

1 **LAW OFFICES OF RONALD A. MARRON**
2 RONALD A. MARRON (SBN 175650)
3 *ron@consumersadvocates.com*
4 MICHAEL T. HOUCHEIN (SBN 305541)
5 *mike@consumersadvocates.com*
6 LILACH HALPERIN (SBN 323202)
7 *lilach@consumersadvocates.com*
8 651 Arroyo Drive
9 San Diego, California 92103
10 Telephone: (619) 696-9006
11 Facsimile: (619) 564-6665

12 **LAW OFFICE OF DAVID ELLIOT**

13 DAVID ELLIOT (SBN 270381)
14 *davidelliot@elliotlawfirm.com*

15 2028 3rd Avenue
16 San Diego, CA 92101
17 Telephone: (858) 228-7997

18 ***Attorneys for Plaintiffs and the Proposed Class***

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

21 CRYSTAL HILSLEY, ADRIENNE
22 MORRIS, NIKKI COOK, and DAVID
23 CHRISTENSEN, on behalf of
24 themselves and all others similarly
25 situated,

26 Plaintiffs,

27 vs.

28 GENERAL MILLS, INC. and
GENERAL MILLS SALES, INC.,

Defendants.

CASE NO. 3:18-cv-00395-L-BLM

CLASS ACTION

**PLAINTIFFS' NOTICE OF
MOTION AND UNOPPOSED
RENEWED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: October 12, 2021

Time: 10:30 a.m.

Ctrm: 5B

Judge: Hon. M. James Lorenz

NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on October 12, 2021 at 10:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5B of the United States District Court for the Southern District of California located at 221 West Broadway, San Diego, CA 92101, before the Honorable Judge M. James Lorenz presiding, Plaintiffs Crystal Hilsley, Adrienne Morris, Nikki Cook, and David Christensen (“Plaintiffs”) will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e) for an Order (1) Granting Preliminary Approval of a Class Action Settlement; (2) Certifying a Settlement Class; (3) Appointing Plaintiffs as the Class Representatives and Plaintiffs’ Attorneys as Class Counsel; (4) Approving the Notice Plan; and (5) Setting the Final Approval Hearing and Schedule.

This Unopposed Renewed Motion is based on this Notice of Motion, Plaintiffs' concurrently-filed Memorandum of Points and Authorities in Support of the Motion, the concurrently-filed Declaration of Ronald A. Marron in Support of the Motion and Exhibits 1 and 2 attached thereto, the Declaration of James R. Prutsman in Support of the Motion, all prior pleadings and proceedings in this matter, and all other evidence and written and oral argument that will be submitted in support of the Motion.

DATED: September 13, 2021

Respectfully submitted,

/s/ Ronald A. Marron
RONALD A. MARRON

**LAW OFFICES OF
RONALD A. MARRON**
RONALD A. MARRON
ron@consumersadvocates.com
Michael T. Houchin
mike@consumersadvocates.com
Lilach Halperin

lilach@consumersadvocates.com
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665

LAW OFFICE OF DAVID ELLIOT
DAVID ELLIOT
davidelliot@elliotlawfirm.com
2028 3rd Avenue
San Diego, CA 92101
Telephone: (858) 228-7997
***Counsel for Plaintiffs and the Proposed
Class***

1 **LAW OFFICES OF RONALD A. MARRON**
2 RONALD A. MARRON (SBN 175650)
3 *ron@consumersadvocates.com*
4 MICHAEL T. HOUCHEIN (SBN 305541)
5 *mike@consumersadvocates.com*
6 LILACH HALPERIN (SBN 323202)
7 *lilach@consumersadvocates.com*
8 651 Arroyo Drive
9 San Diego, California 92103
10 Telephone: (619) 696-9006
11 Facsimile: (619) 564-6665

12 **LAW OFFICE OF DAVID ELLIOT**

13 DAVID ELLIOT (SBN 270381)
14 *davidelliot@elliotlawfirm.com*

15 2028 3rd Avenue
16 San Diego, CA 92101
17 Telephone: (858) 228-7997

18 ***Attorneys for Plaintiffs and the Proposed Class***

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

21 CRYSTAL HILSLEY, ADRIENNE
22 MORRIS, NIKKI COOK, and DAVID
23 CHRISTENSEN, on behalf of
24 themselves and all others similarly
25 situated,

26 Plaintiffs,

27 vs.

