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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**SOUTHERN DIVISION**

Jacob Petersen, *et al*., individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

Costco Wholesale Co., Inc. a Washington corporation doing business in California, Townsend Farms, Inc., an Oregon corporation doing business in California, Fallon Trading Co., Inc., a Pennsylvania corporation doing business in California, and United Juice Corp., a New Jersey corporation doing business in California,,

Defendants.

Case No. 8:13-cv-01292 DOC (JCGx)

Assigned To: Hon. David O. Carter – Dept. 9D

**PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR THE PRELIMINARY APPROVAL OF CLASS-ACTION SETTLEMENT AND NOTICE OF SETTLEMENT TO CLASS MEMBERS**

Hearing: November 25, 2019 at 8:30 AM

Trial Date: None

## NOTICE OF MOTION

TO THE DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on November 25, 2019 at 8:30 a.m., or what other time as the Court subsequently orders, counsel for the above-captioned parties are to be heard by the Court, where located at 411 West Fourth Street, Santa Ana, California 92701, in the courtroom of Judge David O. Carter. Accordingly, the Plaintiff, by and

through his counsel of record, will and hereby move the Court to grant this Motion for the Preliminary Approval of Class Action Settlement and Notice of Settlement to Class Members, doing so pursuant to Federal Rule of Civil Procedure 23(e), and requesting that the Court preliminarily approve the proposed settlement as being fair, adequate, and reasonable, and the notice of settlement to class members, and plan for notice, as reasonable and sufficient.

This Motion is made following the parties' agreement on a settlement as originally set forth in the parties' Joint Report, Dkt. 398. After the setlment was reached and its principal terms memorialized in a term-sheet, see Joint Report, Dkt. 398, Exhibit A, a Settlement Agreement—included as Exhibit A in the Appendix to the Memorandum accompanying this filing—was finalized and agreed upon by the Settling Parties.

This Motion is based on the Supporting Memorandum filed simultaneously with the Motion, as well the documents included in its Appendix, the Declarations of William Marler, Class Counsel, and Jacob Petersen, Plaintiff and Class Representative, along with any arguments of counsel that may be made at the hearing.

## RELIEF REQUESTED

The plaintiff respectfully requests that the Court issue an Order preliminarily approving the settlement as fair, adequate, and reasonable, and to approve the notice of settlement to class members as reasonable and sufficient. The settlement was reached through years of litigation, arms-length negotiations, and multiple Court-ordered mediations, is supported by both class counsel and the class representative, and the settlement amount is justified due to the significant risk, expense, and complexity imposed by continued litigation.

The plaintiff also respectfully requests that the Court issue and Order approving the proposed notice of settlement as reasonable and sufficient. The proposed notice is the best practicable under the circumstances as it will be provided in substantially the same manner as the opt-out notices previously approved by the Court. See Order, Dkt.

295. Notice will involve mailed postcards directing class members to a website where an online questionnaire will be used to determine if a claimant meets the requirements of the settlement or, in the alternative, allow a claimant the opportunity to object to the terms of the settlement or to request to be excluded from settlement.

**MOTION**

Now, therefore, the plaintiffs move the Court to issue an Order preliminarily approving the class-action settlement and notice of settlement to class members.

Dated: October 28, 2019

Respectfully submitted,

MARLER CLARK, LLP, PS

By: /s/William D. Marler
William D. Marler, admitted *pro hac vice*
Denis W. Stearns, admitted *pro hac vice*
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of October 2019, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office using the Court's CM/ECF System for filing and transmittal of a Notice of Electronic Filing, thereby serving all counsel of record in this matter.

By: /s/ Debbie Stanley

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Defendants.

Case No. 8:13-cv-01292 DOC (JCGx)

Assigned To: Hon. David O. Carter – Dept. 9D

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS-ACTION SETTLEMENT AND NOTICE OF SETTLEMENT TO CLASS MEMBERS**

Motion-Hearing Date and Time:
November 25, 2019 at 8:30 AM

Trial Date: None

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**



**Other Authorities**

## I. INTRODUCTION AND RELIEF REQUESTED

In response to the Scheduling Order that had vacated the trial date, Dkt. 397, after the Notice of Settlement had been filed, Dkt. 396, the Plaintiff Jacob Petersen, along with Defendants Costco Wholesale Corporation, Townsend Farms, Inc., and Fallon Trading Company ("TFI Defendants"), filed a Joint Report that "set forth the principle terms of the settlement, as well as advising the Court in more detail of the additional steps to be imminently completed" before the motion for preliminary approval of the settlement was to be filed. Joint Report, Dkt. 398, at 2/2-4. The Court then granted the Settling Parties until November 30, 2018 to either file a "motion for settlement approval or status report regarding status of the settlement approval." Scheduling Notice, Dkt. 399.

With the additional needed-steps having been accomplished, the Plaintiff now files this Memorandum in Support of the Motion for Preliminary Approval of a Class Action Settlement, also seeking the Court's approval of the plan for notice of settlement to class members, and the plan for claims-administration, including the rights of class member to seek exclusion from the settlement or to object. As such, the Plaintiff hereby respectfully requests that the Court preliminarily approve the settlement as being fair, adequate and reasonable, and the notice of settlement to class members as reasonable and sufficient.

## II. PROCEDURAL HISTORY

A lengthy procedural history has brought the parties to the present point. A review of this history is justified because it shows that the proposed settlement is the end-result of a hard-fought battle that, but for settlement, would have continued for a lot longer, at great expense, and with great uncertainty of likely outcomes for all involved.

