1.12 (defining Class, Class Period, and Class Products).[2]

## II. Benefits for the Settlement Class

### A. $1.25 Million Non-Reversionary Settlement Fund

As consideration for Class Members' release, NextFoods will establish a $1,250,000 non-reversionary common fund (the "Settlement Fund") to pay Class Notice and Claims Administration; Court-approved attorneys' fees, expenses, and service awards; and Class Member claims. *See* SA ¶ 2.1.

To obtain monetary relief, a Class Member must submit an online or hard copy Claim Form. SA ¶ 4.1. After providing identifying information, the Claimant will be asked to estimate the number of Class Products purchased since August 2017. *Id.* ¶ 4.1(a)-(b). Claimants will be entitled to a Cash Award of $1 per Class Product, with a cap of 5 Products without proof of purchase. *Id.* ¶ 4.1(c). Claimants who submit valid proof of purchase of more than 5 Class Products will be entitled to a Cash Award of $1 per Class Product on the full number purchased during the Class Period. *Id.* Cash Awards are subject to *pro rata* adjustments (reductions or increases) if claims exceed or are less than the money remaining in the Settlement Fund after all expenses. *Id.* ¶¶ 4.1(d), 4.5. Any amounts remaining uncleared after 180 days will be provided to Class Member Claimants in a supplemental distribution, or donated *cy pres* to the UCLA Resnick Center for Food Law & Policy, subject to the Court's

[2] Capitalized terms used herein and not otherwise defined have the same meaning ascribed to them in the Settlement Agreement.

approval. *See id.* ¶ 4.7. Because of its work, the Resnick Center has previously been approved as a *cy pres* recipient in similar cases. *See* Fitzgerald Decl. ¶¶ 28-30.

**B. Changes to GoodBelly JuiceDrink's Labeling**

As further consideration for the Class's release, NextFoods has agreed to, for at least 36 months, (i) refrain from using "GoodHealth" on the JuiceDrinks' label, SA ¶ 5.1.1; (ii) limit any reference to "overall health" or "overall wellness" to being tied directly to digestive health (for example, rather than stating the product "may help promote healthy digestion and overall wellness," stating the product "may help promote healthy digestion, which in turn can promote overall wellness"), *id.* ¶ 5.1.2; and (iii) any time "overall health" or "overall wellness" is used, include an asterisk to language on the products label reading:

> [LP299v] can be found naturally in the intestinal system, and may help promote healthy digestion when consumed daily as part of a nutritious diet and healthy lifestyle. GoodBelly is a food product and not a treatment or cure for any medical disorder or disease. If you have any concerns about your digestive system, please consult your healthcare professional. ***See Nutrition Facts Box for sugar content***."

*Id.* ¶ 5.1.3 (emphasis added). While most of this language already appears on the Class Product labels, as part of the Settlement NextFoods has specifically agreed to add "See Nutrition Facts Box for sugar content" to the explanatory language. Fitzgerald Decl. ¶ 19.

**III. Class Notice and Claims Administration**

Subject to the Court's approval, the parties have retained Postlethwaite & Netterville ("P&N") as the Class Administrator to effect Class Notice and Claims Administration. *See* SA ¶ 6.1 (listing duties of Class Administrator); Fitzgerald Decl. ¶ 22. P&N has been administering class action notice and claims since 1999 and has extensive experience in state and federal courts. *See* Declaration of Brandon Schwartz ("Schwartz Decl.") ¶¶ 2-5 & Exs. A-B. Courts in this district have recently approved P&N as a class administrator for other consumer fraud class action settlements. *See McMorrow v. Mondelez Int'l, Inc.*, 2021 WL 5417183, at *2 (S.D. Cal. Nov. 19, 2021); *Winters v. Two Towns Ciderhouse, Inc.*, 2020 WL

5642754, at *5-6 (S.D. Cal. Sept. 22, 2020). And P&N has served as the Class Administrator for the settlement of several similar lawsuits, including *Krommenhock*, *Hadley*, *Milan*, and *McMorrow*. Fitzgerald Decl. ¶ 22.

The Settlement provides that Class Notice will be effectuated through a Notice Plan designed by the Class Administrator to comply with the requirements of Rule 23 and approved by the Parties and Court. SA ¶ 6.3. P&N has offered a Notice Plan that meets these requirements. *See* Schwartz Decl. ¶¶ 6-27; *see also infra* Point III. On behalf of NextFoods, P&N will also serve CAFA notice upon the appropriate officials within 10 days after the filing of this motion, as required by 28 U.S.C. § 1715(b). *See* SA ¶ 6.5.

**IV. The Settlement's Release**

Upon the Effective Date, each Class Member who has not opted out will be deemed to have released NextFoods and related entities from past, present, and future claims the Class Member has or may have against NextFoods arising out of the transactions, occurrences, events, behaviors, conduct, practices, and policies alleged in the Action regarding the Class Products, which have been, or which could have been asserted in the Action. *See* SA ¶ 8.1. Thus, the release complies with the applicable standard. *See Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010) (claims released should be limited to those based on the identical factual predicate or which depend on the same set of facts alleged in the Complaint).

**V. Opting Out**

Class Members who wish to be excluded must submit a Request for Exclusion (or "Opt-Out Form") to the Class Administrator, postmarked no later than the Opt-Out Deadline. "Mass" or "class" opt-outs are not permitted. All Class Members who submit a timely, valid Request for Exclusion will not be bound by the terms of the Agreement, whereas all Class Members who do not submit a timely, valid Request for Exclusion will be bound by the Agreement and any Judgment. *Id.* ¶ 6.6.

**VI. Objecting**

Settlement Class Members wishing to object must, by the Objection Deadline, file or mail their written objections to the Court. *Id.* ¶ 6.7.1. An objection must contain (i) a caption

or title that clearly identifies this action, and that the document is an objection; (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney, if represented; (iii) information sufficient to establish the person's standing as a Settlement Class Member; (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection; (v) the objector's signature; and (vi) the signature of the objector's counsel, if any. *Id*. ¶ 6.7.2. Class Members who object through an attorney must sign either the Objection themselves or execute a separate declaration authorizing the Objection. *Id.* ¶ 6.7.3. Class Members who both object and opt out will be deemed to have opted out, and thus be ineligible to object. *Id.* ¶ 6.7.4. Objectors are permitted to appear at the final approval hearing and are requested, but not required, in advance of the Final Approval Hearing, to file with the Court a Notice of Intent to Appear. *Id.* ¶ 6.7.5. The parties have the right, but not the obligation, to respond to any objections. *Id.* ¶ 6.7.7.

**VII. Attorneys' Fees, Costs, and Service Awards**

"'In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.'" *Shannon v. Sherwood Mgmt. Co.*, 2020 WL 2394932, at *10 (S.D. Cal. May 12, 2020) (quoting Fed. R. Civ. P. 23(h)). "'Where a settlement produces a common fund for the benefit of the entire class,' as here, 'courts have discretion to employ either the lodestar method or percentage-of-recovery method' to determine the reasonableness of attorneys' fees." *In re Regulus Therapeutics Inc. Sec. Litig.*, 2020 WL 6381898, at *3 (S.D. Cal. Oct. 30, 2020) (Moskowitz, J.) ["*Regulus*"] (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)).

The Settlement Agreement provides that the Class Representatives and their counsel will seek Court approval for service awards and attorneys' fees and costs, to be paid from the Settlement Fund. SA ¶ 3. Here, the Class Representatives will likely request service awards of $5,000 each. *See Regulus*, 2020 WL 6381898, at *8 ("Service awards as high as $5,000 are presumptively reasonable in this judicial district." (citing *Lloyd v. Navy Fed. Credit*

*Union*, 2019 WL 2269958, at *15 (S.D. Cal. May 28, 2019)).[3] And Plaintiff's counsel will request fees in the amount of their lodestar as of the filing of this motion, which is approximately $530,000, based on over 760 hours expended on the case. *See* Fitzgerald Decl. ¶¶ 32-33. Plaintiff will also seek reimbursement of $36,684 in costs. *See id.* ¶ 33.[4]

While Plaintiff's fee motion will argue these amounts are reasonable, the Settlement "is not dependent or conditioned upon the Court's approving Class Counsel's and Class Representatives' requests . . . or awarding the particular amounts sought," and if the "Court declines Class Counsel's or Class Representatives' requests or awards less than the amounts sought, this Settlement will continue to be effective and enforceable," SA ¶ 3.4.

**VIII. Timeline**

Assuming the Court grants preliminary approval, the schedule proposed below gives Class Members sufficient time to receive Notice, and to make a claim, opt out, or object after reviewing Plaintiff's Motion for Attorneys' Fees, Costs, and Service Awards. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010).

---

[3] Although she was the named plaintiff in a related action filed in New York, the Court may award Ms. Gates a service award given her involvement in the litigation and inclusion in the Settlement Agreement. *See*, *e.g.*, *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *2, *11 (N.D. Cal. Mar. 18, 2013).

[4] The Settlement Agreement includes a "quick pay" provision for attorneys' fees and costs. SA ¶ 3.2. These help deter meritless objections and are routinely approved in the Ninth and other Circuits. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal. Dec. 27, 2011) (collecting cases); *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) ("we observe that quick-pay provisions have generally been approved by other federal courts." (citations omitted)); *Pelzer v. Vassalle*, 655 Fed. App'x 352, 365 (6th Cir. 2016) ("over one-third of federal class action settlement agreements in 2006 included quick-pay provisions" (citation omitted) and they do "not harm the class members in any discernible way, as the size of the settlement fund available to the class will be the same regardless of when the attorneys get paid").

| Event | Day | Weeks After Preliminary Approval | Example Assuming PA Granted Oct. 27, 2023 |
|---|---|---|---|
| Date Court grants preliminary approval | 0 | - | October 27, 2023 |
| Deadline to commence 63-day notice period | 21 | 3 weeks | November 17, 2023 |
| Deadline to file Motion for Attorneys' Fees, Costs, and Service Awards | 49 | 7 weeks | December 15, 2023 |
| Notice completion date, and deadline to make a claim, opt out, and object | 63 | 9 weeks | December 29, 2023 |
| Deadline to file Motion for Final Approval | 77 | 11 weeks | January 12, 2023 |
| Final Approval Hearing | 105 | 15 weeks | February 9, 2023 |

## ARGUMENT

"The claims, issues, or defenses of . . . a class proposed to be certified for purposes of settlement . . . may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). "A court may approve a class action settlement of a class only 'after a hearing and on finding that it is fair, reasonable, and adequate,' and that it meets the requirements for class certification." *Regulus*, 2020 WL 6381898, at *2 (quoting Fed. R. Civ. P. 23(e)(2)). Where a complaint is brought on behalf of one or more state classes, if the Rule 23 requirements are satisfied, "[e]xpansion of the class to include all purchasers nationwide . . . does not change the class certification analysis." *McMorrow v. Mondelez Int'l, Inc.*, 2022 WL 1056098, at *3 (S.D. Cal. Apr. 8, 2022) ["*McMorrow II*"] (citing *Allen v. Similasan Corp.*, 2017 WL 1346404, at *3 (S.D. Cal. Apr. 12, 2017)); *see also In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 556-57 (9th Cir. 2009) (en banc) ["*Hyundai*"].

## I. The Court Should Certify the Settlement Class

"The party seeking class certification bears the burden of satisfying each of the four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequate representation—and at least one requirement of Rule 23(b)." *Moriarty v. Am. Gen. Life Ins. Co.*, 2022 WL 6584150, at *2 (S.D. Cal. Sept. 27, 2022) (Moskowitz, J.) (citing *Willis v. City of Seattle*, 943 F.3d 882, 885 (9th Cir. 2019)). Those requirements are met here.

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

#### 1. Numerosity

A class action satisfies the numerosity requirement if "the class is so large that joinder of all members is impracticable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (quotation omitted). This is typically true "when class size exceeds 40 members," *Mandalevy v. Bofi Holding Inc.*, 2022 WL 4474263, at *4 (S.D. Cal. Sept. 26, 2022) (citation omitted). Here, the Class is estimated at 1.4 million, Schwartz Decl. ¶ 7, easily satisfying the requirement.

#### 2. Commonality

"Rule 23(a)(2) commonality requires 'questions of fact or law common to the class,' though all questions of fact and law need not be in common." *Regulus*, 2020 WL 6381898, at *3 (quoting *Hanlon*, 150 F.3d at 1026). The "burden for showing commonality is 'minimal,'" *Mezzadri v. Med. Depot, Inc.*, 2016 WL 5107163, at *3 (S.D. Cal. May 12, 2016) (quoting *Hanlon*, 150 F.3d at 1020). "A common nucleus of operative fact is usually enough to satisfy the commonality requirement," *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citation omitted), which exists "where a defendant has engaged in standardized conduct toward members of the class." *Hale v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4992504, at *6 (S.D. Ill. Sept. 16, 2016) (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (listing cases)). To satisfy Rule 23(a)(2), "even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (alterations and quotation omitted).

Here, whether NextFoods' health and wellness labeling for the Class Products was misleading, and whether purchasers paid more as a result, are issues common to the putative

class. *See Regulus*, 2020 WL 6381898, at *3 ("The focus of this action is common to all class members, namely whether Defendants misrepresented material facts or omitted material facts . . . and whether these alleged actions artificially inflated . . . [the] price.").

**3. Typicality**

"Rule 23(a)(3) requires that the plaintiff show that 'the claims of the representative parties are typical of the claims or defenses of the class.'" *Id.* (quoting Fed. R. Civ. P. 23(a)(3)). "This requirement is permissive and requires only that the representative's claims are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1118 (N.D. Cal. 2018) (quotation marks and quotation omitted).

Here, the Class Representatives' claims are typical of Settlement Class Members' claims because each purchased Class Products and were exposed to challenged labeling claims and omissions, allegedly losing money as a result. The injuries they claim are "the same injuries each [Settlement] Class Member alleges based on the same [NextFoods] conduct," *see id.* at 1118 (quotation omitted); *see also Regulus*, 2020 WL 6381898, at *3 ("Lead Plaintiff's claims are typical of those of the class, as they advance the same claims, share identical legal theories, and allegedly experience the same losses from [Defendant's] alleged misrepresentations.").

**4. Adequacy**

"Under Rule 23(a)(4), representative parties must be able to 'fairly and adequately protect the interest of the class.'" *Mandalevy*, 2022 WL 4474263, at *5 (quoting Fed. R. Civ. P. 23(a)(4)). In analyzing this requirement, "the Court must ask two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Id.* (quoting *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012)).

Here, Ms. Andrade-Heymsfield and Ms. Gates are adequate Class Representatives because each is a *bona fide* purchaser with standing, has no conflicts, and has been aware of

and carried out their obligations on behalf of the Class. *See* Andrade-Heymsfield Decl. ¶¶ 2-8; Gates Decl. ¶¶ 4-10; *cf. Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). And—as several California district courts have recently found—Plaintiff's counsel is adequate Class Counsel, experienced in prosecuting similar actions. *See Testone v. Barlean's Organic Oils, LLC*, 2023 WL 2375246, at *9 (S.D. Cal. Mar. 6, 2023); *Hanson v. Welch Foods Inc.*, 2022 WL 1133028, at *1 (N.D. Cal. Apr. 15, 2022); *Milan v. Clif Bar & Co.*, 340 F.R.D. 591, 597 (N.D. Cal. 2021); *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 562 (N.D. Cal. 2020); *Hadley*, 324 F. Supp. 3d at 1119-21; *cf. McMorrow II*, 2022 WL 1056098, at *7 ("Plaintiffs argue that 'great skill was required by Class Counsel here . . . .' This Court tends to agree." (record citation omitted)); *see also* Fitzgerald Decl. ¶ 31, Ex. 4 (firm resume).

**B. The Requirements of Rule 23(b)(3) are Satisfied**

**1. Predominance**

"The 'predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). "[E]ven if just one common question predominates, 'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.'" *Hyundai*, 926 F.3d at 557 (quoting *Tyson Foods*, 136 S. Ct. at 1045). Moreover, "whether a proposed class is sufficiently cohesive to satisfy Rule 23(b)(3) is informed by whether certification is for litigation or settlement." *Id.* at 558; *see also Jabbari v. Farmer*, 965 F.3d 1001, 1005-1006 (9th Cir. 2020). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

"In evaluating predominance, courts look to whether the focus of the proposed class action will be on the words and conduct of the defendants rather than on the behavior of the individual class members." *Kutzman v. Derrel's Mini Storage, Inc.*, 2020 WL 406768, at *7 (E.D. Cal. Jan. 24, 2020) (citation omitted). "Class actions in which a defendant's uniform

policies are challenged generally satisfy the predominance requirement of Rule 23(b)(3)." *Castro v. Paragon Indus., Inc.*, 2020 WL 1984240, at *10 (E.D. Cal. Apr. 27, 2020) (citations omitted); *accord Moreno v. Beacon Roofing Supply, Inc.*, 2020 WL 1139672, at *3 (S.D. Cal. Mar. 9, 2020) (predominance satisfied where "liability would be determined by looking at [defendant]'s uniform policies and practices"). This "is a test readily met in certain cases alleging consumer . . . fraud," *Amchem*, 521 U.S. at 625 (citations omitted), because "the crux of each consumer's claim is that a company's mass marketing efforts, common to all consumers, misrepresented the company's product," so that a "cohesive group of individuals suffered the same harm in the same way because of the [defendant's] alleged conduct," *see Hyundai*, 926 F.3d at 559 (predominance present where "class members were exposed to uniform fuel-economy misrepresentations and suffered identical injuries within only a small range of damages"). Thus, courts regularly find predominance in settlements of consumer fraud class actions. *See*, *e.g.*, *Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *2 (S.D. Cal. Jan. 31, 2020) ("common questions of law and fact" that "predominate over individual questions" included, *inter alia*, "whether Ocean Spray's representations . . . were false and misleading or reasonably likely to deceive consumers"); *cf. Regulus*, 2020 WL 6381898, at *3 ("The common questions in this case which would be subject to common proof include whether Defendants misrepresented material facts or omitted material facts . . . whether Defendants had a duty to disclose alleged material omissions . . . and whether the market price . . . was artificially inflated due to the alleged material omissions and/or misrepresentations. These questions predominate.").

Here, the First Amended Complaint alleges that "NextFoods markets the JuiceDrinks as promoting digestive health, as well as 'overall' health and wellness, by placing on the JuiceDrinks' labels, statements that expressly or implicitly convey the message that the JuiceDrinks are healthy." FAC ¶ 14; *see also id.* ¶ 15 (setting forth challenged health and wellness claims). It alleges those claims are "false and misleading for several reasons," *id.* ¶ 2, including that "the sugar contained in the JuiceDrinks directly harms digestive health and those harmful effects to the digestive system increase inflammation which [ ] thereby

increase[s] risk of metabolic syndrome, obesity, and type 2 diabetes," *id.* ¶ 4; *see also id.* ¶¶ 98, 100 (scientific evidence of digestive and general health harms from sugar consumption renders NextFoods' claims misleading). Predominance is satisfied by these allegations.

Moreover, while all Class Products included in the Settlement bore challenged health and wellness claims, Fitzgerald Decl. ¶ 8, Plaintiff also asserted an omissions theory that applies to all Class Products, *see* FAC ¶ 101, and this separately presents predominating common questions. *See Butler v. Porsche Cars N. Am., Inc.*, 2017 WL 1398316, at *10 (N.D. Cal. Apr. 19, 2017) ("exposure and reliance suitable for class-wide resolution . . . where the class was defined as all purchasers" and plaintiff's "claims were based on information omitted from the product's packaging"). "In these cases, all class members were 'necessarily exposed' to the defendant's omissions on the package prior to purchase," *Id.* (quoting *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1105 (C.D. Cal. 2015)).

**2. Superiority**

"The superiority inquiry 'requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case.'" *Scheuneman v. Arena Pharms., Inc.*, 2020 WL 3129566, at *3 (S.D. Cal. June 12, 2020) (quoting *Hanlon*, 150 F.3d at 1023). A "relatively limited potential recovery for the class members as compared with the costs [of] litigating the claims . . . support[s] the conclusion that a class action is superior to other methods . . . ." *See id.*; *accord Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 486 (C.D. Cal. 2012) (The "superiority requirement is met '[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis.'" (quotation omitted)); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

The Class Products cost $3.36 each, and damages are likely to be about 4% of the price, or 13 cents per unit. *See* Fitzgerald Decl. ¶¶ 5, 15. Thus, "[t]here can be no doubt . . . that a class is the superior method of handling these consumer claims." *Milan*, 340 F.R.D. at 602 (Noting that the "bars at issue here cost no more than a few dollars per bar . . . and it is not likely for class members to recover large amounts individually if they prevailed." (record citation omitted)).

## II. The Court Should Approve the Proposed Settlement

"The Ninth Circuit maintains a 'strong judicial policy' that favors the settlement of class actions." *Watkins v. Hireright, Inc.*, 2016 WL 1732652, at *3 (S.D. Cal. May 2, 2016) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). At this first step, the Court must make "a preliminary determination of whether the class-action settlement is 'fair, reasonable, and adequate' pursuant to Rule 23(e)(2)." *Id*., at *6. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026 (citation omitted). Factors relevant to this determination include:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

*Id.* (citation omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citation omitted).

"Preliminary approval of a settlement and notice to the proposed class is appropriate if 'the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.'" *Manner v. Gucci Am., Inc.*, 2016 WL 1045961, at *6 (S.D. Cal. Mar. 16, 2016) ["*Gucci*"] (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)). "In reviewing the proposed settlement, a court need not address whether the settlement is ideal or the best outcome, but only whether the settlement is fair, free of collusion, and consistent with plaintiff's fiduciary obligations to the class." *Regulus*, 2020 WL 6381898, at *2 (citing *Hanlon*, 150 F.3d at 1027).

**A. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations**

That the Settlement was reached only after significant discovery and litigation shows that it resulted from arm's-length negotiations. *See Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1122, 1127 (9th Cir. 2020) (case being "nearly [at] the close of discovery" indicated "the settlement's substantive fairness"); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 424 F. Supp. 3d 456, 486 (E.D. La. 2020) (

> Counsel on both sides have zealously advocated for their clients. . . as evidenced by the extensive discovery, motions practice, and significant resources expended in this case. The parties entered the negotiation with the experience and institutional knowledge necessary to successfully negotiate on behalf of their clients, and the settlement was accordingly achieved as a result of the adversarial process.).

In addition, the Settlement was negotiated during a Settlement Conference with Judge Berg. *See* Dkt. No. 51; *cf. Gucci*, 2016 WL 1045961, at *7 (finding a "proposed Settlement was the result of 'serious, informed, and non-collusive arm's-length negotiations'" where the parties engaged in "mediation efforts overseen by retired United States Magistrate Judge Edward Infante, who conducted a full-day mediation session" (citations omitted)); *Hale v. Manna Pro Prod., LLC*, 2020 WL 3642490, at *11 (E.D. Cal. July 6, 2020) ("extensive discovery and arm[']s-length, mediator-guided negotiations all suggest the settlement agreement is not the product of collusion"); *In re Zynga Inc. Sec. Litig.*, 2015 WL 6471171, at *9 (N.D. Cal. Oct. 27, 2015) (The "use of a mediator and the presence of discovery 'support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'" (citation omitted)).

Also, none of the "subtle signs" of collusion that the Ninth Circuit identified in *Bluetooth* are present here. *See* 654 F.3d at 947. Nothing in the Agreement purports to entitle counsel to "a disproportionate distribution of the settlement" (and Class Members *are* to "receive[] [a] monetary distribution"); nothing returns unawarded fees to NextFoods; and the

Settlement Agreement includes no "clear sailing" agreement, instead providing only that counsel will apply to the Court for fees, imposing no conditions on NextFoods' response, and making the fee determination independent of the Settlement's other provisions, *compare* SA ¶ 3.4, *with Bluetooth*, 654 F.3d at 947 (quotations omitted).

"[T]he prospect of fraud or collusion is substantially lessened where, as here, the settlement agreement leaves the determination and allocation of attorney fees to the sole discretion of the trial court," *Chinese Drywall*, 424 F. Supp. 3d at 486. Here, "[b]ecause the parties have not agreed to an amount of attorney fees and instead [will] merely petition[] the Court for an award they believe is appropriate, there is no threat of the issue tainting the fairness of the settlement negotiations." *See id.* Similarly, no other agreements have been made in connection with the settlement, Fitzgerald Decl. ¶ 2, so there is no possibility such an agreement "may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others," Fed. R. Civ. P. 23(e), advisory committee note (2003 amendment).

Finally, the excellent nature of the Settlement, especially in the face of significant risks the Class faced, *see* Fitzgerald Decl. ¶¶ 14-21, demonstrates it was achieved through vigorous litigation, rather than collusion, since "cash . . . is a good indicator of a beneficial settlement," *Rodriguez v. W. Pub'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ["*W. Pub'g*"], and a sign that Class Counsel did not subvert the Class's interests to NextFoods' interests "in exchange for red-carpet treatment on fees," *see Bluetooth*, 654 F.3d at 947 (quotation omitted).

**B. The Settlement Does Not Grant Preferential Treatment**

The Settlement does not treat the Class Representatives or any Class Members preferentially, since every Class Member who makes a claim, including the Class Representatives, will be subject to the same claims process that provides the same remedy based on the Claimant's purchase history. That the Class Representatives will move for service awards does not change this analysis. *See Regulus*, 2020 WL 6381898, at *5 ("[T]he service award Lead Plaintiff seeks is reasonable and does not constitute inequitable treatment of class members" where "[u]nder the Settlement Agreement, class members who have

submitted timely claims will receive payments on a *pro rata* basis . . . ." (citation omitted)); *see also Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *9 (N.D. Cal. Apr. 29, 2011) (no preferential treatment where settlement "provides equal relief to all class members" and "distributions to each class member—including Plaintiff—are calculated in the same way").

**C. The Settlement Falls within the Range of Possible Approval**

"'The relief the settlement is expected to provide to class members is a central concern,' though it is not enumerated among the factors of Rule 23(e)," *Regulus*, 2020 WL 6381898, at *5 (quoting Fed. R. Civ. P. 23, advisory committee's note (2018 amendment)). "To evaluate the range of possible approval criterion, which focuses on substantive fairness and adequacy, courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *Harris*, 2011 WL 1627973, at *9 (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009)).

> Additionally, to determine whether a settlement is fundamentally fair, adequate, and reasonable, the Court may preview the factors that ultimately inform final approval: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement.

*Id.* (citing *Churchill Vill.*, 361 F.3d at 575); *accord Winters*, 2020 WL 5642754, at *3 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003)).

**1. The *Churchill Village* Factors Favor Preliminary Approval**

An initial analysis of the *Churchill Village* factors favors preliminary approval.

***The Strength of Plaintiff's Case*** and ***the Risk, Expense, Complexity, and Duration of Further Litigation.*** Plaintiff and her counsel believe the theory underlying this case was and is strong on the merits, but despite that, this particular case faced significant challenges to Plaintiff establishing liability and obtaining damages. *See generally* Fitzgerald Decl. ¶¶ 14,

16, 18, 20. Particularly given the scientific evidence that there are some health benefits to the probiotics in the Class Products, there was a risk the Class could lose at trial and recover nothing—as has happened in several seemingly meritorious consumer fraud class actions that have recently gone to trial in California with judgments returned for defendants. *See Farar v. Bayer AG*, No. 14-cv-4601 (N.D. Cal.); *Allen v. Hyland's, Inc.*, No. 12-cv-1150 DMG (MANx) (C.D. Cal.); *cf. Racies v. Quincy Bioscience, LLC*, No. 15-cv-292 (N.D. Cal.) (declaring mistrial and decertifying class).

Moreover, because of the need for expert scientific testimony from both sides, trial would have been complex and expensive. "[C]ontinued litigation of this matter would include motions for summary judgment, trial and appeal" and "further litigation would have significantly delayed any relief to Class Members," *Watkins*, 2016 WL 1732652, at *7 (record citations and quotation marks omitted); *see also Regulus*, 2020 WL 6381898, at *5 ("Proceeding with this case presents very real risks regarding additional pleading challenges, class certification, summary judgment, *Daubert* and *in limine* motions, proving the necessary falsity . . . and damages if the case proceeded to trial, and a possible unfavorable decision on the merits," and "these risks weigh in favor of settlement." (citation omitted)).

In sum, "'these types of food labeling claims are difficult to maintain,' and success at trial was far from certain," *Testone*, 2023 WL 2375246, at *6 (quoting *Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *3 (N.D. Cal. Aug. 1, 2016)).

Further, even complete success at trial would leave Class Members outside California and New York uncompensated. For even the possibility of obtaining the nationwide relief conferred by the Settlement, Class Counsel or other attorneys would have to file and prosecute actions in all other states since—given existing precedent—it is virtually impossible that the claims of the nationwide Settlement Class could ever be adjudicated in a single forum and trial. *See, e.g., Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL 8578913, at *12 (C.D. Cal. Dec. 2, 2016) ("Nationwide class certification under the laws of multiple states can be very difficult for plaintiffs' counsel." (citing *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590-94 (9th Cir. 2012); *In re Pharm. Indus. Average*

*Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) ("While numerous courts have talked-the-talk that grouping of multiple state laws is lawful and possible, very few courts have walked the grouping walk.")); *Rodriguez v. Bumble Bee Foods, LLC*, 2018 WL 1920256, at *3 (S.D. Cal. Apr. 24, 2018) (That "[t]he parties acknowledge[d] that obtaining a nationwide class may be difficult in light of recent case law . . . . weigh[ed] in favor of settlement."). Such litigation would cost the respective state classes millions of dollars to prosecute, be inherently risky, and continue for years, not including any appeals. *See* Fitzgerald Decl. ¶ 16.

Finally, even if successful at trial, Plaintiff faced risk on appeal, especially given the unfavorable outcomes of two similar cases that were dismissed on the pleadings and had unsuccessful appeals. *See* Fitzgerald Decl. ¶ 20. These factors thus weigh in favor of preliminary approval. *See Watkins*, 2016 WL 1732652, at *7 ("The Court agrees with the parties that the proposed Settlement eliminates the litigation risks and ensures that the Class Members receive some compensation for their claims. Therefore, on balance, the strength of Plaintiff's case and risk of further litigation favor approving the proposed Settlement."); *Allen*, 2017 WL 1346404, at *4 (holding the same where, like here, "the litigation involves complex issues requiring extensive resources, expert testimony and a likely appeal, if the case goes to trial"); *Winters*, 2020 WL 5642754, at *3.

***The Risk of Maintaining Class Action Status Through Trial.*** A "district court may decertify a class at any time." *W. Pub'g*, 563 F.3d at 966 (citation omitted). Decertification happens with some regularity, including by courts in this district. *See NEI Contracting & Eng'g, Inc. v. Hanson Aggregates, Inc.*, 2016 WL 2610107, at *5-8 (S.D. Cal. May 6, 2016), *aff'd*, 926 F.3d 528 (9th Cir. 2019); *Yeoman v. Ikea U.S.A. W., Inc.*, 2014 WL 7176401, at *7 (S.D. Cal. Dec. 4, 2014), *vacated and remanded sub nom.* on other grounds in *Medellin v. Ikea U.S.A. W., Inc.*, 672 Fed. App'x 782 (9th Cir. 2017); *see also Tschudy v. J.C. Penney Corp., Inc.*, 2015 WL 8484530, at *6 (S.D. Cal. Dec. 9, 2015); *Makaeff v. Trump Univ., LLC*, 309 F.R.D. 631, 643 (S.D. Cal. 2015) (partially granting "motion to decertify the subclasses on the issue of damages").

***The Settlement Amount.*** The settlement amount here is favorable in comparison to other recent settlements of similar cases. For example, out of six settlements of similar sugar cases, the amount here is 2.24 times larger than the next-largest as a proportion of nationwide damages, and the largest as a proportion of nationwide sales—by more than double the next-largest. *See* Fitzgerald Decl. ¶ 17. Given the challenges Plaintiff faced, this is a very reasonable, if not excellent result. *See id.* ¶ 21. As discussed below, the amount is also reasonable in relation to the Settlement Class's potential recovery. *See infra* Point II(C)(2).

***The Extent of Discovery Completed and Procedural Posture.*** Because fact discovery was substantially complete and Plaintiff's expert analysis was underway, "the parties ha[d] sufficient information to make an informed decision about settlement." *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation omitted). This factor thus favors preliminary approval. *See Allen*, 2017 WL 1346404, at *4 (factor favored approval where "Plaintiffs engaged in substantial discovery and negotiations" and parties "briefed, and the Court has ruled on, [] motions to dismiss . . . [and] a motion for class certification").

***The Experience and Views of Counsel.*** The Ninth Circuit has "held that '[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.'" *W. Pub'g*, 563 F.3d at 967 (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995)). "Generally, '[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *Allen*, 2017 WL 1346404, at *5 (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Here, Class Counsel has considerable experience in consumer class actions, and particularly those involving the false advertising of foods, especially foods with high sugar content touted as healthy. Fitzgerald Decl. ¶ 21. Moreover, given counsel's experience litigating several similar cases during the pendency of this action, counsel has been exposed to a wide variety of information about the claims and defenses, and ultimately the potential upside and risks attendant to this case, and endorse the Settlement. *Id.* Accordingly, this factor favors preliminary approval. *See Gucci*, 2016 WL 1045961, at *7 ("[G]iving the appropriate weight to class counsel's recommendation, the Court concludes that this factor also weighs

in favor of approval." (citation omitted)); *cf. Testone*, 2023 WL 2375246, at *4 ("Here, given [Fitzgerald Joseph LLP's] experience in prosecuting class actions, including cases involving the false advertising of foods (like coconut oil), Class Counsel's recommendations are presumed to be reasonable, and this factor accordingly favors [final] approval."); *McMorrow II*, 2022 WL 1056098, at *4 ("Here, due especially to the experience and knowledge of [Fitzgerald Joseph LLP as] Class Counsel, their recommendations are presumed to be reasonable, and this factor accordingly favors [final] approval.").

***Governmental Participation.*** "There is no governmental participant in this case, so this factor is neutral." *Allen*, 2017 WL 1346404, at *5.

***Class Member Reaction.*** Because "Class Members will have an opportunity to object or opt out of the Settlement [,] at this time, this factor weighs in favor of approving the Settlement," *Gucci*, 2016 WL 1045961, at *7.

**2. The Monetary Relief is Fair in Relation to Potential Damages**

Here, Plaintiff and Class Counsel secured for the Settlement Class direct monetary benefits of $1.25 million, which is reasonable in relation to the Settlement Class's potential damages. *See* Fitzgerald Decl. ¶¶ 15-16 (estimating damages for California, New York, and nationwide classes to be $453,000, $33,000, and $2.98 million respectively, representing a recovery of 276% of the California class's damages; 257% of the damages of a combined California and New York class; and 42% of the nationwide Settlement Class's damages); *cf. Regulus*, 2020 WL 6381898, at *6 (finding settlement fund "represents a respectable recovery for the class" where it represented "1.99% of total estimated damages").

Moreover, if the Court awards the full amount of attorneys' fees, costs, and service awards Class Representatives may request, given the estimated class size and claims rate, the average cash refund for Class Member Claimants is estimated to be $7.48. *See* Fitzgerald Decl. ¶¶ 26-27. Based on an estimated price premium of 3.97% due to the challenged claims, which is reasonably grounded in consumer surveys performed on similar claims in similar cases, *see id.* ¶ 15, actual damages would be 13¢ per container given the Class Products' average unit price of $3.36. *See id.* ¶ 5. Thus, the amount Claimants are estimated to receive

represents a recovery of full damages for approximately 57 units, or about 10 units per year over the 6-year Class Period. This likely exceeds most Class Members' actual damages, since most will not have purchased with that frequency for that duration. *Id.* ¶ 27.

Moreover, at $3.36 per unit, the $7.48 average recovery anticipated represents a full refund for more than 2 units per Claimant. Thus, the monetary relief is fair in relation to potential damages. *See Winters*, 2020 WL 5642754, at *4 (Where "Class Members who file for monetary relief are likely on average to receive approximately $17.70, which represents a 31% refund on the purchase price of the product," the "monetary compensation and the stipulated injunctive relief offered in the Settlement Agreement is sufficient for approval." (record citation omitted)); *Hilsley*, 2020 WL 520616, at *6 ($1.00 recovery per purchase "is an excellent result" considering the fraction of purchase price recoverable at trial and in light of expert opinion that price premium was 19% (record citation omitted)); *cf. In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), *as amended* (June 19, 2000) ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." (quotation and quotation marks omitted)).

**3. The Injunctive Relief is Appropriate and Meaningful**

"[T]here is a high value to the injunctive relief obtained" in consumer class actions resulting in labeling changes. *See Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013). It benefits not just Class Members, but also "the marketplace, and competitors who do not mislabel their products." *Id.*; *accord McMorrow II*, 2022 WL 1056098, at *6 (

> An injunction precluding Defendant from using the term "nutritious" and other synonyms on Class Products' labels for three years following final approval is undoubtedly beneficial to class consumers, the marketplace, and even to competitors who do not mislabel their products. It is a mark of success that the class was able to secure the type of injunctive relief sought in its Complaint, and

. . . it supports the Court's conclusion that the settlement is an exceptional result for the class. (internal citations omitted)).

The injunctive relief obtained here is especially noteworthy because the Court dismissed Plaintiff's claims for injunctive relief, limiting her leverage to obtain it. *See Andrade-Heymsfield I*, 2022 WL 1772262, at *7. Despite this, the labeling change effectively espouses a large portion of Plaintiff's case theory, prohibiting NextFoods from advertising the JuiceDrinks as promoting "GoodHealth," narrowing the ways in which it can mention "overall health" or "overall wellness," and requiring it to include explanatory language about sugar content.

## III. The Court Should Approve the Class Notice and Notice Plan

"Under Rule 23(c)(2)(B), 'the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *Allen*, 2017 WL 1346404, at *5. "[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards imposed by due process." *Id*. (quotation and citation omitted).

P&N's proposed Notice Plan is reasonable under the circumstances. It includes targeted print and online ads and will reach an estimated minimum 70% of Class Members, and more than twice each. *See* Schwartz Decl. ¶¶ 11-12; *see also Edwards v. Nat'l Milk Producers Fed'n*, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017), *aff'd sub nom. Edwards v. Andrews*, 846 Fed. App'x 538 (9th Cir. 2021) ("[N]otice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23." (footnote omitted)).

The proposed Notice itself is also appropriate, since it contains "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977). The Notice sufficiently informs Class Members of (1) the nature of the litigation, the Settlement Class, and the identity of Class Counsel, (2) the essential terms of the Settlement, including the gross settlement award and net settlement payments class members can expect to receive,

(3) how notice and administration costs, court-approved attorneys' fees, costs, and service awards will be paid from the Settlement Fund, (4) how to make a claim, opt out, or object to the Settlement, (5) procedures and schedules relating to final approval, and (6) how to obtain further information. *See* SA Ex. 1, Long Form Notice.

## CONCLUSION

The Court should, respectfully, grant preliminary approval to the Settlement, authorize Class Notice, appoint Ms. Andrade-Heymsfield and Ms. Gates as Class Representatives and their counsel as Class Counsel, set deadlines for making claims, opting out, and objecting, and schedule a Final Approval Hearing and related deadlines.

Dated: September 22, 2023

Respectfully Submitted,

/s/ Jack Fitzgerald

**FITZGERALD JOSEPH LLP**
JACK FITZGERALD
*jack@fitzgeraldjoseph.com*
PAUL K. JOSEPH
*paul@fitzgeraldjoseph.com*
MELANIE PERSINGER
*melanie@fitzgeraldjoseph.com*
TREVOR M. FLYNN
*trevor@fitzgeraldjoseph.com*
CAROLINE S. EMHARDT
*caroline@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741

***Counsel for Plaintiff***

**FITZGERALD JOSEPH LLP**
JACK FITZGERALD (SBN 257370)
*jack@fitzgeraldjoseph.com*
PAUL K. JOSEPH (SBN 287057)
*paul@fitzgeraldjoseph.com*
MELANIE PERSINGER (SBN 275423)
*melanie@fitzgeraldjoseph.com*
TREVOR M. FLYNN (SBN 253362)
*trevor@fitzgeraldjoseph.com*
CAROLINE S. EMHARDT (SBN 321222)
*caroline@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741
***Counsel for Plaintiff***

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

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NEXTFOODS, INC.,

Defendant.

Case No.: 21-cv-1446-BTM-MSB

**DECLARATION OF JACK FITZGERALD IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL**

Judge: Hon. Barry Ted Moskowitz
Hearing Date: Oct. 27, 2023, 11:00 a.m.

PER CHAMBERS, NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

I, Jack Fitzgerald, declare:

1. I am a member in good standing of the State Bars of California and New York; and of the United States District Courts for the Northern, Central and Southern Districts of California, the Southern and Eastern Districts of New York, and the Western District of Wisconsin; and of the United States Courts of Appeal for the Second, Eighth, and Ninth Circuits. I make this declaration based on my own personal knowledge, in support of the Motion for Preliminary Approval of Class Action Settlement.

**The Settlement Agreement**

2. Attached hereto as Exhibit 1 is the parties' executed Settlement Agreement. There are no other agreements made in connection with the proposed settlement or Settlement Agreement. *See* Fed. R. Civ. P. 23(e)(3).

**Discovery**

3. The below table summarizes the parties' written discovery in this case.

| Date | Requester | Discovery | Response Date |
|---|---|---|---|
| March 27, 2023 | Plaintiff | 1st Document Requests | April 26, 2023 |
| March 27, 2023 | Plaintiff | 1st Interrogatories | April 26, 2023 |
| April 14, 2023 | Plaintiff | 2nd Document Requests | May 15, 2023 |
| May 1, 2023 | Plaintiff | 3rd Document Requests | May 31, 2023 |
| June 27, 2023 | Plaintiff | 2nd Interrogatories | Did Not Respond[1] |
| June 27, 2023 | Plaintiff | 1st Requests for Admission | Did Not Respond[1] |
| June 27, 2023 | NextFoods | 1st Document Requests | Did Not Respond[1] |
| June 27, 2023 | NextFoods | 1st Interrogatories | Did Not Respond[1] |
| June 27, 2023 | NextFoods | 1st Requests for Admission | Did Not Respond[1] |

More specifically, Plaintiff propounded on NextFoods 51 document requests, 21 interrogatories, and 24 requests for admission. NextFoods propounded on Plaintiff 42 document requests, 24 interrogatories, and 14 requests for admission.

[1] After scheduling a Settlement Conference, the parties agreed to extend the deadline to respond to these requests pending its outcome.

4. In response to Plaintiff's requests, the parties not only met and conferred at length to resolve many of NextFoods' objections without intervention, but also negotiated an extensive list of search terms and custodians. Beginning in late June, 2023, NextFoods then produced more than 103,000 documents spread across approximately 320,000 pages. Plaintiff's counsel subsequently spent dozens of hours performing targeted searches and employing other review strategies to hone in on important documents.