28 GENERAL MILLS, INC. and
GENERAL MILLS SALES, INC.,

Defendants.

CASE NO. 3:18-cv-00395-L-BLM

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' UNOPPOSED
RENEWED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: October 12, 2021

Time: 10:30 a.m.

Ctrm: 5B

Judge: Hon. M. James Lorenz

NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT

TABLE OF CONTENTS

1	I. INTRODUCTION	1
2	II. FACTUAL AND PROCEDURAL BACKGROUND	2
3	A. The <i>Hilsley</i> Litigation	2
4	B. The <i>Morris</i> Litigation	3
5	C. Plaintiffs' First Amended Complaint.....	4
6	D. The Order Denying Plaintiffs' Original Motion for Preliminary Approval of	
7	Class Action Settlement.....	4
8	E. Subsequent Settlement Negotiations	5
9	III. SUMMARY OF THE PROPOSED SETTLEMENT	6
10	A. The Settlement Class.....	6
11	B. Settlement Consideration	6
12	C. The Notice Plan and Settlement Administration	7
13	D. The Right to Object to the Settlement	8
14	E. Release of Claims	9
15	F. Class Counsel's Fees and Expenses and Plaintiffs' Incentive Awards	9
16	IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL	10
17	V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY	
18	APPROVAL.....	12
19	A. Plaintiffs and Class Counsel Have Adequately Represented the Class.....	12
20	B. The Settlement was Negotiated at Arm's Length.....	13
21	C. The Relief Provided to the Class is Adequate	14
22	1. <i>The Costs, Risks, and Delay of Trial and Appeal Support Preliminary</i>	
23	<i>Approval</i>	17
24	2. <i>The Proposed Method of Distributing Relief to the Class Is Effective</i>	17
25	3. <i>The Proposed Attorneys' Fee Award is Fair and Reasonable</i>	18
26	4. <i>No Side Agreements Were Made in Connection with the Proposed</i>	
27	<i>Settlement</i>	18

1	D. The Proposed Settlement Treats Class Members Equitably Relative to Each	
2	Other.....	18
3	VI. THE COURT SHOULD PROVISIONALLY CERTIFY THE CLASS AND	
4	ENTER THE PRELIMINARY APPROVAL ORDER.....	19
5	A. The Settlement Class Satisfied Rule 23(a)	19
6	1. <i>Numerosity</i>	19
7	2. <i>Commonality</i>	20
8	3. <i>Typicality</i>	21
9	4. <i>Adequacy</i>	21
10	B. The Settlement Class Satisfies Rule 23(b)(2).....	21
11	VII. PROPOSED SCHEDULE OF EVENTS.....	23
12	VIII. CONCLUSION.....	23
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Cases

3	<i>Allison v. Citgo Petroleum Corp.</i> ,	
4	151 F.3d 402 (5th Cir. 1998)	22
5	<i>Amchem Prods., Inc. v. Windsor</i> ,	
6	521 U.S. 591 (1997).....	19
7	<i>Arnold v. United Artists Theatre Circuit, Inc.</i> ,	
8	158 F.R.D. 439 (N.D. Cal. 1994).....	20
9	<i>Carr v. Tadin, Inc.</i> ,	
10	2014 WL 7497152 (S.D. Cal. Apr. 18, 2014).....	2, 15, 16
11	<i>Churchill Vill., L.L.C. v. Gen. Elec.</i> ,	
12	361 F.3d 566 (9th Cir. 2004)	11
13	<i>Curtis-Bauer v. Morgan Stanley & Co., Inc.</i> ,	
14	2008 WL 4667090 (N.D. Cal. Oct. 22, 2008)	17
15	<i>Dashnaw v. New Balance Athletics, Inc.</i> ,	
16	2019 WL 3413444 (S.D. Cal. July 29, 2019)	10
17	<i>Fulford v. Logitech, Inc.</i> ,	
18	2010 U.S. Dist. LEXIS 29042 (N.D. Cal. Mar. 5, 2010)	17
19	<i>Gen. Tel. Co. of the Sw. v. Falcon</i> ,	
20	457 U.S. 147 (1982).....	21
21	<i>Guttmann v. Ole Mexican Foods, Inc.</i> ,	
22	2016 WL 91074261 (N.D. Cal. Aug. 1, 2016)	15
23	<i>Hanlon v. Chrysler Corp.</i> ,	
24	150 F.3d 1011 (9th Cir. 1998)	11, 12, 20
25	<i>Hefler v. Wells Fargo & Co.</i> ,	
26	2018 WL 6619983 (N.D. Cal. Dec. 18, 2018).....	12
27	<i>In re Extreme Networks, Inc. Securities Litigation</i> ,	
28	2019 WL 3290770 (N.D. Cal. July 22, 2019)	12