The Plaintiff commenced this action in Orange County Superior Court on June 3, 2013; however, the defendant Purely Pomegranate removed the action to this Court on August 22, 2013. Notice of Removal, Dkt. 1. After the Court granted leave

to amend, the Plaintiff filed a Second Amended Complaint that added class representatives and related allegations for Arizona, Colorado, Hawaii, Idaho, Nevada, New Mexico, Oregon, and Washington. See Order, Dkt. 17. The deadline for responding to pleadings was extended more than once, including "in light of a mediation scheduled for late February," Dkt. 29, and pending the ruling on a Motion to Stay the Case pending a Motion to Transfer the actions into multi-district litigation. See Dkt. 32, 34, 36. After a Scheduling Conference, the Court ordered that the Motion for Class Certification be filed by December 15, 2014, and set the trial date for October 6, 2015. See Scheduling Conference Minutes, Dkt. 41.

At the request of the Plaintiff, which was unopposed, on June 12, 2014, the Court ordered the parties "to engage in a mediation session ... on or before July 21, 2014." Dkt. 47. Soon after the Court's order to mediation, the Defendant Purely Pomegranate filed a Motion to Strike Class Allegations, Dkt. 48, along with a Motion to Dismiss for Lack of Standing and For Failure to State a Claim, Dkt. 49. After taking them under advisement, Dkt. 65, the Court subsequently ruled on the Motions, Dkt. 70, resulting in the filing of the Third Amended Complaint, Dkt. 71, on September 4, 2014. Not giving up its right, the Defendant Purely Pomegranate then moved to dismiss with prejudice to the claims of Colorado and Idaho claimants. See Motion to Dismiss, Dkt. 82. After briefing was done, the Motion to Dismiss was denied without oral argument. See Order, Dkt. 90.

On October 21, the Court issued an Order to Show Cause Why Cases Should Not Be Consolidated, Dkt. 86, the effect of which would be to bring before the Court both the pending shot-pain class actions and the individual-infection actions.[1] Attendance at a mandatory settlement conference was also ordered, first for a conference set to occur on December 12, 2014, Dkt. 95, and then February 12, 2015,

[1] The consolidation was eventually put into full effect the following year, mostly relating to actions on behalf of persons alleging injury from Hepatitis A infection. See Minutes of Status Conference, Dkt. 150. Eventually, all individual-infection actions were settled and dismissed.

Dkt. 102. Neither one of these conferences resulted in the settlement of any class claims, and thus the litigation related to the class action claims continued, albeit soon without Purely Pomegranate, after there was a stipulation to dismissal at a Scheduling/Status Conference on March 11, 2015. The dismissal was formalized when Court granted Plaintiffs' Unopposed Motion to Dismiss Purely Pomegranate Without Prejudice. See Motion and Order, Dkt. 118, 119.[2]

The Plaintiffs filed their Motion for Class Certification, along with a Memorandum and Declarations in Support, on July 27, 2015. See Dkt. 133-147. The opposition and reply pleadings followed, Dkt. 158-161, with the motion subsequently set for hearing on October 26, 2015. After the hearing, the Court issued an order that sought additional briefing. See Minutes and Minutes Order, Dkt. 168, 169. The Plaintiffs filed their additional briefing on November 3, and the TFI Defendants and United Juice filed their respective briefing a week later, on November 10. See Supplemental Briefing, Dkt. 173, 17 4, 17 5. The Court issued its order granting the Motion for Class Certification on January 25, 2016, "insofar as it seeks to certify nine single-state subclasses for purposes of determining liability." See Order RE: Class Certification, Dkt. 181, at 27/4-5.

After the certification issue had been had been decided, the discovery that was still to be done was addressed, including depositions of the class representatives that occurred over a two-week period. The Plaintiff Jacob Petersen was deposed on July 16, 2016.

The Plaintiffs filed a Motion for Court-Approval of the Plan for Notice and Form of Notice, Dkt. 208, on September 21, 2016, with a hearing-date set for October 17. The Court granted the Motion and approved the notice-plan and notice form without hearing on October 7. See Order, Dkt. 212. On this same day, the TFI Defendants filed a motion for de-certification, Dkt. 210, which was soon joined by the

[2] The Defendant Townsend Farms dismissed its third-party claims against Purely Pomegranate on August 26, 2016. See Notice of Dismissal, Dkt. 155.

Defendant United Juice, Dkt. 213. The Plaintiffs filed their opposition to de-certification ten-days later, Dkt. 216, with the TFI Defendants' reply filed seven days later on October 24, Dkt. 221. This same day, the TFI Defendants filed a Motion for Summary Judgment, Dkt. 222, which was stricken as untimely. See Order, Dkt. 225.[3]

After hearing argument of all parties on November 7, the Court issued the Order three days later conditionally denying the Motion to Decertify the Class. See Order, Dkt. 235. The TFI Defendants were also allowed to refile the Motion for Summary Judgment, which occurred on November 21, 2016. The opposition and reply briefing was finished on December 9, with the Court granting leave to file a brief exceeding 25-page limit, and filing of the Plaintiffs' Amended Memorandum in Opposition to the Defendants' Motion for Summary Judgment. See Dkt. 248,249,250. (The TFI Defendants' Reply in Support had been filed on December 1, which is also when the Fourth Amended Complaint had been filed. See Dkt. 241, 242.) The hearing on the summary judgment motion was set for January 10, 2017. See Scheduling Notice, Dkt. 256. The hearing on the still-pending motion to approve class notice was also rescheduled to this same day.