5. In April 2023, Plaintiff also subpoenaed Circana, the predecessor to IRI, which aggregates scan data at retail purchase points. By doing so, Plaintiff was able to obtain information data showing nationwide sales the Class Products (as defined in the Settlement Agreement) were approximately $69 million between August 2017 and April 2023. As shown below, based on data through the end of March 2023 and projecting through the filing date of the Preliminary Approval Motion, the nationwide sales at issue are approximately $75.1 million, with approximately 22.3 million units sold at an average price of $3.36 per unit.

| Year | Nationwide Sales (32 oz) | Nationwide Units (32 oz) | Avg. Price |
|---|---|---|---|
| 2017* | $4,730,226 | 1,328,533 | $3.56 |
| 2018 | $12,362,789 | 3,724,993 | $3.32 |
| 2019 | $12,221,718 | 3,727,079 | $3.28 |
| 2020 | $13,859,267 | 4,193,351 | $3.31 |
| 2021 | $12,516,090 | 3,759,013 | $3.33 |
| 2022 | $10,890,437 | 3,072,780 | $3.54 |
| 2023^ | $2,719,591 | 812,453 | $3.35 |
| 2023+ | $5,792,729 | 1,730,525 | $3.35 |
| **Totals** | **$75,092,847** | **22,348,727** | **$3.36** |

* 2017 starts 8/13

^ through 3/26/2023 [84 days]

+ Projected 3/27/2023 – 9/22/2023 [179 days / 2.13 x 2023^]

6. The same data shows California sales during the same period were $11,417,291, and New York sales during the relevant statutory period, $831,686

7. In preparation for a class certification motion that was due shortly when the parties settled, Plaintiff retained three experts, who drafted declarations intended to support the motion. This includes:

a. **Dr. Michael Greger, M.D., FACLM** – Dr. Greger is a physician, licensed as a general practitioner specializing in clinical nutrition, and is a founding member and a Fellow of the American College of Lifestyle Medicine. Dr. Greger serves as Chief Science Officer for a 501(c)(3) nonprofit called NutritionFacts.org, which is a science-based, strictly non-commercial website that provides informational videos and articles on the latest evidence-based nutrition research. Dr. Greger has authored numerous books on nutrition, like *How Not to Die*, which became an instant New York Times bestseller, and published papers in peer-reviewed journals. Dr. Greger has prepared a report showing why NextFoods' challenged labeling claims are misleading in light of the scientific evidence of the health harms of consuming added sugars at the levels present in the products. Dr. Greger's testimony helped secure class certification in several other sugar cases of ours, including *Hadley v. Kellogg*,[2] *Krommenhock v. Post*,[3] *McMorrow v. Mondelez*,[4] and *Milan v. Clif Bar & Co.*[5]

b. **J. Michael Dennis, Ph.D.** – Dr. Dennis has worked as a survey research expert for more than 25 years, authoring more than 60 articles, conference and seminar papers, and book chapters. He is recognized as an expert in survey research methods. Dr. Dennis prepared a declaration detailing a conjoint analysis that would be used to assess the price premium attributable to the challenged

[2] *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. Aug. 17, 2018).

[3] *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 560-68 (N.D. Cal. Mar. 9, 2020).

[4] *McMorrow v. Mondelez Int'l, Inc.*, 2021 WL 859137 (Mar. 8, 2021).

[5] *Milan v. Clif Bar & Co.*, 340 F.R.D. 591 (N.D. Cal. Sept. 27, 2021).

statements. Similar declarations from Dr. Dennis have supported class certification in several other similar cases of ours in this district, including, *McMorrow v. Mondelez* and *Testone v. Barlean's Organic Oils*.[6]

c. **Colin B. Weir** – Mr. Weir is an economist and President of Economics and Technology, Inc., a research and consulting firm specializing in economics, statistics, regulation, and public policy. He has provided expert testimony before the Federal Communications Commission and state regulatory commissions, and in federal and state courts on damages in consumer products cases. Mr. Weir has analyzed the sales data obtained from Circana and drafted a declaration explaining how damages will be calculated once a price premium is derived from Dr. Dennis's survey. Similar declarations have supported class certification in several other sugar cases, including *Hadley v. Kellogg*, *Krommenhock v. Post*, *McMorrow v. Mondelez*, and *Milan v. Clif Bar & Co.*

8. By the time the case settled, Plaintiff's counsel had done additional work preparing a motion for class certification, including mining NextFoods' production for documents supporting the different elements of certification and Plaintiff's underlying claims; creating label timelines to show the consistency of the labeling, which demonstrated that all Class Products bore the challenged claims throughout the Class Period; and drafting the motion itself (which was largely complete when the parties settled).

**The Parties' Settlement Negotiations**

9. The parties first discussed settlement at the April 2023 ENE. But NextFoods had shortly before then filed a motion for reconsideration of the Court's Order denying its Motion to Dismiss the First Amended Complaint, and the parties were otherwise far apart, so the case did not settle.

[6] *Testone v. Barlean's Organic Oils, LLC*, 2021 WL 4438391 (S.D. Cal. Sept. 28, 2021).

10. Although in its March 31, 2023 initial disclosures, NextFoods had identified an insurance policy, it had withheld the policy under a claim of privilege, pending entry of a Protective Order, and not produced it to Plaintiff until April 26, the day before the ENE. Accordingly, although (as Plaintiff later learned) NextFoods' defense had been tendered to the insurer, the insurer was not at the ENE.

11. Following the ENE, Plaintiff's counsel drafted, and on June 9, 2023 sent to NextFoods' insurer, a 13-page policy limit demand letter. The letter discussed the merits of the case and damages; the likelihood of class certification; the extent to which the policy at issue covered the claims; and the bad-faith implications if the insurer refused to settle.

12. At around this same time, the parties began discussing labeling changes on which they might be able to agree to settle the action. When those discussions were productive, they scheduled a Settlement Conference with Judge Berg, this time to include the insurer. *See* Dkt. No. 48. To conserve resources that might go toward a settlement, the parties asked that the then-pending deadlines be continued until after the Settlement Conference. Dkt. No. 49.

13. Given these advancements, the parties were able to reach the proposed settlement during an August 18, 2023 Settlement Conference with Judge Berg. *See* Dkt. No. 51.

**Settlement Considerations**

14. The decision to settle this case was made balancing numerous considerations. First, we considered the strength of the Class's claims. In particular, there was a relative dearth of information in the scientific record weighing the relative harms of sugar against the relative benefits of probiotics, making it potentially difficult to prove our claims. Moreover, unlike as with some other defendants in similar cases we have prosecuted, our review of NextFoods' documents showed little in the way of the defendant's knowledge of or concern over the issue. In fact, defendant's documents had relatively little discussion about sugar at all, again making our job of establishing liability at trial potentially more difficult.

15. Second, we considered the potential recovery at trial. Specifically, sales of the products in California were only about $10.5 million during the class period (and only about $725,000 in New York). In our experience prosecuting many similar actions in which we have run conjoint studies to determine the price premia associated with health and wellness claims on foods and beverages, premiums are typically between 2% and 10%. To determine the likely scope of the premium in this case, we considered statements similar to those challenged here, for which we had previously performed conjoint analyses to derive price premia in other, similar cases (*i.e.*, challenging health claims on sugary foods). These appear below and show an average premium of 3.97%.

| Case | Product | Claim Tested | Premium |
|---|---|---|---|
| *Krommenhock* | Post Raisin Bran | "Healthy" | 2.34% |
| *Krommenhock* | Post Raisin Bran | "Nutritious" | 2.13% |
| *Krommenhock* | Post Raisin Bran | "Fiber is good for digestive health" | 2.55% |
| *Krommenhock* | Post Raisin Bran | "CONTAINS DIETARY FIBER to Help Maintain Digestive Health" | 9.16% |
| *Krommenhock* | Post Honeycomb | "NUTRITIOUS SWEETENED CORN & OAT CEREAL" | 0.75% |
| *McMorrow* | BelVita Breakfast Biscuits | "Nutritious" | 6.88% |
| | | ***Average:*** | ***3.97%*** |

Using this as a best estimate, the maximum damages for a California class after trial would be approximately $453,000, and for a New York class, just $33,000. But it would cost the parties far more than that to take these cases—even just one of them—to trial. Moreover, while there is no venue in which claims on behalf of a nationwide class could be tried in single venue, the nationwide Settlement Class's damages under this model would amount to approximately $2.98 million, again a modest sum.

16. The $1.25 million common fund here thus represents about 276% of the amount Plaintiff could have recovered at trial for California Class Members, and 257% of the amount recoverable under a price premium theory if New York is included.

Extrapolating to the nationwide Settlement Class, the $1.25 million common fund represents a recovery of about 42% of potential damages. However, because there is likely no venue in which this case could be brought to trial on a nationwide basis, my firm or others would likely have had to file at least several additional actions alleging claims on behalf of individual or multi-state classes. This might cost millions of dollars more and take many additional years of litigation, in a case that is quite modest in value. Even then it might be impossible to get relief for consumers in some states, for example where class actions are not permitted, or individual showings of reliance are required. And of course, damages are only possible if liability is first established.

17. Third, in settling this action, we considered how the amount compared to recent settlements in similar actions challenging health and wellness claims on foods and beverages containing high amounts of added sugar, especially considering the sales and damages at issue in each case.

| Case | Settlement | Nationwide Sales | As % of Nationwide Sales | Nationwide Price Premium Damages | As % of Nationwide Damages |
|---|---|---|---|---|---|
| *Krommenhock* | $15M | $5.6B | 0.268% | $482.5M | 3.109% |
| *Hadley* | $13M | $3.9B | 0.333% | $135M | 9.630% |
| *McMorrow* | $8M | $1.8B | 0.444% | $127M | 6.299% |
| *Hanson* | $1.5M | $0.2B | 0.743% | $7.3M | 20.548% |
| *Milan* | $12M | $2.6B | 0.462% | $150.2M | 7.0% |
| *Andrade-Heymsfield* | $1.25M | $0.075B | 1.667% | $3.0M | 41.7% |
| | | **Average:** | **0.653%** | | **10.542%** |

As demonstrated above, the settlement here falls well within the range of the other actions.[7] In fact, as a proportion of nationwide sales, it is 2.24 times larger than the next-

[7] The cases are: *Krommenhock v. Post Foods, LLC*, No. 16-cv-4958-WHO (N.D. Cal.) (final approval granted June 25, 2021); *Hadley v. Kellogg Sales Co.*, No. 16-cv-4955-KOH (N.D. Cal.) (final approval granted November 23, 2021); and *Hanson v. Welch Foods Inc.*, No. 20-cv-2011-JCS (N.D. Cal.) (final approval granted April 15, 2022).

largest settlement (*Hanson*), and the largest as a proportion of nationwide damages—by more than double *Hanson*.

18. Fourth, we considered NextFoods' financial condition and its potential to enter bankruptcy or otherwise be judgment proof, as revealed during litigation, including from our review of financial documents NextFoods produced in discovery.

19. Fifth, we considered NextFoods' willingness to make label changes as part of a classwide settlement even though Plaintiff's claims for injunctive relief had been dismissed, such that she could not obtain such relief from the Court even if she prevailed at trial. Not only was NextFoods willing to remove the most explicit health claim, "GoodHealth," but it agreed to qualify other digestive health and overall health and wellness claims, including by adding to an existing explanatory paragraph the statement, "See Nutrition Facts Box for sugar content." Drawing consumers' attention to the products' sugar content when considering its health claims represents a benefit that has value to both class members and the general public.

20. Finally, we took into account the current legal climate surrounding Plaintiff's claims, where the underlying case theory has had mixed results, including at the Ninth Circuit. In December 2018, the Honorable William Alsup dismissed a similar case Plaintiff's counsel brought against a product called Perfect Bar, finding the theory not plausible under the reasonable consumer standard. *See Clark v. Perfect Bar, LLC*, 2018 WL 7048788, at *1 (N.D. Cal. Dec. 21, 2018). Shortly thereafter, the Honorable Jeffrey S. White dismissed a suit brought against General Mills, on similar grounds. *See Truxel v. General Mills Sales, LLC*, 2019 WL 3940956, at *4 (N.D. Cal. Aug. 13, 2019). The *Clark* and *Truxel* Plaintiffs appealed. The *Clark* panel took the matter under submission without oral argument. The *Truxel* panel then held argument in June 2020. I argued, and the panel appeared skeptical.[8] A month later, on August 11, 2020, the *Clark* panel affirmed Judge

[8] Archived video of the oral argument is available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000017597. Following the arguments, Law360 ran a story in which it noted "U.S. Circuit Court Judge Danielle J.

Alsup's decision, though on the alternative basis of federal preemption, seemingly leaving the reasonable consumer issue to the *Truxel* panel to resolve. *See Clark v. Perfect Bar, LLC*, 816 Fed. App'x 141 (9th Cir. 2020). Ultimately, the risk that a decision in *Truxel* could undermine this and the other then-pending cases was too great, and we made a difficult decision to voluntarily dismiss the *Truxel* appeal. If this case had gone to trial and the class obtained a verdict, NextFoods may have appealed many issues in the case, including at least class certification and damages. The decisions in *Clark* and our decision to voluntarily dismiss the *Truxel* appeal demonstrate this case theory has real risk in the Ninth Circuit right now.[9]

21. My colleagues and I have considerable experience prosecuting consumer fraud class actions, especially regarding foods advertised as healthy. In fact, the Honorable Michael M. Anello recently stated that "the entire firm" is "well-known and respected in the class action litigation field."[10] We are also deeply familiar with the issues in this case, through prosecuting several with similar case theories. Considering the case's strength and damages, the possible lengthy time to resolution through trial and appeals, and the expenses and risks attendant to trial, we believe the $1.25 million Settlement Fund in this case is not only fair, reasonable, and adequate, but an excellent result under the circumstances. The Settlement will not only provide a significant number of consumers

---

Hunsacker . . . pressed the consumers' counsel Jack Fitzgerald on whether the lawsuit against General Mills Sales Inc. takes aim at a dietary issue, as opposed to a product issue," and that "at the end of [Fitzgerald's] arguments, Judge Hunsaker still appeared unswayed that General Mills' sugar-packed cereals can be singled out." *See* Exhibit 2, Dorthy Atkins, "9th Circ. Judge Doubts General Mills False Label Claims," Law360.com (June 12, 2020).

[9] Indeed, this Court relied, in part, on *Clark* and *Truxel* in dismissing the initial Complaint without prejudice. *See* Dkt. No. 13, Order at 7. While Plaintiff was able to overcome the issues the Court raised by amending her Complaint, this demonstrates the risk the case theory has.

[10] *See* Exhibit 3, Transcript of March 8, 2021 Final Approval Hearing in *Loomis v. Slendertone, Inc.*, No. 19-cv-0854-MMA (S.D. Cal.) at 5 ("Mr. Fitzgerald and the entire firm . . . are well-known and respected in the class action litigation field, and they did their usual excellent job here.").

with appropriate monetary compensation for NextFoods' alleged false advertising but will also highlight an important issue of public health and reduce the effect of health claims in influencing consumers to eat products with substantial amounts of added sugar.

**The Proposed Class Administrator: Postlethwaite & Netterville ("P&N")**

22. The parties have selected as a Class Administrator to carry out class notice and claims administration, Postlethwaite & Netterville ("P&N"). P&N was selected and approved as the Class Administrator in *Krommenhock*, *Hadley*, *Milan*, and *McMorrow* and has a great deal of experience administering similar claims. In addition, P&N was selected in all these cases because its bids have always been competitive, and in our experience, we have gotten excellent service from P&N despite its relatively lost cost.

23. In the most recent and accurate bid P&N provided, the estimated total cost of Class Notice is $99,715. The Notice Plan is detailed more specifically in the concurrently-filed Declaration of Brandon Schwartz.

24. P&N has also estimated costs of claims administration based on potential claims rate of 3.5% (against a class estimated to be 1.4 million large), for which administrative costs are estimated to be $206,669. This claims rate is based on rates in recent similar settlements, as described below.

**Anticipated Cash Awards to Class Members**

25. It is possible now to predict the average Cash Award Claimants will receive by subtracting the predicted expenses from the Settlement Fund and dividing the remainder among the number of claimants predicted. Across four similar recent settlements, we saw an average claims rate of 3.38%, as follows. Based on this, we use a 3.5% claims rate (in between P&N's 2% and 5% estimates) here.

| Case | Estimated Class Size | Number of Claims | Claims Rate |
|---|---|---|---|
| *Krommenhock* | 20.9 million | 335,816 | 1.61% |
| *Hadley* | 16.0 million | 513,342 | 3.21% |
| *McMorrow* | 5.7 million | 250,753 | 4.4% |
| *Hanson* | 3.2 million | 155,833 | 4.9% |
| | | ***Average =*** | ***3.38%*** |

26. Assuming that the estimated cost of notice and administration is approved and accurate, and that the Court approves the full amount of fees, expenses, and service awards requests, there will be $366,988 left in the Settlement Fund as distribute as Cash Awards for Claimants, as follows:

| **Settlement Fund:** | **$1,250,000** |
|---|---|
| Notice | ($99,715) |
| Administration | ($206,699[11]) |
| Attorneys' Fees | ($529,914) |
| Expenses | ($36,684) |
| Service Awards | ($10,000) |
| **Remainder** | **$366,988** |

27. Dividing this among the predicted 49,000 Claimants (3.5% of the estimated class of 1.4 million), the average Cash Award is estimated to be $7.49. Since Plaintiff's damages models suggested actual damages of no more than $0.13 per unit based on a 3.97% price premium, this represents a recovery of full damages for approximately 57 units, or about 10 units per year over the 6-year Class Period. This likely exceeds most Class Members' actual damages since most will not have purchased with that frequency or for that length of time.

**Potential *Cy Pres* Recipients for Uncleared Funds**

28. Paragraph 4.7 of the Settlement Agreement provides that, after Cash Awards are distributed to Claimants, any amounts remaining uncleared after 180 days will be provided to Class Member Claimants in a supplemental distribution, or donated *cy pres*. The parties have met and conferred regarding potential *cy pres* recipients, keeping in mind the requirements that their activities be sufficiently tethered to Plaintiff's claims. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 866-67 (9th Cir. 2012). They jointly propose and ask the Court to approve the UCLA Resnick Center for Food Law & Policy as a potential *cy pres* recipient.

[11] This is the average of P&N's administrative estimate costs at a 2% an 5% claims rate.

29. The Resnick Center performs cutting-edge legal research and scholarship in food law and policy to improve health and quality of life for humans and the planet, focusing on food governance strategies to promote accountability, transparency, and safety in the national and global food chain. To advance its mission, the Resnick Center works with UCLA Law students and faculty and the broader UCLA and UC communities, and engages with national and international scholars, experts, and policymakers to provide robust academic support to organizations working to change food policy. Through its publications, courses, clinic, and events, the Resnick Center also affords students valuable scholarship, research, and networking opportunities. The Resnick Center also maintains a robust slate of outside advisors, including its Outside Advisory Board, and its Research Affiliates, who are recent law school graduates working to better the food system who will consult and assist on various Resnick Center research projects. The Resnick Center has hosted various events on consumer protection issues and on issues concerning sugar, including an event on food litigation in 2014 and a roundtable on sugar reduction strategies in 2018, both of which contained components on false advertising. Currently, the Center is working with a group of academics and scientists to write a petition to FDA to advocate for better labeling on fruit and vegetable juice beverages, specifically regarding added sugars. *See* https://law.ucla.edu/academics/centers/resnick-center-food-law-policy for additional information.

30. Because the Resnick Center works to protect consumers from fraud in the sale and consumption of foods by providing legal, governmental, and regulatory services, and education regarding food law, it is an appropriate *cy pres* recipient, and several courts have approved it as such (including in *Hadley*, *Krommenhock*, and *McMorrow*).

**Class Counsel's Lodestar**

31. Fitzgerald Joseph LLP ("FJ") dedicates its practice almost entirely to prosecuting class action lawsuits. FJ prosecuted this action on a contingency basis. Attached hereto as Exhibit 4 is a firm resume detailing the experience of the firm and its attorneys.

32. FJ's timekeepers are myself and co-Principal, Paul Joseph; Partner, Melanie Persinger; Senior Associate, Trevor Flynn; Associate, Caroline Emhardt; and Paralegal, Christina Mendez. FJ's practice is to keep contemporaneous records for each timekeeper, and to regularly record time records in the normal course of business. Moreover, FJ's practice is to bill in 6-minute (tenth-of-an-hour) increments. The firm uses software called Harvest to assist in this task. Each timekeeper kept time records in this case, using Harvest, consistent with these practices.

33. For purposes of this Preliminary Approval Motion, we have culled all timekeepers' records, though we have not yet evaluated them in detail to make cuts if appropriate. Based on the raw time records, FJ presently has over 760 hours into the case, representing a lodestar of approximately $530,000, as summarized below.

| Timekeeper | Rate | Hours | Lodestar |
|---|---|---|---|
| Jack Fitzgerald (Principal) | $885 | 144.1 | $127,528.50 |
| Paul Joseph (Principal) | $710 | 181.3 | $128,723.00 |
| Melanie Persinger (Partner) | $695 | 61.1 | $42,464.50 |
| Trevor Flynn (Senior Associate) | $680 | 283.6 | $192,848.00 |
| Caroline Emhardt (Associate) | $430 | 87.4 | $37,582.00 |
| Christina Mendez (Paralegal) | $240 | 3.2 | $768.00 |
| **Totals =** | | **760.7** | **$529,914** |

**Class Counsel's Expenses**

34. FJ advanced all out-of-pocket costs associated with the prosecution of this action. As of the filing of the Motion for Preliminary Approval, we have incurred a total of $37,000 in expenses, most of which is attributable to our experts' work on class certification.

| Category | Amount |
|---|---|
| Case Initiation and Management | $1,164.00 |
| Expert Costs | $35,242.50 |
| Ground Transportation | $209.89 |

| Category | Amount |
|---|---|
| Lodging & Accommodations | $67.62 |
| **Total =** | **$36,684.01** |

A detailed chronological expense report is attached hereto as Exhibit 5.[12]

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 22nd day of September, 2023, in San Diego, California.

By: /s/ Jack Fitzgerald
Jack Fitzgerald

[12] Our actual expenses are greater because we are not seeking reimbursement for postage, legal research, PACER, color copies, and the software we license and use for document review, among other things.

# Exhibit 1

# Class Action Settlement Agreement

This Class Action Settlement Agreement ("Agreement"), effective upon the date of the signatories below, is made by and between, on the one hand, NextFoods, Inc. ("NextFoods"), and on the other hand, the Class Representatives (defined below) on behalf of the Class (defined below) (collectively, the "Parties"), in the matters of *Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.) ("*Andrade-Heymsfield*") and *Gates v. NextFoods, Inc.*, No. 23-cv-530-FJS (N.D.N.Y.) ("*Gates*," together with *Andrade-Heymsfield*, the "Action").

**WHEREAS**, on August 13, 2021, Class Representative Evlyn Andrade-Heymsfield commenced *Andrade-Heymsfield*, alleging violations of California law of unfair competition, false advertising, and breach of warranty in the United States District Court for the Southern District of California;

**WHEREAS**, on April 27, 2023, Class Representative Valerie Gates commenced *Gates*, alleging unfair competition and false advertising, misrepresentation, and unjust enrichment in the United States District Court for the Northern District of New York;

**WHEREAS**, NextFoods denies the allegations in the Action; and

**WHEREAS**, NextFoods and the Class Representatives on behalf of the Class (as defined below) wish to resolve any and all past, present, and future claims the Class has or may have against NextFoods on a nationwide basis as they relate to the allegations in the Action regarding the Class Products (as defined below);

**NOW THEREFORE**, the Parties, for good and valuable consideration, the sufficiency of which is hereby acknowledged, understand and agree to the following terms and conditions.

## 1. DEFINITIONS.

As used in this Agreement, the following capitalized terms have the meanings specified below.

**1.1.** "**Action**" means the matters of *Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.) ("*Andrade-Heymsfield*"), and *Gates v. NextFoods, Inc.*, No. 23-cv-530-FJS (N.D.N.Y.) ("*Gates*").

**1.2.** "**Agreement" or "Settlement Agreement"** means this Class Action Settlement Agreement.

**1.3.** **"Cash Award"** means a cash payment from the Settlement Fund to a Settlement Class Member with an Approved Claim.

**1.4.** **"Claim"** means a request for relief submitted by or on behalf of a Class Member on a Claim Form filed with the Class Administrator in accordance with the terms of this Agreement.

**(a)** **"Approved Claim"** means a claim approved by the Class Administrator, according to the terms of this Agreement.

**(b)** **"Claimant"** means any Class Member who submits a Claim Form for the purpose of claiming benefits, in the manner described in Section 4 of this Agreement.

**(c)** **"Claim Form"** means the document to be submitted by Claimants seeking direct monetary benefits pursuant to this Agreement.

**(d)** **"Claims Deadline"** means the date by which a Claimant must submit a Claim Form to be considered timely. The Claims Deadline shall be sixty-three (63) calendar days after the Settlement Notice Date.

**(e)** **"Claims Process"** means the process by which Class Members may make claims for relief, as described in Section 4 of this Agreement.

**1.5.** **"Claims Administration"** means the administration of the Claims Process by the Class Administrator.

**1.6.** **"Class"** or **"Settlement Class"** means all persons in the United States who, between August 13, 2017 and the Settlement Notice Date, purchased in the United States, for household use and not for resale or distribution, one of the Class Products, as defined below.

**1.7.** **"Class Administrator"** means the independent company approved by the Court to provide the Class Notice and to administer the Claims Process.

**1.8.** **"Class Counsel"** means the following attorneys of record for the Class Representatives and Class in the Action, unless otherwise modified by the Court:

Fitzgerald Joseph LLP
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741

**1.9.** **"Class Member"** means any person who is a member of the Class.

**1.10.** **"Class Notice"** means both those documents notifying Class Members, pursuant to the Notice Plan, of the Settlement, and the substance of those documents.

**1.10.1.** **"Long Form Notice"** refers to the proposed full Class Notice that is attached to this Agreement as Exhibit 1, which the Parties acknowledge may be modified by the Court without affecting the enforceability of this Agreement.

**1.10.2.** **"Notice Plan"** means the plan for dissemination of Class Notice to be submitted to the Court in connection with a motion for preliminary approval of this Settlement.

**1.10.3.** **"Settlement Notice Date"** means twenty-one (21) calendar days after the Preliminary Approval Date.

**1.10.4.** **"Short Form Notice"** means the summary Class Notice that is attached to this Agreement as Exhibit 2, which the Parties acknowledge may be modified by the Court

without affecting the enforceability of this Agreement.

**1.11. "Class Period"** means August 13, 2017 to the Settlement Notice Date.

**1.12. "Class Products"** means all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers during the Class Period.

**1.13. "Class Representative(s)"** means Evlyn Andrade-Heymsfield and Valerie Gates.

**1.14. "Court"** means the Southern District of California, the Honorable Barry Ted Moskowitz presiding, or any judge who will succeed him as the Judge in this Action.

**1.15. "Effective Date"** means the date on which the Judgment becomes final. For purposes of this definition, the Judgment shall become final: (a) if no appeal from the Judgment is filed, the date of expiration of the time for filing or noticing any appeal from the Judgment; or (b) if an appeal from the Judgment is filed, and the Judgment is affirmed or the appeal dismissed, the date of such affirmance or dismissal; or (c) if a petition for certiorari seeking review of the appellate judgment is filed and denied, the date the petition is denied; or (d) if a petition for writ of certiorari is filed and granted, the date of final affirmance or final dismissal of the review proceeding initiated by the petition for a writ of certiorari.

**1.16. "Fee Award"** means the amount of attorneys' fees and reimbursement of expenses and costs awarded by the Court to Class Counsel, which will be paid out of the Settlement Fund.

**1.17. "Final Approval Hearing"** means the hearing to be conducted by the Court to determine whether to finally approve the Settlement and to enter Judgment.

**1.18. "Final Approval Order"** means the proposed order to be submitted to the Court in connection with a Motion for Final Approval and the Final Approval Hearing, substantially in the form attached hereto as Exhibit 3.

**1.19. "Injunctive Relief Deadline"** means 6 months after entry of Judgment.

**1.20. "Judgment"** means the Court's act of entering a final judgment on the docket as described in Federal Rule of Civil Procedure 58.

**1.21. "NextFoods"** means NextFoods, Inc., the Defendant in the Action.

**1.22.** "**Notice and Other Administrative Costs**" means all costs and expenses actually incurred by the Class Administrator in administering the Settlement, including the publication of Class Notice, establishment of the Settlement Website, providing CAFA notice, the processing, handling, reviewing, and paying of claims made by Claimants, and paying taxes and tax expenses related to the Settlement Fund (including all federal, state, or local taxes of any kind and interest or penalties thereon, as well as expenses incurred in connection with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants), with all such costs and expenses to be paid from the Settlement Fund. All taxes on the income of the Settlement Fund, and any costs or expenses incurred in connection with the taxation of the Settlement Fund shall be paid out of the Settlement Fund, shall be considered to be a Notice and Other Administrative Cost, and shall be timely paid by the Class Administrator without prior order of the

Court. The Parties shall have no liability or responsibility for the payment of any such taxes.

**1.23. "Objection Deadline"** means the date by which Class Members must file with the Court a written statement objecting to any terms of the Settlement or to Class Counsel's request for fees or expenses and shall be sixty-three (63) calendar days after the Settlement Notice Date.

**1.24. "Opt-Out Deadline"** means the deadline by which a Class Member must exercise his or her option to opt out of the settlement so as not to release his or her claims as part of the Released Claims and shall be sixty-three (63) calendar days after the Settlement Notice Date.

**1.25. "Party"** or **"Parties"** means the Class Representatives, on behalf of the Class, and NextFoods.

**1.26. "Person"** means any individual, corporation, partnership, association, or any other legal entity.

**1.27. "Plaintiffs"** means the Class Representatives, either individually or on behalf of the Class.

**1.28. "Preliminary Approval Date"** means the date of entry of the Court's order granting preliminary approval of the Settlement.

**1.29. "Preliminary Approval Order"** means the proposed order to be submitted to the Court in connection with the Motion for Preliminary Approval, substantially in the form attached hereto as Exhibit 4.

**1.30. "Released Claims"** means the claims released by the Class Members via this Agreement.

**1.31. "Released NextFoods Persons"** means NextFoods, and any past, current, or future parent companies (including intermediate parents and ultimate parents) and subsidiaries, affiliates, predecessors, successors, and assigns, and each of their respective officers, directors, employees, agents, attorneys, insurers, stockholders, representatives, heirs, administrators, executors, successors and assigns, and any other person or entity acting on NextFoods' behalf.

**1.32. "Request for Exclusion"** means the written submission submitted by a Settlement Class Member to be excluded from the Settlement consistent with the terms of this Agreement.

**1.33.** "**Service Award**" means any award approved by the Court that is payable to the Class Representatives from the Settlement Fund.

**1.34. "Settlement"** means the resolution of this Action embodied in the terms of this Agreement.

**1.35. "Settlement Fund"** means the qualified settlement fund this Agreement obligates NextFoods to fund in the amount of $1,250,000, which is in the form of a non-reversionary common fund and is established in accordance with 26 C.F.R. §§ 1.468B-1(c) and (e)(1).

**1.36. "Settlement Payment"** means the amount to be paid to valid Claimants as detailed

in Section 4.

**1.37. "Settlement Website"** means a website maintained by the Class Administrator to provide the Class with information relating to the Settlement.

## 2. SETTLEMENT FUND

**2.1. Settlement Consideration**. NextFoods agrees to establish a non-reversionary common fund of $1,250,000 (the "Settlement Fund"), which shall be used to pay all Settlement expenses, including Notice and Other Administrative Costs; Class Members' Claims; Fee Award; and Service Awards.

**2.2. Creation and Administration of Qualified Settlement Fund.** The Class Administrator is authorized to establish the Settlement Fund under 26 C.F.R. §§ 1.468B-1(c) and (e)(1), to act as the "administrator" of the Settlement Fund pursuant to 26 C.F.R. § 1.468B- 2(k)(3), and to undertake all duties as administrator in accordance with the Treasury Regulations promulgated under § 1.468B of the Internal Revenue Code of 1986. All costs incurred by the Class Administrator operating as administrator of the Settlement Fund shall be construed as costs of Claims Administration and shall be borne solely by the Settlement Fund. Interest on the Settlement Fund shall inure to the benefit of the Class.

**2.3. NextFoods' Payment into Settlement Fund.** Within ten (10) calendar days after the Court grants preliminary approval of the Settlement Agreement, or another date agreed upon by the Parties in writing or ordered by the Court, NextFoods shall establish the Settlement Fund by paying (or causing its insurer to pay) $600,000 into the qualified settlement fund established by the Class Administrator pursuant to Paragraph 2.2. Within ten (10) calendar days after the Court grants final approval of the Settlement Agreement, or another date agreed upon by the Parties in writing or ordered by the Court, NextFoods shall pay (or cause its insurer to pay) $650,000 (the remainder of the $1,250,000 total) into the qualified settlement fund established by the Class Administrator pursuant to Paragraph 2.2.

## 3. ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS.

**3.1. Application for Attorneys' Fees and Costs and Service Awards**. At least 14 days before the Objection Deadline, Class Counsel and Class Representatives shall file a motion, set for hearing on the same date as the Final Approval Hearing, requesting a Fee Award and Service Awards, to be paid from the Settlement Fund.

**3.2. Distribution of Attorneys' Fees and Costs**. The Class Administrator shall pay to Class Counsel from the Settlement Fund the amount of attorneys' fees and costs awarded by the Court within twenty-one (21) calendar days of entry of Judgment, notwithstanding the filing of any appeals, or any other proceedings which may delay the Effective Date of the Settlement or a final Judgment in the case, subject to Class Counsel providing all payment routing information and tax ID numbers. Payment of the Fee Award will be made from the Settlement Fund by wire transfer to Class Counsel in accordance with wire instructions to be provided by Class Counsel. Notwithstanding the foregoing, if for any reason the Fee Award is overturned, reduced, vacated, or otherwise modified, Class Counsel shall be obligated to return any difference between the amount of the original award and any reduced award.

**3.3. Distribution of Service Awards**. Any Service Award approved by the Court for the Class Representatives shall be paid from the Settlement Fund within the earlier of thirty (30) calendar days after the Effective Date, or the date the Class Administrator begins making distributions to Claimants.

**3.4. Settlement Independent of Award of Fees, Costs, and Service Awards**. The awards of attorneys' fees and costs, and payment to the Class Representatives are subject to and dependent upon the Court's approval. However, this Settlement is not dependent or conditioned upon the Court's approving Class Counsel's and Class Representatives' requests for such payments or awarding the particular amounts sought by Class Counsel and Class Representatives. In the event the Court declines Class Counsel's or Class Representatives' requests or awards less than the amounts sought, this Settlement will continue to be effective and enforceable by the Parties, provided, however, that the Class Representatives and Class Counsel retain the right to appeal any decision by the Court regarding attorneys' fees and costs, and service awards, even if the Settlement is otherwise approved by the Court.

## 4. CLAIMS PROCESS.

**4.1. General Process.** To obtain monetary relief as part of the Settlement, a Class Member must fill out and submit a Claim Form, completed online or in hard copy mailed to the Class Administrator. The claim made via the Claim Form will proceed through the following general steps:

**(a)** The Claimant will be asked to provide identifying information.

**(b)** The Claimant will be asked to estimate the number of Class Products purchased since August 2017.

**(c)** The Claimant will be entitled to a Cash Award of $1 per Class Product, with a cap of 5 Products without proof of purchase. Claimants who submit proof of purchase of more than 5 Products will be entitled to a Cash Award of $1 per Class Product on the full number of Class Products purchased during the Class Period.

**(d)** All Cash Awards will be adjusted pro rata up or down as described in Section 4.5 below.

**4.2. The Claim Form and Timing.** The Claim Form will be available on the Settlement Website and may be submitted to the Class Administrator online. A maximum of one Claim Form may be submitted for each household. Claim Forms must be submitted or postmarked on or before the Claims Deadline to be considered timely. The Claims Deadline shall be clearly and prominently stated in the Preliminary Approval Order, the Class Notice, on the Settlement Website, and on the Claim Form.

**4.3. Substance of the Claim Form.** In addition to the Claimant purchase information set forth in Paragraph 4.1 above, the Claim Form will request customary identifying information (including the Claimant's name, address, email address, and telephone number), and may seek limited additional information from Claimants to provide reasonable bases for the Class Administrator to monitor for and detect fraud. Such additional information may include, for example, retailers and locations (city and state) at which the Class Products were purchased. In

addition, the Claim Form will require the Claimant to declare that the information provided is true and correct to the best of the Claimant's recollection and understanding.

**4.4. Claim Validation.** The Class Administrator shall be responsible for reviewing all claims to determine their validity. The Class Administrator shall reject any Claim that does not comply in any material respect with the instructions on the Claim Form or with the terms of this Section 4, that is submitted after the Claims Deadline, or that the Class Administrator identifies as fraudulent. The Class Administrator shall retain sole discretion in accepting or rejecting claims and shall have no obligation to notify Claimants of rejected claims unless otherwise ordered by the Court.

**4.5. *Pro Rata* Adjustment of Cash Awards.** If the total value of all approved Claims either exceeds or falls short of the funds available for distribution to Class Members, then the amounts of the cash payments to Claimants will be reduced or increased *pro rata*, as necessary, to use all funds available for distribution to Class Members. Any such *pro rata* adjustment will be calculated prior to distribution of funds (*i.e.*, will be made in a single distribution).

**4.6. Timing of Distribution.** The Class Administrator shall pay out Approved Claims in accordance with the terms of this Agreement commencing within thirty (30) calendar days after the Effective Date, or as otherwise ordered by the Court. The Parties shall work with the Class Administrator to choose one or more manners of payment that are secure, cost-effective, and convenient for Claimants.

**4.7. Uncleared Payments: Second Distribution and Cy Pres.** Those Claimants whose payments are not cleared within one hundred and eighty (180) calendar days after issuance will be ineligible to receive a cash settlement benefit and the Class Administrator will have no further obligation to make any payment from the Settlement Fund pursuant to this Settlement Agreement or otherwise to such Claimant. Any funds that remain unclaimed or remain unused after the initial distribution will be distributed to Claimants who cashed the initial payment, on a pro rata basis, to the extent the cost of such redistribution is considered economical by the Class Administrator, Class Counsel, and NextFoods. If such redistribution is not considered economical, or if unpaid funds remain after a second distribution, any unpaid funds will be donated *cy pres* to the UCLA Resnick Center for Food Law and Policy, or, if not approved by the Court, one or more other Court-approved, non-sectarian, not-for-profit organizations whose work is sufficiently tethered to the allegations in this action.

**4.8. Taxes on Distribution**. Any person who receives a Cash Award will be solely responsible for any taxes or tax-related expenses owed or incurred by that person by reason of that Award. Such taxes and tax-related expenses will not be paid from the Settlement Fund. In no event will NextFoods, the Class Representatives, Class Counsel, the Class Administrator, or any of the other Released Parties have any responsibility or liability for taxes or tax-related expenses arising in connection with the issuance of Cash Awards or other payments made from the Settlement Fund to Class Representatives, Settlement Class Members, or any other person or entity.

## 5. INJUNCTIVE RELIEF.

**5.1.** As part of the consideration of this Agreement, and without admitting that the previous labels were deceptive, unlawful, or actionable in any way, NextFoods agrees to implement

the following labeling practices with respect to all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers:

**5.1.1.** NextFoods agrees to remove the term "GoodHealth" from the label;

**5.1.2.** NextFoods agrees that any reference to "overall health" or "overall wellness" shall be directly tied to digestive health (for example, rather than stating "may help promote healthy digestion and overall wellness," stating "may help promote healthy digestion, which in turn can promote overall wellness"); and

**5.1.3.** NextFoods agrees that any time "overall health" or "overall wellness" is used on a label, it will include an asterisk to language on the label, which shall read:

> [LP299v] can be found naturally in the intestinal system, and may help promote healthy digestion when consumed daily as part of a nutritious diet and healthy lifestyle. GoodBelly is a food product and not a treatment or cure for any medical disorder or disease. If you have any concerns about your digestive system, please consult your healthcare professional. See Nutrition Facts Box for sugar content.

**5.2. Term of Injunctive Relief; Timeline and Conditions for Implementing Injunctive Relief.** Within 6 months of the entry of Judgment, the Injunctive Relief Deadline, NextFoods shall implement the injunctive relief noted in this Section 5 by changing the labels of all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers that are printed and placed into the marketplace on or after the Injunctive Relief Deadline. Nothing in this Agreement shall require NextFoods to withdraw, change, or otherwise modify labeling or advertising for any products already manufactured, distributed, in distribution or storage, and or stocked in stores prior to the Injunctive Relief Deadline. NextFoods shall be permitted to "sell through" all existing inventory, *i.e.*, need not recall or destroy packaging already in the marketplace or printed. The injunctive relief shall exist for a period of three years from the earliest of the Injunctive Relief Deadline or the date upon which NextFoods implements the injunctive relief, after which it shall expire in its entirety.

## 6. CLASS NOTICE AND CLAIMS ADMINISTRATION.

**6.1. Class Administrator.** The Class Administrator shall assist with various administrative tasks including, without limitation:

**6.1.1** Establishing and operating the Settlement Fund;

**6.1.2** Arranging for the dissemination of the Class Notice pursuant to the Notice Plan agreed to by the Parties and approved by the Court;

**6.1.3** Making any mailings required under the terms of this Agreement or any Court order or law, including handling returned mail;

**6.1.4** Answering inquiries from Class Members and/or forwarding such inquiries to Class Counsel;

**6.1.5** Receiving and maintaining Requests for Exclusion;

**6.1.6** Establishing a Settlement Website;

**6.1.7** Establishing a toll-free informational telephone number for Class Members;

**6.1.8** Receiving and processing (including monitoring for fraud and validating or rejecting) Class Member claims and distributing payments to Class Members;

**6.1.9** Providing regular updates on the claims status to counsel for all Parties; and

**6.1.10** Otherwise assisting with the implementation and administration of the Settlement.

**6.2. Notice.** Notice of the Settlement will be made to the Class, and to certain federal and state officials.

**6.3. To the Class.** Class Notice will be effectuated through advertisement in suitable print publications and through targeted internet and social-media based advertisements. The Class Notice will conform to all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clauses), and any other applicable law, and will otherwise be in the manner and form approved by the Parties and Court.

**6.4. Timing of Class Notice**. Class Notice will commence no later than twenty-one (21) calendar days following entry of the Preliminary Approval Order ("Settlement Notice Date").

**6.5. CAFA Notice.** The Class Action Fairness Act of 2005 ("CAFA") requires NextFoods to inform certain federal and state officials about this Agreement and proposed Settlement no later than 10 days after the proposed Settlement Agreement is filed in court. *See* 28 U.S.C. § 1715. In compliance with the provisions of CAFA, the Class Administrator, on behalf of NextFoods, will serve notice upon the appropriate officials by September 29, 2023. *See* 28 U.S.C. § 1715(b). The costs of such notice will be paid from the Settlement Fund.

**6.6. Opt-Out Procedures.** Class Members who wish to opt out of and be excluded from the Settlement must submit a Request for Exclusion to the Class Administrator, postmarked or submitted online no later than the Opt-Out Deadline. The Request for Exclusion must be personally completed and submitted by the Class Member or his or her attorney, and so-called "mass" or "class" opt-outs shall not be permitted or recognized. The Class Administrator shall periodically notify Class Counsel and NextFoods' counsel of any Requests for Exclusion. All Class Members who submit a timely, valid Request from Exclusion will be excluded from the Settlement and will not be bound by the terms of this Agreement, and all Class Members who do not submit a timely, valid Request for Exclusion will be bound by this Agreement and the Judgment, including the release in Paragraph 8.1 below.

**6.7. Procedures for Objecting to the Settlement.** Class Members have the right to appear and show cause why the Settlement should not be granted final approval, subject to each of the provisions of this paragraph:

**6.7.1 Timely Written Objection Required.** Any objection to the Settlement must be in writing and must be filed with the Court on or before the Objection Deadline.

**6.7.2 Form of Written Objection.** Any objection regarding or related to the Agreement must contain (i) a caption or title that clearly identifies the Action and that the document is an objection, (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney if represented, (iii) information sufficient to establish the person's standing as a Settlement Class Member, (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection, (v) the objector's signature, and (vi) the signature of the objector's counsel, if any (the "Objection").

**6.7.3 Authorization of Objections Filed by Attorneys Representing Objectors.** Class Members may object either on their own or through an attorney hired at their own expense, but a Class Member represented by an attorney must sign either the Objection itself or execute a separate declaration stating that the Class Member authorizes the filing of the Objection.

**6.7.4 Effect of Both Opting Out and Objecting.** If a Class Member submits both an Opt-Out Form and files an Objection, the Class Member will be deemed to have opted out of the Settlement, and thus to be ineligible to object. However, any objecting Class Member who has not timely submitted a completed Opt-Out Form will be bound by the terms of the Agreement upon the Court's final approval of the Settlement.