1	<i>In re Mego Fin. Corp. Sec. Litig.</i> ,	
2	213 F.3d 454 (9th Cir. 2000)	12
3	<i>In re Netflix Privacy Litig.</i> ,	
4	2013 WL 1120801 (N.D. Cal. Mar. 18, 2013)	17
5	<i>In re NJOY, Inc. Consumer Class Action Litig.</i> ,	
6	120 F.Supp.3d 1050 (C.D. Cal. 2015)	16
7	<i>In re Omnivision Techs., Inc.</i> ,	
8	559 F. Supp. 2d 1036 (N.D. Cal. 2008).....	13
9	<i>In re Quaker Oats Labeling Litig.</i> ,	
10	2014 WL 12616763 (N.D. Cal. July 29, 2014)	15
11	<i>In re Tobacco II Cases</i> ,	
12	46 Cal. 4th 298 (2009)	15, 22
13	<i>Johnson v. Triple Leaf Tea Inc.</i> ,	
14	2015 WL 8943150 (N.D. Cal. Nov. 16, 2015)	15, 16
15	<i>Lilly v. Jamba Juice Co.</i> ,	
16	2015 WL 1248027 (N.D. Cal. Mar. 18, 2015)	7
17	<i>Littlejohn v. Ferrara Candy Co.</i> ,	
18	2019 WL 2514720 (S.D. Cal. June 17, 2019).....	2, 15
19	<i>Lyons v. CoxCom, Inc.</i> ,	
20	No. 08-cv-2047-HCAB (S.D. Cal. Aug. 23, 2010)	15
21	<i>McGill v. Citibank, N.A.</i> ,	
22	2 Cal. 5th 945 (2017)	15
23	<i>Moreno v. San Francisco Bay Area Rapid Transit Dist.</i> ,	
24	2019 WL 343472 (N.D. Cal. Jan. 28, 2019).....	7
25	<i>Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.</i> ,	
26	221 F.R.D. 523 (C.D. Cal. 2004).....	14
27	<i>Probe v. State Teachers' Ret. Sys.</i> ,	
28	780 F.2d 776 (9th Cir. 1986)	22