After hearing argument as previously scheduled, on January 17, 2017, the Court granted the Motion for Summary Judgment "as to any claims of emotional distress due to fear of disease," but otherwise denied the Motion. See Order, Dkt. 266, at 16/11-12 and *passim*. The Final Pretrial Conference was then set for August 14, 2017, with the jury trial set to begin on October 16, 2017. See Minute Order, Dkt. 269. Thus, at this point, the parties proceeded to prepare for trial, with Rule 16 pretrial submissions starting with the filing of Memoranda of Contentions of Fact and Law, Dkt. 283, 284, 286, Witness Lists, Dkt. 285,287,288, and Joint Exhibit List, Dkt. 289. A great many Motions *in Limine* followed on August 3, Dkt. 296-300, 301, with the Opposition Memoranda and Joinders filed on August 7, Dkt. 303-311, followed by the

[3] An Ex Parte Application for Reconsideration was also denied. Dkt. 229.

lodging of the proposed Final Pretrial Conference Order, Dkt. 301. And although a hearing was held on August 14, the result was the Court's decision that the parties were to propose a new trial date, Dkt. 316.

As ordered, the joint request for a new trial date was filed by August 17, Dkt. 317. The Court then set April 3, 2018 as the new trial date, stating that "the parties seemingly agreed California would be the lead-off case for a non-bifurcated liability and damages trial." See Order, Dkt. 319. Nonetheless, the Court also stated its willingness to "consider a motion to join cases from California, Washington, and Hawaii into a single trial. Id. The Plaintiffs did not file this motion, choosing to proceed first on the California claims.

On December 1, 2017, the TFI Defendants filed a Motion to Dismiss Nonresident Subclasses for Lack of Personal Jurisdiction, Dkt. 325, seeking to dismiss all state claims except those on behalf of California claimants, including the Plaintiff Jacob Petersen. The Plaintiffs filed their Opposition on December 18, Dkt. 327, and the TFI Defendants filed a Reply on December 22, Dkt. 330. Finding the "matter appropriate for decision without oral argument," the Court struck the hearing date and took the motion under submission. Dkt. 331. The Plaintiffs then sought approval of amended notices to class members, and a new trial date to accommodate the need for a sufficient opt-out period for recipients of the notices. The Court issued an order of approval on January 24, Dkt. 336, and the new trial date was now set for July 10, 2018. A report on opt-out requests and other details of the notice provided to class members was lodged with the Court on April 25, 2018, Dkt. 351. By the agreement of the parties, that report was supplemented on May 2, 2018 to include additional information about the break-down by state of individuals who had registered as class members, the total being 1,803 individuals, with 1,065 of those being from California. See Supplemental Declaration, ¶ 6, at 3, and Exhibit C, Dkt. 352.

As the pretrial preparations began for a second time in earnest, on May 21, 2018, TFI Defendants filed a Motion to Compel Trial Plan, Reopen Discovery and

Continue Pretrial and Trial Dates. Dkt. 353. In response, the Plaintiffs filed an *Ex Parte* Application Compelling the Defendants to Cooperate in Good Faith in the Preparation of the Final Pretrial Conference Order. Dkt. 355. Despite the back and forth of the competing filings, in the several weeks that followed, Rule 16 Pretrial Submissions did end up getting filed for a second time, including Memoranda of Contentions of Fact and Law, Dkt. 362, 365, proposed Final Pretrial Conference Order, Dkt 375, and both new and amended Motions *in Limine*, Dkt. 373-378. The Final Pretrial Conference also occurred on June 25, 2018, with no rulings made on any pending matters, other than the Court's instruction that the trial was going to proceed on July 10, 2018.[4] The trial date was soon changed, however, to July 23, 2018. See Scheduling Notice, Dkt. 380.

On the day that the final pretrial submissions were due to be filed, the Parties filed a Joint Stipulation seeking to continue the pretrial deadlines and trial date in light of the continued progress of settlement negotiations. (For more on this, see Joint Report, Dkt. 398, Section II.C.) The mediation that was hopefully to finalize negotiations could not be scheduled any earlier than October 10, which left the Parties in disagreement on whether amended or new pretrial submissions could be filed (the position of the TFI Defendants), versus whether only those submissions that had not yet been filed remained due, *i.e.*, ones that had been due seven days prior to the previous October 23 trial date (the position of the Plaintiff).[5] Meanwhile, TFI Defendants continued to vigorously contest all issues and asserted new arguments in a Memorandum of Contentions of Fact and Law, Dkt. 389.

It was against this backdrop, at the precipice of trial, that continued negotiations

[4] The Court also kept under submission TFI Defendants' Motion to Dismiss non-California subclasses given that it did not implicate the California claims proceeding to trial, thus meaning that a ruling on the Motion could wait.

[5] The competing contentions can be surmised from the TFI Defendants' Ex Parte Application to File a New Joint Exhibit List, Dkt. 390, and the Plaintiff's Opposition to the same, Dkt. 391. The Plaintiff did not file a new Memorandum or Witness List.

got a toehold. Seeking to capitalize on the progress being made, the parties sought and obtained another extension of the trial date. See Joint Stipulation to Continue All Pretrial Deadlines, Dkt. 382, and Order Extending Trial Date, Dkt. 383. And as set forth in the Joint Report, Dkt. 398, the negotiations ultimately achieved a settlement.

## III. THE AGREED DEFINITION OF THE SETTLEMENT CLASS AND REQUIREMENTS FOR PARTICIPATING IN THE PROPOSED SETTLEMENT.

After settlement was reached, and its principle terms memorialized in a term-sheet, see Joint Report, Dkt. 398, Exhibit A, a Settlement Agreement was finalized and agreed upon by the Settling Parties.[6] What follows is a near-verbatim presentation of the major terms of the settlement as relating to the definition of the settlement class, requirements for participating in the proposed settlement, notice of settlement, claims administration, and the rights of class members to seek exclusion or object to the settlement.