**6.7.5 Appearance at Final Approval Hearing.** Objecting Class Members may appear at the Final Approval Hearing and be heard. Such Class Members are requested, but not required, in advance of the Final Approval Hearing, to file with the Court a Notice of Intent to Appear.

**6.7.6 Right to Discovery**. Upon Court order, the Parties will have the right to obtain document discovery from and take depositions of any Objecting Class Member on topics relevant to the Objection.

**6.7.7 Response to Objections.** The Parties shall have the right, but not the obligation, either jointly or individually, to respond to any objection, with a written response due the same day as the Motion for Final Approval, or as otherwise ordered by the Court.

## 7. COURT APPROVAL

**7.1. Preliminary Approval.** After executing this Agreement, Plaintiffs will submit to the Court the Agreement, and will request that the Court enter the Preliminary Approval Order in substantially similar form as the proposed order attached as Exhibit 4. In the Motion for Preliminary Approval, Plaintiffs will request that the Court grant preliminary approval of the proposed Settlement, provisionally certify the Class for settlement purposes and appoint Class Counsel, approve the forms of Notice and find that the Notice Plan satisfies Due Process and Rule 23 of the Federal Rules of Civil Procedure, and schedule a Final Approval Hearing to determine whether the Settlement should be granted final approval, whether an application for attorneys' fees and costs should be granted, and whether an application for service awards should be granted.

**7.2. Final Approval.** A Final Approval Hearing to determine final approval of the Agreement shall be scheduled as soon as practicable, subject to the calendar of the Court, but no sooner than one hundred (100) calendar days after the Preliminary Approval Date. If the Court

issues the Preliminary Approval Order and all other conditions precedent of the Settlement have been satisfied, no later than fourteen (14) calendar days before the Final Approval Hearing and eighteen (18) calendar days after the Objection Deadline all Parties will request, individually or collectively, that the Court enter the Final Approval Order in substantially similar form as the proposed order attached as Exhibit 3, with Class Counsel filing a memorandum of points and authorities in support of the motion. NextFoods may, but is not required to, file a memorandum in support of the motion.

**7.3. Failure to Obtain Approval.** If this Agreement is not given preliminary or final approval by the Court, or if an appellate court reverses final approval of the Agreement, the Parties will seek in good faith to revise the Agreement as needed to obtain Court approval. Failing this, the Parties will be restored to their respective places in the litigation. In such event, the terms and provisions of this Agreement will have no further force or effect with respect to the Parties and will not be used in this or any other proceeding for any purposes, and any Judgment or Order entered by the Court in accordance with the terms of this Agreement will be treated as vacated. The Parties agree that, in the event of any such occurrence, the Parties shall stipulate or otherwise take all necessary action to resume this Action at the procedural posture it occupied immediately prior to the filing of the Parties' Notice of Settlement, as though this Agreement had never been reached.

## 8. RELEASE

**8.1. Release of NextFoods and Related Persons.** Upon the Effective Date, each Class Member who has not opted out will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, and discharged the Released NextFoods Persons (including, without limitation, all past, current, or former agents, employees, contractors, affiliates, heirs, attorneys, insurers, and assignees thereof) from any and all claims, demands, rights, suits, liabilities, injunctive and/or declaratory relief, and causes of action, including costs, expenses, penalties, and attorneys' fees, whether known or unknown, matured or unmatured, at law or in equity, existing under federal or any state's law, that any Class Member has or may have against the Released NextFoods Persons arising out of the transactions, occurrences, events, behaviors, conduct, practices, and policies alleged in the Action regarding the Class Products, which have been, or which could have been asserted in the Action, and that have been brought, could have been brought, or are currently pending in any forum in the United States. The Released Claims include claims that the Class Representatives do not know or suspect to exist in their favor at the time of granting a release, which if known by them might have affected their Settlement of the Action. This Section constitutes a waiver of any and all provisions, rights, and benefits conferred by any law of any state of the United States, or any law of any state or territory of the United States, or principle of common law which is similar, comparable, or equivalent to section 1542 of the California Civil Code, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Class Representatives understand and acknowledge the significance of this waiver of California Civil Code section 1542 and/or of any other similar applicable law relating to limitations on releases. The Class Representatives acknowledge that they are aware that they and/or Class Counsel may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Settlement, but that it is their intention to release fully, finally, and forever all Released Claims with respect to the Released NextFoods Persons, and in furtherance of such intention, the release of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

**8.2. Covenant Not to Sue**. The Class Representatives agree and covenant, and each Class Member who has not opted out will be deemed to have agreed and covenanted, not to sue any of Released Parties, with respect to any of the Released Claims, or otherwise to assist others in doing so, and agree to be forever barred from doing so, in any court of law or equity, or any other forum.

**8.3. Release of Class Representatives and Related Persons by NextFoods.** Upon the Effective Date, NextFoods will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, and discharged Class Representatives, the Class, and Class Counsel from any and all claims, demands, rights, suits, liabilities, and causes of action of every nature and description whatsoever, whether known or unknown, matured or unmatured, at law or in equity, existing under federal or state law, that NextFoods has or may have against any of them arising out of the transactions, occurrences, events, behaviors, conduct, practices, and policies alleged in the Action regarding the Class Products, and in connection with the filing and conduct of the Action, that have been brought, could have been brought, or are currently pending in any forum in the United States.

## 9. MISCELLANEOUS

**9.1. Change of Time Periods.** The time periods and/or dates described in this Settlement Agreement are subject to Court approval and may be modified upon order of the Court or written stipulation of the Parties without notice to Settlement Class Members. The Parties reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extension of time that might be needed to carry out any of the provisions of this Settlement Agreement.

**9.2. Time for Compliance**. If the date for performance of any act required by or under this Settlement Agreement falls on a Saturday, Sunday, or court holiday, that act may be performed on the next business day with the same effect as it had been performed on the day or within the period of time specified by or under this Settlement Agreement.

**9.3. Entire Agreement.** This Agreement shall constitute the entire Agreement among the Parties with regard to the subject matter of this Agreement and shall supersede any previous agreements, representations, communications, and understandings among the Parties with respect to the subject matter of this Agreement. The Parties acknowledge, stipulate, and agree that no covenant, obligation, condition, representation, warranty, inducement, negotiation, or undertaking concerning any part or all of the subject matter of the Agreement has been made or relied upon except as expressly set forth herein.

**9.4. Notices Under Agreement.** All notices or mailings required by this Agreement to

be provided to or approved by Class Counsel and NextFoods, or otherwise made pursuant to this Agreement, shall be provided as follows:

***Class Counsel***
Jack Fitzgerald
*jack@fitzgeraldjoseph.com*
Fitzgerald Joseph LLP
2341 Jefferson Street, Suite 200
San Diego, CA 92110

***NextFoods***
Ryan Hansen
*ryan.hansen@brownliehansen.com*
Brownlie Hansen LLP
10920 Via Frontera, Suite 550
San Diego, CA

**9.5. Good Faith.** The Parties acknowledge that each intends to implement the Agreement. The Parties have at all times acted in good faith and shall continue to, in good faith, cooperate and assist with and undertake all reasonable actions and steps in order to accomplish all required events on the schedule set by the Court, and shall use reasonable efforts to implement all terms and conditions of this Agreement.

**9.6. Binding on Successors.** This Agreement shall be binding upon and inure to the benefit of the heirs, successors, assigns, executors, and legal representatives of the Parties to the Agreement and the released Parties and persons.

**9.7. Arms'-Length Negotiations.** This Agreement compromises claims that are contested, and the Parties agree that the consideration provided to the Class and other terms of this Agreement were negotiated in good faith and at arms' length by the Parties, and reflect an Agreement that was reached voluntarily, after consultation with competent legal counsel. The Parties reached the Agreement after considering the risks and benefits of litigation. The determination of the terms of, and the drafting of, this Agreement, has been by mutual agreement after negotiation, with consideration by and participation of all Parties hereto and their counsel. Accordingly, the rule of construction that any ambiguities are to be construed against the drafter shall have no application.

**9.8. Waiver.** The waiver by one Party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

**9.9. Modification in Writing Only.** This Agreement and any and all parts of it may be amended, modified, changed, or waived only by a writing signed by duly authorized agents of the Parties.

**9.10. Headings.** The descriptive headings of any paragraph or sections of this Agreement are inserted for convenience of reference only and do not constitute a part of this Agreement.

**9.11. Governing Law.** This Agreement shall be interpreted, construed and enforced according to the laws of the State of California, without regard to conflicts of law.

**9.12. Continuing Jurisdiction.** After entry of the Judgment, the Court shall have continuing jurisdiction over the Action solely for purposes of (i) enforcing this Agreement, (ii) addressing settlement administration matters, and (iii) addressing such post-Judgment matters as may be appropriate under court rules or applicable law.

**9.13. Execution.** This Agreement may be executed in one or more counterparts. All

executed counterparts and each of them will be deemed to be one and the same instrument. Photocopies and electronic copies (e.g., PDF copies) shall be given the same force and effect as original signed documents.

**IN WITNESS WHEREOF**, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on that date upon which it has been executed by all of the undersigned.

**Plaintiffs, on behalf of the Class**

DocuSigned by:
Evlyn Andrade
4591847A5BDF4DD...
Evlyn Andrade

Dated: 9/22/2023

Valerie Gates

Dated: _____

**Class Counsel**

Jack Fitzgerald

Dated: _____

**NextFoods, Inc.**

Name:
Position:

Dated: _____

executed counterparts and each of them will be deemed to be one and the same instrument. Photocopies and electronic copies (e.g., PDF copies) shall be given the same force and effect as original signed documents.

**IN WITNESS WHEREOF**, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on that date upon which it has been executed by all of the undersigned.

**Plaintiffs, on behalf of the Class**

_____ Dated: _____

Evlyn Andrade

DocuSigned by:

_____ Dated: 9/22/2023

CAB73DE87F1A493...

Valerie Gates

**Class Counsel**

_____ Dated: _____

Jack Fitzgerald

**NextFoods, Inc.**

_____ Dated: _____

Name:

Position:

executed counterparts and each of them will be deemed to be one and the same instrument. Photocopies and electronic copies (e.g., PDF copies) shall be given the same force and effect as original signed documents.

**IN WITNESS WHEREOF**, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on that date upon which it has been executed by all of the undersigned.

**Plaintiffs, on behalf of the Class**

_____ Dated: _____
Evlyn Andrade

_____ Dated: _____
Valerie Gates

**Class Counsel**

DocuSigned by:
Jack Fitzgerald
1568092CC9617...
_____ Dated: 9/22/2023
Jack FitzGerald

**NextFoods, Inc.**

_____ Dated: _____
Name:
Position:

executed counterparts and each of them will be deemed to be one and the same instrument. Photocopies and electronic copies (e.g., PDF copies) shall be given the same force and effect as original signed documents.

**IN WITNESS WHEREOF**, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on that date upon which it has been executed by all of the undersigned.

**Plaintiffs, on behalf of the Class**

_____ Dated: _____, 2023
Evlyn Andrade-Heymsfield

_____ Dated: _____, 2023
Valerie Gates

**Class Counsel**

_____ Dated: _____, 2023
Jack Fitzgerald

**NextFoods, Inc.**

_____ Dated: September 22, 2023
Name: Barbara Keiger
Position: CFO

# Exhibit 1

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

**NOTICE OF CLASS ACTION SETTLEMENT**

*Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.)

*The United States District Court has authorized this notice.*
*This is not a solicitation from a lawyer.*

You may be a Class Member entitled to a Cash Award if you purchased any flavor of GoodBelly Probiotic JuiceDrink sold in a 1 Quart (32oz.) container between August 13, 2017 and [DATE SETTLEMENT NOTICE DATE]

**THIS NOTICE CONCERNS YOUR LEGAL RIGHTS, WHICH ARE AFFECTED WHETHER YOU ACT OR DON'T. PLEASE READ IT CAREFULLY.**

| **Summary of Your Legal Rights & Options** | |
|---|---|
| **Submit a Claim Form** | **Obtain compensation from the Settlement.**<br>The only way to get a monetary payment.<br>Claim Forms must be submitted online at the Settlement Website, www.[URL].com/ClaimForm, or mailed to the Class Administrator by [Claim Deadline] |
| **Ask to be Excluded** | **Opt out of the Settlement, get no benefits from it, and retain your claims.**<br>You may ask to be excluded from the Settlement, in which case your individual claims will not be released if the Settlement is approved by the Court. But if you ask to be excluded, you cannot obtain compensation from the Settlement. Opt-Out Forms must be submitted online at the Settlement Website, www.[URL].com/OptOutForm, or mailed to the Class Administrator by [Opt-Out Deadline]. |
| **Object** | **Tell the Court why you believe the proposed Settlement is unfair, unreasonable, or inadequate.**<br>You may mail to the Class Administrator or file with the Court a written objection no later than [Objection Deadline], and/or appear at the Final Approval Hearing to tell the Court why you believe the proposed Settlement is unfair, unreasonable, or inadequate. If you object, you may still submit a claim form and be eligible to receive settlement benefits if the Settlement becomes final. |
| **Do Nothing** | **Stay in the Settlement, await the outcome, give up certain rights.**<br>By doing nothing, you will get no compensation from the Settlement, and give up any right you may have to sue the Defendant separately about the same legal claims in this lawsuit. |

## WHAT THIS NOTICE CONTAINS

## Basic Information

### 1. Why is there a Notice?

You have the right to know about a proposed Settlement of a class action lawsuit, and about your options, before the Court decides whether to approve the Settlement.

The court in charge of this case is the United States District Court for the Southern District of California (the "Court"), and the case is called *Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.). The case is assigned to the Honorable Barry Ted Moskowitz. The individuals who sued are called the Class Representatives. Those persons are Evlyn Andrade-Heymsfield and Valerie Gates (who filed a separate action titled *Gates v. NextFoods, Inc.*, No. 23-cv-530-FJS (N.D.N.Y.). The company they sued, NextFoods, Inc. ("NextFoods"), is called the Defendant.

### 2. What is this lawsuit about?

The lawsuit alleges NextFoods violated certain laws in labeling GoodBelly Probiotic JuiceDrinks that contain sugar with certain "health and wellness" claims. NextFoods denies any and all wrongdoing and has asserted various defenses that it believes are meritorious.

### 3. Why is this a class action?

In a class action, one or more people called "Class Representatives" (in this case, Evlyn Andrade-Heymsfield and Valerie Gates), sue on behalf of people who have similar claims, all of whom are a class, or class members. Bringing a case as a class action allows the adjudication of many similar claims that might be economically too small to bring in individual actions. One court resolves the issues for all class members, except for those who exclude themselves from the class.

### 4. Why is there a settlement?

NextFoods denies that the labeling of GoodBellly Probiotic JuiceDrinks violated any law and denies that it did anything wrong. Both sides have agreed to a Settlement, which will allow both sides to avoid the risk and cost of further litigation. The Court has not decided in favor of the Class or NextFoods. The Class Representatives and their attorneys think the Settlement is best for the Class.

## Who is in the Settlement?

### 5. How do I know if I am part of the Settlement?

The Class includes all persons in the United States who, between August 13, 2018 and [SETTLEMENT NOTICE DATE] (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, one of the Class Products. The Class Products include all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers during the Class Period.

### 6. What if I am still not sure if I am included in the Settlement?

If you are not sure whether you are a Class Member, or have any other questions about the Settlement, you should visit the Settlement Website, www.[URL].com, or call the Settlement Administrator toll-free at 1-8xx-xxx-xxxx. Do not contact NextFoods, Inc. or the Court to inquire regarding the Settlement.

## What are the Terms of the Settlement?

### 7. What types of relief does the Settlement provide?

The Settlement provides both monetary and injunctive relief to all Class Members. Class Members who make claims will be entitled to monetary compensation, on a *pro rata* basis, depending on how many Class Products they purchased during the Class Period. Although NextFoods denies its labeling violated any law, NextFoods has also agreed to revise the Class Products' labeling to address the Class's claims, as described further in response to Question 13 below.

### 8. What is the Settlement Fund?

As part of the Settlement, NextFoods has agreed to establish a $1,250,000, non-reversionary Settlement Fund to pay all Settlement Expenses, including the costs of Class Notice and Administration, attorneys' fees and costs, service awards for the Class Representatives, and Cash Awards for Class Members who make claims.

### 9. What can I get from the Settlement?

Class Members who timely submit a valid approved claim are entitled to compensation of $1 per Class Product purchased during the Class Period, with a cap of 5 Products without proof of purchase (and no cap with proof of purchase of more than 5 Products during the Class Period). The actual amount of the Cash Award any individual claimant receives will depend on both the number of claims made.

### 10. What am I giving up to get a payment?

If you are a Class Member, unless you exclude yourself from the Settlement, you cannot sue NextFoods, continue to sue, or be part of any other lawsuit against NextFoods about the claims released in this Settlement. It also means that all decisions by the Court will bind you. The Released Claims and Released NextFoods Persons are defined in the Settlement Agreement and describe the legal claims that you give up (or "release") if you stay in the Settlement. The Released Claims relate to the Class Products and issues raised in the lawsuit. The Settlement Agreement is available on the Settlement Website, www.[URL].com.

### 11. How do I make a claim?

Class Members wishing to make a claim must either (a) visit the Settlement Website, www.[URL].com, and submit a claim form online, or (b) print, fill out, and mail the claim form to the Class Administrator at the following address:

[Administrator]
[mailing address]

**The deadline for submitting a claim is [Claims Deadline].**

### 12. When will I get my Cash Award?

Cash Award payments will be made to Class Members who make valid and timely claims after the Court grants "final approval" to the Settlement, and after any appeals are resolved. If the Court approves the Settlement, there may be appeals. It is always uncertain when these appeals will be resolved, and resolving them can take time.

### 13. What injunctive relief does the Settlement provide?

Although NextFoods denies that its labeling was unlawful, as part of the Settlement, NextFoods has agreed that, beginning 6 months after the entry of a Final Approval Order and for a period of at least 36 months thereafter, it will make the following labeling changes to all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers:

- NextFoods agrees to remove the term "GoodHealth" from the label;
- NextFoods agrees that any reference to "overall health" or "overall wellness" shall be directly tied to digestive health (for example, rather than stating "may help promote healthy digestion and overall wellness," stating "may help promote healthy digestion, which in turn can promote overall wellness"); and
- NextFoods agrees that any time "overall health" or "overall wellness" is used on a label, it will include an asterisk to language on the label, which shall read:

> [LP299v] can be found naturally in the intestinal system, and may help promote healthy digestion when consumed daily as part of a nutritious diet and healthy lifestyle. GoodBelly is a food product and not a treatment or cure for any medical disorder or disease. If you have any concerns about your digestive system, please consult your healthcare professional. See Nutrition Facts Box for sugar content.

## Excluding Yourself from the Settlement

### 14. How do I get out of the Settlement?

If you do not want to be bound by the Settlement, you must request to be excluded from the Settlement. If you request to be excluded, you will retain any individual rights you have against NextFoods and will not be deemed to have individually "released" NextFoods from any of the Released Claims. However, you will ***not*** be eligible to receive compensation under the Settlement, as described above. You also may not object to the Settlement if you request to be excluded.

To exclude yourself (or "opt-out") from the Settlement, you must visit the Settlement Website, www.[URL].com, and either complete and submit the Opt-Out Form online, or print, complete, and mail the Opt-Out Form to the Class Administrator at the following address:

[Administrator]
[mailing address]

**To be timely, an Opt-Out Form must be submitted online or postmarked on or before [Opt-Out Deadline].**

**15. If I don't exclude myself, can I sue Defendant for the same thing later?**

No. Unless you exclude yourself, you give up any right to sue NextFoods for the claims that this Settlement resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit to determine whether you must exclude yourself from this Settlement to continue your own lawsuit. If you properly exclude yourself from the Settlement, you shall not be bound by any orders or judgments entered in the Action relating to the Settlement.

**16. If I exclude myself, can I still get a Settlement payment?**

No. You will not get any money from the Settlement if you exclude yourself. If you exclude yourself from the Settlement, do not submit a Claim Form asking for benefits.

## Objecting to the Settlement

**17. How do I tell the Court if I do not like the Settlement?**

If you are a Class member, you can object to the Settlement if you do not think it is fair, reasonable, or adequate, including Class Counsel's motion for an award of attorneys' fees and costs and expenses, and/or the requested service award payments to the Class Representatives. The Court cannot order a larger settlement or award you more based on your individual circumstances; the Court can only approve or deny the Settlement as it is presented.

If you wish to object, your Objection must contain:

(a) The name of this Action (*Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.)), and a statement that the document is an objection;

(b) Your full name, address, and telephone number or, if objecting through counsel, your lawyer's name, address, and telephone number;

(c) A statement of the Class Product(s) you bought during the Class Period;

(d) A clear and concise statement of your objection, as well as any facts and law supporting the objection; and

(e) You and/or your attorney's signature.

To be considered by the Court, your objection must, by [Objection Deadline], either be filed with the Court or mailed to the following address:

[Administrator]
[mailing address]

If you do not comply with these procedures and the deadline for objections, you may waive your opportunity to have your Objection considered at the Final Approval Hearing or otherwise to contest the approval of the Settlement or to appeal from any orders or judgments entered by the Court in connection with the proposed Settlement. You will still be eligible to receive settlement benefits if the Settlement becomes final, even if you object to the Settlement, if you submitted a claim.

Objecting Class members may appear at the Final Approval Hearing but are not required to do so. Class Members that wish to appear, are requested, but not required to mail to the Class Administrator at the above address or file with the Court in advance of the Hearing, a Notice of Intent to Appear.

Instructions and requirements for objecting are set forth in the Court's Preliminary Approval Order, which is available on the Class Settlement Website, www.[URL].com.

**18. What is the difference between objecting and excluding myself?**

Objecting is simply telling the Court that you do not like something about the Settlement. You can object to the Settlement only if you do not exclude yourself from the Settlement. Excluding yourself from the Settlement is telling the Court that you do not want to be part of the Settlement. If you exclude yourself from the Settlement, you have no basis to object to the Settlement because it no longer affects you.

## The Lawyers Representing You

**19. Do I have a lawyer in the case?**

Yes. The Court has appointed Fitzgerald Joseph LLP as Class Counsel. The lawyers representing you will be paid, only with the Court's approval, from the Settlement Fund, as explained below in Question 20. If you want to be represented by your own lawyer, you may hire one at your own expense.

**20. How will the lawyers be paid?**

Class Counsel spent considerable time and effort prosecuting this matter on a purely contingent fee basis, and advanced the expenses of the litigation, in the expectation that they would receive a fee, and have expenses reimbursed, only if there was a benefit created for the Class. Class Counsel will file a motion on or before [Fee Motion Deadline] seeking an award of fees in an amount equal to their lodestar (*i.e.*, the number of hours spent on the action multiplied by the lawyers' hourly rates, which must be approved by the Court), which is currently estimated to be approximately $530,000. Class Counsel will also seek reimbursement of case expenses totaling approximately $37,000. Finally, Class Counsel will ask the Court for service awards of $5,000 each for Class Representatives Evlyn Andrade-Heymsfield and Valerie Gates.

After Class Counsel's motion for attorneys' fees, expenses, and service awards is filed on or before [Fee Motion Deadline], it will be posted on the Settlement Website, www.[URL].com, and you will have an opportunity to review and comment on the motion via an Objection. The Court will then determine the amount of fees, expenses, and service awards, which will be paid from the Settlement Fund.

## Notice and Administration Expenses

**21. How will notice and administration expenses be paid?**

Using the Class Administrator's estimates regarding the Class size and likely claims rate, notice and administration expenses, to be paid from the Settlement Fund, are currently estimated to be $[cost].

## The Court's Final Approval Hearing

### 22. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Final Approval Hearing (sometimes called a "fairness hearing") on [DATE], 2022, at [time] p.m., in Courtroom 15B of the United States Courthouse, 333 West Broadway, San Diego, California 92101. At the Final Approval Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate and may also consider how much to award to Class Counsel and the Class Representatives. If there are objections, the Court will consider them at this time. After the hearing, the Court will decide whether to approve the Settlement.

### 23. Do I have to come to the hearing?

No. Class Counsel will answer any questions that the Court may have, but you may come at your own expense. If you submit an objection, you do not have to come to the Court to talk about it. If you timely mail your written objection to the Class Administrator (see Question 17 above), Class Counsel will submit it to the Court on your behalf for consideration. You may also pay your own lawyer to attend, but it is not necessary.

### 24. May I speak at the hearing?

Yes. You may appear and speak at the Final Approval Hearing. Although it is not required, if you intend to appear and speak, you are requested to mail notice of your intent to appear no later than [Objection Deadline], to the same address identified above for objections (see Question 17). Persons who opt out, however, may not appear and be heard.

## If You Do Nothing

### 25. What happens if I do nothing at all?

If you do nothing, you will not get a payment from the Settlement but you will still be bound by the release. Unless you exclude yourself, if the Settlement is approved, you will not be able to start a lawsuit, or be part of any other lawsuit against NextFoods regarding claims based on the same facts as the Released Claims in this case.

## Getting More Information

### 26. How can I get more information?

This Notice summarizes the proposed Settlement. More details are in the Settlement Agreement and in case documents, available at the Settlement Website, www.[URL].com. If you have additional questions, you can visit the Settlement Website or contact the Class Administrator:

**By Mail:** [Administrator]

**By Email:** [email]

**By Phone (Toll Free):** 1-8xx-xxx-xxxx

Updates will be posted at the Settlement Website, as information about the Settlement process becomes available.

You are also welcome to contact Class Counsel with any questions:

Questions? Visit www.[URL].com or call toll free 1-8xx-xxx-xxxx

**By Email:** jack@fitzgeraldjoseph.com

**By Phone:** (619) 215-1741

For a more detailed statement of the matters involved in the litigation or the Settlement, you may review the various documents on the Settlement Website, and/or the other documents filed in this case by visiting, during business hours, the Clerk's Office at the United States District Court for the Southern District of California, James M. Carter & Judith N. Keep United States Courthouse, 333 West Broadway, San Diego, California 92101, file: *Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB, or by accessing the docket in this case through the Court's Public Access to Court Electronic Records (PACER) system at www.pacer.gov.

* * *

**PLEASE DO NOT TELEPHONE OR ADDRESS ANY QUESTIONS ABOUT THE CASE OR SETTLEMENT TO THE CLERK OF THE COURT OR TO THE JUDGE. THEY ARE NOT PERMITTED TO ANSWER YOUR QUESTIONS. THE COURT EXPRESSES NO VIEW AS TO THE MERITS OF ANY CLAIMS OR DEFENSES ASSERTED BY ANY PARTY TO THE ACTION.**

# Exhibit 2

**LEGAL NOTICE**

**If You Purchased any Flavor of GoodBelly Probiotic JuiceDrink Sold in a 1 Quart (32oz.) Container Between August 13, 2017 and [SETTLEMENT NOTICE DATE], You May Be Affected by a Proposed Class Action Settlement.**

*The United States District Court has authorized this notice. This is not a solicitation from a lawyer.*

A proposed settlement has been reached against NextFoods, Inc. ("NextFoods") in an action alleging that certain "health and wellness" representations on GoodBelly Probiotic JuiceDrink products were misleading in light of the drinks' sugar content. The case is known as *Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.). NextFoods denies the allegations and denies that its product labeling was misleading or unlawful.

This is only a summary of the key settlement terms. A full copy of the Settlement Agreement and Class Notice is available at www.[URL].com, or by calling 1-8xx-xxx-xxxx.

Who is Included?

The Settlement Class includes all persons in the United States who, between August 13, 2017 and [SETTLEMENT NOTICE DATE] (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, any flavor of GoodBelly Probiotic JuiceDrink sold in a 1 Quart (32oz.) container. See the Settlement Website, www.[URL].com, for the specific products included in the Settlement.

What Does the Settlement Provide?

The proposed settlement will provide the Class with $1,250,000 in monetary benefits (the "Settlement Fund"); and with injunctive relief in the form of labeling changes NextFoods has agreed to make.

Who Can Receive a Payment?

Class Members who timely submit a valid approved claim are entitled to compensation. Each timely, valid claimant will receive a payment based on the type and estimated amount of Class Products purchased during the Class Period. The amount of the Cash Award any individual receives will depend on both the number of claims made, and each claimant's purchase history.

Claim Forms and more information about the claims process are available on the Settlement Website, www.[URL].com. **The deadline for submitting a claim is [Claims Deadline].**

What are Class Members' Other Options?

Class Members may opt out of this Settlement. A Class Member who opts out will retain rights to sue NextFoods separately, but will not be eligible to receive any compensation under the Settlement. To opt out, a Class Member must submit an Opt-Out Form on the Settlement Website, www.[URL].com. Alternatively, Opt-Out Forms can be downloaded, filled out, and mailed to the Class Administrator at: [Administrator], [address]. **Opt-Out Forms must be submitted online or postmarked on or before [Opt-Out Deadline].**

Class Members may also object to any part of this Settlement by mailing an Objection to the Class Administrator at [Administrator], [address]. Alternatively, Class Members may file an Objection with the Court. Further details regarding the procedures for objecting are available at www.[URL].com. **Objections must be postmarked or filed on or before [Objection Deadline].** Class members who object to the Settlement will still be eligible to receive settlement benefits if the Settlement becomes final, if they also submitted claims.

Has the Court Approved the Settlement?

The Court has not yet approved the Settlement, but has set a Final Approval Hearing for [date], 2023, to determine whether the Settlement is fair, reasonable, and adequate for the Class. The Court will also consider during that hearing whether and in what amount to award attorneys' fees and expenses to Class Counsel, and service awards to the Class Representatives, which shall come from the Settlement Fund, along with Notice and Administration expenses currently estimated at $[cost]. Prior to making that determination, the Court will set a deadline for Class Counsel to make a motion, the motion will be posted on the Settlement Website, www.[URL].com, and Class Members will have an opportunity to respond and object.

As described further on the Settlement Website, Class Counsel intend to seek an award of fees in the amount of their lodestar (the amount expended on the case) of approximately $530,000, and reimbursement of case expenses of approximately $37,000, along with incentive awards of $5,000 each for Class Representatives Evlyn Andrade-Heymsfield and Valerie Gates.

You do not need to appear at the Final Approval Hearing, but you may come at your own expense. The Court has appointed Fitzgerald Joseph LLP as Class Counsel. The lawyers representing you will be paid, only with the Court's approval, from the Settlement Fund. If you want to be represented by your own lawyer, you may hire one at your own expense. For more information, or to view the motion for attorneys' fees, expenses, and service awards after it is filed on or before [Fee Motion Deadline], please visit the Settlement Website, www.[URL].com.

**PLEASE DO NOT CALL OR WRITE THE COURT FOR INFORMATION OR ADVICE.**

# Exhibit 3

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

| | |
|---|---|
| EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,<br><br>Plaintiff,<br><br>v.<br><br>NEXTFOODS, INC.,<br><br>Defendant. | Case No. 3:21-cv-1446-BTM-MSB<br><br>**[PROPOSED] ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FINAL ORDER OF DISMISSAL**<br><br>Judge: Hon. Barry Ted Moskowitz |

The Court having held a Final Approval Hearing on [date], 2024, notice of the Final Approval Hearing having been duly given in accordance with this Court's Order Granting Preliminary Approval of the Class Action Settlement, and having considered all matters submitted to it at the Final Approval Hearing and otherwise, and good cause appearing therefore,

**THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS**:

1. Incorporation of Other Documents. The Settlement Agreement dated September 23, 2023, including its exhibits, and the definitions of words and terms contained therein are incorporated by reference in this Order. The terms of this Court's Preliminary Approval Order are also incorporated by reference in this Order.

2. Jurisdiction. This Court has jurisdiction over the subject matter of this Action and over the Parties, including all members of the following Settlement Class certified for settlement purposes in this Court's Preliminary Approval Order: All persons in the United States who, between August 13, 2017, and [SETTLEMENT NOTICE DATE] (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, any of the Class Products identified in the Settlement Agreement.[1] Excluded from the Settlement Class are all persons who validly excluded themselves from the Settlement Class according to the terms of this Court's Preliminary Approval Order.

3. Class Certification. For purposes of settlement only, the Settlement Class, as defined in the Settlement Agreement and above, meets the requirements of Federal Rule of Civil Procedure Rule 23(a) and 23(b). Accordingly, for purposes of settlement, the Court finally certifies the Settlement Class.

4. Adequate Representation. The Class Representatives and Class Counsel have adequately represented the Settlement Class in accordance with Federal Rule of Civil Procedure 23(e)(2)(A).

[1] The Class Products include all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers during the Class Period.

5. Arms-Length Negotiations. The Settlement Agreement is the product of arms-length settlement negotiations between the Class Representatives and Class Counsel, on the one hand, and Defendant and its counsel, on the other, in accordance with Federal Rule of Civil Procedure 23(e)(2)(B).

6. Class Notice. The Class Notice and claims submission procedures set forth in Sections 4 and 6 of the Settlement Agreement, and the Notice Plan filed on September 22, 2023, satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement Agreement and this Order. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

7. CAFA Notice. The notice provided by the Class Administrator to the appropriate State and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of that statute.

8. Settlement Class Response. A total of [number] Settlement Class Members submitted timely and proper Requests for Exclusion, as reported in the declaration of the Class Administrator submitted to this Court. The Court hereby orders that each of the individuals listed by the Class Administrator as having submitted a valid Request for Exclusion is excluded from the Settlement Class. Those individuals will not be bound by the Settlement Agreement, and neither will they be entitled to any of its benefits.

9. Objections. A total of [number] Settlement Class Members submitted timely and proper Objections to the Settlement Agreement. Having considered those Objections and the Parties' responses to them, the Court finds that none of the Objections is well founded. Plaintiffs faced serious risks both on the merits of their claims and on the ability to maintain certification as a litigation class in this matter. The relief provided to the Settlement Class pursuant to the Settlement Agreement is adequate, given the costs, risks, and delay of trial and appeal, and taking into consideration the attorneys' fees this Court has awarded. *See* Fed. R. Civ. P. 23(e)(2)(C)(i), (iii). The Settlement also treats Settlement Class Members equitably

relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(D).

10. Final Settlement Approval. The Court hereby finally approves the Settlement Agreement, the exhibits, and the Settlement contemplated thereby ("Settlement"), and finds that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil Procedure, and directs its consummation pursuant to its terms and conditions.

11. Attorneys' Fees and Costs; Service Awards. The Court approves Class Counsel's application for attorneys' fees and costs in the amount of $ _____ in fees and $ _____ in costs; and approves service awards of $ _____ for Class Representatives Evlyn Andrade-Heymsfield and Valerie Gates.

12. Dismissal. The Court hereby DISMISSES WITH PREJUDICE this action *Andrade-Heymsfield v. NextFoods, Inc.*, No. 21-cv-1446-BTM-MSB (S.D. Cal.), without costs to any party, except as expressly provided for in the Settlement Agreement.

13. Release. Upon the Effective Date as defined in the Settlement Agreement, the Plaintiff, Class Representatives, and each and every one of the Settlement Class Members unconditionally, fully, and finally releases and forever discharges the Released NextFoods Persons from the Released Claims, as set forth in the Settlement Agreement.

14. Injunction Against Released Claims. Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties. This permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement, this Final Order of Dismissal, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

15. No Admission of Liability. The Settlement Agreement and any and all negotiations, documents, and discussions associated with it will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation, or principle of common law or equity, or of any liability or wrongdoing by Defendant, or the truth of any of the claims. Evidence relating to the Agreement will not be discoverable or admissible, directly or indirectly, in any way, whether in this Action or in any other action or proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the terms and conditions of the Agreement, the Preliminary Approval Order, or this Order.

16. Findings for Purposes of Settlement Only. The findings and rulings in this Order are made for the purposes of settlement only and may not be cited or otherwise used to support the certification of any contested class or subclass in any other action.

17. Effect of Termination or Reversal. If for any reason the Settlement terminates or Final Approval is reversed or vacated, the Settlement and all proceedings in connection with the Settlement will be without prejudice to the right of Defendant or the Class Representatives to assert any right or position that could have been asserted if the Agreement had never been reached or proposed to the Court, except insofar as the Agreement expressly provides to the contrary. In such an event, the certification of the Settlement Class will be deemed vacated. The certification of the Settlement Class for settlement purposes will not be considered as a factor in connection with any subsequent class certification issues.

18. Injunctive Relief. By attaching the Settlement Agreement as an exhibit and incorporating its terms herein, the Court determines that this Final Order complies in all respects with Federal Rule of Civil Procedure 65(d)(1).

19. Retention of Jurisdiction. Without affecting the finality of the Judgment, the Court reserves jurisdiction over the implementation, administration, and enforcement of the Judgment and the Agreement and all matters ancillary to the same.

20. Entry of Judgment. The Clerk of the Court is directed to enter Judgment.

**IT IS SO ORDERED.**

DATED: _____

_____
Hon. Bary Ted Moscowitz
United States District Judge

# Exhibit 4

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

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NEXTFOODS, INC.,

Defendant.

Case No. 3:21-cv-1446-BTM-MSB

**[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Judge: Hon. Barry Ted Moskowitz

WHEREAS, the above-entitled action is pending before this Court (the "Action");

WHEREAS, Class Representatives Evlyn Heymsfield and Valerie Gates have moved, pursuant to Federal Rule of Civil Procedure 23(e), for an order approving the Settlement of this Action in accordance with the September 22, 2023 Class Action Settlement Agreement ("Settlement Agreement") attached as Exhibit 1 to the Declaration of Jack Fitzgerald in Support of Plaintiffs' September 22, 2023 Motion for Preliminary Approval of Class Settlement (the "Motion"), which Settlement Agreement sets forth the terms and conditions for a proposed classwide settlement of the Action;

WHEREAS, the Court, has read and considered the Settlement Agreement, Plaintiffs' Motion, and the arguments of counsel;

**NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:**

1. Settlement Terms. All capitalized terms herein have the same meanings ascribed to them in the Settlement Agreement.

2. Jurisdiction. The Court has jurisdiction over the subject matter of the action and over all parties to the action, including all members of the Settlement Class.

3. Preliminary Approval of Proposed Settlement Agreement. The Court finds that, subject to the Final Approval hearing, the proposed Settlement Agreement is fair, reasonable, adequate, and within the range of possible approval considering the possible damages at issue and defenses to overcome. The Court also finds that the Settlement Agreement: (a) is the result of serious, informed, non-collusive, arms-length negotiations, involving experienced counsel familiar with the legal and factual issues of this case; and (b) meets all applicable requirements of law, including Federal Rule of Civil Procedure 23, and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715. Therefore, the Court grants preliminary approval of the Settlement.

4. Class Certification for Settlement Purposes Only. The Court conditionally certifies, for settlement purposes only, a Settlement Class defined as all persons who, between

August 13, 2017 and the Settlement Notice Date (the "Class Period"), purchased in the United States, for household use and not for resale or distribution, any flavor of GoodBelly Probiotic JuiceDrink sold in a 1 Quart (32 oz.) container during the Class Period (the "Class Products").

5. The Court finds, for settlement purposes only, that class certification under Federal Rule of Civil Procedure 23(b)(3) is appropriate in the settlement context because (a) the Settlement Class Members are so numerous that joinder of all Settlement Class Members is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over any individual questions; (c) the claims of the Plaintiffs and proposed Class Representatives are typical of the claims of the Settlement Class; (d) the Plaintiffs and proposed Class Representatives and their counsel will fairly and adequately represent and protect the interests of the Settlement Class Members; (e) questions of law or fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. Class Representatives. The Court appoints Evlyn Andrade-Heymsfield and Valerie Gates as Class Representatives.

7. Class Counsel. The Court appoints Fitzgerald Joseph LLP as Class Counsel.

8. Settlement Class Administrator. The Court hereby approves Postlethwaite & Netterville, APAC ("P&N") to act as Class Administrator. P&N shall be required to perform all the duties of the Class Administrator as set forth in the Agreement and this Order.

9. Qualified Settlement Fund. P&N is authorized to establish the Settlement Fund under 26 C.F.R. §§ 1.468B-1(c) and (e)(1), to act as the "administrator" of the Settlement Fund pursuant to 26 C.F.R. § 1.468B-2(k)(3), and to undertake all duties as administrator in accordance with the Treasury Regulations promulgated under § 1.468B of the Internal Revenue Code of 1986. All costs incurred by the Class Administrator operating as administrator of the Settlement Fund shall be construed as costs of Claims Administration

and shall be borne solely by the Settlement Fund. Interest on the Settlement Fund shall inure to the benefit of the Class.

10. Class Notice. The Court approves the form and content of the Class Notice in the long form attached to the Settlement Agreement as Exhibit 1, the short form attached to the Settlement Agreement as Exhibit 2, and the other forms of notice submitted with the Motion for Preliminary Approval. The Court finds that dissemination of the Class Notice as proposed in the Settlement Agreement and in P&N Notice Plan as set forth in the September 22, 2023 Declaration of Brandon Schwartz meets the requirements of Federal Rule of Civil Procedure 23(c)(2), and due process, and further constitutes the best notice practicable under the circumstances. Notice in any form, whether video, audio, digital, or otherwise, shall not deviate from the language of the short and long form notices and the banner notice language approved by the Court. Accordingly, the Court hereby approves the Notice Plan.

11. Objection and Exclusion Deadline. Settlement Class Members who wish either to object to the Settlement or to exclude themselves from the Settlement must do so by the Objection Deadline and Exclusion Deadline of [date]. Settlement Class Members may not both object to and exclude themselves from the Settlement. If a Settlement Class Member submits both a Request for Exclusion and an Objection, the Request for Exclusion will be controlling.

12. Exclusion from the Settlement Class. To submit a Request for Exclusion, Settlement Class Members must follow the directions in the Notice and submit online at the Settlement Website by the Exclusion Deadline, or send a compliant request to the Class Administrator at the address designated in the Class Notice, postmarked by the Exclusion Deadline. No Request for Exclusion may be made on behalf of a group of Settlement Class Members.

13. All Settlement Class Members who submit a timely, valid Request for Exclusion will be excluded from the Settlement and will not be bound by the terms of the Settlement Agreement and any determinations and judgments concerning it. All Settlement Class

Members who do not submit a valid Request for Exclusion by [date], in accordance with the terms set forth in the Agreement, will be bound by all determinations and judgments concerning the Agreement.

14. Objections to the Settlement. To object to the Settlement, Settlement Class Members should follow the directions in the Notice and file with the Court or mail to the Class Administrator a written Objection by the Objection Deadline. In the written Objection, the Settlement Class Member should include (i) a caption or title that clearly identifies the Action and that the document is an objection, (ii) the Settlement Class Member's name, current address, and telephone number, or—if objecting through counsel—his or her lawyer's name, address, and telephone number, (iii) the Class Product(s) the Settlement Class Member bought during the Class Period, (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection, (v) the objector's signature, and (vi) the signature of the objector's counsel, if any. Upon the Court's Order at the parties' request, the Parties will have the right to obtain document discovery from and take depositions of any objecting Settlement Class Member on topics relevant to the Objection.

15. If a Settlement Class Member does not submit a written Objection to the Settlement or to Class Counsel's application for attorneys' fees and costs or the Service Awards in accordance with the deadline and procedure set forth in the Notice and this Order, but the Settlement Class Member wishes to be appear and be heard at the Final Approval Hearing, the Settlement Class Member may do so provided the Objector satisfies the requirements of Federal Rule of Civil Procedure 23(e)(5)(A) at the Final Approval Hearing.

16. Objecting Settlement Class Members may appear at the Final Approval Hearing and be heard. Such Class Members are requested, but not required, in advance of the Final Approval Hearing, to file with the Court or mail to the Class Administrator a Notice of Intent to Appear.

17. All Members of the Settlement Class, except those who submit timely Requests for Exclusion, will be bound by all determinations and judgments regarding the Settlement, whether favorable or unfavorable to the Settlement Class.