1	<i>Rodriguez v. W. Publ'g Corp.</i> ,	
2	563 F.3d 948 (9th Cir. 2009)	13
3	<i>Slaven v. BP Am., Inc.</i> ,	
4	190 F.R.D. 649 (C.D. Cal. 2000)	19
5	<i>Stathakos v. Columbia Sportswear Co.</i> ,	
6	2018 WL 582564 (N.D. Cal. Jan. 25, 2018)	7
7	<i>Townsend v. Monster Beverage Corp.</i> ,	
8	303 F. Supp. 3d 1010 (C.D. Cal. 2018)	16
9	<i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
10	564 U.S. 338 (2011)	20, 22
11	<i>Zamora Jordan v. Nationstar Mortg., LLC</i> ,	
12	2019 WL 1966112 (E.D. Wash. May 2, 2019)	10, 11
13	<i>Zinser v. Accufix Research Inst.</i> ,	
14	253 F.3d 1180 (9th Cir. 2001)	22
15	Statutes	
16	Cal. Bus. & Prof. Code § 17200, <i>et seq.</i>	2
17	Cal. Bus. & Prof. Code § 17500, <i>et seq.</i>	2
18	Cal. Civ. Code § 1750, <i>et seq.</i>	2, 8
19	Rules	
20	Fed. R. Civ. P. 23(a)(1)	19
21	Fed. R. Civ. P. 23(a)(2)	20
22	Fed. R. Civ. P. 23(a)(3)	21
23	Fed. R. Civ. P. 23(a)(4)	21
24	Fed. R. Civ. P. 23(b)(2)	7, 22
25	Fed. R. Civ. P. 23(c)(2)	7
26	Fed. R. Civ. P. 23(e)	10
27	Fed. R. Civ. P. 23(e)(2)	10, 11
28	Fed. R. Civ. P. 23(e)(2)(A)	12

1	Fed. R. Civ. P. 23(e)(2)(B)	13
2	Fed. R. Civ. P. 23(e)(2)(C)	14
3	Fed. R. Civ. P. 23(e)(2)(D)	18
4	Fed. R. Civ. P. 23(e)(3).....	18

5 **Other Authorities**

6	NEWBERG ON CLASS ACTIONS § 13:48 (5th ed.)	12
7	NEWBERG ON CLASS ACTIONS § 13:49 (5th ed.)	13
8	NEWBERG ON CLASS ACTIONS § 13:50 (5th ed.)	13
9	NEWBERG ON CLASS ACTIONS § 13:51 (5th ed.)	14
10	NEWBERG ON CLASS ACTIONS § 13:53 (5th ed.)	18
11	NEWBERG ON CLASS ACTIONS § 13:56 (5th ed.)	19

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 Plaintiffs Crystal Hilsley, Adrienne Morris, Nikki Cook, and David
 2 Christensen (“Plaintiffs”) respectfully submit this Memorandum of Points and
 3 Authorities in support of their Unopposed Renewed Motion for Preliminary
 4 Approval of Class Action Settlement with Defendants General Mills, Inc. and
 5 General Mills Sales, Inc. (“General Mills” or “Defendants”) and state as follows:

6 **I. INTRODUCTION**

7 This settlement provides for meaningful injunctive relief and resolves two
 8 consumer protection class action lawsuits involving fruit flavored snack products
 9 that are manufactured and sold by General Mills (the “Products”).¹ The Products at
 10 issue are labeled as containing “No Artificial Flavors.” Plaintiffs allege that General
 11 Mills’ “No Artificial Flavors” labeling claims are false and misleading because the
 12 Products allegedly contain an artificial flavoring ingredient called dl-malic acid.
 13 FAC ¶¶ 18-60. General Mills vigorously denies these allegations and contends that
 14 its labeling complies with all federal regulations.

15 After hard-fought settlement negotiations, which included formal discovery,
 16 confirmatory discovery, three full-day mediations, and extensive negotiations
 17 among the Parties, the Parties reached this proposed settlement. There can be no
 18 doubt that the terms of this settlement accomplish the goals of this litigation. As
 19 further discussed below, the terms of this settlement require General Mills to remove
 20 the “No Artificial Flavors” statement from the product packaging and promotional
 21 materials. SA ¶ 5.2. Moreover, the release of claims is narrowly tailored as to only
 22 release claims for injunctive relief that involve an identical factual predicate to
 23 claims asserted in this litigation. SA ¶ 2.26. The release does not extend to any claims
 24 for damages or personal injury regarding the Products. SA ¶ 2.26.

25

26 ¹ The Products at issue are listed in Exhibit A to the Parties’ Settlement Agreement. A copy of the
 27 Settlement Agreement (“SA”) is attached to the concurrently filed Declaration of Ronald A.
 28 Marron in Support of Plaintiffs’ Renewed Motion for Preliminary Approval (“Marron Decl.”) as
 Exhibit 1. Capitalized terms in this Motion have the same meaning as the capitalized terms defined
 in the Agreement.