A. The Agreed Upon Definition of the Settlement Class for California Claimants.

The proposed settlement involves the California subclass that the Court certified, but the Settlement Class is predictably narrower. The definition of the Settlement Class has two components that determine eligibility for Noneconomic Damages and eligibility for Economic Damages, with these components only partly overlapping. To be eligible at all, however, claimants must provide required information (as set forth in the following section) that shows purchase and consumption of Townsend Farms Antioxidant Blend ("Berry Mix") before obtaining a Hepatitis A vaccination or immune-globulin injection.

**Eligibility Requirements:** Individuals eligible to be part of the Settlement Class must provide a declaration under penalty of perjury that he or she: (a) received a Hepatitis A vaccination or an immune globulin injection between May 31 and June 13, 2013, and (b) was not immune to Hepatitis A on the date of consumption due

[6] For the Court's ease of reference and review, the Settlement Agreement has been included in an Appendix to this Memorandum as Exhibit A.

to an earlier Hepatitis A vaccination or infection.

**Settlement Class for Non-Economic Damages:** Whether an Eligible Claimant received a Hepatitis A vaccination at Costco or a Hepatitis A vaccination or immune globulin injection from a commercial entity or private medical provider, the Claimant would be eligible for Noneconomic Damages of $80.00 provided that he or she meets the following requirements:

1. **Proof of Purchase:** (a) If the Claimant purchased the Berry Mix under his or her Costco member number, the Claimant must provide his or her Costco member number; (b) if the Claimant did not purchase the Berry Mix under his or her Costco member number, the Claimant must provide: (D the Costco member-number for the purchaser of the Berry Mix consumed by the claimant; (ii) the name of the holder of that Costco member number; and (iii) a description of the location and manner of consumption in a declaration under the penalty of perjury.

2. **Proof of Vaccination or Immune Globulin Injection:** (a) If the Claimant received a Hepatitis A Vaccination free at Costco, the Claims Administrator will check the Claimant against the list of recipients and confirm the Claimant appears on the list of recipients; (b) if the Claimant received a Hepatitis A Vaccination or immunoglobulin injection from a commercial entity or private medical provider, the Claimant must provide documentary proof of the vaccination or injection.

**Settlement Class for Economic Damages:** If an Eligible Claimant received a hepatitis A vaccination or immune globulin injection from a commercial entity or private medical provider, the Claimant would be eligible for Economic Damages to reimburse for the actual cost of the Hepatitis A Vaccination or injection up to a maximum additional amount of **$120.00** provided he or she meets the following requirements:

1. **Proof of Actual Cost of Vaccination or Injection:** The Claimant must provide legible, documentary proof of the actual cost paid out of pocket by the Claimant for a Hepatitis A vaccination or immunoglobulin injection (not the total cost

of any visit, additional fees or amounts covered by insurance); and

**2. Proof of Vaccination or Injection Timeframe:** The Proof of Actual Cost of Vaccination or Injection reflects that the Claimant received a Hepatitis A vaccination or immunoglobulin injection between May 31 and June 6, 2013.

B. Claims Administration, Submission. and Related Settlement Terms.

**1. Appointment of Claims Administrator.** Lead Class Counsel will hire a firm to provide class notice and class administration. To do so, the Settling Parties will solicit bids from at least three qualifying firms and confer before selecting a firm. In the event of a dispute over which firm to hire, the firm with the lowest bid shall become the Claims Administrator. (The three bids have been obtained, and the Settling Parties are in the process of making a selection, which will occur shortly. The Settling Parties will file a supplemental report with the Court once the selection is made.)

**2. Duties of the Claims Administrator.** The Claims Administrator will handle the administration of the Settlement, as follows: The printing, handling, mailing and re-mailing, and administration of the Notice Website as required by the Notice of Settlement, including all related personnel and operating costs, and the processing of Claims, requests for exclusion and other documents submitted as well as the distribution of Settlement payments to Authorized Claimants.

After entry of the Preliminary Approval Order, Lead Class Counsel and the TFI Defendants will provide the Claims Administrator with the names and addresses of potential Settlement Class Members known to them (the "Class List"). The Claims Administrator shall then cause the Notice Postcard and Class Action Notice Claim Form ("Notice Package") to be sent by the United States Postal Service first-class mail, postage prepaid, to all potential Settlement Class Members whose name and address appear on the Class List directing them to the Notice Website. The Claims Administrator shall also establish a website where Claimants may submit a Claim

Form online. In doing so, the Claimant must swear under oath the Eligibility Requirements are met, and submit the Required Documentation to prove their entitlement to compensation, if any.

**3. Eligibility Time-Period.** All Claimants must submit the Claim Form and any documentation required to support a claim for Non-Economic Damages and/or Economic Damages within 21 days of receiving Notice, and in no case more than 30 days from the date of mailing of the Notice (the "Eligibility Period").

**4. Review of Submitted Claims.** The Claims Administrator shall receive Claims and review each Claimant's Claim Form and Required Documentation, if any, submitted to the Notice Website, and determine, first, whether the Claim is a valid Claim, in whole or in part, and second, the amount the Claimant is entitled to as compensation under the Settlement. Claim Forms that do not meet the Eligibility Requirements may be rejected, but prior to rejecting a Claim in whole or in part, the Claims Administrator shall communicate with the Claimant in writing, by mail, first class postage pre-paid, to give the Claimant the chance to remedy any curable deficiencies in the Claim Form submitted.