18. Submission of Claims. To receive a Cash Award, Settlement Class Members must follow the directions in the Notice and file a claim with the Class Administrator by the Claims Deadline of [date]. Settlement Class Members who do not submit a claim will not receive a Cash Award, but will be bound by the Settlement.

19. Schedule of Future Events. The Court adopts the schedule proposed by Plaintiffs, as follows (with Day "0" the date of this Order):

| Event | Day | Approximate Weeks After Preliminary Approval |
|---|---|---|
| Date of Preliminary Approval Order | 0 | - |
| Deadline to commence 63-day notice period | 21 | 3 weeks |
| Deadline for Plaintiffs to file Motion for Attorneys' Fees, Costs, and Incentive Awards | 49 | 7 weeks |
| Notice completion date, and deadline to make a claim, opt out, and object | 63 | 9 weeks |
| Deadline for Plaintiffs to file Motion for Final Approval | 84 | 12 weeks |
| Final Approval Hearing | 105 | 14 weeks |

20. Final Approval Hearing. A Final Approval Hearing is scheduled for [date], at [time], for the Court to determine whether the proposed settlement of the Action on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate to the Settlement Class and should be finally approved by the Court; whether a Judgment should be entered; and to determine any amount of fees, costs, and expenses that should be awarded to Class Counsel and the amount of any service awards to Plaintiffs. The Court reserves the right to adjourn the date of the Final Approval Hearing without further notice to the members

of the Settlement Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement. The Court may approve the Settlement, with such modifications as may be agreed to by the settling Parties, if appropriate, without further notice to the Settlement Class.

21. Stay of Proceedings. All proceedings in this action are stayed until further order of this Court, except as may be necessary to implement the Settlement or comply with the terms of the Settlement Agreement.

22. Pending the final determination of whether the Settlement should be approved, the Settlement Class Representatives and all Settlement Class Members are hereby stayed and enjoined from commencing, pursuing, maintaining, enforcing, or prosecuting, either directly or indirectly, any Released Claims in any judicial, administrative, arbitral, or other forum, against any of the Released Parties. Such injunction will remain in force until Final Approval or until such time as the Parties notify the Court that the Settlement has been terminated. Nothing herein will prevent any Settlement Class Member, or any person actually or purportedly acting on behalf of any Settlement Class Member(s), from taking any actions to stay or dismiss any Released Claim(s). This injunction is necessary to protect and effectuate the Agreement, this Preliminary Approval Order, and the Court's flexibility and authority to effectuate the Agreement and to enter Judgment when appropriate, and is ordered in aid of this Court's jurisdiction and to protect its judgments. This injunction does not apply to any person who files a Request for Exclusion.

23. If the Settlement is not approved or consummated for any reason whatsoever, the Settlement and all proceedings in connection with the Settlement will be without prejudice to the right of Defendant or the Class Representatives to assert any right or position that could have been asserted if the Agreement had never been reached or proposed to the Court, except insofar as the Agreement expressly provides to the contrary. In such an event, the certification of the Settlement Class will be deemed vacated. The certification of the Settlement Class for

settlement purposes will not be considered as a factor in connection with any subsequent class certification issues.

24. No Admission of Liability. By entering this Order, the Court does not make any determination as to the merits of this case. Preliminary approval of the Settlement Agreement is not a finding or admission of liability by Defendant. Furthermore, the Agreement and any and all negotiations, documents, and discussions associated with it will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation, or principle of common law or equity, or of any liability or wrongdoing by Defendant, or the truth of any of the claims. Evidence relating to the Agreement will not be discoverable or used, directly or indirectly, in any way, whether in this Action or in any other action or proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the terms and conditions of the Agreement, this Order, the Final Approval Order, and the Judgment.

25. Retention of Jurisdiction. The Court retains jurisdiction over the Action to consider all further matters arising out of or connected with the Settlement Agreement and the settlement described therein.

**IT IS SO ORDERED.**

DATED: _____

_____
Hon. Barry Ted Moskowitz
United States District Judge

# Exhibit 2

**Portfolio Media. Inc.** | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# 9th Circ. Judge Doubts General Mills False Label Claims

By **Dorothy Atkins**

Law360 (June 12, 2020, 7:55 PM EDT) -- A Ninth Circuit judge told a proposed class of General Mills consumers Friday that she's "struggling" with their bid to revive allegations that the food giant falsely labels its sugary cereals and bars as healthy, repeatedly questioning what amount of sugar in a product makes a product unhealthy.

During a videoconferencing hearing before a three-judge panel, U.S. Circuit Court Judge Danielle J. Hunsaker, who was nominated by President Donald Trump and **confirmed** to the Ninth Circuit last year, pressed the consumers' counsel Jack Fitzgerald on whether the lawsuit against General Mills Sales Inc. takes aim at a dietary issue, as opposed to a product issue.

"What is the rule that tells us that the product is healthy or not? And if your argument it's sugar consumption, then … what's the cut off of sugar in a product that makes it healthy or not?" Hunsaker asked.

Fitzgerald replied the labels affirmatively represent that its cereals and bars are healthy and the question is whether those representations are likely to mislead a reasonable consumer. He noted that the American Heart Association recommends less than 5% of daily sugar content should come from added sugar, and the U.S. Food Administration recommends less than 10%, but the products at issue contain between 20% to 30% of added sugar.

But at the end of his arguments, Judge Hunsaker still appeared unswayed that General Mills' sugar-packed cereals can be singled out.

"Isn't that true of any product?" she asked. "There's nothing unique about the argument you're making that's specific to cereal. You're making this argument that could apply to anything that has added sugar."

The attorney agreed that the argument could apply to any sugar-loaded products that represents themselves as being healthy. But he emphasized that few products with such high-sugar content do that.

"There's not a lot of junk food that represents itself to be healthy," Fitzgerald said. "Candy bars aren't out there calling themselves 'healthy for your family' or 'heart healthy.'"

The exchange came during a hearing on an appeal of an order dismissing a proposed class action that Beverly Truxel and Stephen Hadley filed against the Minnesota-based company **in August 2016.**

The consumers allege that health and nutrition claims on the product labels tricked them into thinking 52 of the company's best-selling products, including Honey Nut Cheerios and other varieties of the classic cereal, are healthy when they're actually loaded with added sugar.

The consumers argue that as a result they've been put at risk of developing a slew of chronic diseases, including diabetes, heart disease and obesity. In 2015, General Mills raked in more than $502 million in sales of Honey Nut Cheerios alone, a 5.6% share of the $8.9 billion U.S. cereal

market, the suit alleges.

But in August, U.S. District Judge Jeffrey S. White **declined to allow** the consumers to amend their complaint for a fourth time, finding that the products clearly included information about their ingredients and sugar content.

The consumers appealed the ruling, and Fitzgerald argued during a hearing on the appeal Friday that Judge White prematurely threw out the case.

He noted two other judges in California's Northern District — U.S. District Judges Lucy H. Koh and William Orrick III — recently allowed similar cases against food manufacturers Kellogg and Post Foods LLC to survive motions to dismiss, and both judges **certified** classes.

One case against Kellogg reached a **settlement,** which includes proposed label changes, after surviving a motion for summary judgment, and the other case is proceeding to trial, he said. He said that those results are astounding if their argument is truly based on an err in law.

Fitzgerald argued that the health claims on the packages are likely to mislead buyers and if the court were to look at the entire record, the scientific evidence supports the consumers' position. He also argued that any FDA statements on added sugar cited by the defense are taken out of context and shouldn't be enough to beat the lawsuit on a motion to dismiss.

He also argued that the company's position assumes that "healthy" is relative to the amount of sugar an individual is consuming as a whole, but if that rationale is true, then no product should be allowed to make a health claim.

"If no food can be called 'healthy' or 'unhealthy,' because you have to look at a full diet, then General Mills shouldn't be labeling its food as healthy," Fitzgerald said. "A healthy diet is different than a healthy food. The concepts may sound similar, but they're different."

But General Mills' counsel, Charles Christian Sipos of Perkins Coie LLP, said the lower court got it right when it tossed the suit, arguing that the company communicates the overall nutritional content of the food on its packaging and reasonable consumers can consider that information and incorporate it into their daily diets.

Sipos argued that cereal is part of a healthy diet, and there are studies that show that when people eat cereal with added sugar their overall diet improves. He also pointed out that breakfast cereal has been around for decades and that reasonable consumers go to the grocery store with some preexisting knowledge of what it is. He added that they also have a basic understanding that cereal is just one meal that should be balanced with other food throughout the day.

Judge Hunsaker told Sipos she's still struggling with understanding the sugar-content metric that the court should consider. Sipos replied that the FDA's daily recommended consumption of added sugar is roughly 50 grams, and "none of the cereals come close to that."

The panel took the arguments under submission.

U.S. Circuit Court Judges A. Wallace Tashima and Danielle Hunsaker and U.S. District Judge James V. Selna, sitting by designation, sat on the panel for the Ninth Circuit.

Stephen Hadley and Beverly Truxel are represented by Jack Fitzgerald.

General Mills is represented by Charles Christian Sipos of Perkins Coie LLP.

The case is Beverly Truxel et al. v. General Mills Sales Inc., case number 19-16621, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dave Simpson. Editing by Gemma Horowitz.

# Exhibit 3

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| JANE LOOMIS, | |
| PLAINTIFF, | NO.19-CV-0854-MMA |
| V. | MARCH 8, 2021 |
| SLENDERSTONE DISTRIBUTION, INC., | SAN DIEGO, CALIFORNIA |
| DEFENDANT. | (HELD TELEPHONICALLY) |

TRANSCRIPT OF FINAL APPROVAL AND MOTION HEARING
BEFORE THE HONORABLE MICHAEL M. ANELLO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: LAW OFFICE OF JACK FITZGERALD, PC
BY: TREVOR MATTHEW FLYNN
3636 FOURTH AVENUE, SUITE 202
SAN DIEGO, CALIFORNIA 92103

FOR THE DEFENDANT: BUCHALTER
BY: COLTON PARKS
18400 VON KARMAN AVENUE, SUITE 800
IRVINE, CALIFORNIA 92612

COURT REPORTER: JULIET Y. EICHENLAUB, RPR, CSR
USDC CLERK'S OFFICE
333 WEST BROADWAY, ROOM 420
SAN DIEGO, CALIFORNIA 92101
JULIET_EICHENLAUB@CASD.USCOURTS.GOV

REPORTED BY STENOTYPE, TRANSCRIBED BY COMPUTER

14:27:33

SAN DIEGO, CALIFORNIA; MARCH 8, 2021; 2:27 P.M.

-OOO-

THE CLERK: CALLING MATTER NUMBER ONE ON THE CALENDAR, 19CV0854, LOOMIS V. SLENDERSTONE DISTRIBUTION, INC, FOR FINAL APPROVAL HEARING, HELD TELEPHONICALLY.

THE COURT: GOOD AFTERNOON, FOLKS, IF WE COULD HAVE THE APPEARANCES PLEASE.

MR. FLYNN: GOOD AFTERNOON, YOUR HONOR. TREVOR FLYNN FOR THE PLAINTIFF AND THE CLASS.

THE COURT: GOOD AFTERNOON, MR. FLYNN.

MR. PARKS: GOOD AFTERNOON. COLTON PARKS ON BEHALF OF DEFENDANT SLENDERSTONE DISTRIBUTION.

THE COURT: GOOD AFTERNOON, MR. PARKS. I GUESS THAT'S EVERYONE. LET ME JUST STATE FOR THE RECORD: THIS IS

14:28:22 THE DATE AND TIME SET FOR HEARING ON PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEY'S FEES AND COSTS AND SERVICE AWARD. AND FOR THE RECORD, ALSO, WHILE THE JUDGE AND COURT STAFF HERE ARE PHYSICALLY PRESENT TODAY, THE ATTORNEYS, WITH PERMISSION OF THE COURT, ARE APPEARING REMOTELY BY TELECONFERENCE DUE TO THE ONGOING CORONAVIRUS PANDEMIC.

BY WAY OF A BRIEF BACKGROUND HERE, I HAVE REVIEWED PLAINTIFF'S MOTION AND SUPPORTING DOCUMENTATION ALONG WITH THE RELEVANT PORTIONS OF OUR CASE FILE, AND I AM PREPARED TO RULE ON THE MOTION TODAY. THE COURT HAS PREVIOUSLY ISSUED A WRITTEN TENTATIVE RULING ON THE MOTION; SO THERE'S NO MYSTERY THERE. I

ASSUME BOTH SIDES HAVE RECEIVED THE COURT'S TENTATIVE RULING; IS THAT RIGHT?

MR. PARKS: YES, YOUR HONOR. THIS IS COLTON PARKS ON BEHALF OF DEFENDANT. WE RECEIVED IT.

MR. FLYNN: SORRY. I WAS ON MUTE, YOUR HONOR. TREVOR FLYNN FOR THE PLAINTIFF. YES, WE HAVE RECEIVED IT AS WELL, AND WE WOULD SUBMIT ON THAT.

THE COURT: ALL RIGHT. THANKS. I WOULD NOTE FOR THE RECORD THAT THE DEFENDANT DOES NOT OPPOSE THE MOTION AND THERE HAVE BEEN NO WRITTEN OBJECTIONS RECEIVED FROM CLASS MEMBERS OR ANYONE ELSE, AND NO ONE ELSE HAS APPEARED TODAY EITHER IN PERSON OR BY TELEPHONE. OF COURSE, IT WOULD BE TOO LATE PROBABLY ANYWAY; BUT NO ONE HAS APPEARED, NEVERTHELESS, OBJECTING TO THE SETTLEMENT. I UNDERSTAND THERE HAS BEEN ONLY ONE OPT OUT? IS THAT RIGHT? JUST THE ONE OPT OUT?

MR. FLYNN: TREVOR FLYNN. YES, THAT'S CORRECT, YOUR HONOR.

THE COURT: AND I WOULD NOTE FOR THE RECORD THE TIME IS NOW 2:30, THE TIME FOR WHICH THE MOTION WAS SCHEDULED TODAY. LET ME JUST CONFIRM ON THE RECORD FIRST WITH DEFENSE COUNSEL, I THINK WE ALREADY HAVE, BUT JUST TO MAKE CLEAR, THE DEFENDANT DOES NOT OPPOSE THE MOTION; IS THAT RIGHT?

MR. PARKS: YES, YOUR HONOR, WE DO NOT OPPOSE.

THE COURT: AND LET ME CONFIRM FROM BOTH COUNSEL THAT NO OBJECTIONS TO THE SETTLEMENT HAVE BEEN RECEIVED FROM

ANYBODY; IS THAT RIGHT ALSO?

MR. PARKS: YES, YOUR HONOR.

MR. FLYNN: YES, YOUR HONOR.

THE COURT: ALL RIGHT. ANYTHING ELSE FROM PLAINTIFF'S COUNSEL THAT YOU'D LIKE TO ADD TODAY BY WAY OF ARGUMENT OR OTHERWISE?

MR. FLYNN: NO, YOUR HONOR. THANK YOU.

THE COURT: ANYTHING FROM DEFENSE COUNSEL?

MR. PARKS: NO, YOUR HONOR. THANK YOU VERY MUCH.

THE COURT: ALL RIGHT. SO LET ME JUST MAKE A LITTLE RECORD HERE. IN REVIEWING THE MOTION, I HAVE CONSIDERED ALL OF THE FACTORS SET FORTH IN RULE 23(E), ALONG WITH ADDITIONAL FACTORS IDENTIFIED UNDER PREVAILING NINTH CIRCUIT CASE LAW, AND I FIND THAT THEY ALL WEIGH IN FAVOR OF GRANTING THE MOTION HERE AND DETERMINE THAT THE PROPOSED SETTLEMENT TAKEN AS A WHOLE IS FAIR, REASONABLE AND ADEQUATE AS TO ALL CONCERNED.

THE ONLY CLOSE ISSUE I ENCOUNTERED HERE WAS WHETHER PLAINTIFF'S COUNSEL WAS SUFFICIENTLY EXPERIENCED IN CLASS ACTION WORK TO ADEQUATELY REPRESENT THE CLASS. IS THIS YOUR FIRST CLASS ACTION?

MR. FLYNN: UM...

THE COURT: MR. FLYNN?

MR. FLYNN: I...

THE COURT: I'M JUST KIDDING, MR. FLYNN. DID YOU GET A LITTLE HEART ATTACK THERE?

14:31:26 MR. FLYNN: I DID, YOUR HONOR. THANK YOU.

THE COURT: OBVIOUSLY, MR. FLYNN AND HIS FIRM -- I'M SORRY. MR. FITZGERALD AND THE ENTIRE FIRM, INCLUDING MR. FLYNN, ARE WELL-KNOWN AND RESPECTED IN THE CLASS ACTION LITIGATION FIELD, AND THEY DID THEIR USUAL EXCELLENT JOB HERE. SO, OBVIOUSLY, NO ISSUE THERE.

TO CONCLUDE THEN, BASED ON THE RECORD PRESENTED, THE COURT GRANTS PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE CLASS SETTLEMENT FOR ATTORNEY'S FEES AND COSTS AND THE CLASS REPRESENTATIVE SERVICE AWARD. THE COURT CERTIFIES THE SETTLEMENT CLASS FOR THE PURPOSES OF THIS SETTLEMENT. THE COURT APPROVES THE SETTLEMENT AS FAIR, REASONABLE AND ADEQUATE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(E). THE COURT ORDERS THE PARTIES TO UNDERTAKE THE OBLIGATIONS SET FORTH IN
14:32:13 THE SETTLEMENT AGREEMENT THAT ARISE OUT OF THIS ORDER. THE COURT AWARDS THE CLASS COUNSEL ATTORNEY'S FEES IN THE AMOUNT OF $59,060.20 AND COSTS IN THE AMOUNT OF $939.80. YOU MIGHT CHECK ME ON THOSE NUMBERS. I THINK THOSE ARE THE CORRECT NUMBERS. AND LASTLY, THE COURT AWARDS TO PLAINTIFF A SERVICE AWARD FOR WORK PERFORMED AS THE CLASS REPRESENTATIVE IN THE AMOUNT OF $10,000. DID I GET THOSE NUMBERS CORRECT?

MR. FLYNN: YES, YOUR HONOR. THANK YOU.

THE COURT: ALL RIGHT. I WILL, OF COURSE, GET OUT A DETAILED WRITTEN ORDER FORTHWITH ON THE CASE, BUT OBVIOUSLY, IT WILL FOLLOW WHAT WE SAID TODAY, AND THE MOTION WILL BE GRANTED.

14:32:59 IS THERE ANYTHING ELSE WE SHOULD SAY OR DO TODAY? ANYTHING ELSE FROM PLAINTIFF'S COUNSEL?

MR. FLYNN: I DON'T THINK SO, YOUR HONOR. I APPRECIATE THE COURT'S COMMENTS AND THE NICE JOLT THERE TO GET ME THROUGH THE REST OF THIS AFTERNOON. I APPRECIATE THAT.

THE COURT: ANYTHING ELSE FROM DEFENSE COUNSEL?

MR. PARKS: NO, YOUR HONOR. THANK YOU VERY MUCH.

THE COURT: MACKLIN, ANYTHING ELSE FROM YOU OR FROM US?

MR. THORNTON: NO, YOUR HONOR.

THE COURT: OKAY. I THINK WE'RE DONE. SO THANK YOU, FOLKS. I WISH WE COULD HAVE YOU COME HERE IN PERSON, BUT WE COULDN'T, OBVIOUSLY; BUT HOPEFULLY, WE'RE GOING TO OPEN UP HERE PRETTY SOON. SO YOU'RE WELCOME TO COME BACK AND SEE US ANY

14:33:39 TIME. THANK YOU FOR THE PRESENTATION AND PROFESSIONAL HANDLING OF THE CASE. I HOPE YOU ALL HAVE A NICE REST OF THE DAY; AND EVERYBODY, STAY SAFE.

MR. FLYNN: AND EVERYBODY FROM HERE AS WELL, THANK YOU, YOUR HONOR.

MR. PARKS: THANK YOU, YOUR HONOR. STAY SAFE AS WELL.

THE COURT: ALL RIGHT. THANKS. WE CAN GO OFF THE RECORD.

(MATTER CONCLUDED.)

C-E-R-T-I-F-I-C-A-T-I-O-N

I HEREBY CERTIFY THAT I AM A DULY APPOINTED, QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE; THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL CONFERENCE.

DATED: MARCH 25, 2021, AT SAN DIEGO, CALIFORNIA.

/S/ JULIET Y. EICHENLAUB
JULIET Y. EICHENLAUB, RPR, CSR
OFFICIAL COURT REPORTER
CERTIFIED SHORTHAND REPORTER NO. 12084

FITZGERALD JOSEPH LLP
2341 Jefferson St., Ste. 200, San Diego, CA 92110 | (619) 215-1741 www.fitzgeraldjoseph.com

# Firm Resume – September 2023

## Overview

Fitzgerald Joseph LLP represents consumers and companies against entities that falsely advertise or otherwise market their products in a deceptive, misleading, or unfair manner. The firm has substantial experience in many different industries, including foods and beverages, dietary supplements, homeopathic remedies, cosmetics, fashion and accessories, computer hardware and software, telecommunications, music, sports, database protection and privacy, financial and banking services, medical products, health services, and Internet and e-commerce marketing.

## Attorneys

### Jack Fitzgerald - Principal

Mr. Fitzgerald is an accomplished class action attorney who has been appointed class counsel in numerous cases, helped victimized consumers recover tens of millions of dollars, and convinced dozens of companies to change their harmful practices.

He is especially recognized for his expertise in food litigation. For example, Mr. Fitzgerald has been a multi-year member of the Steering Committee for the Cambridge Forum on Plaintiffs' Food Fraud Litigation. He has also been a panelist at the UCLA International Food Law Conference, the Consumer Brands of America Legal Forum, and the RE:FORMULATE Conference (dedicated to manufacturers reducing sugar in their foods). Mr. Fitzgerald has also been a multi-year guest speaker at UCLA Law School, has appeared multiple times on *Good Morning America*, and been featured in the *New York Times*. Mr. Fitzgerald is also a successful appellate advocate. His efforts briefing and presenting oral argument led the Ninth Circuit Court of Appeals to issue an important pro-consumer decision in *Reid v. Johnson & Johnson*, 780 F.3d 952 (9th Cir. 2015).

Prior to founding Fitzgerald Joseph LLP, Mr. Fitzgerald was a litigation associate in the New York office of Baker & Hostetler LLP, and a patent litigation associate in the Palo Alto office of Mayer Brown LLP.

***Education***

- New York University School of Law, J.D. (2004)
    - Editor, Law Review
- Cornell University, B.A., American Studies, *magna cum laude* (2001)

***Admissions***

- California (2008)
- New York (2005)

**Paul Joseph – Principal**

Mr. Joseph is an experienced civil litigator who specializes in consumer protection class actions. During his career, he has successfully prosecuted numerous consumer protection class actions in which he helped secure tens of millions of dollars for injured class member and obtain significant corrective actions to the challenged business practices. He has extensive experience litigating cases involving the false advertising of food products and dietary supplements, as well as cases involving product defect, antitrust, and RICO claims. Before founding Fitzgerald Joseph, LLP, Mr. Joseph started his legal career at a boutique class action firm in San Diego. He has also devoted substantial time on pro-bono work on behalf of at-risk youth and foster children.

***Education***

- University of Michigan Law School, J.D., *cum laude* (2012)
- University of Michigan, B.S.E., Industrial Engineering (2008)
    - Dean's List
    - University Honors
    - MEAP Scholar

***Admissions***

- California (2012)

***Clerkship***

- Judicial Extern, Hon. James Ware (Northern District of California) (2010)

**Melanie Persinger - Partner**

Since her admission to the California Bar, Ms. Persinger has represented individuals and businesses in a variety of disputes, including in actions alleging the fraudulent transfer of real property, breach of contract, unfair competition, misappropriation of likeness, and violations of antitrust laws, among others. Ms. Persinger primarily litigates complex consumer class actions involving false advertising, particularly of foods and beverages. She has been appointed Class Counsel by numerous federal courts and has obtained substantial financial compensation for class members and secured changes to challenged business practices. In addition to her experience in class action litigation, Ms. Persinger is a Registered Patent Agent.

***Education***

- University of Michigan Law School, J.D. (2010)
    - Contributing Editor, *Michigan Telecommunications & Technology Law Review*
    - Honors in Legal Practice
- San Diego State Univ., B.S.E., Civil Engineering, *magna cum laude*, with distinction (2006)

***Admissions***

- California (2011)

**Trevor M. Flynn – Senior Associate**

For many years, Mr. Flynn has focused his practice almost exclusively on litigating complex class actions on behalf of consumers who were injured by false advertising or other unlawful business practices. He has been appointed Class Counsel by numerous state and federal courts in cases that often resulted in substantial financial compensation to class members and significant changes to how the products at issue are labeled and advertised.

Prior to joining Fitzgerald Joseph LLP, Mr. Flynn represented the County of San Diego as a deputy county counsel and was a court-appointed counsel for minors and non-minor dependents in San Diego's dependency court system. For the majority of his time in that practice, he worked with a non-profit 501(c)(3), and was recognized as an attorney of the year for his non-profit work.

***Education***

- University of San Diego Law School, J.D. (2007)
- University of California - San Diego, B.A., Political Science (2004)

***Admissions***

- California (2007)

**Caroline Emhardt – Associate**

Ms. Emhardt is admitted to practice before all district courts in California. Her practice is focused on litigating class actions on behalf of consumers who were harmed, misled, or otherwise injured by false advertising or other unlawful business practices.

Prior to joining Fitzgerald Joseph LLP, Ms. Emhardt worked in insurance defense litigation and uninsured & underinsured motorist claims. She served as a Post Bar Intern at the Office of the City of San Diego, in the Criminal Division's "Case Issuance" Unit. In law school she worked at a plaintiffs' personal injury and medical malpractice firm in Indianapolis, Indiana.

***Education***

- Indiana University Robert H. McKinney School of Law, J.D. (2017)
  - Member, *Indiana Health Law Review*
  - Dean's Tutorial Society Legal Writing Tutor
- DePauw University, B.A., English, *cum laude* (2014)

***Admissions***

- California (2018)
- District of Columbia (2021)

# Exhibit 5

*Andrade-Heymsfield v. NextFoods, Inc.* & *Gates v. NextFoods, Inc.* Expenses Listed Chronologically

| Date | Category | Amount | Description |
|---|---|---|---|
| 8/13/2021 | Case Initiation and Management | $402.00 | Filing fee in *Andrade-Heymsfield v. NextFoods, Inc.* |
| 4/26/2023 | Ground Transportation | $74.87 | Uber from home of Ms. Evlyn Andrade-Heymsfield to airport for travel to San Diego (from Seattle) for Early Neutral Evaluation conference (ENE) |
| 4/26/2023 | Ground Transportation | $25.09 | Uber from San Diego Airport to hotel for Ms. Evlyn Andrade-Heymsfield (traveling to attend ENE). |
| 4/27/2023 | Lodging & Accommodations | $67.62 | Lodging for Ms. Evlyn Andrade-Heymsfield for ENE. |
| 4/27/2023 | Ground Transportation | $10.50 | Uber for Ms. Evlyn Andrade-Heymsfield from hotel to courthouse for ENE. |
| 4/27/2023 | Ground Transportation | $10.50 | Uber for Ms. Evlyn Andrade-Heymsfield from courthouse to hotel following ENE. |
| 4/27/2023 | Ground Transportation | $70.95 | Uber for Ms. Evlyn Andrade-Heymsfield from airport to home following attendance at ENE |
| 5/1/2023 | Case Initiation and Management | $402.00 | Filing fee in *Gates v. NextFoods, Inc.* |
| 5/1/2023 | Expert Costs | $6,655.00 | Invoice from NutritionFacts.org for expert work performed by Dr. Michael Greger. |
| 5/31/2023 | Expert Costs | $8,387.50 | Invoice from Economics & Technology, Inc. for expert work performed by Colin Weir. |
| 7/13/2023 | Expert Costs | $13,750.00 | Invoice from JMDSTAT Consulting, Inc. for expert work performed by Dr. J. Michael Dennis. |
| 7/31/2023 | Expert Costs | $6,450.00 | Invoice from Economics & Technology, Inc. for expert work performed by Colin Weir. |
| 8/18/2023 | Ground Transportation | $17.98 | Lyft rides for Mr. Fitzgerald, Mr. Joseph, and Ms. Persinger between office and courthouse for Settlement Conference. |
| Life of Case | Case Initiation and Management | $300.00 | Deadlines (calendaring software) for *Andrade-Heymsfield*. |
| Life of Case | Case Initiation and Management | $60.00 | Deadlines (calendaring software) for *Gates*. |
| | **Total =** | **$36,684.01** | |

**FITZGERALD JOSEPH LLP**
JACK FITZGERALD (SBN 257370)
*jack@fitzgeraldjoseph.com*
PAUL K. JOSEPH (SBN 287057)
*paul@pauljosephlaw.com*
MELANIE PERSINGER (SBN 275423)
*melanie@jackfitzgeraldlaw.com*
TREVOR M. FLYNN (SBN 253362)
*trevor@jackfitzgeraldlaw.com*
CAROLINE S. EMHARDT (SBN 321222)
*caroline@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741
***Counsel for Plaintiff***

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

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NEXTFOODS, INC.,

Defendant.

Case No.: 21-cv-1446-BTM-MSB

**DECLARATION OF EVLYN ANDRADE-HEYMSFIELD IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL**

Judge: Hon. Barry Ted Moskowitz

PER CHAMBERS, NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

I, Evlyn Andrade, declare:

1. I am the Plaintiff in this action and a proposed Class Representative. I make this declaration based on my own personal knowledge and, if called to testify to the matters set forth herein, I could and would do so competently.

2. Beginning in 2018, I purchased 32 oz. cartons of the NextFoods GoodBelly Probiotic Drinks, and continued to purchase them until around the middle of 2019. I typically bought them from Sprouts Farmers Market and I recall paying approximately $3 to $5 per carton.

3. When I was purchasing the GoodBelly Probiotic Drinks, I read and relied on statements on the labels, including "START YOUR GOODHEALTH GAME PLAN . . . Drink one 8 oz. glass of delicious GoodBelly a day for 12 days."; "Reboot your belly, then make GoodBelly your daily drink to keep your GoodHealth going. Because when your belly smiles the rest of you does too"; "WE DIG SCIENCE. LP299V is naturally occurring in the human gut. It has been studied more than 2 decades and has numerous research trials to show that it may help promote healthy digestion and overall wellness"; and "GoodBelly Probiotics is a delicious blend of fruit juices and a daily dose of probiotic cultures created to naturally renew your digestive health, right where your overall health gets started – in your belly."

4. Based on these statements, I believed that the GoodBelly Probiotic Drinks would promote good digestive health and overall health.

5. I volunteered as a named plaintiff and potential class representative in this lawsuit in October 2020. I understand that, as a Class Representative, I am representing other purchasers of GoodBelly Probiotic Drinks. I understand that I have a duty to the Class, and am obligated to make decisions in the best interests of the whole Class.

6. I have no conflicts with the Class of which I am aware. I have been in steady, periodic communications with my counsel and otherwise actively involved in the lawsuit. For example, in April 2023, I flew to San Diego from my home in Seattle to attend the Early Neutral Evaluation in this case. During the August 18, 2023 Settlement Conference, I was

available to my counsel by phone and discussed the potential settlement with counsel both before and after the conference.

7. I have reviewed and discussed the proposed Settlement with my counsel and understand its terms. In my opinion, the Settlement is in the best interests of all absent Class Members.

8. I will continue to stay active and in touch with my counsel, and to fulfill my duties as a Class Representative, and will continue to prosecute the case vigorously as needed until final judgment.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on 9/22/2023, in San Diego, California.

By: DocuSigned by: Evlyn Andrade 4591847AEBDF4DD...
Evlyn Andrade

**FITZGERALD JOSEPH LLP**
JACK FITZGERALD (SBN 257370)
*jack@fitzgeraldjoseph.com*
PAUL K. JOSEPH (SBN 287057)
*paul@pauljosephlaw.com*
MELANIE PERSINGER (SBN 275423)
*melanie@jackfitzgeraldlaw.com*
TREVOR M. FLYNN (SBN 253362)
*trevor@jackfitzgeraldlaw.com*
CAROLINE S. EMHARDT (SBN 321222)
*caroline@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741
***Counsel for Plaintiff***

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

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

NEXTFOODS, INC.,

Defendant.

Case No.: 21-cv-1446-BTM-MSB

**DECLARATION OF VALERIE GATES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL**

Judge: Hon. Barry Ted Moskowitz

PER CHAMBERS, NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

I, Valerie Gates, declare:

1. I am a resident of New York and a proposed Class Representative. I make this declaration based on my own personal knowledge and, if called to testify to the matters set forth herein, I could and would do so competently.

2. I was the sole named plaintiff in a putative class action filed on April 27, 2023 in the Northern District of New York, styled *Gates v. NextFoods, Inc.*, No. 23-cv-00530-FJS-ATB (N.D.N.Y.). The action challenged the same products and behavior at issue in this case, on behalf of New York residents. A true and correct copy of my Complaint is attached hereto as Exhibit 1. I agreed to voluntarily dismiss *Gates* on August 22, 2023, after being a settlement was reached in the litigation on a nationwide class basis. A true and correct copy of my Notice of Dismissal is attached hereto as Exhibit 2. At the time I dismissed the action, NextFoods' Motion to Dismiss was pending, and discovery had not yet begun.

3. I understand that, because resolving my case was one of NextFoods' goals in agreeing to enter into a nationwide settlement, the parties have agreed that I may seek appointment as a Class Representative for purposes of the Settlement. I am an adequate Class Representative for the reasons that follow.

4. Beginning in 2019, I purchased 32 oz. cartons of the NextFoods GoodBelly Probiotic Drinks, and continued to purchase them until around 2022. I typically bought them from a Wegmans in Liverpool, New York. I recall paying approximately $3 to $5 per carton.

5. When I was purchasing the GoodBelly Probiotic Drinks, I read and relied on statements on the labels, including: "START YOUR GOODHEALTH GAME PLAN . . . Drink one 8 oz. glass of delicious GoodBelly a day for 12 days."; "Reboot your belly, then make GoodBelly your daily drink to keep your GoodHealth going. Because when your belly smiles the rest of you does too"; "WE DIG SCIENCE. LP299V is naturally occurring in the human gut. It has been studied more than 2 decades and has numerous research trials to show that it may help promote healthy digestion and overall wellness"; and "GoodBelly Probiotics is a delicious blend of fruit juices and a daily dose of probiotic cultures created to naturally renew your digestive health, right where your overall health gets started – in your belly."

6. Based on these statements, I believed that the GoodBelly Probiotic Drinks would promote good digestive health and overall good health and wellness.

7. I volunteered as a named plaintiff in *Gates* in April 2023. I understand that, as a Class Representative, I am representing other purchasers of GoodBelly Probiotic Drinks. I understand that I have a duty to the Class and am obligated to make decisions in the best interests of the whole Class.

8. I have no conflicts with the Class of which I am aware. I have been in steady, periodic communications with my counsel and assisted my counsel in preparing the Complaint in my case.

9. I have reviewed and discussed the proposed Settlement with my counsel and understand its terms. In my opinion, the Settlement is in the best interests of all absent Class Members.

10. I will continue to stay active and in touch with my counsel, and to fulfill my duties as a Class Representative, and will continue to prosecute the case vigorously as needed until final judgment.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on 9/22/2023 in Fulton, New York.

By: DocuSigned by: CAB73DE87F1A493... _____
Valerie Gates

# Exhibit 1

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| VALERIE GATES, on behalf of herself, all others similarly situated, and the general public,<br><br>Plaintiff,<br><br>v.<br><br>NEXTFOODS, INC.,<br><br>Defendant. | Case No.: 5:23-cv-530 (FJS/ATB)<br><br>CLASS ACTION<br><br>**COMPLAINT FOR CONSUMER FRAUD, NEGLIGENT AND INTENTIONAL MISREPRESENTATION, AND UNJUST ENRICHMENT**<br><br>DEMAND FOR JURY TRIAL |

Plaintiff Valerie Gates, on behalf of herself, all others similarly situated, and the general public, by and through her undersigned counsel, brings this action against NextFoods, Inc. ("NextFoods"), and alleges the following upon her own knowledge, or where she lacks personal knowledge, upon information and belief, including the investigation of her counsel.

## INTRODUCTION

1. For several years, NextFoods has sold a line of fruit juice beverages branded GoodBelly Probiotic JuiceDrinks (the "JuiceDrinks").[1] NextFoods represents on their labels that the JuiceDrinks promote "digestive health" and thereby promote "overall health," and "overall wellness."

2. The labeling of the JuiceDrinks is false or highly misleading for several reasons.

3. First, representations that the JuiceDrinks promote "digestive health" are false, or at least highly misleading, because the sugar contained in the JuiceDrinks directly harms digestive health. A reasonable consumer would not expect a product labeled as promoting "digestive health" to contain large amounts of another substance that directly and significantly harms digestive health, and thus would be misled.

4. Second, representations that the JuiceDrinks promote digestive health and thereby promote

[1] This includes at least the following varieties: Tropical Green, Blueberry Acai, Pomegranate Blackberry, Mango, Cranberry Watermelon, Strawberry Banana, Raspberry Blackberry, Orange, and Peach Mango Orange. For exemplars of the JuiceDrinks' labeling available at the time of filing, *see* Appendix 1.

"overall health," and "overall wellness" are also false, or at least highly misleading. This is because the sugar contained in the JuiceDrinks directly harms digestive health and those harmful effects to the digestive system increase inflammation which and thereby increase risk of metabolic syndrome, obesity, and type 2 diabetes. A reasonable consumer would not expect a product labeled as promoting "overall health," and "overall wellness" to contain large amounts of another substance that directly and significantly increases risk of chronic diseases like metabolic syndrome, obesity, and type 2 diabetes and others.

5. Third, given the representations that the JuiceDrinks promote "digestive health" and also thereby promote "overall health," and "overall wellness," the JuiceDrinks omit material facts regarding the harmful effects of sugar on both digestive and overall health.

6. Plaintiff brings this action against NextFoods on behalf of herself, similarly-situated Class Members, and the general public to recover compensation for injured Class Members.

## JURISDICTION & VENUE

1. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)(2) (The Class Action Fairness Act) because the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and at least one member of the class of plaintiffs is a citizen of a State different from NextFoods. In addition, more than two-thirds of the members of the class reside in states other than the state in which NextFoods is a citizen and in which this case is filed, and therefore any exceptions to jurisdiction under 28 U.S.C. § 1332(d) do not apply.

2. The Court has personal jurisdiction over NextFoods because it has purposely availed itself of the benefits and privileges of conducting business activities within New York, including by marketing, distributing, and selling the JuiceDrinks in New York.

3. Venue is proper in the Northern District of New York pursuant to 28 U.S.C. § 1391(b) and (c), because NextFoods resides (*i.e.*, is subject to personal jurisdiction) in this district, and because a substantial part of the events or omissions giving rise to the claims occurred in this district.

## PARTIES

4. Plaintiff Valerie Gates is a citizen of New York because she resides in New York and intends to remain there.

5. Defendant NextFoods, Inc. is a Colorado corporation with its principal place of business in Boulder, Colorado.

## FACTS

### I. NEXTFOODS MARKETS THE JUICEDRINKS AS BENEFICIAL TO DIGESTIVE AND OVERALL HEALTH

6. NextFoods was founded by two food industry veterans who helped popularize products consumers perceive as healthy, like Silk Soymilk. Their self-described mission "was born out of the age-old mantra that food is the best medicine."[2] According to one founder's "epiphany," the Baby Boomer generation needs "some help having long, happy, healthy and active lives . . . but they need a means to do it and [sic] that means is better food."[3] The company was started in late 2006, with the promise that its products would have "scientifically substantiated health benefits combined with the goodness and responsibility of healthy, natural foods."[4] NextFoods communicates to consumers that the JuiceDrinks are "just the thing to give us that extra boost we need as we're trekking along on our own personal journeys toward GoodHealth and nutrition."[5]

7. As NextFoods is well aware, consumers prefer healthful foods and are willing to pay more for, or purchase more often, products marketed and labeled as healthy. For instance, a Nielsen 2015 Global Health & Wellness Survey found that "88% of those polled are willing to pay more for healthier foods."[6]

8. Accordingly, NextFoods markets the JuiceDrinks as promoting digestive health, as well as "overall" health and wellness, by placing on the JuiceDrinks' labels, statements that expressly or implicitly convey the message that the JuiceDrinks are healthy.

9. During the Class Period, the JuiceDrinks' labels bore at least the following statements, which individually and in the context of the label as a whole, convey a message that the JuiceDrinks promote digestive health and overall health:

---

[2] NextFoods Inc., "About" Page, https://goodbelly.com/about (last visited July 7, 2021).

[3] *Id*.

[4] *See id*.

[5] *Id*.

[6] Nancy Gagliardi, "Consumers Want Healthy Foods--And Will Pay More For Them," *Forbes* (Feb. 18, 2015) (citing Neilson, Global Health & Wellness Survey, at 11 (Jan. 2015)).

a. "START YOUR GOODHEALTH GAME PLAN . . . Drink one 8 oz. glass of delicious GoodBelly a day for 12 days.";

b. "Reboot your belly, then make GoodBelly your daily drink to keep your GoodHealth going. Because when your belly smiles the rest of you does too."

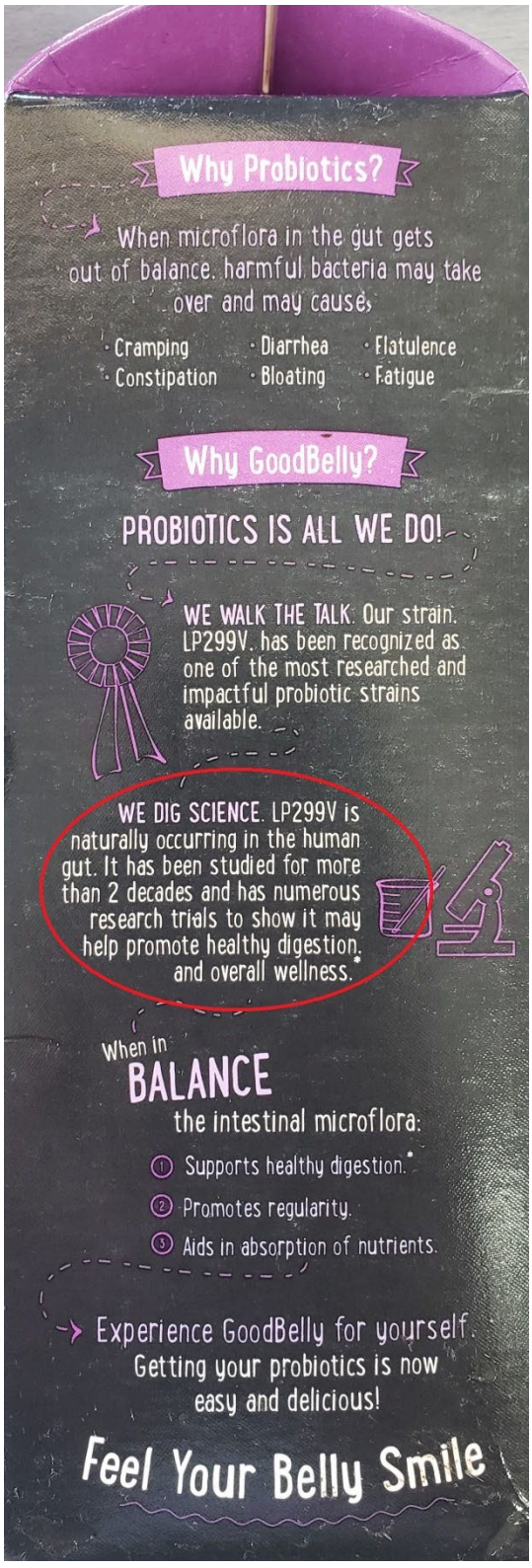
c. "WE DIG SCIENCE. LP299V is naturally occurring in the human gut. It has been studied more than 2 decades and has numerous research trials to show that it may help promote healthy digestion and overall wellness"; and

d. "GoodBelly Probiotics is a delicious blend of fruit juices and a daily dose of probiotic cultures created to naturally renew your digestive health, right where your overall health gets started – in your belly."[7]

[Intentionally Left Blank]

[7] According to NextFoods, "Probiotics are living microorganisms, which, when taken in adequate amounts, have a beneficial effect on the body." *See* NextFoods Inc., "The Science" Page, https://goodbelly.com/goodhealth.