1 The value of this injunctive relief settlement cannot be underestimated. *See*
 2 *Carr v. Tadin, Inc.*, 2014 WL 7497152, at *4 (S.D. Cal. Apr. 18, 2014) (granting
 3 preliminary approval where “the injunctive relief Defendant has agreed to provide—
 4 modifying the labeling and packaging of the Products—is the primary relief Plaintiffs
 5 sought in their complaint.”); *Littlejohn v. Ferrara Candy Co.*, 2019 WL 2514720, at
 6 *5 (S.D. Cal. June 17, 2019), *aff’d sub nom. Littlejohn v. Copland*, 2020 WL
 7 3536531 (9th Cir. June 30, 2020) (approving settlement that affords “meaningful
 8 injunctive relief” including removal of a “No Artificial Flavors” labeling statement
 9 from the product packaging.).

10 For the reasons set forth below, this settlement is fair, reasonable, and
 11 adequate and should be approved by the Court.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 **A. The *Hilsley* Litigation**

14 On December 5, 2017, Plaintiff Crystal Hilsley filed this putative class action
 15 in the Superior Court of California for the County of San Diego alleging that General
 16 Mills engaged in false and misleading labeling and advertising of certain fruit
 17 flavored snack products. Dkt. No. 1-2.² On February 21, 2018, General Mills filed a
 18 Notice of Removal to this Court. Dkt. No. 1. On March 26, 2018, General Mills filed
 19 a Motion to Dismiss Plaintiff Hilsley’s complaint (Dkt. No. 13) and on March 26,
 20 2019, this Court entered an Order Granting in Part and Denying in Part General
 21 Mills’ Motion to Dismiss. Dkt. No. 17.

22 On May 1, 2019, General Mills filed an Answer to Plaintiff Hilsley’s
 23 complaint. Dkt. No. 23. On June 6, 2019, the Parties to the *Hilsley* Litigation
 24 participated in an Early Neutral Evaluation Conference (Dkt. No. 29) and then

25

 26 ² The Complaint included claims for violations of California’s Consumer Legal Remedies Act,
 27 (Cal. Civ. Code § 1750, *et seq.* [“CLRA”]), violations of California’s Unfair Competition Law
 28 (Cal. Bus. & Prof. Code § 17200, *et seq.* [“UCL”]) (unlawful prong), violations of California’s
 Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.* [“UCL”]) (unfair prong), and
 violations of California’s False Advertising Law (Cal. Bus. & Prof. Code § 17500, *et seq.* [“FAL”])
 (Dkt. No. 1-2).

1 discovery commenced. On June 5, 2019, Plaintiff Hilsley served a first set of
 2 interrogatories and a first set of requests for production of documents. Marron Decl.,
 3 ¶ 6. On July 16, 2019, General Mills served responses to Plaintiff Hilsley's discovery
 4 requests. Marron Decl., ¶ 6. General Mills also produced documents that helped
 5 Plaintiff Hilsley evaluate the strengths and weaknesses of her case. Marron Decl., ¶
 6 6. The Parties to the *Hilsley* Litigation also exchanged expert witness designations
 7 and expert reports. Marron Decl., ¶ 7. On February 14, 2020, Plaintiff Hilsley served
 8 an expert report from Dr. Laszlo Somogyi, who opined that dl-malic acid is used as
 9 a flavoring ingredient in the Products. Marron Decl., ¶ 7. On February 14, 2020,
 10 General Mills served three expert reports from Dolf Derovia, Dr. Ran Kivetz, and
 11 Marianne Gillette. Marron Decl., ¶ 7. Mr. Derovia and Ms. Gillette opined that dl-
 12 malic acid is not used as a flavoring ingredient in the Products. Marron Decl., ¶ 7.
 13 Dr. Kivitz conducted a consumer survey and opined that the challenged labeling
 14 statements are not material to a reasonable consumer. Marron Decl., ¶ 7.