The Claims Administrator shall notify all claimants whose Claim the Claims Administrator proposes to reject in whole or in part, setting forth the reasons therefor, and shall indicate in such notice that the Claimant whose Claim is to be rejected has the right to a review. If any Claimant whose Claim has been rejected in whole or in part desires to contest such rejection, the Claimant must, within the timeframe set out in the Settlement Agreement, serve upon the Claims Administrator a notice and statement of reasons indicating the Claimant's grounds for contesting the rejection along with any supporting documentation and requesting a review thereof by the Court. If a dispute concerning a Claim cannot be otherwise resolved, Lead Class Counsel shall thereafter present the request for review to the Court.

Prior to the end of the Eligibility Period, the Claims Administrator shall provide Lead Class Counsel and TFI Defendants' Counsel with: (1) a list of Approved

Claimants; (2) corresponding Claim Forms and Required Documentation, if any; and (3) a corresponding calculation of the total settlement payment approved by the Claims Administrator for each Claimant.

**5. Settlement Objections and Requests for Exclusion.** Any Settlement Class Member shall have the option to request to be excluded from the Settlement on the Notice Website instead of submitting a Claim Form during the Eligibility Period. Settlement Class Members may also request to be excluded from the Settlement by mailing a request to the Claims Administrator during the Eligibility Period. Any potential Settlement Class Member who does not file a timely request for exclusion shall be bound by the Settlement Agreement and all subsequent proceedings, orders, and judgments in this litigation, even if that potential member of the Settlement Class subsequently initiates litigation against the TFI Defendants relating to any of the Released Claims.

Any Settlement Class Member who has not filed a request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of this Agreement or the proposed settlement must serve on Lead Class Counsel and on TFI Defendants' Counsel, and must file with the Court, according to the deadlines set forth in the Settlement Agreement, or as the Court may otherwise direct, a notice of intention to appear and/ or object, together with copies of any papers such Settlement Class Member intends to present to the Court in connection with such objection. Settlement Class Members may make such appearances or objections either on their own or through attorneys hired at their own expense. Any Settlement Class Member who does not appear individually or through counsel and/ or who does not challenge or comment upon the fairness and adequacy of this Agreement shall waive and forfeit any and all rights that she or he may have to appear separately and/ or object.

No Settling Party shall encourage any potential Settlement Class Member to file a request for exclusion or encourage or provide any material assistance for any potential Settlement Class Member to file an objection to this Settlement or to file any

other action, except as expressly provided herein.

C. Maximum Individual Relief, Administration Costs, and Other Fees.

**1. Total Damages and Cap on the Number of Eligible Claimants.** No Claimant is eligible to receive more than a total payment of **$200.00** under the Class Settlement, in accordance with the separate limits for the non-economic and economic damage components defined in Section III(A), above. The total number of Claimants eligible for the Class Settlement shall be capped at **3,000**.

**2. Claims Administration Costs.** The TFI Defendants shall be responsible for fees and charges owed to the Claims Administrator with respect to the administration of the Settlement, not to exceed **$150,000.00**. TFI Defendants shall not be responsible, and shall not pay, for any time or costs incurred by Settlement Class Members or their counsel with respect to the negotiation, implementation, or administration of the Settlement, or any costs incurred by any Settlement Class Member in connection with participating in the Settlement, except as provided in the Settlement Agreement.

**3. Additional Compensation for Class Representative.** In addition to payment according to the damage components outlined in Section III(A), the Class Representative will receive an additional **$2,500.00** in compensation.

**4. Attorneys' Fees.** Lead Class Counsel waives all attorneys' fees and costs, and will seek no reimbursement, fees, expenses, or costs from the class settlement, nor from the TFI Defendants.

## IV. THE APPROPRIATENESS OF CLASS TREATMENT HAS BEEN DECIDED, BUT IT REMAINS SUBJECT TO FURTHER DECERTIFICATION ATTEMPTS AND APPEAL.

Federal Rule of Civil Procedure 23(e) requires judicial approval of any compromise of claims brought on a class-wide basis. Fed. R. Civ. P. 23(e) ("Claims ... of a certified class may be settled ... only with the court's approval.").[7] "In

[7] Several amendments to the Federal Rules of Civil Procedure have been approved and go into effect on December 1, 2018, including amendments to Rule 23. Because this Motion is being filed prior to

deciding whether to approve a proposed settlement, the Ninth Circuit has a 'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."' *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *9 (C.D. Cal. June 10, 2005) (citation omitted); *see also Officers for Justice v. Civil Serv. Comm'n of the City and Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). "[f]here is an over-riding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also Browning v. Yahoo! Inc.*, 2007 U.S. Dist. LEXIS 86266, at *39 (N.D. Cal. Nov. 16, 2007) ("public and judicial policies strongly favor settlement of class action law suits").

Judicial settlement-approval has two stages: (i) ***preliminary approval***, followed by distribution of notice to the class, and (ii) ***final approval***. *Murrillo v. Pac. Gas & Elec. Co.*, 266 F.RD. 468, 473 (E.D. Cal. 2010) ("Procedurally, the approval of a class action settlement takes place in two stages."); *see also Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). "In the first stage of the approval process, the court preliminarily approve[s] the Settlement pending a fairness hearing, temporarily certifie[s] the Class ... , and authorize[s] notice to be given to the Class." Murillo, 266 F.R.D. at 473 (alterations in original, citation and internal quotations omitted).

At this initial preliminary approval stage, the "Court need only determine whether the proposed settlement appears on its face to be fair" and "falls within the range of possible approval." *Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 19674, at *15-16 (S.D. Cal. Mar. 4, 2010); *see also In re Wireless Facilities Inc. Sec. Litig. II*, 253 F.R.D. 607, 612 (S.D. Cal. 2008). In considering whether to grant preliminary approval of a proposed class action settlement, courts make a preliminary evaluation of the fairness of the settlement. At this stage, however, the

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the effective date of the amended rules, the pre-amendment rules apply to the Court's approval of the proposed settlement.