10. An exemplar of the JuiceDrinks' health and wellness labeling is shown below.




## II. SCIENTIFIC EVIDENCE DEMONSTRATES THAT CONSUMING SUGAR, LIKE THAT IN NEXTFOOD'S JUICEDRINKS, HARMS DIGESTIVE HEALTH

### A. The Sugar in the NextFoods JuiceDrinks Harms the Gut Microbiota

11. Diet plays a central role in shaping the microbiota that make up the gut biome in human' digestive tracts. In fact, studies "suggest that diet has a dominant role over other possible variables such as ethnicity, sanitation, hygiene, geography, and climate, in shaping the gut microbiota."[8]

12. Studies also show that certain types of nutrients have specific effects on the gut microbiota.

13. "For example, complex polysaccharides commonly referred to as dietary fiber, remain undigested in the small intestine, reach the microbiota in the distal gut, and promote colonization by beneficial microbes associated with lean and healthy individuals."[9]

14. "Conversely, diets rich in simple sugars favor the expansion of [harmful microbial] organisms . . ."[10] in at least four separate ways.

15. First, simple sugars serve as a nutrient for harmful bacteria and "[r]ecent studies have shown that high intake of sugars increase the relative abundance of [harmful] Proteobacteria in the gut, while simultaneously decreasing the abundance of [beneficial] Bacteroidetes. "[11]

16. Second, and importantly, high sugar diets result in "lost gut microbial diversity."[12]

---

[8] De Filippo, C., et al., "Impact of diet in shaping gut microbiota revealed by a comparative study in children from Europe and rural Africa," *PNAS*, Vol. 107, No. 33, 14691-14696 (August 17, 2010); *see also* Brown, K, et al., "Diet-Induced Dysbiosis of the Intestinal Microbiota and the Effects on Immunity and Disease," *Nutrients* 2012, *4*, 1095-1119 ("the composition of the gut microbiota strongly correlates with diet as demonstrated by a study assessing the relative contributions of host genetics and diet in shaping the gut microbiota" "dietary changes could explain 57% of the total structural variation in gut microbiota whereas changes in genetics accounted for no more than 12% This indicates that diet has a dominating role in shaping gut microbiota") [hereafter "De Filippo, Diet-Induced Dysbiosis of the Intestinal Microbiota"].

[9] Townsend II, G., et al., "Dietary sugar silences a colonization factor in a mammalian gut symbiont," PNAS, Vol. 116, No. 1, 233-238 (January 2, 2019) [hereinafter "Townsend II, Dietary sugar silences a colonization factor"].

[10] *Id.*

[11] Satokari, R., "High Intake of Sugar and the Balance between Pro- and Anti-Inflammatory Gut Bacteria," *Nutrients* 2020 May, 12(5), 1348 (published online May 8, 2020) [hereinafter "Satokari, High Intake of Sugar"].

[12] Ho Do, M., et al., "High-Glucose or -Fructose Diet Cause Changes of the Gut Microbiota and Metabolic Disorders in Mice without Body Weight Change," *Nutrients* 2018, 10, 761 (June 13, 2018) [hereinafter "Ho Do, High-Glucose or -Fructose Diet Cause Changes of the Gut Microbiota and Metabolic Disorders "]; *see also* Jian-Mei Li, et al., "Dietary fructose-induced gut dysbiosis promotes mouse hippocampal

17. Third, independent of their effect as a nutrient for harmful microbiota, because consuming sugar increases bile output, "[r]efined sugars," also "mediate the overgrowth of opportunistic[, harmful] bacteria like C. difficile and C. perfringens,"[13] which feed on the bile.

18. Fourth, sugar "can impact gut colonization by the microbiota independently of their ability to serve as nutrients" since both "fructose and glucose silence a critical colonization factor, called Roc, in a widely distributed gut commensal bacterium B. thetaiotaomicron." [14]

19. These changes in the gut microbiota composition harm digestive health and increase risk of chronic digestive track conditions.

20. Specifically, "[e]vidence suggests that the composition of the intestinal microbiota can influence susceptibility to chronic disease of the intestinal tract including ulcerative colitis, Crohn's disease, celiac disease and irritable bowel syndrome . . . ."[15]

21. "Evidence [also] suggests that the composition of the intestinal microbiota can influence susceptibility to . . . more systemic diseases such as obesity, type 1 diabetes and type 2 diabetes."[16]

22. In sum, "high sugar intake may stagger the balance of microbiota to have increased pro-inflammatory properties and decreased [] capacity to regulate epithelial integrity and mucosal immunity. Consequently, high dietary sugar can, through the modulation of microbiota, promote metabolic endotoxemia, systemic (low grade) inflammation and the development of metabolic dysregulation and thereby, high dietary sugar may have many-fold deleterious health effects, in addition to providing excess energy." [17]

**B. The Sugar in the NextFoods JuiceDrinks Harms the Gut Barrier**

---

neuroinflammation: a benefit of short-chain fatty acids," *Microbiome*, 7, Article No. 98 (2019) (June 29, 2019) ("The abundance of Bacteroidetes was significantly decreased and Proteobacteria was significantly increased in fructose-fed mice") [hereinafter "Jian-Mei Li, Dietary fructose-induced gut dysbiosis"].

[13] De Filippo, Diet-Induced Dysbiosis of the Intestinal Microbiota, *supra* n.8.

[14] Townsend II, Dietary sugar silences a colonization factor, *supra* n.9 ("dietary simple sugars can suppress gut colonization in a commensal bacterium just by altering the levels of a colonization factor [know as Roc] dispensable for the utilization of such sugars.").

[15] De Filippo, Diet-Induced Dysbiosis of the Intestinal Microbiota, *supra* n.8.

[16] *Id.*

[17] Satokari, High Intake of Sugar, *supra* n.11.

23. "The gut barrier consists of a specialized, semi-permeable mucosal, and epithelial cell layers that are reinforced by tight junction proteins. Among other functions, this barrier serves to regulate nutrient and water entry and prevents the entry of harmful compounds into extra-luminal tissues" and the blood.[18]

24. When the permeability of the gut or epithelial barrier is increased, this "allows for the influx of adverse substances and may ultimately contribute to the development of metabolic disorders, and cognitive dysfunction."[19]

25. "A compromised gut barrier makes the intestinal tract potentially vulnerable to the gram-negative bacteria-derived LPS, which upon excess entry into circulation promotes endotoxemia and systemic inflammation."[20]

26. Both glucose and fructose increase gut barrier permeability.

27. "Although dietary fructose was thought to be metabolized exclusively in the liver, evidence has emerged that it is also metabolized in the small intestine and leads to intestinal epithelial barrier deterioration."[21] A high fructose diet, for example, has been found to result in the "thinning of the intestinal mucosa, epithelium, and muscularis mucosae; loss of crypts and glands" among other harmful effects.[22]

28. The "increase[d] intestinal permeability," in turn "precedes the development of metabolic endotoxemia, inflammation, and lipid accumulation, ultimately leading to hepatic steatosis and normal-weight obesity." [23]

---

[18] Noble, E., et al., "Gut to Brain Dysbiosis: Mechanisms Linking Western Diet Consumption, the Microbiome, and Cognitive Impairment," *Front Behav. Neurosci*. 2017, 11:9 (published online January 30, 2017).

[19] *Id.*

[20] *Id.* (Studies have found "elevated plasma levels of a gavaged fluorescent molecule (FITC-dextran) that is typically unable to cross the gut barrier.").

[21] Febbraio, M., et al., "'Sweet death': Fructose as a metabolic toxin that targets the gut-liver axis," Cell Metab. 2021 Dec 7;33(12):2316-2328 (published online October 6, 2021) [hereinafter "Febbraio, Fructose as a metabolic toxin that targets the gut-liver axis"].

[22] Jian-Mei Li, Dietary fructose-induced gut dysbiosis, *supra* n.12.

[23] Ho Do, High-Glucose or -Fructose Diet Cause Changes of the Gut Microbiota and Metabolic Disorders, *supra* n.12.

29. In addition, "[t]he monosaccharide fructose can escape absorption in the small intestine and reach the microbiota in the distal gut, where microbiota-derived products of fructose metabolism enter the host blood."[24]

30. Thus, "excessive fructose consumption" has been shown to "result[] in barrier deterioration, dysbiosis, low-grade intestinal inflammation, and endotoxemia."[25]

31. In short, consuming fructose, like that in the GoodBelly JuiceDrinks, has numerous harmful effects on the gut barrier.[26, 27, 28, 29]

32. Like fructose, glucose also harms the gut barrier. For example, both a "[high glucose diet] and [high fructose diet] increased gut permeability and disrupted the gut barrier."[30] This harms the health of the digestive track because "damaged gut barriers" lead to endotoxins crossing the epithelial and into the blood stream, resulting in "higher [blood] plasma endotoxin levels."[31]

33. Not only does glucose harm the gut barrier from within the digestive track, high levels of glucose in the blood, known as "[h]yperglycemia[,] markedly interfered with homeostatic epithelial integrity, leading to abnormal influx of immune-stimulatory microbial products and a propensity for systemic spread

---

[24] Townsend II, Dietary sugar silences a colonization factor, *supra* n.9.

[25] Febbraio, Fructose as a metabolic toxin that targets the gut-liver axis, *supra* n.21.

[26] Satokari, High Intake of Sugar, *supra* n.11 ("consuming high amounts of sugar harms the gut by "increasing small intestinal permeability in healthy humans,").

[27] Ho Do, High-Glucose or -Fructose Diet Cause Changes of the Gut Microbiota and Metabolic Disorders, *supra* n.12 ("diet induced changes in the gut microbiota affect the expression of tight junction proteins and inflammatory cytokines, which leads to increased gut permeability and inflammation").

[28] Febbraio, Fructose as a metabolic toxin that targets the gut-liver axis, *supra* n.21 ("fructose, . . . led to the downregulation of enterocyte tight-junction proteins and subsequent barrier deterioration, which is in agreement with previous rodents and human studies (Jin et al., 2014; Kavanagh et al., 2013; Lambertz et al., 2017; Spruss et al., 2012).").

[29] Young-Eun Cho, et al., "Fructose Promotes Leaky Gut, Endotoxemia, and Liver Fibrosis Through Ethanol-Inducible Cytochrome P450-2E1–Mediated Oxidative and Nitrative Stress," Hepatology, Vol. 73, Issue 6, June 2021, 2180-2195 (April 8, 2019) ("fructose intake causes protein nitration of intestinal [tight-junction] and AJ proteins, resulting in increased gut leakiness, endotoxemia, and steatohepatitis with liver fibrosis").

[30] Ho Do, High-Glucose or -Fructose Diet Cause Changes of the Gut Microbiota and Metabolic Disorders, *supra* n.12.

[31] *Id.*

of enteric pathogens."[32] This happens, at least in part, because "hyperglycemia causes retrograde transport of glucose into intestinal epithelial cells via GLUT2, followed by alterations in intracellular glucose metabolism and transcriptional reprogramming."[33]

34. In short, "experiments establish hyperglycemia as a direct and specific cause for intestinal barrier dysfunction and susceptibility to enteric infection,"[34] such that "[b]lood glucose concentrations are associated with microbial product influx in humans[.]" [35]

## III. SCIENTIFIC EVIDENCE DEMONSTRATES THAT CONSUMING JUICE, LIKE NEXTFOOD'S JUICEDRINKS, HARMS OVERALL HEALTH

35. In addition to harming the digestive track directly, because sugar consumption negatively impacts the gut microbiota composition and harms the gut barrier (which causes inflammation), it can also increase risk of "more systemic diseases such as obesity, type 1 diabetes and type 2 diabetes."[36]

### A. Juice Consumption is Associated with Increased Risk of Metabolic Disease

36. Excess sugar consumption leads to metabolic syndrome by stressing and damaging crucial organs, including the pancreas and liver. When the pancreas, which produces insulin, becomes overworked, it can fail to regulate blood sugar properly. Large doses of fructose can overwhelm the liver, which metabolizes fructose. In the process, the liver will convert excess fructose to fat, which is stored in the liver and released into the bloodstream. This process contributes to key elements of metabolic syndrome, including high blood fats and triglycerides, high cholesterol, high blood pressure, and extra body fat, especially in the belly.[37]

---

[32] Thaiss, C., et al., "Hyperglycemia drives intestinal barrier dysfunction and risk for enteric infection," Science 359, 1376–1383 (2018) (March 23, 2018) ("We have identified glucose as an orchestrator of intestinal barrier function.").

[33] *Id.*

[34] *Id.*

[35] *Id.* (Human studies "suggest that similar to their effects in mice, serum glucose concentrations, rather than obesity, may associate with or potentially even drive intestinal barrier dysfunction in humans.").

[36] De Filippo, Diet-Induced Dysbiosis of the Intestinal Microbiota, *supra* n.8.

[37] Te Morenga, L., et al., "Dietary sugars and body weight: systematic review and meta-analyses of randomized controlled trials and cohort studies," *BJM* (January 2013) [hereinafter, "Te Morenga, Dietary Sugars & Body Weight"].

37. Metabolic disease has been linked to type 2 diabetes, cardiovascular disease, obesity, polycystic ovary syndrome, nonalcoholic fatty liver disease, and chronic kidney disease, and is defined as the presence of any three of the following:

a. Large Waist Size (35" or more for women, 40" or more for men);

b. High triglycerides (150mg/dL or higher, or use of cholesterol medication);

c. High total cholesterol, or HDL levels under 50mg/dL for women, and 40 mg for men;

d. High blood pressure (135/85 mm or higher); or

e. High blood sugar (100mg/dL or higher).

38. More generally, "metabolic abnormalities that are typical of the so-called metabolic syndrome . . . includ[e] insulin resistance, impaired glucose tolerance, high concentrations of circulating triacylglycerols, low concentrations of HDLs, and high concentrations of small, dense LDLs."[38]

39. Fifty-six million Americans have metabolic syndrome, or about 22.9% over the age of 20, placing them at higher risk for chronic disease.

40. In 2010, Harvard researchers published a meta-analysis of three studies, involving 19,431 participants, concerning the effect of consuming sugar-sweetened beverages on risk for metabolic syndrome. They found participants in the highest quantile of 1-2 servings per day[39] had an average 20% greater risk of developing metabolic syndrome than did those in the lowest quantile of less than 1 serving per day, showing "a clear link between SSB consumption and risk of metabolic syndrome . . . ."[40]

41. Researchers who studied the incidence of metabolic syndrome and its components in relation to soft drink consumption in more than 6,000 participants in the Framingham Heart Study found that individuals who consumed 1 or more soft drinks per day (i.e., 140-150 calories and 35-37.5 grams of sugar or more) had a 48% higher prevalence of metabolic syndrome than infrequent consumers, those who drank

---

[38] Fried, S.K., "Sugars, hypertriglyceridemia, and cardiovascular disease," *American Journal of Clinical Nutrition*, Vol. 78 (suppl.), 873S-80S, at 873S (2003) [hereinafter, "Fried, Hypertriglyceridemia"].

[39] Because 1 sugar-sweetened beverage typically has 140-150 calories and 35-37.5 grams of sugar per 12-ounce serving, this is equivalent to between 140 and 300 calories per day, and 35 to 75 grams of sugar per day.

[40] Malik, Vasanti S., et al., "Sugar-Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes," *Diabetes Care*, Vol. 33, No. 11, 2477-83, at 2477, 2480-81 (November 2010) [hereinafter "Malik, 2010 Meta-Analysis"].

less than 1 soft drink per day. In addition, the frequent-consumer group had a 44% higher risk of developing metabolic syndrome.[41]

**B. Juice Consumption is Associated with Increased Risk of Type 2 Diabetes**

42. Diabetes affects 25.8 million Americans, and can cause kidney failure, lower-limb amputation, and blindness. In addition, diabetes doubles the risk of colon and pancreatic cancers and is strongly associated with coronary artery disease and Alzheimer's disease.[42]

43. In 2010, Harvard researchers also performed a meta-analysis of 8 studies concerning sugar-sweetened beverage consumption and risk of type 2 diabetes, involving a total of 310,819 participants. They concluded that individuals in the highest quantile of SSB intake had an average 26% greater risk of developing type 2 diabetes than those in the lowest quantile.[43] Moreover, "larger studies with longer durations of follow-up tended to show stronger associations."[44] Thus, the meta-analysis showed "a clear link between SSB consumption and risk of . . . type 2 diabetes."[45]

44. An analysis of data for more than 50,000 women from the Nurses' Health Study,[46] during two 4-year periods (1991-1995, and 1995-1999), showed, after adjusting for confounding factors, that women who consumed 1 or more sugar-sweetened soft drink per day (*i.e.*, 140-150 calories and 35-37.5 grams of sugar), had an 83% greater relative risk of type 2 diabetes compared with those who consumed less than 1

---

[41] Dhingra, R., et al., "Soft Drink Consumption and Risk of Developing Cardiometabolic Risk Factors and the Metabolic Syndrome in Middle-Aged Adults in the Community," *Circulation*, Vol. 116, 480-88 (2007) [hereinafter "Dhingra, Cardiometabolic Risk"].

[42] Aranceta Bartrina, J. et al., "Association between sucrose intake and cancer: a review of the evidence," *Nutrición Hospitalaria*, Vol. 28 (Suppl. 4), 95-105 (2013); Garcia-Jimenez, C., "A new link between diabetes and cancer: enhanced WNT/beta-catenin signaling by high glucose," *Journal of Molecular Endrocrinology*, Vol. 52, No. 1 (2014); Linden, G.J., "All-cause mortality and periodontitis in 60-70-year-old men: a prospective cohort study," *Journal of Clinical Periodontal*, Vol. 39, No. 1, 940-46 (October 2012).

[43] Malik, 2010 Meta-Analysis, *supra* n.40 at 2477, 2480.

[44] *Id.* at 2481.

[45] *Id.*

[46] The Nurses' Health Study was established at Harvard in 1976, and the Nurses' Health Study II, in 1989. Both are long-term epidemiological studies conducted on women's health. The study followed 121,700 women registered nurses since 1976, and 116,000 female nurses since 1989, to assess risk factors for cancer, diabetes, and cardiovascular disease. The Nurses' Health Studies are among the largest investigations into risk factors for major chronic disease in women ever conducted. *See generally* "The Nurses' Health Study," *at* http://www.channing.harvard.edu/nhs.

such beverage per month, and women who consumed 1 or more fruit punch drinks per day had a 100% greater relative risk of type 2 diabetes.[47]

45. The result of this analysis shows a statistically significant linear trend with increasing sugar consumption.[48]

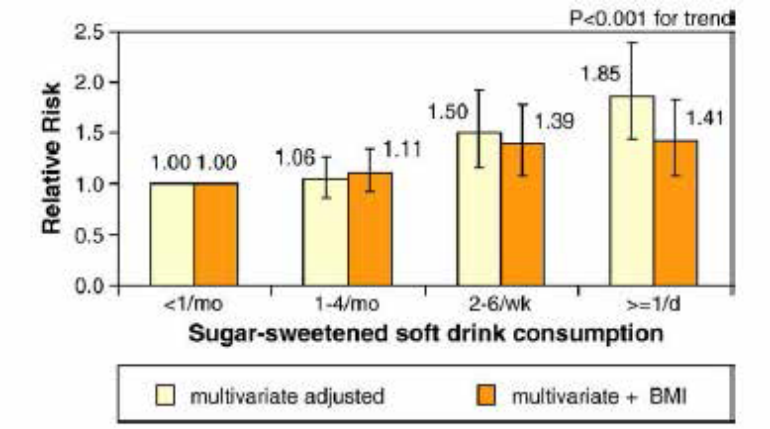



**Fig. 4.** Multivariate relative risks (RRs) of type 2 diabetes according to sugar-sweetened soft drink consumption in the Nurses' Health Study II 1991–1999 (Multivariate RRs were adjusted for age, alcohol (0, 0.1–4.9, 5.0–9.9, 10+ g/d), physical activity (quintiles), family history of diabetes, smoking (never, past, current), postmenopausal hormone use (never, ever), oral contraceptive use (never, past, current), intake (quintiles) of cereal fiber, magnesium, trans fat, polyunsaturated:saturated fat, and consumption of sugar-sweetened soft drinks, diet soft drinks, fruit juice, and fruit punch (other than the main exposure, depending on model). The data were based on Ref. [50]).

46. A prospective cohort study of more than 43,000 African American women between 1995 and 2001 showed that the incidence of type 2 diabetes was higher with higher intake of both sugar-sweetened soft drinks and fruit drinks. After adjusting for confounding variables, those who drank 2 or more soft drinks per day (*i.e.*, 140-300 calories and 35-75 grams of sugar) showed a 24% greater risk of type 2 diabetes, and

[47] Schulze, M.B., et al., "Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women," *Journal of the American Medical Association*, Vol. 292, No. 8, 927-34 (Aug. 25, 2004) [hereinafter "Schulze, Diabetes in Young & Middle-Aged Women"].

[48] Hu, F.B., et al., "Sugar-sweetened beverages and risk of obesity and type 2 diabetes: Epidemioligic evidence," *Physiology & Behavior*, Vol. 100, 47-54 (2010).

those who drank 2 or more fruit drinks per day showed a 31% greater risk of type 2 diabetes, than those who drank 1 or less such drinks per month.[49]

47. A large cohort study of 71,346 women from the Nurses' Health Study followed for 18 years showed that those who consumed 2 to 3 apple, grapefruit, and orange juices per day (280-450 calories and 75-112.5 grams of sugar) had an 18% greater risk of type 2 diabetes than women who consumed less than 1 sugar-sweetened beverage per month. The data also showed a linear trend with increased consumption, as demonstrated below.[50]

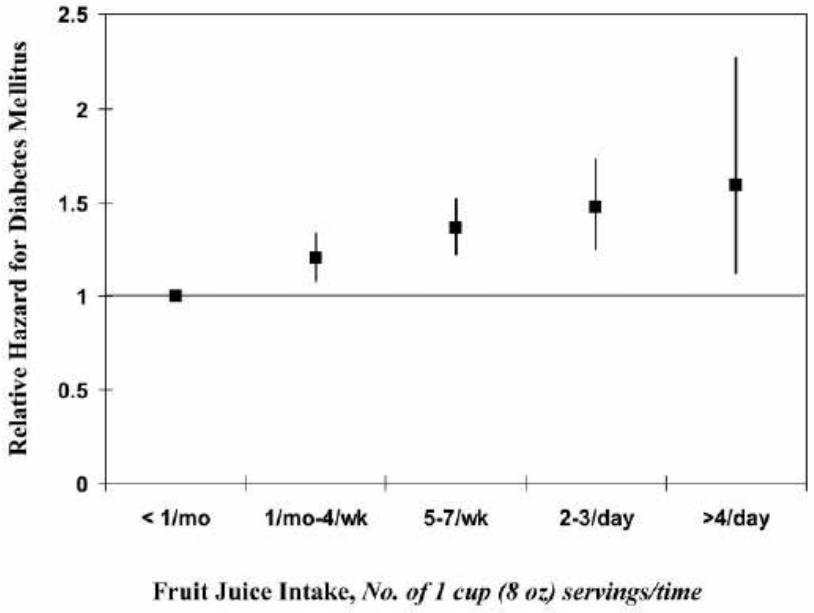



**Figure 1**—*Multivariate-adjusted relative hazard of diabetes by category of cumulatively updated fruit juice intake. Values were adjusted for cumulatively updated BMI, physical activity, family history of diabetes, postmenopausal hormone use, alcohol use, smoking, and total energy intake. For an increase of 1 serving/day of fruit juice, the multivariate-adjusted relative risk was 1.18 (95% CI 1.10–1.26; P < 0.0001).*

48. An analysis of more than 40,000 men from the Health Professionals Follow-Up Study, a prospective cohort study conducted over a 20-year period, found that, after adjusting for age and a wide variety of other confounders, those in the top quartile of sugar-sweetened beverage intake had a 24% greater

[49] Palmer, J.R., et al., "Sugar-Sweetened Beverages and Incidence of Type 2 Diabetes Mellitus in African American Women," *Archive of internal Medicine*, Vol. 168, No. 14, 1487-82 (July 28, 2008) [hereinafter "Palmer, Diabetes in African American Women"].

[50] Bazzano, L.A., et al., "Intake of fruit, vegetables, and fruit juices and risk of diabetes in women," *Diabetes Care*, Vol. 31, 1311-17 (2008).

risk of type 2 diabetes than those in the bottom quartile, while consumption of artificially-sweetened beverages, after adjustment, showed no association.[51]

49. In an analysis of tens of thousands of subjects from three prospective longitudinal cohort studies (the Nurses' Health Study, Nurses' Health Study II, and Health Professionals Follow-up Study), researchers found, after adjusting for BMI, initial diet, changes in diet, and lifestyle covariates, that increasing sugary beverage intake—which included both sugar-sweetened beverages and fruit juice—by half-a-serving per day over a 4-year period was associated with a 16% greater risk of type 2 diabetes.[52]

50. In another study of subjects from the Nurses' Health Study, Nurses' Health Study II, and Health Professionals Follow-up Study, researchers set out to "determine whether individual fruits are differentially associated with risk of type 2 diabetes," looking at the associated risk with eating three servings per week of blueberries, grapes and raisins, prunes, apples and pears, bananas, grapefruit, oranges, strawberries, cantaloupe, and peaches, plums and apricots, as well as "the same increment" in fruit juice consumption. They found that "[g]reater consumption of specific whole fruits" was "significantly associated with a lower risk of type 2 diabetes, whereas greater consumption of fruit juice is associated with a higher risk." The increased risk was approximately 8% based on three fruit juice servings per week.[53] Similarly, a meta-analysis of 17 prospective cohort studies showed higher consumption of fruit juice was associated with a 7% greater incidence of type 2 diabetes after adjusting for adiposity.[54]

51. An econometric analysis of repeated cross-sectional data published in 2013 established a causal relationship between sugar availability and type 2 diabetes. After adjusting for a wide range of confounding factors, researchers found that an increase of 150 calories per day related to an insignificant

---

[51] de Konig, L., et al., "Sugar-sweetened and artificially sweetened beverage consumption and risk of type 2 diabetes in men," *American Journal of Clinical Nutrition*, Vol. 93, 1321-27 (2011).

[52] Drouin-Chatier, J., et al., "Changes in Consumption of Sugary Beverages and Artificially Sweetened Beverages and Subsequent Risk of Type 2 Diabetes: Results From Three Large Prospective U.S. Cohorts of Women and Men." *Diabetes Care*, Vol. 42, pp. 2181-89 (Dec. 2019).

[53] Muraki, I., et al., "Fruit consumption and risk of type 2 diabetes: results from three prospective longitudinal cohort studies." *BMJ* (Aug. 28, 2013).

[54] Imamura, F., et al., "Consumption of sugar sweetened beverages, artificially sweetened beverages, and fruit juice and incidence of type 2 diabetes: systematic review, meta-analysis, and estimation of population attributable fraction." *BMJ*, Vol. 351 (2015).

0.1% rise in diabetes prevalence by country, while an increase of 150 calories per day in sugar related to a 1.1% rise in diabetes prevalence by country, a statically-significant 11-fold difference.[55]

**C. Juice Consumption is Associated with Increased Risk of Cardiovascular Heart Disease**

52. Heart disease is the number one killer in the United States. The scientific literature demonstrates that consumption of sugar-containing beverages (SCB), including juices, at amounts typically consumed, has deleterious effects on heart health.

53. In a study published in January 2020, researchers set out to determine whether consumption of SCBs, including juice, is associated with cardiometabolic risk (CMR) in preschool children, using 2007-2018 data from TARGet Kids!, a primary-care, practice-based research network in Canada. After adjusting for sociodemographic, familial, and child-related covariates, higher consumption of SCB was significantly associated with elevated CMR scores, including lower HDL "good" cholesterol, and higher triglycerides. In addition, when examined separately, juice specifically was significantly associated with lower HDL cholesterol. The researchers stated that their "findings support recommendations to limit overall intake of SCB in early childhood, in [an] effort to reduce the potential long-term burden of CMR."[56]

54. But juice consumption does not just detrimentally affect children. Analyzing data from the Danish Diet, Cancer and Health cohort study, representing 57,053 men and women aged 50 to 64 years old, researchers found "a tendency towards a lower risk of ACS [acute coronary syndrome] . . . for both men and women with higher [whole] fruit and vegetable consumption," but "a higher risk . . . among women with higher fruit juice intake[.]"[57]

55. In one study, those who consumed juice daily, rather than rarely or occasionally, had significantly higher central systolic blood pressure, a risk factor for cardiovascular disease, even after adjusting for age, height, weight, mean arterial pressure, heart rate, and treatment for lipids and hypertension.[58]

---

[55] Basu, S., et al., "The Relationship of Sugar to Population-Level Diabetes Prevelance: An Econometric Analysis of Repeated Cross-Sectional Data," *PLOS Online*, Vol. 8, Issue 2 (February 27, 2013).

[56] Eny, KM, et al., "Sugar-containing beverage consumption and cardiometabolic risk in preschool children." *Prev. Med. Reports* 17 (Jan. 14, 2020).

[57] Hansen, L., et al., "Fruit and vegetable intake and risk of acute coronary syndrome." *British J. of Nutr.*, Vol. 104, p. 248-55 (2010).

[58] Pase, M.P., et al., "Habitual intake of fruit juice predicts central blood pressure." *Appetite*, Vol. 84, p. 658-72 (2015).

56. Studies of the cardiovascular effects of added sugar consumption further suggest juice consumption causes increased risk for and contraction of cardiovascular disease, since the free sugars in juice act physiologically identically to added sugars, such as those in sugar-sweetened beverages.

57. For example, data obtained from NHANES surveys during the periods of 1988-1994, 1999-2004, and 2005-2010—after adjusting for a wide variety of other factors—demonstrate that those who consumed 10% - 24.9% of their calories from added sugar had a 30% greater risk of cardiovascular disease (CVD) mortality than those who consumed 5% or less of their calories from added sugar. In addition, those who consumed 25% or more of their calories from added sugar had an average 275% greater risk of CVD mortality than those who consumed less than 5% of calories from added sugar. Similarly, when compared to those who consumed approximately 8% of calories from added sugar, participants who consumed approximately 17% - 21% (the 4th quintile) of calories from added sugar had a 38% higher risk of CVD mortality, while the relative risk was more than double for those who consumed 21% or more of calories from added sugar (the 5th quintile). Thus, "[t]he risk of CVD mortality increased exponentially with increasing usual percentage of calories from added sugar," as demonstrated in the chart below.[59]

58. The NHANES analysis also found "a significant association between sugar-sweetened beverage consumption and risk of CVD mortality," with an average 29% greater risk of CVD mortality "when comparing participants who consumed 7 or more servings/wk (360 mL per serving) with those who consumed 1 serving/wk or less . . . ."[60] The study concluded that "most US adults consume more added sugar than is recommended for a healthy diet. A higher percentage of calories from added sugar is associated with significantly increased risk of CVD mortality. In addition, regular consumption of sugar-sweetened beverages is associated with elevated CVD mortality."[61]

59. Data from the Nurses' Health Study consistently showed that, after adjusting for other unhealthy lifestyle factors, those who consumed two or more sugar-sweetened beverages per day (280

[59] Yang, Quanhe, et al., "Added Sugar Intake and Cardiovascular Diseases Mortality Among US Adults," *JAMA*, at E4-5 (pub. online, Feb. 3, 2014).

[60] *Id.* at E6.

[61] *Id.* at E8.

calories, or 70 grams of sugar or more) had a 35% greater risk of coronary heart disease compared with infrequent consumers.[62]

60. In another prospective cohort study, it was suggested that reducing sugar consumption in liquids is highly recommended to prevent CHD. Consumption of sugary beverages was significantly shown to increase risk of CHD, as well as adverse changes in some blood lipids, inflammatory factors, and leptin.[63]

61. Juice consumption is also associated with several CHD risk factors. For example, consumption of sugary beverages like juice has been associated with dyslipidemia,[64] obesity,[65] and increased blood pressure.[66]

**D. Juice Consumption is Associated with Increased Risk of Obesity**

62. Excess sugar consumption also leads to weight gain and obesity because insulin secreted in response to sugar intake instructs the cells to store excess energy as fat. This excess weight can then exacerbate the problems of excess sugar consumption, because excess fat, particularly around the waist, is in itself a primary cause of insulin resistance, another vicious cycle. Studies have shown that belly fat produces hormones and other substances that can cause insulin resistance, high blood pressure, abnormal cholesterol levels, and cardiovascular disease. And belly fat plays a part in the development of chronic inflammation in the body, which can cause damage over time without any signs or symptoms. Complex

---

[62] Fung, T.T., et al., "Sweetened beverage consumption and risk of coronary heart disease in women." *Am. J. of Clin. Nutr.*, Vol. 89, pp. 1037-42 (Feb. 2009).

[63] Koning, L.D., et al., "Sweetened Beverage Consumption, Incident Coronary Heart Disease, and Biomarkers of Risk in Men."," *Circulation*, Vol. 125, pp. 1735-41 (2012).

[64] Elliott S.S., et al., "Fructose, weight gain, and the insulin resistance syndrome." *Am. J. Clin. Nutr.*, Vol. 76, No. 5, pp. 911-22 (2002).

[65] Faith, M.S., et al., "Fruit Juice Intake Predicts Increased Adiposity Gain in Children From Low-Income Families: Weight Status-by-Environment Interaction." *Pediatrics*, Vol. 118 (2006) ("Among children who were initially either at risk for overweight or overweight, increased fruit juice intake was associated with excess adiposity gain, whereas parental offerings of whole fruits were associated with reduced adiposity gain."); Schulze, M.B, et al., "Sugar-Sweetened Beverages, Weight Gain, and Incidence of Type 2 Diabetes in Young and Middle-Aged Women." *JAMA*, Vol. 292, No. 8, pp. 927-34 (2004); Ludwig, D.S., et al., "Relation between consumption of sugar-sweetened drinks and childhood obesity: a prospective, observational analysis." *Lancet*, Vol. 257, pp. 505-508 (2001); Dennison, B.A., et al., "Excess fruit juice consumption by preschool-aged children is associated with short stature and obesity." *Pediatrics*, Vol. 99, pp. 15-22 (1997).

[66] Hoare, E., et al., "Sugar- and Intense-Sweetened Drinks in Australia: A Systematic Review on Cardiometabolic Risk." *Nutrients*, Vol. 9, No. 10 (2017).

interactions in fat tissue draw immune cells to the area, which triggers low-level chronic inflammation. This in turn contributes even more to insulin resistance, type 2 diabetes, and cardiovascular disease.

63. Based on a meta-analysis of 30 studies between 1966 and 2005, Harvard researchers found "strong evidence for the independent role of the intake of sugar-sweetened beverages, particularly soda, in the promotion of weight gain and obesity in children and adolescents. Findings from prospective cohort studies conducted in adults, taken in conjunction with results from short-term feeding trials, also support a positive association between soda consumption and weight gain, obesity, or both."[67]

64. A recent meta-analysis by Harvard researchers evaluating change in Body Mass Index per increase in 1 serving of sugar-sweetened beverages per day found a significant positive association between beverage intake and weight gain.[68]

65. One study of more than 2,000 2.5-year-old children followed for 3 years found that those who regularly consumed sugar-sweetened beverages between meals had a 240% better chance of being overweight than non-consumers.[69]

66. An analysis of data for more than 50,000 women from the Nurses' Health Study during two 4-year periods showed that weight gain over a 4-year period was highest among women who increased their sugar-sweetened beverage consumption from 1 or fewer drinks per week, to 1 or more drinks per day (8.0 kg gain during the 2 periods), and smallest among women who decreased their consumption or maintained a low intake level (2.8 kg gain).[70]

67. A study of more than 40,000 African American women over 10 years had similar results. After adjusting for confounding factors, those who increased sugar-sweetened beverage intake from less than 1 serving per week, to more than 1 serving per day, gained the most weight (6.8 kg), while women who decreased their intake gained the least (4.1 kg).[71]

---

[67] Malik, V.S., et al., "Intake of sugar-sweetened beverages and weight gain: a systematic review," *American Journal of Clinical Nutrition*, Vol. 84, 274-88 (2006).

[68] Malik, V.S., et al., "Sugar-sweetened beverages and BMI in children and adolescents: reanalyses of a meta-analysis," *American Journal of Clinical Nutrition*, Vol. 29, 438-39 (2009).

[69] Dubois, L., et al., "Regular sugar-sweetened beverage consumption between meals increases risk of overweight among preschool-aged children," *Journal of the American Dietetic Association*, Vol. 107, Issue 6, 924-34 (2007).

[70] Schulze, Diabetes in Young & Middle-Aged Women, *supra* n.47.

[71] Palmer, Diabetes in African American Women, *supra* n.49.

68. Experimental short-term feeding studies comparing sugar-sweetened beverages to artificially-sweetened beverages have illustrated that consumption of the former leads to greater weight gain. As demonstrated in the chart below, one 10-week trial involving more than 40 men and women demonstrated that the group that consumed daily supplements of sucrose (for 28% of total energy) increased body weight and fat mass, by 1.6 kg for men and 1.3 kg for women, while the group that was supplemented with artificial sweeteners lost weight—1.0 kg for men and 0.3 kg for women.[72]

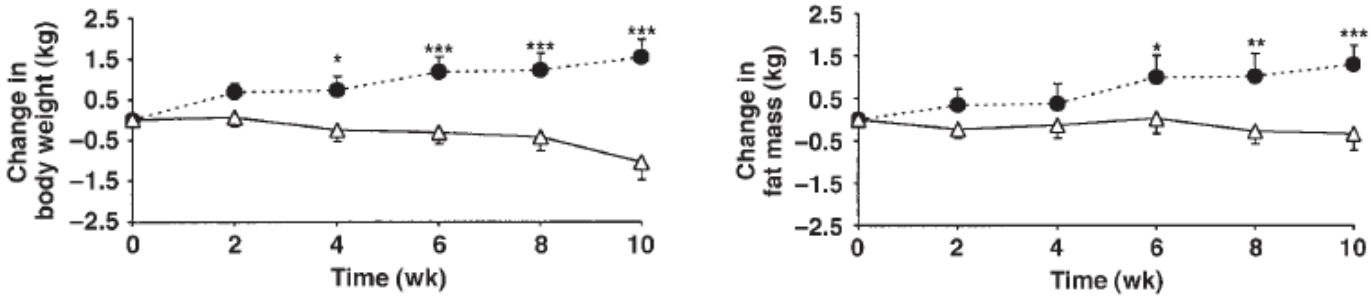



**FIGURE 2.** Mean (±SEM) changes in body weight, fat mass, and fat-free mass during an intervention in which overweight subjects consumed supplements containing either sucrose (●; $n = 21$) or artificial sweeteners (△; $n = 20$) daily for 10 wk. The diet × time interactions were significant for changes in body weight ($P < 0.0001$) and fat mass ($P < 0.05$) by analysis of variance with Tukey's post hoc tests. At specific time points for changes in body weight and fat mass, there were significant differences between the sucrose and sweetener groups: $^{*}P < 0.05$, $^{**}P < 0.001$, and $^{***}P < 0.0001$ (general linear model with least squares means and adjustment for multiple comparisons).

[72] Raben, A., et al., "Sucrose compared with artificial sweeteners: different effects on ad libitum food intake and body weight after 10 wk of supplementation in overweight subjects," *American Journal of Clinical Nutrition*, Vol. 76, 721-29 (2002) [hereinafter, "Raben, Sucrose vs. Artificial Sweeteners"].

**E. Juice Consumption is Associated with Increased Risk of Liver Disease**

69. Sugar consumption causes serious liver disease, including non-alcoholic fatty liver disease (NAFLD), characterized by excess fat build-up in the liver. Five percent of these cases develop into non-alcoholic steatohepatitis (NASH), scarring as the liver tries to heal its injuries, which gradually cuts off vital blood flow to the liver. About 25% of NASH patients progress to non-alcoholic liver cirrhosis, which requires a liver transplant or can lead to death.[73]

70. Since 1980, the incidence of NAFLD and NASH has doubled, along with the rise of fructose consumption, with approximately 6 million Americans estimated to have progressed to NASH and 600,000 to Nash-related cirrhosis. Most people with NASH also have type 2 diabetes. NASH is now the third-leading reason for liver transplant in America.[74]

71. Moreover, because the liver metabolizes sugar virtually identically to alcohol, the U.S. is now seeing for the first time alcohol-related diseases in children. Conservative estimates are that 31% of American adults, and 13% of American children suffer from NAFLD.[75]

**F. Juice Consumption is Associated with Increased Risk of High Blood Triglycerides and Abnormal Cholesterol Levels**

72. Cholesterol is a waxy, fat-like substance found in the body's cells, used to make hormones, bile acids, vitamin D, and other substances. The human body manufactures all the cholesterol it requires, which circulates in the bloodstream in packages called lipoproteins. Excess cholesterol in the bloodstream can become trapped in artery walls, building into plaque and narrowing blood vessels, making them less flexible, a condition called atherosclerosis. When this happens in the coronary arteries, it restricts oxygen

---

[73] Farrell, G.C., et al., "Nonalcoholic fatty liver disease: from steatosis to cirrhosis," *Hepatology*, Vol. 433, No. 2 (Suppl. 1), S99-S112 (February 2006); Powell, E.E., et al., "The Natural History of Nonalcoholic Steatohepatitis: A Follow-up Study of Forty-two Patients for Up to 21 Years," *Hepatology*, Vol. 11, No. 1 (1990).

[74] Charlton, M.R., et al., "Frequency and outcomes of liver transplantation for nonalcoholic steatohepatitis in the United States," *Gastroenterology*, Vol. 141, No. 4, 1249-53 (October 2011).

[75] Lindback, S.M., et al., "Pediatric Nonalcoholic Fatty Liver Disease: A Comprehensive Review," *Advances in Pediatrics*, Vol. 57, No. 1, 85-140 (2010); Lazo, M. et al., "The Epidemiology of Nonalcoholic Fatty Liver Disease: A Global Perspective," *Seminars in Liver Disease*, Vol. 28, No. 4, 339-50 (2008); Schwimmer, J.B., et al., "Prevalence of Fatty Liver in Children and Adolescents," *Pediatrics*, Vol. 118, No. 4, 1388-93 (2006); Browning, J.D., et al., "Prevalence of hepatic steatosis in an urban population in the United States: Impact of ethnicity," *Hepatology*, Vol. 40, No. 6, 1387-95 (2004).

and nutrients to the heart, causing chest pain or angina. When cholesterol-rich plaques in these arteries burst, a clot can form, blocking blood flow and causing a heart attack.

73. Most blood cholesterol is low-density lipoprotein, or LDL cholesterol, which is sometimes called "bad" cholesterol because it carries cholesterol to the body's tissues and arteries, increasing the risk of heart disease. High-density lipoprotein, or HDL cholesterol, is sometimes called "good" cholesterol because it removes excess cholesterol from the cardiovascular system, bringing it to the liver for removal. Thus, a low level of HDL cholesterol increases the risk of heart disease.