15 **B. The *Morris* Litigation**

16 On October 4, 2018, Plaintiff Adrienne Morris filed a class action lawsuit
 17 against Mott's, LLP in the Central District of California captioned *Adrienne Morris*
 18 v. *Motts LLP*, Case No. 8:18-cv-01799-AG-ADS (C.D. Cal.) ("Morris"). The
 19 complaint alleged that the defendant engaged in false and misleading labeling and
 20 advertising of certain Mott's Fruit Flavored Snacks products. *Morris*, Dkt. No. 1.
 21 The Mott's fruit flavored snack products at issue in the *Morris* Action are
 22 manufactured by General Mills, Inc. *Morris*, Dkt. No. 45. On September 26, 2018,
 23 Plaintiff Morris filed an amended complaint that added Plaintiff Nikki Cook to the
 24 *Morris* Action. *Morris*, Dkt. No. 22. On January 9, 2019, the defendant filed a
 25 motion to dismiss the Plaintiffs' first amended complaint (*Morris*, Dkt. No. 24) and
 26 on February 26, 2019, the *Morris* Court entered an Order Granting in Part and
 27 Denying in Part the defendant's Motion to Dismiss the First Amended Complaint.
 28 *Morris*, Dkt. No. 38. On June 26, 2019, the Plaintiffs in the *Morris* Action filed a

1 Second Amended Complaint that adds General Mills, Inc., the manufacturer of the
 2 Mott's Products, as a defendant to the *Morris* Action. *Morris*, Dkt. No. 47.

3 The parties to the *Morris* Action also engaged in meaningful discovery. On
 4 February 27, 2019, the *Morris* Plaintiffs' severed a first set of interrogatories and a
 5 first set of requests for production of documents. Marron Decl., ¶ 11. On April 12,
 6 2019, the defendants served responses to the discovery requests. Marron Decl., ¶ 11.
 7 The defendants also produced over 4,400 pages of documents that helped the *Morris*
 8 Plaintiffs evaluate the strengths and weaknesses of their case. Marron Decl., ¶ 11.
 9 On March 22, 2019, the defendants also served a first set of interrogatories and a
 10 first set of requests for production of documents on the *Morris* Plaintiffs. Marron
 11 Decl., ¶ 11. On April 22, 2019, the *Morris* Plaintiffs served responses to the
 12 defendants' discovery requests. Marron Decl., ¶ 11.

13 **C. Plaintiffs' First Amended Complaint**

14 On August 27, 2020, the Plaintiffs filed their First Amended Complaint in the
 15 present action. Dkt. No. 41. The First Amended Complaint adds the claims of the
 16 *Morris* Plaintiffs to the present action. *Id.* The First Amended Complaint also adds
 17 David Christensen, a Minnesota resident, as a plaintiff to the present action and adds
 18 a cause of action under the Minnesota Prevention of Consumer Fraud Act, Minn.
 19 Stat. § 325F.68-70. FAC ¶¶ 102-107. General Mills maintains its principal place of
 20 business in Minnesota (FAC ¶¶ 12-13) and Plaintiffs assert claims on behalf of a
 21 nationwide class. FAC ¶ 88.

22 **D. The Order Denying Plaintiffs' Original Motion for Preliminary
 23 Approval of Class Action Settlement**

24 On September 4, 2020, Plaintiffs filed a Motion for Preliminary Approval of
 25 Class Action Settlement. (Dkt. No. 45). On October 15, 2020, David Hayes, a named
 26 plaintiff in a related putative class action pending in the Northern District of Illinois,
 27 filed a motion to intervene. (Dkt. No. 52). On June 4, 2021, this Court entered an
 28 order denying Plaintiffs' Motion for Preliminary Approval and granting David

1 Hayes' Motion to Intervene. (Dkt. No. 61). The Court found that the Parties' prior
 2 settlement did not comply with the Ninth Circuit's Opinion in *In re Bluetooth*
 3 *Headset Prod. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Specifically, the
 4 Court held that "the class receives no monetary award while the counsel receives
 5 \$725,000 for fees and costs, and each named Plaintiff receives \$5,000." (Dkt. No.
 6 61 at 6). The Court also held that the settlement agreement contained a "clear sailing"
 7 arrangement and kicker provision whereby unawarded fees will revert back to
 8 General Mills. (*Id.*) With respect to the injunctive relief, the Court found that it was
 9 inadequate because Defendants "have not agreed to remove the allegedly misleading
 10 statements but propose only to embellish them with an asterisk." (Dkt. No. 61 at 8).
 11 The Court also noted that "[t]he release...appears to exceed the permissible scope."
 12 (Dkt. No. 61 at 4).