Court is not required to make a final determination as to whether the proposed settlement will ultimately be found to be fair, reasonable, and adequate. Rather, that evaluation is made only at the final approval stage, after notice of the proposed settlement has been given to the members of the class and class members have had an opportunity both to voice their views of the proposed settlement and to exclude themselves from the class. *See Williams* at *14-15 ("Given that some [] factors cannot be fully assessed until the Court conducts the Final Approval Hearing, 'a full fairness analysis is unnecessary at this stage.'").

By this motion, Lead Plaintiff requests only that the Court take the first step in the settlement review process - ***preliminary approval***. To this end:

> [T]he court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls with the range of possible approval.

*Spann v. J.C. Penney Corp.*, 314 F.R.D. 312,319 (C.D. Cal. 2016) (quotations omitted).

Where "the parties reach a settlement agreement **prior** to class certification, courts must peruse the proposed compromise to ratify **both** the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). But in cases like the present one, where the parties reach a settlement agreement **after** the certification decision has been made, the fairness of the settlement is the only issue that is before the Court, and there is no need to "pay 'undiluted, even heightened, attention' to class certification requirements ...." *Id.* at 952-53 (quoting *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, (1997)). Similarly, the agreement need not "withstand an even higher standard of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required" where the settlement is reached after, and not prior to, class certification. *Radcliffe v. Experian Info. Sols.*, 715 F.3d 1157, 1168 (9th Cir. 2013) (noting that

such scrutiny is only required when settlement "is negotiated prior to formal class certification"). Nonetheless, the evident intent and willingness of the TFI Defendants to contest all issues relating to certification should still be considered as relevant to other factors that the Court must consider in approving a post-certification settlement, like strength of the plaintiffs case, risk of maintaining class action status, and the expense and complexity of the case. *See Churchill Village, LLC v. General Electric*, 361 F.3d 556, 575 (9th Cir. 2004). Accordingly, it is these other factors that will now be addressed, thus showing the proposed Settlement is a fair result in light of the circumstances present in this action, eliminating the risk that the Class might otherwise recover nothing at all.

## V. THE PROPOSED SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE AND, THEREFORE, DESERVES THE COURT'S PRELIMINARY APPROVAL.

This Court helpfully set forth the factors governing preliminary approval of class settlements in *Ma v. Covidien Holding, Inc.*, No. SACV-12-02161-DOC, 2014 U.S. Dist. LEXIS 13296 (C.D. Cal. Jan. 31, 2014). In that Order granting preliminary approval of a class action settlement, the Court stated:

> To determine the preliminary fairness of an agreement, the Court balances "the strength of 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; [and] the presence of a governmental participant." *Staton*, 327 F.3d at 959 (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (2003)); see also *Ching [v. Siemens Indus.]*, 2013 U.S. Dist. LEXIS 169279, at *17[(N.D. Cal. Nov. 26, 2013)] (applying these factors to a preliminary approval of class settlement). Preliminary approval 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." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (citing MANUAL FOR COMPLEX LITIGATION, Second § 30.44 (1985)). The question for preliminary

> approval of a settlement is whether it is "within the range of reasonableness." *Ross v. Trex Co., Inc*., No. C 09-670, 2009 U.S. Dist. LEXIS 69633, at *9 (N.D. Cal. July 30, 2009).

*Ma*, 2014 U.S. Dist. LEXIS 13296 at *9-*10.

It must also be recalled that the Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Linnry v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (quotation omitted). As the Ninth Circuit has emphasized, quoting *Officers for Justice*, 688 F.2d 615, *supra*:

> "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation ...." *Id*. at 625. This policy is also evident in the Federal Rules of Civil Procedure and the Local Rules of the United States District Court, Central District of California, which encourage facilitating the settlement of cases. See FED. R. CIV. P. 16(a)(5) (one of the five purposes of a pretrial conference is to facilitate settlement); L.R. 16-2.9 (requiring parties to exhaust all possibilities of settlement); L.R. 16-15 to 15.9 (setting forth policies and procedures for settlement including encouraging disposition of civil litigation by settlement by any reasonable means).

*In re Syncor ERISA Litig*., 516 F.3d 1095, 1101 (9th Cir. 2008). For all of these reasons it has been more than once observed that a court's role is not to second-guess the terms of the agreement. Officers for Justice, 688 F.2d at 1026.

Because the terms of the settlement agreement that the parties have reached are are demonstrably "within the range of reasonableness, it is respectfully submitted that the preliminary approval of the proposed settlement is appropriate.

A. The Proposed Settlement is the Product of Serious, Informed, Non-Collusive Negotiations Conducted by Experienced Legal Counsel.

Given that the settlement now before the Court is the end result of over five years of hard-fought litigation, punctuated by multiple Court-ordered and other mediations, it seems impossible to deny that the negotiations that achieved this

settlement were serious and non-collusive. As was true in the settlement approved in *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1027 (9th Cir. 1998), "[t]here is no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiffs' claims." And although the relationship between legal counsel for the TFI Defendants and the Plaintiff has always been civil and professional, it has also been nothing if not arms-length. *See* Marler Decl., ¶ 12, at 9. Indeed, as lead counsel for the Plaintiff observed in explaining why the settlement obtained was the best possible under the circumstances, "it probably goes without saying that, by waiving attorney-fees and costs, there is nothing in the present settlement that seeks to benefit counsel for the plaintiff and class." *Id*.