74. Diet affects blood cholesterol. For example, the body reacts to saturated fat by producing LDL cholesterol.

75. When the liver is overwhelmed by large doses of fructose, it will convert excess to fat, which is stored in the liver and then released into the bloodstream, contributing to key elements of metabolic syndrome, like high blood fat and triglycerides, high total cholesterol, and low HDL "good" cholesterol.[76]

76. A study of more than 6,000 participants in the Framingham Heart Study found those who consumed more than 1 soft drink per day had a 25% greater risk of hypertriglyceridemia, and 32% greater risk of low HDL cholesterol than those who consumed less than 1 soft drink per day.[77]

77. A systematic review and meta-analysis of 37 randomized controlled trials concerning the link between sugar intake and blood pressure and lipids found that higher sugar intakes, compared to lower sugar intakes, significantly raised triglyceride concentrations, total cholesterol, and low density lipoprotein cholesterol.[78]

78. A cross-sectional study among more than 6,100 U.S. adults from the NHANES 1999-2006 data were grouped into quintiles for sugar intake as follows: (1) less than 5% of calories consumed from sugar, (2) 5% to less than 10%, (3) 10% to less than 17.5%, (4) 17.5% to less than 25%, and (5) 25% or more. These groups had the following adjusted mean HDL levels (because HDL is the "good" cholesterol, higher levels are better): 58.7 mg/dL, 57.5, 53.7, 51.0, and 47.7. Mean triglyceride levels were 105 mg/dL, 102, 111, 113, and 114. Mean LDL levels were 116 mg/dL, 115, 118, 121, and 123 among women, with no

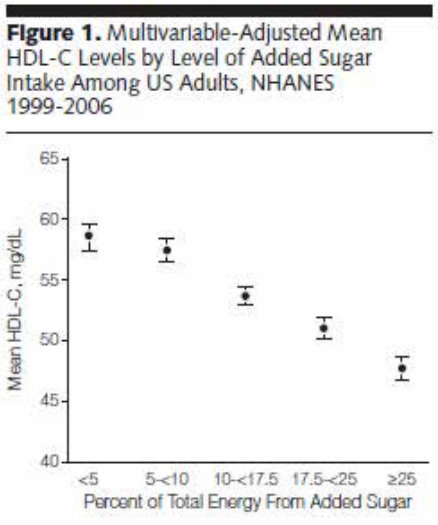
---

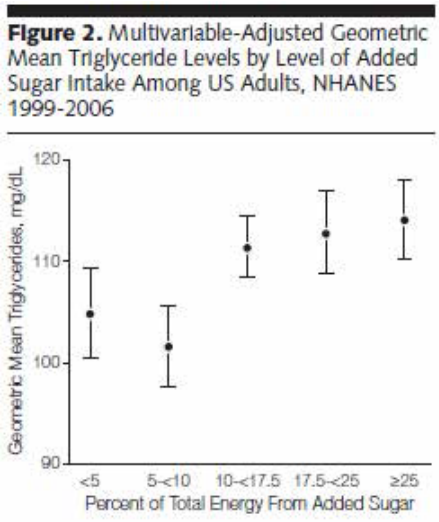
[76] Te Morenga, Dietary Sugars & Body Weight, *supra* n.37.

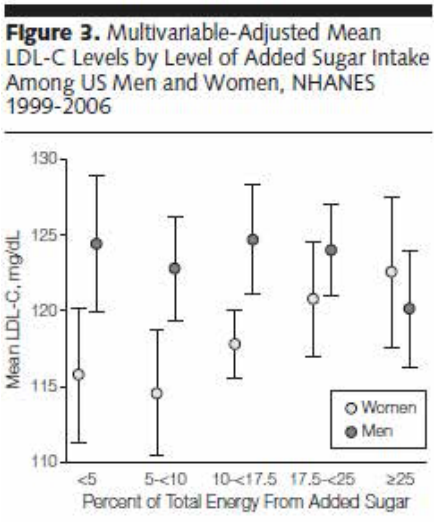
[77] Dhingra, Cardiometabolic Risk, *supra* n.41.

[78] Te Morenga, L., et al., "Dietary sugars and cardiometabolic risk: systematic review and meta-analyses of randomized controlled trials on the effects on blood pressure and lipids," *American Journal of Clinical Nutrition*, Vol. 100, No. 1, 65-79 (May 7, 2014).

significant trend among men. Consumers whose sugar intake accounted for more than 10% of calories had a 50% - 300% higher risk of low HDL levels compared to those who consumed less than 5% of calories from sugar. Likewise, high-sugar consumers had greater risk of high triglycerides. All relationships were linear as demonstrated in the charts below.[79]




79. One experimental study showed that, when a 17% fructose diet was provided to healthy men, they showed an increase in plasma triacylglycerol concentrations of 32%.[80]

80. Another 10-week experimental feeding study showed that those who were fed 25% of their energy requirements as fructose experienced increases in LDL cholesterol, small dense LDL cholesterol, and oxidized LDL cholesterol, as well as increased concentrations of triglycerides and total cholesterol, while those fed a 25% diet of glucose did not experience the same adverse effects.[81]

---

[79] Welsh, J.A., et al., "Caloric Sweetener Consumption and Dyslipidemia Among US Adults," *Journal of the American Medical Association*, Vol. 303, No. 15, 1490-97 (April 21, 2010).

[80] Bantle, J.P., et al., "Effects of dietary fructose on plasma lipids in healthy subjects," *American Journal of Clinical Nutrition*, Vol. 72, 1128-34 (2000).

[81] Stanhope, K.L., et al., "Consuming fructose-sweetened, not glucose-sweetened, beverages increases visceral adiposity and lipids and decreases insulin sensitivity in overweight/obese humans," *The Journal of Clinical Investigation*, Vol. 119, No. 5, 1322-34 (May 2009).

81. In a cross-sectional study of normal weight and overweight children aged 6-14, researchers found that "the only dietary factor that was a significant predictor of LDL particle size was total fructose intake."[82]

**G. Juice Consumption is Associated with Increased Risk of Hypertension**

82. An analysis of the NHANES data for more than 4,800 adolescents also showed a positive, linear association between sugar-sweetened beverages and higher systolic blood pressure, as well as corresponding increases in serum uric acid levels.[83]

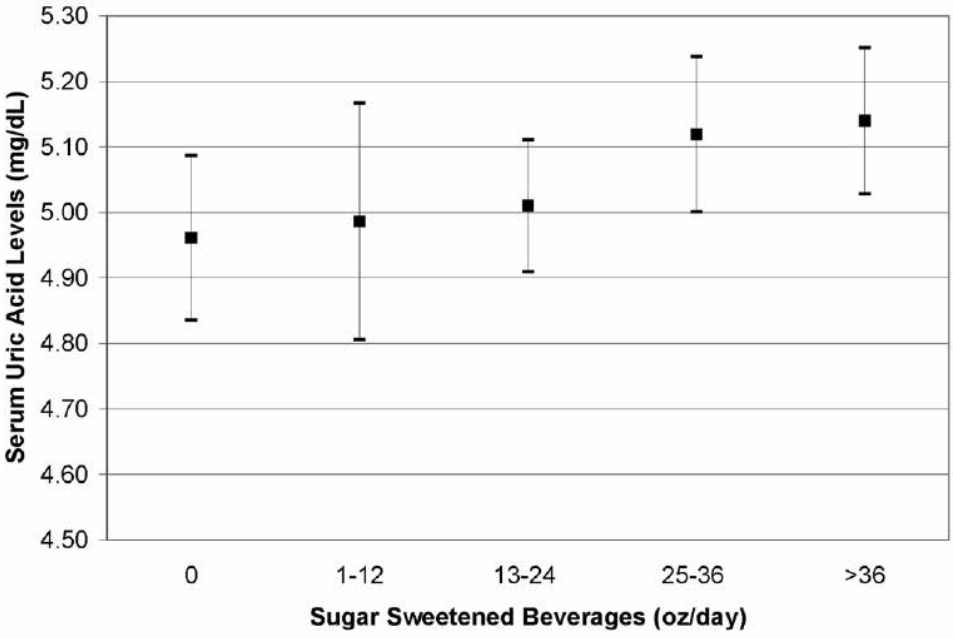



**Figure 1.**
Sample mean of serum uric acid with 95% confidence intervals by categories of sugar sweetened beverage consumption adjusted for age, race/ethnicity, sex, total calories, BMI z-score, alcohol, smoking, dietary fiber intake, diet beverage consumption, and milk consumption. *P* for trend = 0.01

[82] Aeberli, I., et al., "Fructose intake is a predictor of LDL particle size in overweight schoolchildren," *American Journal of Clinical Nutrition*, Vol. 86, 1174-78 (2007).

[83] Nguyen, S., et al., "Sugar Sweetened Beverages, Serum Uric Acid, and Blood Pressure in Adolescents," *Journal of Pediatrics*, Vol. 154, No. 6, 807-13 (June 2009).

83. In one study, 15 healthy men drank 500 ml water containing either no sugar, 60 grams of fructose, or 60 grams of glucose. Blood pressure, metabolic rate, and autonomic nervous system activity were measured for 2 hours. While the administration of fructose was associated with an increase in both systolic and diastolic blood pressure, blood pressure did not rise in response to either water or glucose ingestion, as demonstrated in the chart below.[84]

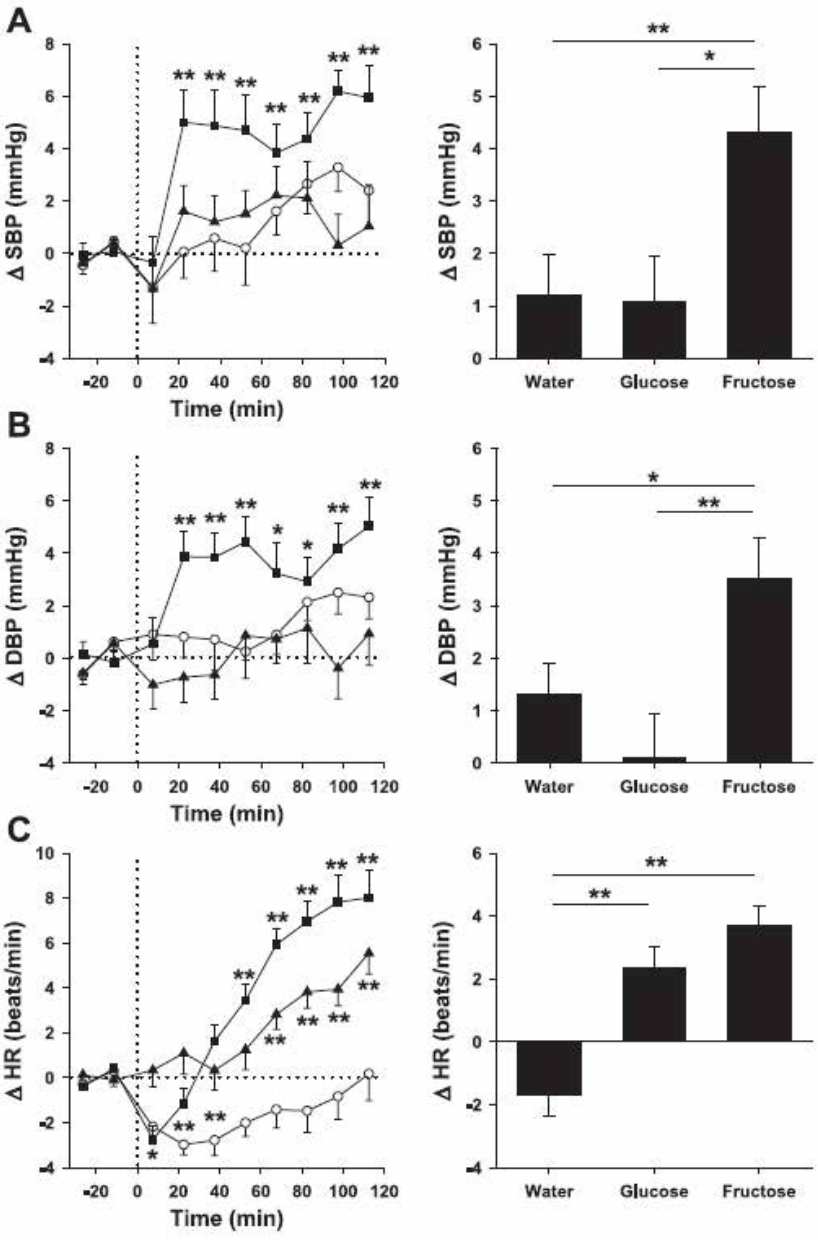



Fig. 1. Time course of the systolic blood pressure (SBP; *A*), diastolic blood pressure (DBP; *B*), and heart rate (HR; *C*) changes (*left*) and mean responses (*right*) to drinking water (○), glucose (▲), and fructose (■). $*P < 0.05$ and $**P < 0.01$, statistically significant differences over time from baseline values (*left*) and differences between responses to the drinks (*right*).

[84] Brown, C.M., et al., "Fructose ingestion acutely elevates blood pressure in healthy young humans," *Am. J. Physiol. Regul. Integr. Compl. Physiol.*, Vol. 294, R730-37 (2008).

84. In another study, more than 40 overweight men and women were supplemented for 10 weeks with either sucrose or artificial sweeteners. The sucrose group saw an increase in systolic and diastolic blood pressure, of 3.8 and 4.1 mm Hg, respectively, while the artificial sweetener group saw a decrease in systolic and diastolic blood pressure, of 3.1 and 1.2 mm Hg, respectively.[85]

85. Another study took a variety of approaches to measuring the association between sugar intake and blood pressure, concluding that an increase of 1 serving of sugar-sweetened beverages per day (*i.e.*, 140-150 calories, and 35-37.5 grams of sugar) was associated with systolic/diastolic blood pressure differences of +1.6 and +0.8 mm Hg (and +1.1/+0.4 mm Hg with adjustment for height and weight), while an increase of 2 servings results in systolic/diastolic blood pressure differences of +3.4/+2.2, demonstrating that the relationship is direct and linear.[86]

**H. Juice Consumption is Associated with Increased All-Cause Mortality**

86. In a cohort study of 13,440 black and white adults 45 years and older, observed for a mean of 6 years, each additional 12-oz serving per day of fruit juice was associated with a 24% higher all-cause mortality risk. This was significantly higher than the increased risk associated with *all* sugary beverages, including sugar-sweetened beverages like soda, which was 11% for each additional 12-oz serving per day. The researchers from Emory University, University of Alabama, and the Weill Cornell Medical College concluded their findings "suggest that consumption of sugary beverages, including fruit juices, is associated with all-cause mortality."[87]

## IV. Because of the Compelling Evidence that Consuming Juice is Unhealthy, Authoritative Bodies Recommend Limiting its Consumption

87. The American Academy of Pediatrics (AAP) suggests limiting juice consumption to no more than 4 to 6 ounces for young children aged 1 to 6,[88] and no more than 8 fluid ounces for children 7 to 18

[85] Raben, Sucrose vs. Artificial Sweeteners, *supra* n.72.

[86] Brown, I.J., et al., "Sugar-Sweetened Beverage, Sugar Intake of Individuals, and Their Blood Pressure: International Study of Macro/Micronutrients and Blood Pressure," *Hypertension*, Vol. 57, 695-701 (2011).

[87] Collin, L.J., et al., "Association of Sugary Beverage Consumption With Mortality Risk in US Adults: A Secondary Analysis of Data From the REGARDS Study," *JAMA Network Open* Vol. 2, No. 5 (May 2019).

[88] Am. Academy of Pediatrics, "Healthy Children, Fit Children: Answers to Common Questions From Parents About Nutrition and Fitness." (2011).

years of age, as well as adults.[89] In addition, both the AAP and Dietary Guidelines for Americans recommend that children consume whole fruit in place of juice.[90]

88. The most recent Dietary Guidelines for Americans states that "[t]he amounts of fruit juice allowed in the USDA Food Patterns for young children align with the recommendation from the American Academy of Pediatrics that young children consume no more than 4 to 6 fluid ounces of 100% fruit juice per day."[91]

89. The World Health Organization recommends that no more than 10% of an adult's calories, and ideally less than 5%, come from free or added sugar, or from natural sugars in honey, syrups, and fruit juice.

## V. NEXTFOODS' REPRESENTATIONS AND OMISSIONS SUGGESTING THE JUICEDRINKS ARE HEALTHY ARE FALSE AND MISLEADING

90. For more than four years preceding the filing of this Complaint and continuing today, NextFoods has sold and continues to sell the JuiceDrinks on a nationwide basis, including in New York, in at least 32 ounce and 15.2 ounce sizes, and in various flavors.

91. The JuiceDrinks' standard serving size is 8 fl. oz (1 cup).[92] Each serving, depending on flavor, contains between 9g and 21g of free sugar, contributing 60% to 88% of its calories.

92. Because scientific evidence demonstrates that consuming foods high in free sugar content, like the JuiceDrinks, harms digestive health, NextFoods' representations that the JuiceDrinks promote digestive or gut health are false, or at least highly misleading.

93. To the extent the JuiceDrinks probiotics may provide some benefits to "digestive health"—like the mitigation of "Flatulence," "Diarrhea," and "Constipation," as set out on the JuiceDrinks' labels, it

---

[89] Heyman, M.B., et al., "Fruit Juice in Infants, Children, and Adolescents: Current Recommendations." *Pediatrics* Vol. 139, No. 6 (June 2017).

[90] *Id.*; *see also* Auerbach, B.J., et al., "Review of 100% Fruit Juice and Chronic Health Conditions: Implications for Sugar-Sweetened Beverage Policy." *Adv. Nutr.*, Vol. 9, pp. 78-85 (2018).

[91] U.S. Dep't of Health & Human Servs. and U.S. Dept. of Agric., "Dietary Guidelines for Americans 2015 – 2020," at 22 (8th ed.), *available at* https://health.gov/sites/default/files/2019-09/2015-2020_Dietary_Guidelines.pdf.

[92] This is also the FDA-promulgated Reference Amount Customarily Consumed (RACC) for juice. 81 Fed. Reg. 34,000 (May 27, 2016). RACCs reflect amounts of food customarily consumed per eating occasion and are derived from NHANES data.

is nevertheless deceptive for NextFoods to advertise the products as promoting digestive health since regular consumption of the JuiceDrinks actually is likely to detriment digestive health.

94. Because scientific evidence demonstrates that, due to its high free sugar content, juice consumption is associated with increased risk of metabolic disease, cardiovascular disease, type 2 diabetes, liver disease, obesity, high blood triglycerides and cholesterol, hypertension, and all-cause mortality, NextFoods' representations that the JuiceDrinks promote "overall health" and "GoodHealth," are healthy, are false, or at least highly misleading.

95. While representing that the JuiceDrinks promote digestive health, NextFoods regularly and intentionally omits material information regarding the dangers of the free sugars in the JuiceDrinks and the harm to digestive health that they cause. NextFoods is under a duty to disclose this information to consumers because (a) NextFoods is revealing some information about its Products—enough to suggest they are beneficial to digestive health—without revealing additional material information, (b) NextFoods deceptive omissions concern human health, and specifically the detrimental digestive health consequences of consuming its Products, (c) NextFoods was in a superior position to know of the dangers presented by the sugars in its juices, as it is a food company whose business depends upon food science and policy, and (d) NextFoods actively concealed material facts not known to Plaintiff and the Class.

96. While representing that the JuiceDrinks promote "overall health" and "GoodHealth," NextFoods regularly and intentionally omits material information regarding the dangers of the free sugars in the JuiceDrinks. NextFoods is under a duty to disclose this information to consumers because (a) NextFoods is revealing some information about its Products—enough to suggest they are healthy or beneficial to health—without revealing additional material information, (b) NextFoods deceptive omissions concern human health, and specifically the detrimental health consequences of consuming its Products, (c) NextFoods was in a superior position to know of the dangers presented by the sugars in its juices, as it is a food company whose business depends upon food science and policy, and (d) NextFoods actively concealed material facts not known to Plaintiff and the Class.

## III. THE JUICEDRINKS' LABELING VIOLATES NEW YORK AND FEDERAL LAW

97. "New York . . . broadly prohibit[s] the misbranding of food in language largely identical to that found in the FDCA." *Ackerman v. Coca-Cola Co.*, 2010 WL 2925955, at *4 (E.D.N.Y. July 21, 2010). "New York's Agriculture and Marketing law . . . incorporates the FDCA's labeling provisions found in 21 C.F.R. part 101." *Ackerman*, 2010 WL 2925955, at *4 (citing N.Y. Comp. Codes R. & Regs. tit. 1, § 259.1).

98. The JuiceDrinks and their challenged labeling statements violate the FDCA and its New York state law equivalent.

99. First, the challenged claims are false and misleading for the reasons described herein, in violation of 21 U.S.C. § 343(a), which deems misbranded any food whose "label is false or misleading in any particular." NextFoods accordingly also violated New York's parallel provision of the Agriculture and Marketing law. *See* N.Y. Agric. Mkts. Law § 201.

100. Second, despite making the challenged claim, NextFoods "fail[ed] to reveal facts that are material in light of other representations made or suggested by the statement[s], word[s], design[s], device[s], or any combination thereof," in violation of 21 C.F.R. § 1.21(a)(1). Such facts include the detrimental health consequences of consuming the JuiceDrinks at typical levels, including (1) harm to the digestive system that can cause chronic digestive track diseases such as ulcerative colitis, Crohn's disease, celiac disease and irritable bowel syndrome and (2) increased risk of other chronic diseases such as metabolic disease, cardiovascular disease, type 2 diabetes, liver disease, obesity, high blood triglycerides and cholesterol, hypertension, and death.

101. Third, NextFoods failed to reveal facts that were "[m]aterial with respect to the consequences which may result from use of the article under" both "[t]he conditions prescribed in such labeling," and "such conditions of use as are customary or usual," in violation of § 1.21(a)(2). Namely, NextFoods failed to disclose the harm to the digestive system that can cause chronic digestive track diseases and increased risk of other serious chronic diseases that is likely to result from the usual consumption of the JuiceDrinks in the customary and prescribed manners.

## IV. PLAINTIFF'S PURCHASE, RELIANCE, AND INJURY

102. As best she can recall, Plaintiff started purchasing 32 oz. cartons of the JuiceDrinks in 2019, and continued to purchase the products until around the 2022. She recalls making her purchases at local stores including the Wegmans located 3955 Route 31, Liverpool, NY 13090, for approximately $3 to $5 per carton.

103. In purchasing the JuiceDrinks, Plaintiff was exposed to, read, and relied upon NextFoods' labeling claims that were intended to appeal to consumers, like her, interested in health and nutrition. Specifically, to the best of her recollection, when deciding to purchase the JuiceDrinks, Plaintiff at various times read and relied on at least the following statements on the products' packaging:

a. "START YOUR GOODHEALTH GAME PLAN . . . Drink one 8 oz. glass of delicious GoodBelly a day for 12 days.";

b. "Reboot your belly, then make GoodBelly your daily drink to keep your GoodHealth going. Because when your belly smiles the rest of you does too";

c. "WE DIG SCIENCE. LP299V is naturally occurring in the human gut. It has been studied more than 2 decades and has numerous research trials to show that it may help promote healthy digestion and overall wellness"; and

d. "GoodBelly Probiotics is a delicious blend of fruit juices and a daily dose of probiotic cultures created to naturally renew your digestive health, right where your overall health gets started – in your belly."

104. Plaintiff believed these claims regarding digestive health and overall health of, which were and are deceptive because they convey that the products promote digestive and overall health and will not detriment digestive or overall health, despite that they contain excessive amounts of free sugar, which harms digestive health and is likely to increase risk of other diseases when consumed regularly.

105. When purchasing the JuiceDrinks, Plaintiff was seeking beverages that were beneficial to digestive and overall health when consumed, that is, whose regular consumption would not harm her digestive health or increase her risk of disease.

106. The digestive health and overall wellness representations on the JuiceDrinks' packaging, however, were misleading, and had the capacity, tendency, and likelihood to confuse or confound Plaintiff and other consumers acting reasonably. This is because, as described in detail herein, the Products actually harm digestive health and are likely to increase the risk of digestive health issues and other chronic diseases when regularly consumed.

107. Plaintiff is not a nutritionist, food expert, or food scientist, but rather a lay consumer who did not have the specialized knowledge that NextFoods had regarding the nutrients present in its JuiceDrinks. At the time of purchase, Plaintiff was unaware of the extent to which consuming high amounts of free sugar, like that in the JuiceDrinks, adversely affects digestive health, blood glucose and cholesterol levels, and increases inflammation. She was also unaware of what amount of free sugar might have such an effect. She also did not know the extent to which consuming high amounts of free sugar, like that in the JuiceDrinks, increases risk of chronic digestive diseases and increases risk of metabolic disease, liver disease, heart disease, diabetes, and other morbidity. She also did not know what amount of free sugar might have such an effect.

108. The average and reasonable consumer is unaware that or at least the extent to which consuming high amounts of free sugar, like that in the JuiceDrinks, adversely affects digestive health, blood glucose and cholesterol levels, and increases inflammation. The reasonable consumer is also unaware what amount of free sugar might have such an effect. The average and reasonable consumer is unaware that or at least the extent to which consuming high amounts of free sugar, like that in the JuiceDrinks, increases risk of chronic digestive diseases and increases risk of metabolic disease, liver disease, heart disease, diabetes, and other morbidity. The average or reasonable consumer is also unaware of what amount of free sugar might have such an effect.

109. Numerous studies demonstrate that the mandatory nutrition facts are not sufficient to allow consumers to make accurate assessments of the healthfulness of foods and beverages.

110. To start, "[m]any consumers have difficulty interpreting nutrition labels[.]" In fact, the "mandated nutrition labels have been criticized for being too complex for many consumers to understand and use."[93] "Understanding the NFP label requires health literacy, that is, 'the capacity to obtain, process, and understand basic health information and services needed to make appropriate health decisions.' However, a sizable proportion of the US population is deficient in health literacy."[94]

111. For example, "[t]he 2003 National Assessment of Adult Literacy found that more than one-third of the US population had only basic or below-basic health literacy, meaning they would have difficulty viewing the nutrition labels of 2 different potato chip packages and determining the difference in the number

[93] Persoskie A, Hennessy E, Nelson WL, "US Consumers' Understanding of Nutrition Labels in 2013: The Importance of Health Literacy," 14 *Prev. Chronic Dis.* 170066 (2017).

[94] *Id.*

of calories."[95] And other "studies have found that even high school graduates and college students lack the basic health literacy skills to effectively apply nutrition label information."[96]

112. While it may be unfortunate, the most consumers "ability to interpret nutrition label information [is] poor" and "[e]ven a college education did not ensure nutrition label understanding."[97]

113. In short, "[a] substantial proportion of consumers in this country, including those with a college education, have difficulty understanding NFP labels, which is likely a function of limited health literacy."[98]

114. Not only does the reasonable consumer have difficulty using the nutrition facts panel deciding if a food or beverage is healthy or unhealthy is complex and the most consumers have difficulty accurately assessing the healthfulness of such products.

115. This has been studied and found to be true in regard to sugar containing beverages. Specifically, even though one may understand a drink is high in sugar and have some notion that sugar can be harmful, many nevertheless still view such products as overall being healthful when there is a health or nutritional claim made on a label.

116. In one study, for example, "[w]hile participants were aware that beverages can contain high amounts of sugar, and that this can be harmful to health, many other factors influence the perceptions of beverage healthfulness *and these can outweigh the perceived harms of consumption*."[99]

117. In fact, "research indicates that consumers hold erroneous views about the healthfulness of certain sugar-containing beverages. For example, previous research has indicated that beverages such as juice, flavoured waters, sports drinks (e.g. Gatorade) and iced teas, are perceived to be healthy, or healthier, and as less likely to lead to disease development, compared to soda (or 'soft drink' e.g. Coca-Cola; Sprite) or energy drinks (e.g. Red Bull)."[100]

---

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] Aimee L. Brownbill et al., "What makes a beverage healthy? A qualitative study of young adults' conceptualisation of sugar-containing beverage healthfulness," 150 *Appetite* 104675 (2020).

[100] *Id.*

118. In one study, "sugar content, nutritional value, naturalness and functionality were important factors participants considered in their conceptualisation of beverage healthfulness. Participants suggested that sugar content was a primary indicator of how healthy a beverage was *but lacked knowledge about the amount of sugar in beverages, and how much should be considered harmful for health*."[101]

119. Crucially, "[m]any participants perceived juice to be a healthier option. Juices were viewed by some participants as equating to fruit consumption or as providing important nutrients to the consumer. While it was common for participants to identify that juice contained sugar, the perceived nutritional benefits appeared to offset concerns about sugar content for some participants."[102]

120. In addition, "[b]everages that were perceived as having added nutrients were seen as healthier. Nutritional value appeared to be particularly relevant to participants' ranking of the relative healthfulness of beverages."[103]

121. Likewise, if a beverage purported to provide a functional benefit, "that functionality of beverages may negate concern about sugar content."[104]

122. Unfortunately, "research has similarly shown that consumers often focus more on added nutrients than unhealthy ingredients and that added nutrients can be seen to counteract the effect of unhealthy ingredients."[105]

123. In short, "health-related marketing . . . may mislead consumers to more positively assess the healthfulness of sugar-containing beverages."[106]

124. That health positioning may mislead consumers is no secret to marketers as there is a wealth of research showing that all sorts of health related representations may mislead consumers to believe a product is healthier than it is—despite them being aware of the sugar content.

125. For example, "[n]utrient content claims may lead consumers to mistakenly infer that a product is healthful, regardless of its overall nutritional profile (i.e., the "health halo effect") and can subsequently

---

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

increase intentions to purchase the product (Roe et al., 1999; Choi et al., 2013; Schuldt and Schwarz, 2010; Kaur et al., 2017; Talati et al., 2017)."[107]

126. Likewise, "research that has found that health-related and nutrient content claims make food and beverages seem healthier and more appealing (Roe et al., 1999; Choi et al., 2013; Schuldt and Schwarz, 2010; Kaur et al., 2017; Talati et al., 2017; Fernan et al., 2018)."[108]

127. Health positioning claims also have the specific effect of "decreas[ing] perceptions of the presence of certain less healthful nutrients."[109]

128. And the presence of such claims make consumers "1) less likely to look for nutrition information on the Nutrition Facts label, 2) more likely to select the product for purchase, 3) more likely to perceive the product as healthier, and 4) less likely to correctly choose the healthier product."[110]

129. One study meant to test consumers ability to determine which of six snack products were the healthiest, found that "[o]nly 9% of Americans could identify the *healthiest* cereal bar," and "81% wrongly identified the healthiest choice."[111]

130. This data shows that identifying real, healthy products appears to be a serious difficulty for American shoppers.[112]

131. Plaintiff acted reasonably in relying on the challenged labeling claims, which NextFoods intentionally placed on the JuiceDrinks' labeling with the intent to induce average consumers into purchasing the products.

132. Plaintiff would not have purchased the JuiceDrinks if she knew that the labeling claims were false and misleading in that the products do not provide the claimed benefits and actually harm digestive and overall health.

133. The JuiceDrinks cost more than similar products without misleading labeling, and would have cost less absent NextFoods' false and misleading statements and omissions.

---

[107] *Id.*

[108] *Id.*

[109] Linda Verrill et al., "Vitamin-Fortified Snack Food May Lead Consumers to Make Poor Dietary Decisions, Journal of the Academy of Nutrition and Dietetics," 117:3, 376-385 (2017).

[110] *Id.*

[111] *Id.*

[112] *Id.*

134. Through the misleading labeling claims and omissions, NextFoods was able to gain a greater share of the juice market than it would have otherwise and also increased the size of the market.

135. Plaintiff paid more for the JuiceDrinks, and would only have been willing to pay less, or unwilling to purchase the JuiceDrinks at all, absent the false and misleading labeling complained of herein.

136. Plaintiff would not have purchased the JuiceDrinks if she had known that the Products were misbranded pursuant to New York and FDA regulations or that the challenged claims were false or misleading.

137. For these reasons, the JuiceDrinks were worth less than what Plaintiff and the Class paid for them.

138. Instead of receiving products that had actual healthful qualities, the JuiceDrinks Plaintiff and the Class received were of the type that harms digestive health and increases risk of chronic diseases.

139. Plaintiff and the Class lost money as a result of NextFoods' deceptive claims, omissions, and practices in that they did not receive what they paid for when purchasing the JuiceDrinks.

## CLASS ACTION ALLEGATIONS

140. While reserving the right to redefine or amend the class definition prior to or as part of a motion seeking class certification, pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks to represent a class of all persons in the United States, and separately Subclasses of all persons in New York, who, at any time from three years preceding the date of the filing of this Complaint to the time a class is notified (the "Class Period"), purchased, for personal or household use, and not for resale or distribution, any of the JuiceDrinks (the "Class").

141. The members in the proposed Class, and each subclass, are so numerous that individual joinder of all members is impracticable, and the disposition of the claims of all Class Members in a single action will provide substantial benefits to the parties and Court.

142. Questions of law and fact common to Plaintiff and the Class include:

a. whether NextFoods communicated a message regarding digestive and overall healthfulness of the Products through its packaging and advertising;

b. whether those messages were material, or likely to be material, to a reasonable consumer;

c. whether the challenged claims are false, misleading, or reasonably likely to deceive a reasonable consumer;

d. whether NextFoods' conduct violates public policy;

e. whether NextFoods' conduct violates state or federal food statutes or regulations;

f. the proper amount of actual, statutory, and punitive damages;

g. the proper amount of restitution;

h. the proper scope of injunctive relief; and

i. the proper amount of attorneys' fees.

143. These common questions of law and fact predominate over questions that affect only individual Class Members.

144. Plaintiff's claims are typical of Class Members' claims because they are based on the same underlying facts, events, and circumstances relating to NextFoods' conduct. Specifically, all Class Members, including Plaintiff, were subjected to the same misleading and deceptive conduct when they purchased the JuiceDrinks and suffered economic injury because the products are misrepresented. Absent NextFoods' business practice of deceptively and unlawfully labeling the JuiceDrinks, Plaintiff and Class Members would not have purchased the products.

145. Plaintiff will fairly and adequately represent and protect the interests of the Class, has no interests incompatible with the interests of the Class, and has retained counsel competent and experienced in class action litigation, and specifically in litigation involving the false and misleading advertising of foods.

146. Class treatment is superior to other options for resolution of the controversy because the relief sought for each Class Member is small, such that, absent representative litigation, it would be infeasible for Class Members to redress the wrongs done to them.

147. NextFoods has acted on grounds applicable to the Class, thereby making appropriate declaratory relief concerning the Class as a whole.

148. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P. 23(a), and 23(b)(3).

149. Plaintiff's claims are typical of Class Members' claims because they are based on the same underlying facts, events, and circumstances relating to NextFoods' conduct. Specifically, all Class Members, including Plaintiff, were subjected to the same misleading and deceptive conduct when they purchased the JuiceDrinks and suffered economic injury because the Products are misrepresented. Absent NextFoods' business practice of deceptively and unlawfully labeling the JuiceDrinks, Plaintiff and Class Members would not have purchased them or would have paid less for them.

150. Plaintiff will fairly and adequately represent and protect the interests of the Class, has no interests incompatible with the interests of the Class, and has retained counsel competent and experienced in class action litigation, and specifically in litigation involving the false and misleading advertising of foods and beverages.

151. Class treatment is superior to other options for resolution of the controversy because the relief sought for each Class Member is small, such that, absent representative litigation, it would be infeasible for Class Members to redress the wrongs done to them.

152. NextFoods has acted on grounds applicable to the Class, thereby making appropriate final injunctive and declaratory relief concerning the Class as a whole.

153. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3).

## CAUSES OF ACTION

### FIRST CAUSE OF ACTION

### Unfair and Deceptive Business Practices, N.Y. Gen. Bus. L. § 349

154. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if fully set forth herein.

155. NextFoods' conduct constitutes deceptive acts or practices or false advertising in the conduct of business, trade, or commerce or in the furnishing of services in New York which affects the public interest under N.Y. Gen. Bus. L. § 349.

156. As alleged herein, NextFoods engaged in, and continues to engage in, deceptive acts and practices by advertising, marketing, distributing, and selling the JuiceDrinks with false or misleading claims and representations, and deceptive omissions.

157. As alleged herein, by misbranding the JuiceDrinks, NextFoods engaged in, and continues to engage in, unlawful and deceptive acts and practices.

158. NextFoods' conduct was materially misleading to Plaintiff and the Class. During the Class Period, NextFoods carried out a plan, scheme and course of conduct which was consumer oriented.

159. As a direct and proximate result of NextFoods' violation of N.Y. Gen. Bus. L. § 349, Plaintiff and the Class were injured and suffered damages.

160. The injuries to Plaintiff and the Class were foreseeable to NextFoods and, thus NextFoods' actions were unconscionable and unreasonable.

161. NextFoods is liable for damages sustained by Plaintiff and the Class to the maximum extent allowable under N.Y. Gen. Bus. L. § 349, actual damages or $50 per unit, whichever is greater.

162. Pursuant to N.Y. Gen. Bus. L. § 349(h), Plaintiff and the Class seek an Order enjoining NextFoods from continuing to engage in unlawful acts or practices, false advertising, and any other acts prohibited by law, including those set forth in this Complaint.

**SECOND CAUSE OF ACTION**

**False Advertising, N.Y. Gen. Bus. L. § 350**

163. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if fully set forth herein.

164. NextFoods has engaged and is engaging in consumer-oriented conduct which is deceptive or misleading in a material way (both by affirmative misrepresentations and by material omissions), constituting false advertising in the conduct of any business, trade, or commerce, in violation of N.Y. Gen. Bus. L. § 350.

165. As a result of NextFoods' false advertising, Plaintiff and the Class Members have suffered and continue to suffer substantial injury, including damages, which would not have occurred but for the false and deceptive advertising, and which will continue to occur unless NextFoods is permanently enjoined by this Court.

166. Plaintiff and the Class seek to enjoin the unlawful acts and practices described herein, and to recover their actual damages or $500 per unit, whichever is greater, and reasonable attorney fees.

**THIRD CAUSE OF ACTION**

**Negligent Misrepresentation**

167. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if fully set forth herein.

168. NextFoods marketed the JuiceDrinks in a manner conveying to reasonable consumers that the Products promote digestive health as well as general health and wellness.

169. NextFoods' misrepresentations regarding the JuiceDrinks are material to a reasonable consumer because they relate to human health, both generally and specifically to digestive health. Reasonable consumers would attach importance to such representations and would be induced to act thereon in making purchase decisions.

170. In selling the JuiceDrinks, NextFoods acted in the ordinary course of its business and had a pecuniary interest in Plaintiff and Class Members purchasing the JuiceDrinks.

171. NextFoods owed a duty of care to Plaintiff, not to provide her false information when she was making her purchase decisions regarding the JuiceDrinks.

172. Through the labeling of the JuiceDrinks and statements made on its website, Nextfoods held and continues to hold itself out as have specialized knowledge regarding probiotics, gut health and nutrition science, and specifically the effect of consuming the JuiceDrinks.

173. For example, on the JuiceDrinks' labeling NextFoods holds itself out as having scientific expertise through statements such as:

a. "Our strain LP299V has been recognized as one of the most researched and impactful probiotic strains available"; and

b. "We Dig Science LP299V is naturally occurring in the human gut. It has been studied for more than 2 decades and has numerous research trials to show it may help promote healthy digestion and overall wellness."

174. On its website, NextFoods further holds itself out as having scientific expertise regarding

nutrition and health. For example, it claims to be "founded by two Natural Foods industry veterans" that

> zeroed in on the sweet spot for the company's products — ingredients with scientifically substantiated health benefits combined with the goodness and responsibility of healthy, natural foods. NextFoods, Inc. was born. The vision was simple: Natural Foods + Science = Next Generation ("I Feel the Effect") Products (that would be delicious, of course)! Based in Boulder, Colorado, NextFoods adheres to a mission that fosters the continuous improvement of human nutrition. The NextFoods team is committed to developing a series of world-class, highly nutritious, functional, "next generation" foods — while using sustainable, socially responsible practices whenever possible
>
> Initially, the team's research into next generation foods led them to a probiotic strain called Lactobacillus plantarum 299v (LP299V®), a probiotic that has over two decades of demonstrated safe & effective use and has been subject to over 60 human clinical trials. GoodBelly, containing LP299V®, became the first probiotic juice drink to hit the U.S. market. GoodBelly chose this scientifically-backed strain from the very start because it has been shown to be one of the most effective probiotics on the market at supporting digestive health, which is where overall health begins.[113]

175. To further reinforce consumers' perception of NextFoods as an expert in nutrition science, its website also contains numerous "resources," which are simply marketing literature in the guise of science and evidence-based resources, like its FAQs, "Gut Health Guide," and other information on gut health and probiotics.

176. NextFoods knew or has been negligent in not knowing that consuming the JuiceDrinks did and does not promote digestive and overall health, but instead harms the digestive and overall health of the average consumer. NextFoods had no reasonable grounds for believing its misrepresentations were not false and misleading regarding overall health or digestive health.

177. NextFoods intends that Plaintiff and other consumers rely on these representations, as evidenced by the intentional and conspicuous placement of the misleading representations on the JuiceDrinks packaging by NextFoods.

178. Plaintiff and Class Members have reasonably and justifiably relied on NextFoods' misrepresentations when purchasing the JuiceDrinks, and had the correct facts been known, would not have purchased them at the prices at which they were offered.

---

[113] https://goodbelly.com/goodhealth/about-us/.

179. Therefore, as a direct and proximate result of NextFoods' negligent misrepresentations, Plaintiff and Class Members have suffered economic losses and other general and specific damages, in the amount of the JuiceDrinks' purchase prices, or some portion thereof, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

**FOURTH CAUSE OF ACTION**

**Intentional Misrepresentation**

180. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

181. NextFoods marketed the JuiceDrinks in a manner conveying to reasonable consumers that the Products promote general health and wellness, as well as providing specific health benefits like digestive health. However, consuming sugar sweetened beverages like the JuiceDrinks harms, rather than supports the overall health of the average consumer and harms rather than supports digestive health. Therefore, NextFoods has made misrepresentations about the JuiceDrinks.

182. NextFoods' misrepresentations regarding the JuiceDrinks are material to a reasonable consumer because they relate to human health, both generally and specifically to digestive health. A reasonable consumer would attach importance to such representations and would be induced to act thereon in making purchase decisions.

183. At all relevant, NextFoods knew that the misrepresentations were misleading, or has acted recklessly in making the misrepresentations, without regard to their truth.

184. NextFoods intends that Plaintiff and other consumers rely on these misrepresentations, as evidenced by the intentional and conspicuous placement of the misleading representations on the JuiceDrinks' packaging by NextFoods.

185. Plaintiff and members of the Class have reasonably and justifiably relied on NextFoods' intentional misrepresentations when purchasing the JuiceDrinks; had the correct facts been known, they would not have purchased the Products at the prices at which the Products were offered.

186. Therefore, as a direct and proximate result of NextFoods' intentional misrepresentations, Plaintiff and Class Members have suffered economic losses and other general and specific damages, in the

amount of the JuiceDrinks' purchase prices, or some portion thereof, and any interest that would have accrued on those monies, all in an amount to be proven at trial.

**FIFTH CAUSE OF ACTION**

**Unjust Enrichment**

187. Plaintiff realleges and incorporates the allegations elsewhere in the Complaint as if set forth in full herein.

188. Plaintiff lacks an adequate remedy at law.

189. Plaintiff and other Class Members conferred upon NextFoods an economic benefit, in the form of profits resulting from the purchase and sale of the JuiceDrinks.

190. NextFoods' financial benefits resulting from their unlawful and inequitable conduct are economically traceable to Plaintiff's and Class Members' purchases of the JuiceDrinks and the economic benefits conferred on NextFoods are a direct and proximate result of its unlawful and inequitable conduct.

191. It would be inequitable, unconscionable, and unjust for NextFoods to be permitted to retain these economic benefits because the benefits were procured as a direct and proximate result of its wrongful conduct.

192. As a result, Plaintiff and Class Members are entitled to equitable relief including restitution and/or disgorgement of all revenues, earnings, profits, compensation and benefits which may have been obtained by Defendant as a result of such business practices.