Furthermore, these negotiations were at arms'-length and were facilitated through mediation before a highly-experienced and well-regarded mediator, Mr. Lindstrom. *See* Gregory P. Lindstrom, Esq. Profile, at http://www.phillipsadr.com/bios/gregory-lindstrom; *see also Khanna v. Intercon Sec. Sys. Inc.*, 2014 WL 1379861, at *9 (E.D. Cal. Apr. 8, 2014) ("That the settlement was reached during an outside mediation supports the conclusion that the settlement was not collusive."); *Villegas v. J.P. Morgan Chase & Co*., 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (finding assistance of an experienced mediator in the settlement process "tends to support the conclusion that the settlement process was not collusive").

Finally, in addition to the complete absence of any evidence of collusion, haste, or a lack of seriousness by the experienced legal counsel involved, there is the very late stage of the proceedings. This case has been on the brink of trial twice, with all of the in-depth preparation that trial requires. This also means that discovery was not simply done to a certain extent; it means that all discovery that was wanted or allowed has been done. As a result, it was surely impossible for there to be any more information available for counsel to evaluate all aspects of this case in deciding whether and for how much to settle. Thus, the present case is likely more the

exception than the rule when it comes to settlement of a class action lawsuit, coming as it does at the absolute latest possible opportunity. It is for these reasons, among others, that the settlement reached deserves the deference that is owed "to the private consensual decision of the parties." See Hanlon, 150 F.3d at 1027. Consequently, it is respectfully submitted that the settlement that the parties reached, and that is now proposed to the Court, is deserving of preliminary approval.

B. The Relative Strength of the Plaintiffs Case Derives from the Successes Already Achieved, None of Which Ensure a Positive Outcome at Trial or On Appeal.

In addition to the more general question of assessing the strength of the plaintiffs case, there is the more specific question that looks at the stage of the proceedings when the assessment is made. Where the litigation is not in its early stages, and discovery has been conducted, the fact that the "parties have sufficient information to make an informed decision about settlement," is a factor that weighs in favor of approving a settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (internal citation and quotation marks omitted). Thus, as already noted, the Court is justified in its acceptance that the experienced legal counsel involved in reaching the settlement in every way assessed the relative strengths and weaknesses of the Plaintiffs case. And although it is unquestionable that Plaintiffs counsel has achieved success in obtaining and defending certification, and successfully opposing summary judgment, none of these successes were sufficient assurances that more could be obtained through trial and appeals that could be obtained by way of this settlement. As the Plaintiffs lead counsel declared in explaining his support of this settlement:

> In weighing the decision to accept the settlement for which we are now seeking the Court's approval, a primary motivating factor was my conclusion that the TFI Defendants, with the strong and unstinting backing of its insurer, was willing to invest any amount in attorney-fees and litigation costs to fully defend against both liability and damages, including appealing any issue for which appeal was possible.

Marler Decl., ¶7, at 7. He further declared that: "Based on my experience, the settlement we obtained ...is the best that was, or ever would be, available from the TFI Defendants and its insurer." *Id.*, ¶9, at 8. Finally, Jacob Petersen, Plaintiff and class representative, has reviewed the settlement term-sheet and the final settlement agreement, and discussed both with class counsel. Based on his review and careful consideration, Mr. Petersen has states in his Declaration: "I not only think that the settlement that has been reached is reasonable, fair, and adequate, I fully support and agree to the settlement reached." *See* Petersen Declaration, ¶11, at 4. Accordingly, the settlement obtained has the support of both class counsel and the class representative.

C. The Risk, Expense, and Complexity of Continued Litigation is E specially Significant Given the ear Certainty of Appeal Regardless of Trial Outcome, and All of This Justifies the Amount of the Settlement That Was Accepted.

The terms of the proposed settlement make a maximum of $200 available for the eligible claimants, including $80 for non-economic damages (i.e., compensation for shotpain), and up to $120 for economic damages (*i.e.*, document out-of-pocket cost to obtain the shot). The per-claim amount is made available for up to 3,000 eligible claimants, and thus means, depending on eligible claims-made, the TFI Defendants have agreed to pay up to a total of $600,000 to settle the California subclass claims. The Plaintiff and Class-Representative Jacob Petersen incurred an out-of-pocket cost of $120 for his shot, which is an amount that likely represents the high-end of such costs, given that only the cost of the shot itself is being reimbursed as part of the settlement.

In looking at comparable settlements that have been obtained in Hepatitis A shot class-actions, the $200 total available-amount "is still equal to the amount that [Plaintiffs counsel] obtained in many prior cases. Marler Decl., ¶10, at 8.[8] Moreover, even though the $80 recovery for non-economic damages (shot-pain) is a relatively

[8] For details of prior settlement amounts, see Marler Declaration, ¶6, at 5-7.

lower amount as against the amount available for economic damages, the compensation for the pain that is associated with a single shot is difficult to difficult to assess, making it even more difficult to predict what a jury might award. There is also the risk that the Court's decision that shot-pain is a compensable injury would be subject to appeal, making the legal basis for this aspect of the award more uncertain still. Consequently, the amount of the settlement available per-claim ($200) is what deserves the greatest focus. And that per-claim amount is wholly in line with past settlements, and an accurate reflection of the legal risks, and the expense and complexity of continued litigation. The fact that TFI Defendants agreed to pay up to $150,000 toward the notice and claims-administration costs is also of great benefit to the Plaintiff and Settlement Class, further justifying the settlement amount.

D. The Additional Compensation-a Service Award-to the Plaintiff is Justified By the Significant Time and Effort He Has Invested on Behalf of the Class, and the Positive Outcome His Efforts Has Achieved.