**PRAYER FOR RELIEF**

193. Wherefore, Plaintiff, on behalf of herself, all others similarly situated, and the general public, pray for judgment against NextFoods as to each and every cause of action, and the following remedies:

a. An Order declaring this action to be a proper class action, appointing Plaintiff as Class Representative, and appointing Plaintiff's undersigned counsel as Class Counsel;

b. An Order requiring NextFoods to bear the cost of Class Notice;

c. An Order compelling NextFoods to destroy all misleading and deceptive advertising materials and product labels, and to recall all offending products;

d. An Order requiring NextFoods to disgorge all monies, revenues, and profits obtained by means of any wrongful act or practice;

e. An Order requiring NextFoods to pay restitution to restore all funds acquired by means of any act or practice declared by this Court to be an unlawful, unfair, or fraudulent business act or practice, or untrue or misleading advertising, plus pre-and post-judgment interest thereon;

f. An Order requiring NextFoods to pay compensatory, statutory, and punitive damages as permitted by law;

g. An award of attorneys' fees and costs; and

h. Any other and further relief that Court deems necessary, just, or proper.

**JURY DEMAND**

194. Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: April 27, 2023

**FITZGERALD JOSEPH LLP**
JACK FITZGERALD
*jack@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, CA 92110
Phone: (619) 215-1741

***Counsel for Plaintiff***

# Appendix 1

# Tropical Green

# Blueberry Acai

# Pomegranate Blackberry




# Mango


Mango
FLAVOR
GoodBelly
PROBIOTICS
JuiceDrink
20 Billion Probiotics Per Serving†
FROM CONCENTRATE
1QT (32 FL OZ) 946ML
Contains 25% Juice
Nutrition Facts
4 Servings Per Container
Serving size 8 fl oz (240 mL)
Amount Per Serving
Calories 100
% Daily Value*
Total Fat 0g 0%
Saturated Fat 0g 0%
Trans Fat 0g
Cholesterol 0mg 0%
Sodium 10mg 1%
Total Carb. 23g 8%
Dietary Fiber 0g 0%
Total Sugars 19g
Includes 12g Added Sugars 24%
Protein <1g
Vitamin D 0mcg 0%
Calcium 10mg 1%
Iron 0.3mg 2%
Potassium 120mg 3%
*The Daily Value tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.
INGREDIENTS: FILTERED WATER, ORGANIC PEAR JUICE FROM CONCENTRATE, ORGANIC MANGO PUREE, ORGANIC EVAPORATED CANE SUGAR, ORGANIC BANANA PUREE, CONTAINS 2% OR LESS OF ORGANIC OAT FLOUR, ORGANIC FLAVORS, NATURAL FLAVOR, CITRIC ACID, ORGANIC BARLEY MALT, ORGANIC GUAR GUM, LACTOBACILLUS PLANTARUM 299V.
CONTAINS: GLUTEN from organic oat flour and barley malt.
Keep Refrigerated
Use within 14 days of opening
Manufactured for:
NextFoods
Boulder, Colorado 80301
Certified Organic by QAI
Got Questions?
Contact us at:
info@goodbelly.com
www.goodbelly.com
Manufactured in USA
GoodBelly
91770 00205 8
* Lactobacillus plantarum 299v can be found naturally in the intestinal system, and may help promote healthy digestion when consumed daily as part of a nutritious diet and healthy lifestyle. GoodBelly is a food product and not a treatment or cure for any medical disorder or disease. If you have any concerns about your digestive system, please consult your healthcare professional.
† Cells per serving at time of manufacture. Storage conditions may affect the number of active probiotic cultures. Please keep at 35–40°F for maximum potency.
Why Probiotics?
When microflora in the gut gets out of balance, harmful bacteria may take over and may cause:
• Cramping • Diarrhea • Flatulence
• Constipation • Bloating • Fatigue
Why GoodBelly?
PROBIOTICS IS ALL WE DO!
WE WALK THE TALK. Our strain, LP299V, has been recognized as one of the most researched and impactful probiotic strains available.
WE DIG SCIENCE. LP299V is naturally occurring in the human gut. It has been studied for more than 2 decades and has numerous research trials to show it may help promote healthy digestion, and overall wellness.*
When in BALANCE the intestinal microflora:
1 Supports healthy digestion.*
2 Promotes regularity.
3 Aids in absorption of nutrients.
Experience GoodBelly for yourself. Getting your probiotics is now easy and delicious!
Feel Your Belly Smile
Give it a GoodShake!
NON-GMO
SOY-FREE
DAIRY-FREE
VEGAN
GoodBelly
PROBIOTICS
is a delicious blend of fruit juices and a daily dose of probiotic cultures created to naturally renew your digestive health, right where your overall health gets started — in your belly.*
12 DAY Belly Reboot
START YOUR GOODHEALTH GAME PLAN
1 Sign up at: goodbelly.com/12-day-reboot
2 Check your email for coupons and print 'em out.
3 Drink one 8 oz. glass of delicious GoodBelly a day for 12 days. (That's just 3 cartons worth.)
4 We guarantee you'll love it — or your money back.‡
Reboot your belly, then make GoodBelly your daily drink to keep your GoodHealth going. Because when your belly smiles, the rest of you does too.
‡ Some restrictions apply.

# Cranberry Watermelon

# Raspberry Blackberry

# Raspberry Blackberry

# Orange


Orange
Flavored JuiceDrink
NO Sugar Added
GoodBelly
PROBIOTICS
20 Billion Probiotics Per Serving*
FROM CONCENTRATE
Contains 32% Juice
Nutrition Facts
Keep Refrigerated
Use within 14 days of opening
Manufactured for:
NextFoods
Certified Organic by QAI
Got Questions?
Made in USA
Why Probiotics?
When microflora in the gut gets out of balance, harmful bacteria may take over and may cause
Why GoodBelly?
PROBIOTICS IS ALL WE DO!
WE WALK THE TALK. Our strain, LP2999, has been recognized as one of the most researched and impactful probiotic strains available.
WE DIG SCIENCE. LP2999 is naturally occurring in the human gut. It has been studied for more than 2 decades and has numerous research trials to show it may help promote healthy digestion, and overall wellness.*
What is BALANCE
the intestinal microflora
Supports healthy digestion.*
Promotes regularity.
Aids in absorption of nutrients.
Experience GoodBelly for yourself. Getting your probiotics is now easy and delicious!
Feel Your Belly Smile
GoodBelly
PROBIOTICS
NO SUGAR ADDED JuiceDrink has 50% less sugar than orange juice and delivers the flavor pop you crave. GoodBelly provides a daily dose of probiotic cultures created to naturally renew your digestive health, right where your overall health gets started — in your belly.
12 DAY Belly Reboot
START YOUR GOODHEALTH GAME PLAN
1 Sign up at: goodbelly.com/12-day-reboot
2 Check your email for coupons and print 'em out.
3 Drink one 8 oz. glass of delicious GoodBelly a day for 12 days. (That's just 3 cartons worth.)
4 We guarantee you'll love it — or your money back.†
Reboot your belly, then make GoodBelly your daily drink to keep your GoodHealth going. Because when your belly smiles, the rest of you does too.
† Some restrictions apply.

# Peach Mango Orange


## Nutrition Facts

Serving Size 8 oz. (240 mL)
Servings Per Package about 4

| Amount Per Serving | |
|---|---|
| **Calories** 90 | |
| Calories from Fat 0 | |
| | **% Daily Value**** |
| **Total Fat** 0g | **0%** |
| Saturated Fat 0g | **0%** |
| Trans Fat 0g | |
| **Cholesterol** 0mg | **0%** |
| **Sodium** 20mg | **1%** |
| **Potassium** 140mg | **4%** |
| **Total Carb.** 21g | **7%** |
| Dietary Fiber 0g | **0%** |
| Sugars 19g | |
| **Protein** 0g | |

Vitamin A 0% • Vitamin C 0%
Calcium 0% • Iron 0%

**Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.

**INGREDIENTS:** FILTERED WATER, ORGANIC PEAR JUICE FROM CONCENTRATE, ORGANIC PEACH JUICE FROM CONCENTRATE, ORGANIC MANGO PUREE, ORGANIC ORANGE JUICE FROM CONCENTRATE, ORGANIC EVAPORATED CANE SUGAR, CONTAINS 2% OR LESS OF NATURAL FLAVORS, CALCIUM CITRATE, CITRIC ACID, ORGANIC GUAR GUM, LACTOBACILLUS PLANTARUM 299V.

# Exhibit 2

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| VALERIE GATES, on behalf of herself, all others similarly situated, and the general public,<br><br>Plaintiff,<br><br>v.<br><br>NEXTFOODS, INC.,<br><br>Defendant. | Case No.: 5:23-cv-00530-FJS-ATB<br><br>**NOTICE OF VOLUNTARY DISMISSAL**<br><br>**[Fed. R. Civ. P. 41(a)(1)(A)(i)]** |

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), Plaintiff Valerie Gates voluntarily dismisses this action without prejudice as to Plaintiff Valerie Gates and without prejudice as to the claims of absent putative class members.

Dated: August 22, 2023

/s/ Paul K. Joseph

**FITZGERALD JOSEPH LLP**
PAUL K. JOSEPH (admitted *pro hac vice*)
*paul@fitzgeraldjoseph.com*
2341 Jefferson Street, Suite 200
San Diego, CA 92110
Phone: (619) 215-1741

***Counsel for Plaintiff***

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

EVLYN ANDRADE-HEYMSFIELD, on behalf of herself, all others similarly situated, and the general public,

Plaintiffs,

v.

NEXTFOODS, INC.,

Defendant.

Case No. 21-cv-1446-BTM-MSB

**DECLARATION OF BRANDON SCHWARTZ REGARDING PROPOSED NOTICE PLAN AND ADMINISTRATION**

Date: September 22, 2023
Judge: Hon. Barry Ted Moskowitz
Location: Courtroom 15B

I, Brandon Schwartz, declare as follows:

1. I am a Director of Legal Notice preparing this Declaration for the proposed Class Administrator, Postlethwaite & Netterville, APAC ("P&N")[1], a full-service administration firm providing legal administration services, including the design, development, and implementation of impartial and complex legal notification programs. We were asked by Counsel to develop and execute the proposed Notice Plan and to administer the claims process in the above-referenced matter (the "Action")[2]. The following statements are based on my personal knowledge as well as information provided by other experienced employees working under my supervision.

2. We have undertaken the creation and execution of notice plans, along with the administration of diverse class action and mass action settlements. Our expertise extends across a wide array of subject matters, encompassing but not limited to privacy, products liability, consumer rights, mass tort, antitrust, property contamination, insurance, and healthcare. The accomplished members of our team possess broad experience in the design and implementation of notice procedures involving various aspects of class certification and settlement programs.

**EXPERIENCE**

3. Drawing upon over 15 years of extensive expertise in class action, advertising, media, and marketing, I have cultivated comprehensive noticing solutions encompassing all facets of class action certification and settlement notice programs. My proficiency extends to an understanding of email and postal distribution methodologies, reach and frequency analysis, strategic media generation, meticulous demographic research, media plan design, effective media development and procurement, commercial and video production creation, and the adept application of best practices for effective social media outreach.

4. I have designed and implemented notice campaigns for more than 100 high-profile cases in

[1] As of May 21, 2023, the Directors & employees of Postlethwaite & Netterville (P&N), APAC joined EisnerAmper as EAG Gulf Coast, LLC. Where P&N is named or contracted, EAG Gulf Coast, LLC employees will service the work under those agreements. P&N's obligations to service work may be assigned by P&N to Eisner Advisory Group, LLC or EAG Gulf Coast, LLC, or one of Eisner Advisory Group, LLC's or EAG Gulf Coast, LLC's subsidiaries or affiliates.

[2] All capitalized terms not otherwise defined in this document shall have the meaning ascribed to them in the Settlement Agreement.

addition to the hundreds of cases I have managed. Some of my notice plans include: *McMorrow v. Mondelez International, Inc.*, No. 3:17-cv-02327 (S.D. Cal); *Rivera v. Goggle* LLC, No. 2019-CH-009900 (Circuit Court of Cook County, IL); *Hezi v. Celsius Holdings, Inc.*, No. 1:21-cv-09892 (S.D.N.Y.); *Gilmore v. Monsanto,* No. 3:21-cv-8159 (N.D. Cal.); *Krommenhock v. Post Foods, LLC*, No. 3:16-cv-04958 (N.D. Cal.); *Hadley v. Kellogg Sales Company*, No. 5:16-cv-04955 (N.D. Cal.); *Jones v. Monsanto,* No. 4:19-cv-00102 (W.D. Mo.)*; Winters v. Two Towns Ciderhouse Inc.*, 3:20-cv-00468 (S.D. Cal.); *In re: Sonic Corp. Customer Data Breach* Litigation, No. 1:17-md-02807 (N.D. Ohio); and *In re: Interior Molded Doors Indirect Purchaser Antitrust Litigation*, No. 3:18-cv-00850 (E.D. Va.).

5. A sample of court opinions on the adequacy of our notice efforts are included in the curriculum vitae as **Exhibit A.** A description of my experience is attached as **Exhibit B.**

## OVERVIEW

6. Based on our review of the Settlement Agreement, the proposed Settlement Class consists of:

> All persons in the United States who, between August 13, 2017 and the Settlement Notice Date purchased in the United States, for household use and not for resale or distribution, one of the Class Products.[3]

7. Following consultations with Class Counsel and utilizing purchaser and household penetration data provided by NextFoods, we estimate that the size of the Settlement Class to be 1,400,000.

8. This declaration will describe the Notice Plan ("Notice Plan") proposed in this Action which has been designed using a method accepted within the advertising industry and the courts to understand the Target Audience (inclusive of Class Members) by examining their demography and media consumption habits. In order to do so, we utilized the nationally syndicated research bureau MRI-Simmons (formerly

[3] The Class Products include all flavors of GoodBelly Probiotic JuiceDrinks sold in 1 Quart (32 oz.) containers during the Class Period.

GfK Mediamark Research, Inc.) ("MRI")[4], Basis Audience Measurement Tools[5], and comScore[6].

9. Using these media research tools, we are able to measure and report to the Court what an estimated percentage of a target audience is estimated to be reached by a notice plan and how many times a target audience will have the opportunity to see a notice. In advertising, this is commonly referred to as a reach and frequency analysis. Reach estimates the unduplicated audience exposed to the notice while frequency, in turn, refers to how many times, on average, the target audience had the opportunity to view the notice. Reach and frequency calculations are widely used in advertising and communications and play a crucial role in assessing the adequacy of notice in class action cases.

10. Utilizing nationally syndicated media research data, we designed the proposed Notice Plan to give notice to the Class in the most practicable manner possible. A single target audience must be defined utilizing the two separate research tools discussed above and, as is common in many notice plans, an exact target of the defined class is not available in the research tools. Therefore, taking into account the Class described above, we have determined that the qualitative target for this case is "Adults 18 years old and older in the United States that have purchased health foods, including probiotics (the "Target Audience"). This Target Audience is broader than the Class and encompasses the Class Members, which is why it was selected.

## PROPOSED NOTICE PLAN

11. We have designed the proposed Notice Plan to provide notice to Class Members and ensure that they will be exposed to, see, review, and understand the Class Notice. Accordingly, we determined that

---

[4] MRI-Simmons is a nationally-syndicated research tool. It is the leading supplier of multi-media audience research, and provides comprehensive reports on demographic, lifestyle, product usage and media exposure. MRI-Simmons conducts more than 30,000 personal interviews annually to gather their information and is used by more than 450 advertising agencies as the basis for the majority of media and marketing campaigns.

[5] Basis provides a digital advertising solution that includes advanced planning and audience measurement tools. Basis has access to more than 30 exchanges, 20 third-party data providers, six billion users and two trillion impressions per month. Basis audience measurement tools allow you to accurately forecast the audience and impression availability for the specific targets of your plan.

[6] comScore is a global internet information provider on which leading companies and advertising agencies rely for consumer behavior insight and internet usage data. comScore maintains a proprietary database of more than 2 million consumers who have given comScore permission to monitor their browsing and transaction behavior, including online and offline purchasing. comScore panelists also participate in survey research that captures and integrates their attitudes.

the most reasonable and practicable way to reach Class Members is through a multifaceted approach, engineered through a combination of (1) online display, (2) social media, (3) video notice, (4) search advertising, (5) national press release, (6) newspaper notice (CLRA fulfillment), (7) Settlement Website, and (8) toll-free settlement hotline.

12. The proposed Notice Plan as outlined is estimated to have a measurable reach of a minimum of 70% of the Target Audience and, by inclusion, the defined Class, with a 3.0 average frequency. The total reach is calculated utilizing a formula that accounts for potential duplication across media titles and vehicles rather than by adding the individual reach figures together.

13. Accordingly, I am of the opinion that the Notice Plan meets due process standards, comports with Fed. R. Civ. P. 23, and aligns with the recommendations provided in the *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*[7].

**Digital Banner Notice**

14. According to MRI research, 97% of the Target Audience has used the internet in the last 30 days, 61% are medium-to-heavy users of the internet, and 60% are medium-to-heavy users of social media. Thus, we will run banner notices on select websites where Class Members may visit regularly and utilize networks based on cost efficiency, timing, and their contribution to the overall reach of the Target Audience as well as social media advertising on Facebook, Instagram, and TikTok.

15. Additionally, MRI reveals that 17% of the Target Audience are of Spanish, Hispanic or Latino origin descent and 18% speak Spanish most often at home. Therefore, where appropriate, digital notices will appear in Spanish and English.

16. We follow advertising industry best practices when designing and implementing digital notice programs. Furthermore, we employ a programmatic approach to create and execute our notice programs. This approach consolidates various consumer data points into a single platform, enabling us to monitor the placement of notices on websites frequently visited by Class Members. We also take real-time measures to enhance efficiency and utilize artificial intelligence (AI) to locate and serve ads to the Target Audience. Additionally, we develop a unique mix of segment targeting that are based on the demography

[7] https://www.fjc.gov/content/301350/illustrative-forms-class-action-notices-notice-checklist-and-plain-language-guide

and metrics of the Target Audience.

17. Here, we would include a mix of segments such as:

- *Behavioral* – individuals who previously viewed or searched for information related to GoodBelly products, probiotics, health foods, etc.;
- *Contextual* – individuals who are accessing and reading content that contains specific words related to probiotics, supplements, health foods, etc.;
- *Interest-based* & *Engagement* – individuals that have interacted, liked, followed, shared or commented on content related to GoodBelly and GoodBelly social media accounts, probiotics, supplements, health food, and other related social media accounts;
- *Language* – individuals that choose Spanish as their preferred browser language and/or Spanish language appropriate websites;
- *Geo-Targeting* – National;
- *Remarketing* – individuals who have visited the Settlement Website but did not submit a claim will be served notice across display and social media channels to encourage them to return to the Settlement Website;
- *Device* – individuals on both desktop and mobile devices; and
- *Select Placement* – high traffic premier websites in the shopping, sports, weather, entertainment, and local sites.

18. The banner notices will have the opportunity to run on thousands of websites through Basis (formerly known as Centro) programmatic demand-side platform (DSP) allowing the notices to appear on websites that align with our segment targeting. This strategy provides an opportunity for a Class Member to see the banner notice while viewing content that's relevant to them.

19. In addition to the programmatic banner advertisement placement described above, P&N will run banner notifications on the top-visited social media sites Facebook, Instagram and TikTok. Facebook and Instagram represent the leading group of social network sites with over 250 million users in the United

States[8] while in March 2023, TikTok reported 150 million active users in the United States[9]. Social media emphasizes user-driven content sharing, thereby facilitating the organic dissemination of notices through trusted channels utilized by Class Members in their regular communication. Notices on Facebook, Instagram, and TikTok will appear in a user's feed.

20. The banner notices will utilize standard Interactive Advertising Bureau ("IAB") ad sizes (350x250, 728x90, 370x250, 300x600) and custom ads sizes according to Facebook and Instagram. A 15-second and/or a 30-second video notice will be developed and run on TikTok in accordance with their advertising guidelines. The video notice may have the opportunity to appear in a user's feed on Facebook and Instagram as well.

21. A summary of the digital banner notice campaign is as follows:

| ***Network/Property*** | ***Banner Size*** | ***# of Days*** | ***Est. Impressions[10]*** |
|---|---|---|---|
| *Basis DSP* | Various | 31 | 51,796,800 |
| *Facebook, Instagram, and TikTok* | Custom | 31 | 55,658,790 |
| **TOTAL:** | | | **107,455,590** |

**YouTube**

22. The video notice created for TikTok will be used to provide notice on YouTube where 54% of our Target Audience visit. The skippable video notice will be targeted to users who search for, or watch videos related to, GoodBelly products, health food and supplements, for example. A viewer will have the option to skip the video after 5 seconds. This format provides an opportunity to gain a large number of impressions while maintaining an efficient budget. An estimated 9.8 million impressions will be served over four weeks.

//

[8] "Number of Facebook users in United States from 2018 to 2027" (Statista; July 2023) and "Number of Instagram users in the United States from 2018 to 2027" (Statista; July 2023).

[9] https://www.reuters.com/technology/tiktok-tell-congress-it-has-150-million-monthly-active-us-users-2023-03-20

[10] An impression is defined as the single display of an ad on a web page.

**Search Advertising**

23. Search-based advertising, also known as paid search, places a notice in front of users that are actively researching a topic. Utilizing Google Ads, a select list of keywords will be developed that are relevant to the litigation. When a user enters the keywords into the Google search bar, a short descriptive notice may appear above the results that when clicked, would send the user to the Settlement Website.

**Press Release**

24. A press release will be distributed over PRNewswire's US1 and Hispanic Newslines in substantially the same form as the Short Form Notice. The press release will be issued broadly to media outlets, including newspapers, magazines, wire services, television, radio, and online media outlets. Combined, the Newsline distributes to more than 20,000 media outlets and contacts in the United States.

**CLRA Notice**

25. To fulfill California's Consumers Legal Remedies Act (CLRA) notice requirements, the Short Form Notice will appear as a quarter-page notice in USA Today – Los Angeles region, once a week, for four consecutive weeks.

**Settlement Website**

26. P&N will create and maintain a website dedicated to this Settlement. The website address will be included in the Short Form Notice and all digital banners will link directly to the Settlement Website. The Class Notices, along with other relevant documents, will be posted on the Settlement Website for Class Members to review and download. The Settlement Website will also include relevant dates, other case-related information, instructions for how to be excluded from the Class or object to the Settlement, and contact information for the Class Administrator.

**Dedicated Toll-Free Hotline**

27. A dedicated toll-free informational hotline will be available 24 hours per day, seven days per week. The hotline will utilize an interactive voice response ("IVR") system where Class Members can obtain essential information regarding the Settlement and be provided responses to frequently asked questions. Class Members will also have the option to leave a voicemail and receive a call back from the call center representative.

//

**Requests for Exclusion**

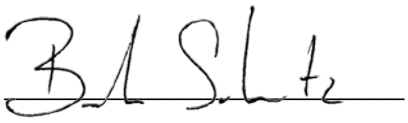
28. Class Members that want to exclude themselves from the Class may submit a request for exclusion by mail to a dedicated Post Office Box that P&N will maintain. P&N will monitor all mail delivered to that post office box and will track all exclusion requests received, which will be provided to the Parties.

**CONCLUSION**

29. The Notice Plan is estimated to reach at least 70% of Class Members with an estimated average frequency of 3. In 2010, the Federal Judicial Center issued the *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*. The guide states that, "the lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%." In light of this, many courts have accepted and understood that a 70% reach is adequate. This method of focused notice dissemination is a measured and targeted approach to provide effective notice in this case, adheres to Federal Rule of Civil Procedure 23, and follows the guidance set forth in the Manual for Complex Litigation 4th Ed.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 22nd day of September, 2023 in Portland, Oregon.



Brandon Schwartz

# Exhibit A: CV of EAG

# Class & Mass Action Settlement Administration

## Our Approach

EisnerAmper provides pre-settlement consulting and post-settlement administration services in connection with lawsuits pending in state and federal courts nationwide. Since 1999, EisnerAmper professionals have processed more than $14 billion dollars in settlement claims. Our innovative team successfully administers a wide variety of settlements, and our industry-leading technology enables us to develop customizable administration solutions for class and mass action litigations.

EisnerAmper professionals have processed more than $14 billion dollars in settlement claims.

# Sample Case Experience*

## Environmental/Toxic Torts

- In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico (MDL 2179)
- In re: FEMA Trailer Formaldehyde Products Liability Litigation (MDL 1873)
- Sanchez et al v. Texas Brine, LLC et al.
- Burmaster et al. v. Plaquemines Parish Government, et al.
- Cajuns for Clean Water, LLC et al. v. Cecilia Water Corporation, et al.
- Cooper, et al. v. Louisiana Department of Public Works
- Maturin v. Bayou Teche Water Works
- Chevron Richmond Refinery Fire Settlement
- Chapman et al. v. voestalpine Texas LLC, et al.

## Consumer

- Jones et al. v. Monsanto Co.
- Hadley, et al. v. Kellogg Sales Co.
- McMorrow, et al. v. Mondelez International, Inc
- Krommenhock, et al. v. Post Foods, LLC
- Hanson v. Welch Foods Inc.
- Siddle et al. v. The Duracell Co. et al.
- Copley, et al. v. Bactolac Pharmaceutical, Inc.
- Hughes et al. v. AutoZone Parts Inc. et al.
- Winters v. Two Towns Ciderhouse, Inc.
- Burford et al. v. Cargill, Incorporated
- Fabricant v. AmeriSave Mortgage Corp. (TCPA)
- Makaron v. Enagic USA, Inc. (TCPA)
- Prescod et al. v. Celsius Holdings, Inc.
- Gilmore v. Monsanto Co.

## Antitrust

- In re: Cathode Ray Tube (CRT) Antitrust Litigation (MDL 1917)[4]
- In re: Interior Molded Doors Antitrust Litigation (Indirect)

## Mass Torts

- In re: E.I. du Pont de Nemours and Company C8 Personal Injury Litigation (MDL 2433)[1]
- In re: Testosterone Replacement Therapy Products Liability Litigation (MDL 2545)[1]
- In re: Paraquat Products Liability Litigation (MDL 3004)[1]
- In re: Paragard Products Liability Litigation (MDL 2974)
- In re: Roundup Products Liability Litigation (MDL 2741)[2]
- Essure Product Liability Settlement[3]
- Porter Ranch (JCCP 4861)

## Data Breach/Privacy

- Miracle-Pond, et al. v. Shutterfly
- Baldwin et al. v. National Western Life Insurance Co.
- Jackson-Battle, et al. v. Navicent Health, Inc.
- Bailey, et al. v. Grays Harbor County Public Hospital No. 2
- In re: Forefront Data Breach Litigation
- Easter et al. v. Sound Generations
- Rivera, et al. v. Google LLC
- Acaley v. Vimeo, Inc.

## Mass Arbitration

- T-Mobile
- Uber
- Postmates
- Instacart
- Intuit

## Other Notable Cases

- Brown, et al. v. State of New Jersey DOC (Civil Rights)
- Slade v. Progressive (Insurance)

**Work performed as Postlethwaite & Netterville, APAC (P&N)*
*[1]Services provided in cooperation with the Court-Appointed Special Master*
*[2]Appointed As Common Benefit Trustee*
*[3]Inventory Settlement*

# EAG Claims Administration Experience

## SAMPLE JUDICIAL COMMENTS

- ***Hezi v. Celsius Holdings, Inc.***, No. 1:21-CV-09892-VM (S.D.N.Y.), Judge Jennifer H. Rearden on April 5, 2023:

  *The Court finds and determines that the notice procedure carried out by Claims Administrator Postlethwaite & Netterville, APAC ("P&N") afforded adequate protections to Class Members and provides the basis for the Court to make an informed decision regarding approval of the Settlement based on the responses of Class Members. The Court finds and determines that the Notice was the best notice practicable, and has satisfied the requirements of law and due process .*

- ***Scott Gilmore et al. v. Monsanto Company, et al.***, No. 3:21-CV-8159 (N.D. Cal.), Judge Vince Chhabria on March 31, 2023:

  *The Court finds that Class Notice has been disseminated to the Class in compliance with the Court's Preliminary Approval Order and the Notice Plan. The Court further finds that this provided the best notice to the Class practicable under the circumstances, fully satisfied due process, met the requirements of Rule 23 of the Federal Rules of Civil Procedure, and complied with all other applicable law.*

- ***John Doe et al. v. Katherine Shaw Bethea Hospital and KSB Medical Group, Inc.***, No. 2021L00026 (Fifteenth Judicial Circuit of Illinois, Lee County), on March 28, 2023:

  *The Court has determined that the Notice given to the Settlement Class Members, in accordance with the Preliminary Approval Order, fully and accurately informed Settlement Class Members of all material elements of the Settlement and constituted the best notice practicable under the circumstances, and fully satisfied the requirements of 735 ILCS 5/2-803, applicable law, and the Due Process Clauses of the U.S. Constitution and Illinois Constitution.*

- ***Sanders et al. v. Ibex Global Solutions, Inc. et al.***, No. 1:22-CV-00591 (D.D.C.), Judge Trevor N. McFadden on March 10, 2023:

  *An affidavit or declaration of the Settlement Administrator's compliance with the Notice process has been filed with the Court. The Notice process as set forth in the Settlement Agreement and ordered in the Preliminary Approval Order constitutes the best notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Class Members in accordance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Vaccaro v. Super Care, Inc.,*** No. 20STCV03833 (Cal. Superior Court), Judge David S. Cunningham on March 10, 2023:

  *The Class Notice provided to the Settlement Class conforms with the requirements of California Code of Civil Procedure § 382, the California and United States Constitutions, and any other applicable law, and constitutes the best notice practicable under the circumstances, by providing individual notice to all Class Members who could be identified through reasonable effort, and by providing due and adequate notice of the proceedings and of the matters set forth therein to the other Class Members. The notice fully satisfied the requirements of Due Process.*

- ***Gonshorowski v. Spencer Gifts, LLC***, No. ATL-L-000311-22 (N.J. Super. Ct.), Judge Danielle Walcoff on March 3, 2023:

  *The Court finds that the Notice issued to the Settlement Class, as ordered in the Amended Preliminary Approval Order, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with New Jersey Court Rules 4:32-2(b)(2) and (e)(1)(B) and due process.*

- ***Vaccaro v. Delta Drugs II, Inc.,*** No. 20STCV28871 (Cal. Superior Court), Judge Elihu M. Berle on March 2, 2023:

  *The Class Notice provided to the Settlement Class conforms with the requirements of California Code of Civil Procedure § 382, the California and United States Constitutions, and any other applicable law, and constitutes the best notice practicable under the circumstances, by providing individual notice to all Class Members who could be identified through reasonable effort, and by providing due and adequate notice of the proceedings and of the matters set forth therein to the other Class Members. The notice fully satisfied the requirements of Due Process.*

- ***Pagan, et al. v. Faneuil, Inc.***, No. 3:22-CV-297 (E.D. Va), Judge Robert E. Payne on February 16, 2023:

  *The Court finds that the Notice Program, set forth in the Settlement Agreement and effectuated pursuant to the Preliminary Approval Order, was the best notice practicable under the circumstances, was reasonably calculated to provide and did provide due and sufficient notice to the Settlement Class of the pendency of the Action, certification of the Settlement Class for settlement purposes only, the existence and terms of the Settlement Agreement, and their right to object and to appear at the final approval hearing or to exclude themselves from the Settlement Agreement, and satisfied the requirements of the Federal Rules of Civil Procedure, the United States Constitution, and other applicable law.*

- ***LaPrairie v. Presidio, Inc., et al.***, No. 1:21-CV-08795-JFK (S.D.N.Y.), Judge Andrew L. Carter, Jr. on December 12, 2022:

  > *The Court hereby fully, finally and unconditionally approves the Settlement embodied in the Settlement Agreement as being a fair, reasonable and adequate settlement and compromise of the claims asserted in the Action. The Class Members have been given proper and adequate notice of the Settlement, fairness hearing, Class Counsel's application for attorneys' fees, and the service award to the Settlement Class Representative. An affidavit or declaration of the Settlement Administrator's compliance with the Notice process has been filed with the Court. The Notice process as set forth in the Settlement Agreement and ordered in the Preliminary Approval Order constitutes the best notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Class Members in accordance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Nelson v. Bansley & Kiener, LLP***, No. 2021-CH-06274 (Circuit Court of Cook County, IL), Judge Sophia H. Hall on November 30, 2022:

  > *The court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with requirements of 735 ILCS 5/2-801, et seq.*

- ***Buck, et al. v. Northwest Commercial Real Estate Investments, LLC, et al***, No. 21-2-03929-1-SEA (Superior Court King County, WA), Judge Douglass A. North on September 30, 2022:

  > *Pursuant to the Court's Preliminary Approval Order, Postcard Notice was distributed to the Class by First Class mail and Email Notice was distributed to all Class Members for whom the Settlement Administrator had a valid email address. The Court hereby finds and concludes that Postcard and Email Notice was disseminated to members of the Settlement Class in accordance with the terms set forth in the Settlement and in compliance with the Court's Preliminary Approval Order. The Court further finds and concludes that the Postcard and Email Notice, and the distribution procedures set forth in the Settlement fully satisfy CR 23(c)(2) and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all members of the Class who could be identified through reasonable effort, provided an opportunity for the Class Members to object or exclude themselves from the Settlement, and support the Court's exercise of jurisdiction over the Settlement Class Members as contemplated in the Settlement and this Final Approval Order.*

- ***Rivera, et al. v. Google LLC,*** No. 2019-CH-00990 (Circuit Court of Cook County, IL), Judge Anna M. Loftus on September 28, 2022:

  *Pursuant to this Court's Order granting preliminary approval of the Settlement, Postlethwaite & Netterville, APAC ("P&N") served as Settlement Administrator. This Court finds that the Settlement Administrator performed all duties thus far required as set forth in the Settlement Agreement.*

  *The Court finds that the Settlement Administrator has complied with the approved notice process as confirmed by its Declaration filed with the Court. The Court further finds that the Notice plan set forth in the Settlement as executed by the Settlement Administrator satisfied the requirements of Due Process and 735 ILCS 5/2-803. The Notice plan was reasonably calculated and constituted the best notice practicable to apprise Settlement Class Members of the nature of this litigation, the scope of the Settlement Class, the terms of the Settlement, the right of Settlement Class Members to object to the Settlement or exclude themselves from the Settlement Class and the process for doing so, and of the Final Approval Hearing. Accordingly, the Court finds and concludes that the Settlement Class Members have been provided the best notice practicable under the circumstances, and that the Notice plan was clearly designed to advise the Settlement Class Members of their rights.*

- ***Davonna James, individually and on behalf of all others similarly situated v. CohnReznick LLP***, No. 1:21-cv-06544 (S.D.N.Y.), Judge Lewis J. Liman on September 21, 2022:

  *The Court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Patricia Davidson, et al. v. Healthgrades Operating Company, Inc.***, No. 21-cv-01250-RBJ (D. Colo), Judge R. Brooke Jackson on August 22, 2022:

  *The Court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Hosch et al. v. Drybar Holdings LLC,*** No. 2021-CH-01976 (Circuit Court of Cook County, IL), Judge Pamela M. Meyerson on June 27, 2022:

  *The Court has determined that the Notice given to the Settlement Class Members, in accordance with the Preliminary Approval Order, fully and accurately informed*

*Settlement Class Members of all material elements of the Settlement and constituted the best notice practicable under the circumstances, and fully satisfied the requirements of 735 ILCS 5/2-803, applicable law, and the Due Process Clauses of the U.S. Constitution and Illinois Constitution.*

- ***Baldwin et al. v. National Western Life Insurance Company,*** No. 2:21-cv-04066-WJE (W.D. MO), Judge Willie J. Epps, Jr. on June 16, 2022:

  *The Court finds that such Notice as therein ordered, constituted the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of Rule 23(c)(2).*

- ***Chapman et al. v. voestalpine Texas Holding LLC,*** No. 2:17-cv-174 (S.D. Tex.), Judge Nelva Gonzales Ramos on June 15, 2022:

  *The Class and Collective Notice provided pursuant to the Agreement and the Order Granting Preliminary Approval of Class Settlement:*

  *(a) Constituted the best practicable notice, under the circumstances;*
  *(b) Constituted notice that was reasonably calculated to apprise the Class Members of the pendency of this lawsuit, their right to object or exclude themselves from the proposed settlement, and to appear at the Fairness Hearing;*
  *(c) Was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and*
  *(d) Met all applicable requirements of the Federal Rules of Civil Procedure and the Due Process Clause of the United States Constitution because it stated in plain, easily understood language the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on members under Rule 23(c)(3).*

- ***Clopp et al. v. Pacific Market Research LLC,*** No. 21-2-08738-4 (Superior Court King County, WA), Judge Kristin Richardson on May 27, 2022:

  *The Court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of Washington Civil Rule 23(c)(2).*

- ***Whitlock v. Christian Homes, Inc., et al,*** No. 2020L6 (Circuit Court of Logan County, IL), Judge Jonathan Wright on May 6, 2022:

  *The Court has determined that the Notice given to the Settlement Class Members, in accordance with the Preliminary Approval Order, fully and accurately informed Settlement Class Members of all material elements of the Settlement and constituted the best notice practicable under the circumstances, and fully satisfied the requirements of 735 ILCS 5/2-803, applicable law, and the Due Process Clauses of the U.S. Constitution and Illinois Constitution.*

- ***Hanson v. Welch Foods Inc.,*** No. 3:20-cv-02011-JCS (N.D. Cal.), Judge Joseph C. Spero on April 15, 2022:

  *The Class Notice and claims submission procedures set forth in Sections 5 and 9 of the Settlement Agreement, and the Notice Plan detailed in the Declaration of Brandon Schwartz filed on October 1, 2021, fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement Agreement and this Order. See Fed. R. Civ. P. 23(e)(2)(C)(ii).*

- ***Dein v. Seattle City Light,*** No. 19-2-21999-8 SEA (Superior Court King County, WA), Judge Kristin Richardson on April 15, 2022:

  *The Court hereby finds and concludes that the notice was disseminated to Settlement Class Members in accordance with the terms set forth in the Settlement and in compliance with the Court's Preliminary Approval Order. The Court further finds and concludes that the notice fully satisfies CR 23(c)(2) and the requirements of due process, was the best notice practicable under the circumstances, provided individual notice to all members of the Class who could be identified through reasonable effort, and provided an opportunity for the Class Members to object to or exclude themselves from the Settlement.*

- ***Frank v. Cannabis & Glass, LLC, et al,*** No. 19-cv-00250 (E.D. Wash.), Judge Stanley A. Bastian on April 11, 2022:

  *Postlethwaite & Netterville, APAC, ("P&N"), the Settlement Administrator approved by the Court, completed the delivery of Class Notice according to the terms of the Agreement. The Class Text Message Notice given by the Settlement Administrator to the Settlement Class, which set forth the principal terms of the Agreement and other matters, was the best practicable notice under the circumstances, including*

*individual notice to all Settlement Class Members who could be identified through reasonable effort.*

- ***McMorrow, et al. v. Mondelez International, Inc,*** No. 17-cv-02327 (S.D. Cal.), Judge Cynthia Bashant on April 8, 2022:

  *Notice was administered nationwide and achieved an overwhelmingly positive outcome, surpassing estimates from the Claims Administrator both in the predicted reach of the notice (72.94% as compared to 70%) as well as in participation from the class (80% more claims submitted than expected). (Schwartz Decl. ¶ 14, ECF No. 206-1; Final App. Mot. 3.) Only 46 potential Class Members submitted exclusions (Schwartz Decl. ¶ 21), and only one submitted an objection—however the objection opposes the distribution of fees and costs rather than the settlement itself. (Obj. 3.) The Court agrees with Plaintiffs that the strong claims rate, single fee-related objection, and low opt-out rate weigh in favor of final approval.*

- ***Daley, et al. v. Greystar Management Services LP, et al.,*** No. 2:18-cv-00381 (E.D. Wash.), Judge Salvador Mendoz, Jr. on February 1, 2022:

  *The Settlement Administrator completed the delivery of Class Notice according to the terms of the Agreement. The Class Notice given by the Settlement Administrator to the Settlement Class….was the best practicable notice under the circumstances. The Class Notice program….was reasonable and provided due and adequate notice of these proceedings and of the matters set forth therein, including the terms of the Agreement, to all parties entitled to such notice. The Class Notice given to the Settlement Class Members satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of constitutional due process. The Class Notice was reasonably calculated under the circumstances to apprise Settlement Class Members of the pendency of this Action….*

- ***Mansour, et al. v. Bumble Trading, Inc.,*** No. RIC1810011 (Cal. Super.), Judge Sunshine Sykes on January 27, 2022:

  *The Court finds that the Class Notice and the manner of its dissemination constituted the best practicable notice under the circumstances and was reasonably calculated, under all the circumstances, to apprise Settlement Class Members of the pendency of the Litigation, the terms of the Agreement, and their right to object to or exclude themselves from the Settlement Class. The Court finds that the notice was reasonable, that it constituted due, adequate and sufficient notice to all persons entitled to receive notice, and that it met the requirements of due process, Rules of Court 3.766 and 3.769(f), and any other applicable laws.*

- ***Hadley, et al. v. Kellogg Sales Company***, No. 16-cv-04955 (N.D. Cal.), Judge Lucy H. Koh on November 23, 2021:

> *The Class Notice and claims submission procedures set forth in Sections 4 and 6 of the Settlement Agreement, and the Notice Plan filed on March 10, 2021, fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Classes as contemplated in the Settlement Agreement and this Order. See Fed. R. Civ. P. 23(e)(2)(C)(ii).*

- ***Miracle-Pond, et al. v. Shutterfly, Inc.***, No. 2019-CH-07050 (Circuit Court of Cook County, IL), Judge Raymond W. Mitchell on September 9, 2021:

> *This Court finds that the Settlement Administrator performed all duties thus far required as set forth in the Settlement Agreement. The Court finds that the Settlement Administrator has complied with the approved notice process as confirmed by its Declaration filed with the Court. The Court further finds that the Notice plan set forth in the Settlement as executed by the Settlement Administrator satisfied the requirements of Due Process and 735 ILCS 5/2-803. The Notice plan was reasonably calculated and constituted the best notice practicable to apprise Settlement Class Members of the nature of this litigation, the scope of the Settlement Class, the terms of the Settlement, the right of Settlement Class Members to object to the Settlement or exclude themselves from the Settlement Class and the process for doing so, and of the Final Approval Hearing. Accordingly, the Court finds and concludes that the Settlement Class Members have been provided the best notice practicable under the circumstances, and that the Notice plan was clearly designed to advise the Settlement Class Members of their rights.*

- ***Jackson-Battle, et al. v. Navicent Health, Inc.***, No. 2020-CV-072287 (Ga Super.), Judge Jeffery O. Monroe on August 4, 2021:

> *The Court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of O.C.G.A. §§ 9-11-23(c)(2).*

- ***In re: Interior Molded Doors Indirect Purchasers Antitrust Litigation,*** No. 3:18-cv-00850 (E.D. Va.), Judge John A. Gibney on July 27, 2021:

> *The notice given to the Settlement Class of the settlement set forth in the Settlement Agreement and the other matters set forth herein was the best notice practicable*

*under the circumstances. Said notice provided due and adequate notice of the proceedings an of the matters set forth therein, including the proposed settlement set forth in the Settlement Agreement, to all persons and entities entitled to such notice, and said notice fully satisfied the requirements of Rules 23(c)(2) and 23(e) and the requirements of due process.*

- ***Krommenhock, et al. v. Post Foods, LLC*,** No. 16-cv-04958 (N.D. Cal.), Judge William H. Orrick on June 25, 2021:

  *The Class Notice and claims submission procedures set forth in Sections 4 and 6 of the Settlement Agreement and the Notice Plan filed on January 18, 2021 fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Classes as contemplated in the Settlement Agreement and this Order. See Fed. R. Civ. P. 23(e)(2)(C)(ii).*

- ***Winters, et al. v. Two Towns Ciderhouse, Inc*,** No. 20-cv-00468 (S.D. Cal.), Judge Cynthia Bashant on May 11, 2021:

  *The settlement administrator, Postlethwaite and Netterville, APAC ("P&N") completed notice as directed by the Court in its Order Granting Preliminary Approval of the Class Action Settlement. (Decl. of Brandon Schwartz Re: Notice Plan Implementation and Settlement Administration ("Schwartz Decl.") ¶¶ 4–14, ECF No. 24-5.)…Thus, the Court finds the Notice complies with due process….With respect to the reaction of the class, it appears the class members' response has been overwhelmingly positive.*

- ***Siddle, et al. v. The Duracell Company, et al.*,** No. 4:19-cv-00568 (N.D. Cal.), Judge James Donato on April 19, 2021:

  *The Court finds that the Class Notice and Claims Administration procedures set forth in the Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided due and sufficient individual notice to all persons in the Settlement Class who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Agreement and this Final Approval Order.*

- ***Fabricant v. Amerisave Mortgage Corporation*,** No. 19-cv-04659-AB-AS (C.D. Cal.), Judge Andre Birotte, Jr. on November 25, 2020:

  *The Class Notice provided to the Settlement Class conforms with the requirements of Fed. Rule Civ. Proc. 23, the California and United States Constitutions, and any other applicable law, and constitutes the best notice practicable under the circumstances, by providing individual notice to all Settlement Class Members who could be identified through reasonable effort, and by providing due and adequate notice of the proceedings and of the matters set forth therein to the other Settlement Class Members. The notice fully satisfied the requirements of Due Process. No Settlement Class Members have objected to the terms of the Settlement.*

- ***Snyder, et al. v. U.S. Bank, N.A., et al.*,** No. 1:16-CV-11675 (N.D. Ill), Judge Matthew F. Kennelly on June 18, 2020:

  *The Court makes the following findings and conclusions regarding notice to the Settlement Class:*

  *a. The Class Notice was disseminated to persons in the Settlement Class in accordance with the terms of the Settlement Agreement and the Class Notice and its dissemination were in compliance with the Court's Preliminary Approval Order;*
  *b. The Class Notice: (i) constituted the best practicable notice under the circumstances to potential Settlement Class Members, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Consolidated Litigation, their right to object or to exclude themselves from the proposed Settlement, and their right to appear at the Final Approval Hearing, (iii) was reasonable and constituted due, adequate, and sufficient individual notice to all persons entitled to be provided with notice, and (iv) complied fully with the requirements of Fed. R. Civ. P. 23, the United States Constitution, the Rules of this Court, and any other applicable law.*

- ***Edward Makaron et al. v. Enagic USA, Inc.*,** No. 2:15-cv-05145 (C.D. Cal.), Judge Dean D. Pregerson on January 16, 2020:

  *The Court makes the following findings and conclusions regarding notice to the Class:*

  *a. The Class Notice was disseminated to persons in the Class in accordance with the terms of the Settlement Agreement and the Class Notice and its dissemination were in compliance with the Court's Preliminary Approval Order;*

  *b. The Class Notice: (i) constituted the best practicable notice under the circumstances to potential Class Members, (ii) constituted notice that was reasonably*

*calculated, under the circumstances, to apprise Class Members of the pendency of the Action, their right to object or to exclude themselves from the proposed Settlement, and their right to appear at the Final Approval Hearing, (iii) was reasonable and constituted due, adequate, and sufficient individual notice to all persons entitled to be provided with notice, and (iv) complied fully with the requirements of Fed. R. Civ. P. 23, the United States Constitution, the Rules of this Court, and any other applicable law.*

- ***Kimberly Miller et al. v. P.S.C, Inc., d/b/a Puget Sound Collections*,** No. 3:17-cv-05864 (W. D. Wash.), Judge Ronald B. Leighton on January 10, 2020:

  *The Court finds that the notice given to Class Members pursuant to the terms of the Agreement fully and accurately informed Class Members of all material elements of the settlement and constituted valid, sufficient, and due notice to all Class Members. The notice fully complied with due process, Rule 23 of the Federal Rules of Civil Procedure, and all other applicable law.*

- ***John Karpilovsky and Jimmie Criollo, Jr. et al. v. All Web Leads, Inc.*,** No. 1:17-cv-01307 (N.D. Ill), Judge Harry D. Leinenweber on August 8, 2019:

  *The Court hereby finds and concludes that Class Notice was disseminated to members of the Settlement Class in accordance with the terms set forth in the Settlement Agreement and that Class Notice and its dissemination were in compliance with this Court's Preliminary Approval Order.*

  *The Court further finds and concludes that the Class Notice and claims submission procedures set forth in the Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement and this Order.*

- ***Paul Story v. Mammoth Mountain Ski Area, LLC,*** No. 2:14-cv-02422 (E.D. Cal.), Judge John A. Mendez on March 13, 2018:

  *The Court finds that the Settlement Administrator delivered the Class Notice to the Class following the procedures set forth in the Settlement Agreement; that the Class Notice and the procedures followed by the Settlement Administrator constituted the best notice practicable under the circumstances; and that the Class Notice and the procedures contemplated by the Settlement Agreement were in full compliance with the laws of the United States and the requirements of due process. These findings support final approval of the Settlement Agreement.*

- ***John Burford, et al. v. Cargill, Incorporated,*** No. 05-0283 (W.D. La.), Judge S. Maurice Hicks, Jr. on November 8, 2012:

  *Considering the aforementioned Declarations of Carpenter and Mire as well as the additional arguments made in the Joint Motion and during the Fairness Hearing, the Court finds that the notice procedures employed in this case satisfied all of the Rule 23 requirements and due process.*

- ***In RE: FEMA Trailer Formaldehyde Product Liability Litigation,*** MDL No. 1873, (E.D La.), Judge Kurt D. Engelhardt on September 27, 2012:

  *After completing the necessary rigorous analysis, including careful consideration of Mr. Henderson's Declaration and Mr. Balhoff's Declaration, along with the Declaration of Justin I. Woods, the Court finds that the first-class mail notice to the List of Potential Class Members (or to their attorneys, if known by the PSC), Publication Notice and distribution of the notice in accordance with the Settlement Notice Plan, the terms of the Settlement Agreement, and this Court's Preliminary Approval Order:*

  *(a) constituted the best practicable notice to Class Members under the circumstances;*
  *(b) provided Class Members with adequate instructions and a variety of means to obtain information pertaining to their rights and obligations under the settlement so that a full opportunity has been afforded to Class Members and all other persons wishing to be heard;*
  *(c) was reasonably calculated, under the circumstances, to apprise Class Members of: (i) the pendency of this proposed class action settlement, (ii) their right to exclude themselves from the Class and the proposed settlement, (iii) their right to object to any aspect of the proposed settlement (including final certification of the settlement class, the fairness, reasonableness or adequacy of the proposed settlement, the adequacy of representation by Plaintiffs or the PSC, and/or the award of attorneys' fees), (iv) their right to appear at the Fairness Hearing - either on their own or through counsel hired at their own expense - if they did not exclude themselves from the Class, and (v) the binding effect of the Preliminary Approval Order and Final Order and Judgment in this action, whether favorable or unfavorable, on all persons who do not timely request exclusion from the Class;*
  *(d) was calculated to reach a large number of Class Members, and the prepared notice documents adequately informed Class Members of the class action, properly described their rights, and clearly conformed to the high standards for modern notice programs;*
  *(e) focused on the effective communication of information about the class action. The notices prepared were couched in plain and easily understood language and were written and designed to the highest communication standards;*

*(f) afforded sufficient notice and time to Class Members to receive notice and decide whether to request exclusion or to object to the settlement.;*

*(g) was reasonable and constituted due, adequate, effective, and sufficient notice to all persons entitled to be provided with notice; and*

*(h) fully satisfied the requirements of the Federal Rules of Civil Procedure, the United States Constitution, including the Due Process Clause, and any other applicable law.*

# Exhibit B: CV of Brandon Schwartz

# Brandon Schwartz

Brandon Schwartz is the Director of Notice for EAG Gulf Coast, LLC. He is responsible for developing customized legal notice solutions for clients related to class action notice and claims administration programs.

Brandon has more than 15 years of experience designing and implementing complex notice programs. His knowledge of email and postal distribution, demographic research, reach and frequency methodology, digital and social media strategies, and Fed R. Civ 23 compliance keep clients informed of the best practices in legal notice design. He is the author of several articles pertaining to Rule 23 changes and notice design and implementation.

Brandon has designed and implemented notice campaigns for hundreds of cases in his career. Prior to joining EAG Gulf Coast, LLC, Brandon was the Director of Notice and Media for a large claims administrator where he was responsible for overseeing cases such as: *In re Ductile Iron Pipe Fittings ("DIPF") Indirect Purchaser Antitrust Litigation*; *In re Sony PS3 "Other OS" Litigation*; *Gordon v. The Hain Celestial Group et al*; and *Smith, et al. v. Floor & Decor Outlets of America, Inc.*

## EDUCATION & CREDENTIALS

- Bachelor of Science, Marketing, University of Illinois at Chicago
- Bachelor of Science, Management, University of Illinois at Chicago
- Legal Notice Expert

## ARTICLES

- Legal Notice and Social Media: How to Win the Internet
- Rule 23 Changes: Avoid Delays in Class Settlement Approval
- Rule 23 Changes: How Electronic Notice Can Save Money
- Tackling Digital Class Notice with Rule 23 Changes
- What to Expect: California's Northern District Procedural Guidance Changes

## SPEAKING ENGAGEMENTS

- Class Action Law Forum: Notice and Administration: Fraud and Third-Party Filers, San Diego, CA, March 18, 2023
- Class Action Law Forum: Settlement and Notice & Claims Trends, San Diego, CA, March 18, 2022
- Class Action Law Forum: Consumer Class Actions, San Diego, CA, March 5, 2020
- Class Action Mastery: Best Practices in Claims Settlement Administration, HB Litigation Conference, San Diego, CA, January 17, 2019
- Class Action Mastery: Communication with the Class, HB Litigation Conference, New York, NY, May 10, 2018

## SAMPLE JUDICIAL COMMENTS

- ***Hezi v. Celsius Holdings, Inc.***, Case No. 1:21-CV-09892-VM (S.D.N.Y.), Judge Jennifer H. Rearden on April 5, 2023:

  *The Court finds and determines that the notice procedure carried out by Claims Administrator Postlethwaite & Netterville, APAC ("P&N") afforded adequate protections to Class Members and provides the basis for the Court to make an informed decision regarding approval of the Settlement based on the responses of Class Members. The Court finds and determines that the Notice was the best notice practicable, and has satisfied the requirements of law and due process.*

- ***Scott Gilmore et al. v. Monsanto Company, et al.***, Case No. 3:21-CV-8159 (N.D. Cal.), Judge Vince Chhabria on March 31, 2023:

  *The Court finds that Class Notice has been disseminated to the Class in compliance with the Court's Preliminary Approval Order and the Notice Plan. The Court further finds that this provided the best notice to the Class practicable under the circumstances, fully satisfied due process, met the requirements of Rule 23 of the Federal Rules of Civil Procedure, and complied with all other applicable law.*

- ***John Doe et al. v. Katherine Shaw Bethea Hospital and KSB Medical Group, Inc.***, Case No. 2021L00026 (Fifteenth Judicial Circuit of Illinois, Lee County), on March 28, 2023:

  *The Court has determined that the notice given to the Settlement Class Members, in accordance with the Preliminary Approval Order, fully and accurately informed Settlement Class Members of all material elements of the Settlement and constituted the best notice practicable under the circumstances, and fully satisfied the requirements of 735 ILCS 5/2-803, applicable law, and the Due Process Clauses of the U.S. Constitution and Illinois Constitution.*

- ***Sanders et al. v. Ibex Global Solutions, Inc. et al.***, Case No. 1:22-CV-00591 (D.D.C.), Judge Trevor N. McFadden on March 10, 2023:

  *An affidavit or declaration of the Settlement Administrator's compliance with the Notice process has been filed with the Court. The Notice process as set forth in the Settlement Agreement and ordered in the Preliminary Approval Order constitutes the best notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Class Members in accordance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Pagan, et al. v. Faneuil, Inc.***, Case No. 3:22-CV-297 (E.D. Va), Judge Robert E. Payne on February 16, 2023:

  *The Court finds that the Notice Program, set forth in the Settlement Agreement and effectuated pursuant to the Preliminary Approval Order, was the best notice practicable under the circumstances, was reasonably calculated to provide and did*

*provide due and sufficient notice to the Settlement Class of the pendency of the Action, certification of the Settlement Class for settlement purposes only, the existence and terms of the Settlement Agreement, and their right to object and to appear at the final approval hearing or to exclude themselves from the Settlement Agreement, and satisfied the requirements of the Federal Rules of Civil Procedure, the United States Constitution, and other applicable law.*

- ***LaPrairie v. Presidio, Inc., et al.***, Case No. 1:21-CV-08795-JFK (S.D.N.Y.), Judge Andrew L. Carter, Jr. on December 12, 2022:

  *The Court hereby fully, finally and unconditionally approves the Settlement embodied in the Settlement Agreement as being a fair, reasonable and adequate settlement and compromise of the claims asserted in the Action. The Class Members have been given proper and adequate notice of the Settlement, fairness hearing, Class Counsel's application for attorneys' fees, and the service award to the Settlement Class Representative. An affidavit or declaration of the Settlement Administrator's compliance with the Notice process has been filed with the Court. The Notice process as set forth in the Settlement Agreement and ordered in the Preliminary Approval Order constitutes the best notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Class Members in accordance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Nelson v. Bansley & Kiener, LLP***, Case No. 2021-CH-06274 (Circuit Court of Cook County, IL), Judge Sophia H. Hall on November 30, 2022:

  *The court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with requirements of 735 ILCS 5/2-801, et seq.*

- ***Buck, et al. v. Northwest Commercial Real Estate Investments, LLC, et al.***, Case No. 21-2-03929-1-SEA (Superior Court King County, WA), Judge Douglass A. North on September 30, 2022:

  *Pursuant to the Court's Preliminary Approval Order, Postcard Notice was distributed to the Class by First Class mail and Email Notice was distributed to all Class Members for whom the Settlement Administrator had a valid email address. The Court hereby finds and concludes that Postcard and Email Notice was disseminated to members of the Settlement Class in accordance with the terms set forth in the Settlement and in compliance with the Court's Preliminary Approval Order. The Court further finds and concludes that the Postcard and Email Notice, and the distribution procedures set forth in the Settlement fully satisfy CR 23(c)(2) and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all members of the Class who could be identified through reasonable effort, provided an opportunity for the Class Members to object or exclude*

*themselves from the Settlement, and support the Court's exercise of jurisdiction over the Settlement Class Members as contemplated in the Settlement and this Final Approval Order.*

- ***Rivera, et al. v. Google LLC,*** Case No. 2019-CH-00990 (Circuit Court of Cook County, IL), Judge Anna M. Loftus on September 28, 2022:

  *Pursuant to this Court's Order granting preliminary approval of the Settlement, Postlethwaite & Netterville, APAC ("P&N") served as Settlement Administrator. This Court finds that the Settlement Administrator performed all duties thus far required as set forth in the Settlement Agreement.*

  *The Court finds that the Settlement Administrator has complied with the approved notice process as confirmed by its Declaration filed with the Court. The Court further finds that the Notice plan set forth in the Settlement as executed by the Settlement Administrator satisfied the requirements of Due Process and 735 ILCS 5/2-803. The Notice plan was reasonably calculated and constituted the best notice practicable to apprise Settlement Class Members of the nature of this litigation, the scope of the Settlement Class, the terms of the Settlement, the right of Settlement Class Members to object to the Settlement or exclude themselves from the Settlement Class and the process for doing so, and of the Final Approval Hearing. Accordingly, the Court finds and concludes that the Settlement Class Members have been provided the best notice practicable under the circumstances, and that the Notice plan was clearly designed to advise the Settlement Class Members of their rights.*

- ***Patricia Davidson, et al. v. Healthgrades Operating Company, Inc.***, Case No. 21-cv-01250-RBJ (D. Colo), Judge R. Brooke Jackson on August 22, 2022:

  *The Court finds that such Notice as therein ordered, constitutes the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of Federal Rule of Civil Procedure 23(c)(2).*

- ***Hosch et al. v. Drybar Holdings LLC,*** Case No. 2021-CH-01976 (Circuit Court of Cook County, IL), Judge Pamela M. Meyerson on June 27, 2022:

  *The Court has determined that the Notice given to the Settlement Class Members, in accordance with the Preliminary Approval Order, fully and accurately informed Settlement Class Members of all material elements of the Settlement and constituted the best notice practicable under the circumstances, and fully satisfied the requirements of 735 ILCS 5/2-803, applicable law, and the Due Process Clauses of the U.S. Constitution and Illinois Constitution.*

- ***Baldwin et al. v. National Western Life Insurance Company,*** 2:21-cv-04066-WJE (W.D. MO), Judge Willie J. Epps, Jr. on June 16, 2022:

  *The Court finds that such Notice as therein ordered, constituted the best possible notice practicable under the circumstances and constitutes valid, due, and sufficient notice to all Settlement Class Members in compliance with the requirements of Rule 23(c)(2).*

- ***Chapman et al. v. voestalpine Texas Holding LLC,*** Case No. 2:17-cv-174 (S.D. Tex.), Judge Nelva Gonzales Ramos on June 15, 2022:

  *The Class and Collective Notice provided pursuant to the Agreement and the Order Granting Preliminary Approval of Class Settlement:*

  *(a) Constituted the best practicable notice, under the circumstances;*
  *(b) Constituted notice that was reasonably calculated to apprise the Class Members of the pendency of this lawsuit, their right to object or exclude themselves from the proposed settlement, and to appear at the Fairness Hearing;*
  *(c) Was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and*
  *(d) Met all applicable requirements of the Federal Rules of Civil Procedure and the Due Process Clause of the United States Constitution because it stated in plain, easily understood language the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on members under Rule 23(c)(3).*

- ***Hanson v. Welch Foods Inc.,*** Case No. 3:20-cv-02011 (N.D. Cal.), Judge Joseph C. Spero on April 15, 2022:

  *The Class Notice and claims submission procedures set forth in Sections 5 and 9 of the Settlement Agreement, and the Notice Plan detailed in the Declaration of Brandon Schwartz filed on October 1, 2021, fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement Agreement and this Order. See Fed. R. Civ. P. 23(e)(2)(C)(ii).*

- ***McMorrow, et al. v. Mondelez International, Inc.,*** No. 17-cv-02327 (S.D. Cal.), Judge Cynthia Bashant on April 8, 2022:

  *Notice was administered nationwide and achieved an overwhelmingly positive outcome, surpassing estimates from the Claims Administrator both in the predicted reach of the notice (72.94% as compared to 70%) as well as in participation from the*

*class (80% more claims submitted than expected). (Schwartz Decl. ¶ 14, ECF No. 206-1; Final App. Mot. 3.) Only 46 potential Class Members submitted exclusions (Schwartz Decl. ¶ 21), and only one submitted an objection—however the objection opposes the distribution of fees and costs rather than the settlement itself. (Obj. 3.) The Court agrees with Plaintiffs that the strong claims rate, single fee-related objection, and low opt-out rate weigh in favor of final approval.*

- ***Hadley, et al. v. Kellogg Sales Company*,** No. 16-cv-04955 (N.D. Cal.), Judge Lucy H. Koh on November 23, 2021:

  *The Class Notice and claims submission procedures set forth in Sections 4 and 6 of the Settlement Agreement, and the Notice Plan filed on March 10, 2021, fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Classes as contemplated in the Settlement Agreement and this Order. See Fed. R. Civ. P. 23(e)(2)(C)(ii).*

- ***Miracle-Pond, et al. v. Shutterfly, Inc.*,** No. 2019-CH-07050 (Circuit Court of Cook County, IL), Judge Raymond W. Mitchell on September 9, 2021:

  *This Court finds that the Settlement Administrator performed all duties thus far required as set forth in the Settlement Agreement. The Court finds that the Settlement Administrator has complied with the approved notice process as confirmed by its Declaration filed with the Court. The Court further finds that the Notice plan set forth in the Settlement as executed by the Settlement Administrator satisfied the requirements of Due Process and 735 ILCS 5/2-803. The Notice plan was reasonably calculated and constituted the best notice practicable to apprise Settlement Class Members of the nature of this litigation, the scope of the Settlement Class, the terms of the Settlement, the right of Settlement Class Members to object to the Settlement or exclude themselves from the Settlement Class and the process for doing so, and of the Final Approval Hearing. Accordingly, the Court finds and concludes that the Settlement Class Members have been provided the best notice practicable under the circumstances, and that the Notice plan was clearly designed to advise the Settlement Class Members of their rights.*

- ***In re: Interior Molded Doors Indirect Purchasers Antitrust Litigation,*** No. 3:18-cv-00850 (E.D. Va.), Judge John A. Gibney on July 27, 2021:

  *The notice given to the Settlement Class of the settlement set forth in the Settlement Agreement and the other matters set forth herein was the best notice practicable under the circumstances. Said notice provided due and adequate notice of the proceedings an of the matters set forth therein, including the proposed settlement set forth in the Settlement Agreement, to all persons and entities entitled to such*

*notice, and said notice fully satisfied the requirements of Rules 23(c)(2) and 23(e) and the requirements of due process.*

- ***Krommenhock, et al. v. Post Foods, LLC*,** No. 16-cv-04958 (N.D. Cal.), Judge William H. Orrick on June 25, 2021:

  *The Class Notice and claims submission procedures set forth in Sections 4 and 6 of the Settlement Agreement and the Notice Plan filed on January 18, 2021 fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Classes as contemplated in the Settlement Agreement and this Order. See Fed. R. Civ. P. 23(e)(2)(C)(ii).*

- ***Lisa Jones et al. v. Monsanto Company, et al.***, No. 4:19-cv-00102-BP (W.D. Mo.), Chief Judge Beth Phillips on May 13, 2021:

  *The Court also notes that there has been only one objection filed, and even the Objector has not suggested that the amount of the settlement is inadequate or that the notice or the method of disseminating the notice was inadequate to satisfy the requirements of the Due Process Clause or was otherwise infirm...However, with respect to the Rule 23(e) factors, the Court finds that the process used to identify and pay class members and the amount paid to class members are fair and reasonable for settlement purposes.*

- ***Winters et al. v. Two Towns Ciderhouse Inc.***, No. 3:20-cv-00468-BAS-BGS (S.D. Cal.), Judge Cynthia Bashant on May 11, 2021:

  *The settlement administrator, Postlethwaite and Netterville, APAC ("P&N") completed notice as directed by the Court in its Order Granting Preliminary Approval of the Class Action Settlement. (Decl. of Brandon Schwartz Re: Notice Plan Implementation and Settlement Administration ("Schwartz Decl.") ¶¶ 4–14, ECF No. 24-5.)....Notice via social media resulted in 30,633,610 impressions. (Schwartz Decl. ¶4.) Radio notice via Spotify resulted in 394,054 impressions. (Id. ¶ 5.) The settlement website received 155,636 hits, and the toll-free number received 51 calls. (Id. ¶¶ 9, 14.). Thus, the Court finds the Notice complies with due process.*

- ***Siddle, et al. v. The Duracell Company, et al.***, No. 4:19-cv-00568 (N.D. Cal.), Judge James Donato on April 19, 2021:

  *The Court finds that the Class Notice and Claims Administration procedures set forth in the Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided due and sufficient individual notice to all persons in the Settlement Class who could be identified through reasonable effort, and support the*

*Court's exercise of jurisdiction over the Settlement Class as contemplated in the Agreement and this Final Approval Order.*

- ***Fabricant v. Amerisave Mortgage Corporation***, No. 19-cv-04659-AB-AS (C.D. Cal.), Judge Andre Birotte, Jr. on November 25, 2020:

  *The Class Notice provided to the Settlement Class conforms with the requirements of Fed. Rule Civ. Proc. 23, the California and United States Constitutions, and any other applicable law, and constitutes the best notice practicable under the circumstances, by providing individual notice to all Settlement Class Members who could be identified through reasonable effort, and by providing due and adequate notice of the proceedings and of the matters set forth therein to the other Settlement Class Members. The notice fully satisfied the requirements of Due Process. No Settlement Class Members have objected to the terms of the Settlement.*

- ***Edward Makaron et al. v. Enagic USA, Inc.***, 2:15-cv-05145 (C.D. Cal.), Judge Dean D. Pregerson on January 16, 2020:

  *The Court makes the following findings and conclusions regarding notice to the Class:*

  *a. The Class Notice was disseminated to persons in the Class in accordance with the terms of the Settlement Agreement and the Class Notice and its dissemination were in compliance with the Court's Preliminary Approval Order;*

  *b. The Class Notice: (i) constituted the best practicable notice under the circumstances to potential Class Members, (ii) constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action, their right to object or to exclude themselves from the proposed Settlement, and their right to appear at the Final Approval Hearing, (iii) was reasonable and constituted due, adequate, and sufficient individual notice to all persons entitled to be provided with notice, and (iv) complied fully with the requirements of Fed. R. Civ. P. 23, the United States Constitution, the Rules of this Court, and any other applicable law.*

- ***John Karpilovsky and Jimmie Criollo, Jr. et al. v. All Web Leads, Inc.***, 1:17-cv-01307 (N.D. Ill.), Judge Harry D. Leinenweber on August 8, 2019:

  *The Court hereby finds and concludes that Class Notice was disseminated to members of the Settlement Class in accordance with the terms set forth in the Settlement Agreement and that Class Notice and its dissemination were in compliance with this Court's Preliminary Approval Order.*

  *The Court further finds and concludes that the Class Notice and claims submission procedures set forth in the Settlement Agreement fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, were the best notice practicable under the circumstances, provided individual notice to all Settlement*

*Class Members who could be identified through reasonable effort, and support the Court's exercise of jurisdiction over the Settlement Class as contemplated in the Settlement and this Order.*

- ***Hartig Drug Company Inc., v. Senju Pharmaceutical LTD., and Allergan, Inc.,*** 1:14-cv-00719 (D. Del.), Judge Joseph F. Bataillon on May 3, 2018:

  *The Court approves the proposed notice program, including the Mail Notice and the Publication Notice, attached as Exhibits A and B to the Declaration of Brandon Schwartz of Garden City Group in support of Plaintiff's Unopposed Motion to Distribute Notice to the Settlement Class ("Schwartz Declaration"). The Court further approves the claim form attached as Exhibit C to the Schwartz Declaration. The Court finds that the manner of notice proposed constitutes the best practicable notice under the circumstances as well as valid, due, and sufficient notice to all persons entitled thereto and complies fully with the requirements of the Federal Rule of Civil Procedure 23…*

- ***Gordon v. Hain Celestial Group, et al.,*** 1:16-cv-06526 (S.D.N.Y.), Judge Katherine B. Forrest on September 22, 2017:

  *The form, content, and method of dissemination of the Class Notice given to Settlement Class Members - as previously approved by the Court in its Preliminary Approval Order – were adequate and reasonable, constituted the best notice practicable under the circumstances, and satisfied the requirements of Rule 23 (c) and (e) and Due Process.*

- ***In re: Sony PS3 "Other OS" Litigation,*** 4:10-cv-01811 (N.D. Cal.), Judge Yvonne Gonzalez Rogers on June 8, 2018:

  *The Court finds that the program for disseminating notice to the Class provided for in the Settlement, and previously approved and directed by the Court (the "Notice Program"), has been implemented by the Settlement Administrator and the Parties, and that such Notice Program, including the approved forms of notice, constitutes the best notice practicable under the circumstances and fully satisfied due process, the requirements of Rule 23 of the Federal Rules of Civil Procedure and all other applicable laws.*

- ***In re: Ductile Iron Pipe Fittings ("DIPF") Indirect Purchaser Antitrust Litigation,*** 3:12-cv-00169 (D.N.J.), Judge Anne E. Thompson on June 8, 2016:

  *Notice of the Settlement Agreements to the Settlement Classes required by Rule 23(e) of the Federal Rules of Civil Procedure, including the additional forms of notice as approved by the Court, has been provided in accordance with the Court's orders granting preliminary approval of these Settlements and notice of the Settlements, and such Notice has been given in an adequate and sufficient manner; constitutes the best notice practicable under the circumstances; and satisfies Federal Rules of Civil Procedure 23(c)(2)(B) and due process.*

## LEGAL NOTICE CASES

| Case Caption | Docket Number | Court |
|---|---|---|
| *Rivera, et al. v. Google LLC* | 19-CH-00990 | Ill. Cir. Ct. Cook Cnty. |
| *Hezi v Celsius Holdings, Inc* | 1:21-cv-09892 | S.D.N.Y. |
| *Quackenbush, et al. v American Honda Motor Company, Inc. et al.* | 3:20-cv-05599 | N.D. Cal. |
| *Sanders, et al. v. Ibex Global Solutions, Inc., et al.* | 1:22-cv-00591 | D.D.C. |
| *In re: Cathode Ray Tube (CRT) Antitrust Litigation* | 4:07-cv-05944 | N.D. Cal. |
| *John Doe et al. v. Katherine Shaw Bethea Hospital and KSB Medical Group, Inc.* | 2021L00026 | Fifteenth Judicial Circuit of Illinois, Lee County |
| *Gonshorowski v. Spencer Gifts, LLC* | ATL-L-000311-22 | N.J. Super. Ct. |
| *Stewart et al. v. Albertsons Cos., Inc.* | 16CV15125 | Mult. Cty. Cir. Ct. |
| *Simmons v. Assistcare Home Health Services, LLC, d/b/a Preferred Home Health Care of New York/Preferred Gold* | 511490/2021 | Kings Co. Sup. Ct., 2d Jud. Dist. |
| *Terry Fabricant v. Top Flite Financial, Inc.* | 20STCV13837 | Cal. Super. |
| *Riley v. Centerstone of America* | 3:22-cv-00662 | M.D. Tenn. |
| *Bae v. Pacific City Bank* | 21STCV45922 | Cal. Super. |
| *Tucker v. Marietta Area Health Care Inc.* | 2:22-cv-00184 | S.D. Ohio |
| *Acaley v. Vimeo.com, Inc* | 19-CH-10873 | Ill. Cir. Ct. Cook Cnty. |
| *Easter v Sound Generations* | 21-2-16953-4 | Wash. Super. |
| *GPM v City of Los Angeles* | 21STCV11054 | Cal. Super. |
| *Pagan v. Faneuil, Inc* | 3:22-cv-297 | E.D. Va. |
| *Estes v. Dean innovations, Inc.* | 20-CV-22946 | Mult. Cty. Cir. Ct. |
| *Buck, et al. v. Northwest Commercial Real Estate Investments, LLC, et al.* | 21-2-03929-1 | Wash. Super. |
| *Gilmore, et al. v. Monsanto Company, et al.* | 3:21-cv-8159 | N.D. Cal. |
| *Copley v. Bactolac Pharmaceutical, Inc. et al.* | 2:18-cv-00575 | E.D.N.Y. |
| *James v. CohnReznick LLP* | 1:21-cv-06544 | S.D.N.Y. |
| *Doe v. Virginia Mason* | 19-2-26674-1 | Wash. Super. |
| *LaPrairie v. Presidio, Inc., et al.* | 1:21-cv-08795 | S.D.N.Y. |
| *Richardson v. Overlake Hospital Medical Center et al.* | 20-2-07460-8 | Wash. Super. |
| *Weidman, et al. v. Ford Motor Company* | 2:18-cv-12719 | E.D. Mich. |
| *Siqueiros et al. v. General Motors, LLC* | 3:16-cv-07244 | N.D. Cal. |
| *Vaccaro v. Delta Drugs, II. Inc.* | 20STCV28871 | Cal. Super. |
| *Hosch v. Drybar Holdings LLC* | 2021-CH-01976 | Ill. Cir. Ct. Cook Cnty. |
| *Davidson v. Healthgrades Operating Company, Inc.* | 21-cv-01250 | D. Colo. |
| *Baldwin et al. v. National Western Life Insurance Co.* | 2:21-cv-04066 | W.D. Mo. |
| *Deien v. Seattle City Light* | 19-2-21999-8 | Wash. Super. |
| *Blake Chapman et al. v. voestalpine Texas, LLC, et al.* | 2:17-cv-00174 | S.D. Tex. |

| Case Caption | Docket Number | Court |
|---|---|---|
| *Hanson v. Welch Foods Inc.* | 3:20-cv-02011 | N.D. Cal. |
| *McMorrow v. Mondelez International, Inc.* | 3:17-cv-02327 | S.D. Cal. |
| *Hadley, et al. v. Kellogg Sales Company* | 5:16-cv-04955 | N.D. Cal. |
| *Miracle-Pond, et al. v. Shutterfly, Inc.* | 16-cv-10984 | Cir. Ct. Cook Cnty. |
| *In Re: Sonic Corp. Customer Data Breach Litigation* | 1:17-md-02807 | N.D. Ohio |
| *In re: Interior Molded Doors Indirect Purchaser Antitrust Litigation* | 3:18-cv-00850 | E.D. Va. |
| *Krommenhock, et al. v. Post Foods, LLC* | 3:16-cv-04958 | N.D. Cal. |
| *Daley, et al. v. Greystar Management Services LP, et al.* | 2:18-cv-00381 | E.D. Wash. |
| *Brianna Morris v. FPI Management Inc.* | 2:19-cv-0128 | E.D. Wash. |
| *Kirilose Mansour v. Bumble Trading Inc.* | RIC1810011 | Cal. Super. |
| *Clopp et. al. v. Pacific Market Research, LLC et. al.* | 21-2-08738-4 | Wash. Super. |
| *Lisa T. Leblanc, et al. v. Texas Brine Company, LLC, et al.* | 12-2059 | E.D. La. |
| *Jackson-Battle v. Navicent Health, Inc.* | 2020-cv-072287 | Ga Super. |
| *Richardson v. Overlake Hospital Medical Center et al.* | 20-2-07460-8 | Wash. Super. |
| *Fabricant v. Amerisave Mortgage Corp* | 2:19-cv-04659 | C.D. Cal. |
| *Jammeh v. HNN Assoc.* | 2:19-cv-00620 | W.D. Wash. |
| *Farruggio, et al. v. 918 James Receiver, LLC et al.* | 3831/2017 | N.Y. Sup Ct |
| *Winters, et al. v. Two Towns Ciderhouse Inc.* | 3:20-cv-00468 | S.D. Cal. |
| *Siddle, et al. v. The Duracell Company, et al.* | 4:19-cv-00568 | N.D. Cal. |
| *Lisa Jones et al. v. Monsanto Company* | 4:19-cv-00102 | W.D. Mo. |
| *Makaron v. Enagic USA, Inc.* | 2:15-cv-05145 | C.D. Cal. |
| *John Karpilovsky, et al. v. All Web Leads, Inc.* | 1:17-cv-01307 | N.D. Ill. |
| *Hughes et al. v. AutoZone Parts Inc. et al.* | BC631080 | Cal. Super. |
| *Kimberly Miller, et al. v. P.S.C., Inc. d/b/a Puget Sound Collections* | 3:17-cv-0586 | W.D. Wash. |
| *Aaron Van Fleet, et al. v. Trion Worlds Inc.* | 535340 | Cal. Super. |
| *Wilmington Trust TCPA (Snyder, et al. v. U.S. Bank, N.A., et al.)* | 1:16-cv-11675 | N.D. Ill. |
| *Deutsche Bank National Trust TCPA (Snyder, et al. v. U.S. Bank, N.A., et al.)* | 1:16-cv-11675 | N.D. Ill. |
| *Adriana Garcia, et al. v. Sun West Mortgage Company, Inc.* | BC652939 | Cal. Super. |
| *Cajuns for Clean Water, LLC, et al. v. Cecilia Water Corporation, et al.* | 82253 | La. Dist. |
| *In re: Sony PS3 "Other OS" Litigation* | 4:10-cv-01811 | N.D. Cal. |
| *In re: Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litigation* | 3:12-cv-00169 | D.N.J. |
| *In re: Ductile Iron Pipe Fittings Direct Purchaser Antitrust Litigation* | 3:12-cv-00711 | D.N.J. |
| *Hartig Drug Company Inc., v. Senju Pharmaceutical et. al.* | 1:14-cv-00719 | D. Del. |
| *Gordon v. The Hain Celestial Group, et al.* | 1:16-cv-06526 | S.D.N.Y. |
| *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico – Economic and Property Damages Settlement (MDL 2179)* | 2:10-md-02179 | E.D. La. |

| Case Caption | Docket Number | Court |
|---|---|---|
| *In re: Google Inc. Cookie Placement Consumer Privacy Litigation (MDL 2358)* | 1:12-md-02358 | D. Del. |
| *In re: Pool Products Distribution Market Antitrust Litigation (MDL 2328)* | 2:12-md-02328 | E.D. La. |
| *In re: Polyurethane Foam Antitrust Litigation (MDL 2196)* | 1:10-md-2196 | N.D. Ohio |
| *In re: Processed Egg Products Antitrust Litigation (MDL 2002)* | 2:08-md-02002 | E.D. Pa. |
| *In re: The Flintkote Company and Flintkote Mines Limited* | 1:04-bk-11300 | Bankr. D. Del. |
| *In re: Prograf (Tacrolimus) Antitrust Litigation (MDL 2242)* | 1:11-cv-02242 | D. Mass. |
| *Markos v. Wells Fargo Bank, N.A.* | 1:15-cv-01156 | N.D. Ga. |
| *Cross v. Wells Fargo Bank, N.A.* | 1:15-cv-01270 | N.D. Ga. |
| *Ferrick v. Spotify USA Inc.* | 1:16-cv-08412 | S.D.N.Y. |
| *In re: Parmalat Securities Litigation (MDL 1653)* | 1:04-md-01653 | S.D.N.Y. |
| *Smith v. Floor and Décor Outlets of America, Inc.* | 1:15-cv-04316 | N.D. Ga. |
| *Schwartz v. Intimacy in New York, LLC* | 1:13-cv-05735 | S.D.N.Y. |
| *In re: TRS Recovery Services, Inc., Fair Debt Collection Practices Act Litigation (MDL 2426)* | 2:13-md-02426 | D. Me. |
| *Young v. Wells Fargo & Co* | 4:08-cv-00507 | S.D. Iowa |
| *In re: Credit Default Swaps Antitrust Litigation (MDL 2476)* | 1:13-md-02476 | S.D.N.Y. |
| *Anthony Frank Lasseter et. al. v. Rite-Aid* | 09-cv-2013-900031 | Ala. Cir. Ct. |
| *Khoday v. Symantec Corp.* | 0:11-cv-00180 | D. Minn. |
| *MacKinnon, Jr v. IMVU* | 1-11-cv-193767 | Cal. Super. |
| *Ebarle et al. v. LifeLock, Inc.* | 3:15-cv-00258 | N.D. Cal. |
| *Sanchez v. Kambousi Restaurant Partners ("Royal Coach Diner")* | 1:15-cv-05880 | S.D.N.Y. |
| *Schwartz v. Avis Rent A Car System* | 2:11-cv-04052 | D.N.J. |
| *Klein v. Budget Rent A Car System* | 2:12-cv-07300 | D.N.J. |
| *Pietrantonio v. Kmart Corporation* | 15-5292 | Mass. Cmmw. |
| *Cox et al. v. Community Loans of America, Inc., et al.* | 4:11-cv-00177 | M.D. Ga. |
| *Vodenichar et al. v. Halcón Energy Properties, Inc. et al.* | 2013-512 | Pa. Com. Pleas |
| *State of Oregon, ex. rel. Ellen F. Rosenblum, Attorney General v. AU Optronics Corporation, et al.* | 1208 10246 | Or. Cir. |
| *Barr v. The Harvard Drug Group, LLC, d/b/a Expert-Med* | 0:13-cv-62019 | S.D. Fla. |
| *Splater et al. v. Thermal Ease Hydronic Systems, Inc. et al.* | 03-2-33553-3 | Wash. Super. |
| *Phillips v. Bank of America* | 15-cv-00598 | Cal. Super. |
| *Ziwczyn v. Regions Bank and American Security Insurance Co.* | 1:15-cv-24558 | S.D. Fla |
| *Dorado vs. Bank of America, N.A.* | 1:16-cv-21147 | S.D. Fla |
| *Glass v. Black Warrior Electric* | cv-2014-900163 | Ala. Cir. |
| *Beck v. Harbor Freight Tools USA, Inc.* | 15-cv-00598 | Ohio Com. Pleas |
| *Ligon v. City of New York, et al.* | 12-cv-2274 | S.D.N.Y. |

| Case Caption | Docket Number | Court |
|---|---|---|
| *Abdellahi, et al., vs. River Metals Recycling, LLC* | 13-CI00095 | Ky. Cir. |
| *Alegre v. XPO Last Mile, Inc.* | 2:15-cv-02342 | D.N.J. |
| *Jack Leach et al. v. E.I. du Pont de Nemours and Co.* | 01-C-608 | W. Va. Cir. |
| *Hayes , et al. v. Citizens Financial Group Inc., et al.* | 1:16-cv-10671 | D. Mass. |
| *In re: Foreign Exchange Benchmark Rates Antitrust Litigation* | 1:13-cv-07789 | S.D.N.Y. |
| *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* | 2:13-cv-05693 | C.D. Cal. |
| *Cozzitorto vs. American Automobile Association of Northern California, Nevada & Utah* | C13-02656 | Cal. Super. |
| *Filannino-Restifo, et al. v. TD Bank, N.A.* | 0:18-cv-01159 | D.N.J. |
| *United States v. Takata Corporation* | 2:16-cv-20810 | E.D. Mich. |
| *Free Range Content, Inc. v. Google Inc.* | 5:14-cv-02329 | N.D. Cal. |
| *Bautista v. Valero Marketing and Supply Company* | 3:15-cv-05557 | N.D. Cal. |
| *Devin Forbes and Steve Lagace -and- Toyota Canada Inc.* | cv-16-70667 | Ont. Super. Ct. |
| *Thierry Muraton -and- Toyota Canada Inc.* | 500-06-000825-162 | Que. Super. Ct. |
| *In re: Residential Schools Class Action Litigation* | 00-cv-192059 | Ont. Super. Ct. |
| *In re: Tricor Antitrust Litigation* | 05-340 | D. Del. |
| *Masztal v. City of Miami* | 3D06-1259 | Fla. Dist. App. |
| *In re: Tribune Company, et al.* | 08-13141 | D. Del. |
| *Marian Perez v. Tween Brands Inc.* | 14-cv-001119 | Ohio Com. Pleas |
| *Ferguson v. Safeco* | DV 04-628B | Mont. Dist. |
| *Williams v. Duke Energy* | 1:08-cv-00046 | S.D. Ohio |
| *Boone v. City of Philadelphia* | 2:05-cv-01851 | E.D. Pa. |
| *In re: Lehman Brothers Inc.* | 08-13555, 08-01420 | Bankr. S.D.N.Y. |
| *In re: Department of Veterans Affairs (VA) Data Theft Litigation (MDL No. 1796)* | 1:06-md-00506 | D.D.C. |
| *In re: Countrywide Customer Data Breach Litigation (MDL No. 1998)* | 3:08-md-01998 | W.D. Ky. |
| *In re: Checking Account Overdraft Litigation (MDL No. 2036)* | 1:09-md-02036 | S.D. Fla. |
| *In re: Heartland Data Security Breach Litigation (MDL No. 2046)* | 4:09-md-02046 | S.D. Tex. |
| *Schulte v. Fifth Third Bank* | 1:09-cv-06655 | N.D. Ill. |
| *Mathena v. Webster Bank, N.A.* | 3:10-cv-01448 | D. Conn. |
| *Delandro v. County of Allegheny* | 2:06-cv-00927 | W.D. Pa. |
| *Trombley v. National City Bank* | 1:10-cv-00232 | D.D.C. |
| *Fontaine v. Attorney General of Canada* | 00-cv-192059 CP | Ont. Super. Ct. |
| *Marolda v. Symantec Corp.* | 3:08-cv-05701 | N.D. Cal. |