The Plaintiff and Class-Representative, Jacob Petersen, has very capably served the interests of California subclass for over five years, investing significant time and effort in doing so. Petersen Decl., ¶4, at 2-3. Not only was he deposed, and assisted in responding to discovery, he made himself available for trial on more than one occasion, and assisted in all aspects of trial preparation-twice. *Id*. He was an active participant in all settlement negotiations, willing to allow the case to go to trial if that would obtain a better result for class members. *Id*., ¶5, at 3. Finally, he was closely involved in the lead-up preparation to the most recent mediation, and fully reviewed and approved the terms of the settlement on his own behalf and behalf of California subclass members. *Id*., ¶¶7-8, at 3-4.

Incentive or service awards are commonly found appropriate when evaluated using relevant factors including, specifically, an evaluation of:

> the actions that the plaintiff has taken to protect the interests of the class, the degree to which the class has been benefitted from those actions ....

> [and] the amount of time and effort the plaintiff expended in pursuing the litigation.

*Staton v. Boeing Co.*, 327 F.3d at 977 (quotation omitted). Based on these factors, courts in this Circuit have approved service awards of $5,000 for litigation that required much less time and effort. *See, e.g., McKenzie v. Federal Express*, 2012 U.S. Dist. LEXIS 103666, *32 (C.D. Dist. July 2, 2012) (approving award in employment action that lasted less than a year from the lawsuit being filed to preliminary approval of settlement agreement). Such awards are also most appropriate when, as in the present case, not conditioned on a class representative approving the settlement, and when the award does nothing to reduce the amounts available to the class. *Cf "Radcliffe*, 715 F.3d at 1163 (explaining careful scrutiny is required where award to class representative potentially creates a conflict of interest).

Because in the present case the $2,500 additional award is based solely on the work that the Plaintiff and class representative, Jacob Petersen, has done on behalf of the class, including the willingness to go to trial and the preparations needed for that, and because the award does not reduce the amount available to class members, the additional award to the Plaintiff is appropriate and deserves preliminary approval.

## VI. PROPOSED NOTICE OF SETTLEMENT IS REASONABLE AND SUFFICIENT.

In addition to determining the "preliminary fairness" of the settlement agreement, the Court must also consider the sufficiency of the notice-plan that the parties proposed. More specifically, the plan must provide for the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S. Ct. 2965 (1985). In addition, the content and method of the notice must advise class members of the settlement terms and of their rights. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652 (1950). Specifically, the notice is satisfactory if "it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Village, LLC*

*v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (citing *Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980)). Notice mailed to each member of a settlement class "who can be identified through reasonable effort" constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175, 94 S. Ct. 2140, (1973). Finally, even though members of the settlement class must be given the opportunity to object, there is no need for a second opt-out opportunity. *See Low v. Trump University*, 881 F.3d 1111 (9th Cir. 2017) (holding there is no due process right to a second opt-out opportunity for the class members who did not opt-out after received notice of trial). Nonetheless, all class members are still being given the opportunity to request exclusion from the settlement.

In the present case, the Court previously approved a plan for opt-out notices that involved the mailing of "short-form" postcard notices that directed class members to a website where the "long-form" notice could be found, along with additional information about the lawsuit and its claims, and a questionnaire to allow potential class members to determine if the requirements of class membership are met. See Order, Dkt. 295. After notice was mailed, the Plaintiff lodged a report on opt-out requests and other details of the notice provided to class members. See Notice of Lodging & Attached Report, Dkt. 351. A supplemental report was lodged a week later to provide the Court with additional information about the break-down by state of individuals who had registered as class members, the total being 1,803 individuals, with 1,065 of those being from California. See Supplemental Declaration, ¶6, at 3, and Exhibit C, Dkt. 352.

The Settling Parties propose that notice be provided in substantially the same way that the opt-out notices were provided—*i.e.*, mailed postcards that direct class members to a website. Because the settlement involves only California subclass claims, only those class members who resided or purchased the recalled product in California would be mailed the postcard. Returns from the last mailing would be used to prevent a similar return in this mailing, thus no follow-up mailings would be

required.

In addition, as with the last notice-plan, an online questionnaire would be used to determine if class members met the requirements of the settlement, including the online affirmation under penalty of perjury that the information provided is truthful. For those who were making claim for economic damages, the requirement of "legible, documentary proof of the actual cost paid out of pocket" would also be submitted online. The required information and documentary proof, if any, would need to be submitted within 21 days of receiving notice, and in no case more than 30 days from the date of mailing.

Finally, through the website, all members of the settlement class will be given the chance to object to the terms of settlement or to request to be excluded from settlement. Any objections that are received will then be submitted to the Court as part of the process for seeking final approval of the settlement.

Copies of the postcard-notice and long-form notice are included in the Appendix to this Memorandum as Exhibits D and E. Once finalized, a full-copy of the website will be provided to the Court, including the eligibility questionnaire that will be used. Once the preliminary approval of the settlement is obtained, and a notice administrator is retained, a link to the not-yet-online website to be further reviewed.

## VII. CONCLUSION

For the factual and legal reasons set forth above, as well as for the support that is provided in the Declarations filed with this Memorandum, it is respectfully requested that the Court preliminarily approve the settlement and the proposed notice plan.

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RESPECTFULLY SUBMITTED this 28th Day of October, 2019.

Attorneys for the Plaintiff and California Subclass-Members

/s/**William D. Marler**
William D. Marler
Denis W. Stearns
Marler Clark, LLP, PS

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of October 2019, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office using the Court's CM/ECF System for filing and transmittal of a Notice of Electronic Filing, thereby serving all counsel of record in this matter.

By: /s/ Debbie Stanley