13 **E. Subsequent Settlement Negotiations**

14 To address the Court's concerns with the Settlement Agreement, the Parties
 15 (including putative intervenor David Hayes) promptly scheduled a mediation with
 16 the Honorable Leo Papas (Ret.) (Judicate West). Marron Decl., ¶ 15. On August 24,
 17 2021, the Parties participated in a productive, full-day mediation before Judge Papas.
 18 Marron Decl., ¶ 16. Putative intervenor David Hayes participated in the mediation
 19 and the following discussions. Marron Decl., ¶ 16. The settlement discussions
 20 continued into the week thereafter with the involvement of Judge Papas and under
 21 his auspices as mediator until the Parties memorialized their revised Class Action
 22 Settlement Agreement. Marron Decl., ¶ 16.

23 As discussed below, the revised class action settlement agreement adequately
 24 addresses the Court's concerns in its June 4, 2021 Order. (Dkt. No. 61). The terms
 25 of this settlement require General Mills to remove the "No Artificial Flavors"
 26 statement from the product packaging and promotional materials. SA ¶ 5.2.
 27 Moreover, the release of claims is narrowly tailored as to only release claims for
 28 injunctive relief that involve an identical factual predicate to claims asserted in this

1 litigation. Class Counsel have reduced the amount of attorneys' fees they are seeking
 2 to \$600,000 and the attorneys' fees provision no longer contains a "clear sailing"
 3 agreement. SA ¶ 10.1. Moreover, any attorneys' fees that are not awarded by the
 4 Court will no longer revert back to General Mills. SA ¶ 10.3. Instead, if the court
 5 awards less than \$600,000 in fees and expenses, then the remaining amount will go
 6 to a *cy pres* organization that will be proposed in Plaintiffs' Motion for Final
 7 Approval. SA ¶ 10.3. General Mills reserves all rights to propose an alternative *cy*
 8 *pres* beneficiary and/or contest that proposed by Plaintiffs. (*Id.*).

9 **III. SUMMARY OF THE PROPOSED SETTLEMENT**

10 **A. The Settlement Class**

11 The proposed settlement establishes a Settlement Class comprised of "all
 12 residents of the United States of America who, during the Class Period as defined
 13 [in the Settlement Agreement], purchased any of the General Mills Products as
 14 defined in [Exhibit A³ to the Settlement Agreement] for personal and household use
 15 and not for resale." SA ¶ 2.3. The Class Definition excludes: (1) Defendants and
 16 Defendants' officers directors, employees, agents, and affiliates; (2) counsel for any
 17 of the parties; (3) the Court and its staff. SA ¶ 2.3. The Class Period is defined as
 18 "January 1, 2012 through the date of class certification, as designated by the Court
 19 in its Preliminary Approval Order." SA ¶ 2.5.

20 **B. Settlement Consideration**

21 The settlement provides for meaningful injunctive relief. General Mills will
 22 be ordered and enjoined to remove the Challenged Claims from the Products." SA ¶
 23 5.1. "'Challenged Claims' means the statement 'No Artificial Flavors' appearing on
 24 the packaging of the Products or used in any way in connection with the sale or
 25 marketing of the Products." SA ¶ 2.1. For all Products identified in Exhibit A to the

26 ³ Exhibit A to the Settlement Agreement includes various General Mills Fruit Flavored Snack
 27 Products, including Gushers, Fruit by the Foot, Fruit Roll Ups, Sunkist Fruit Flavored Snacks,
 28 Fiber One Fruit Flavored Snacks, Motts Fruit Flavored Snacks, DC Superhero Girls Fruit Flavored
 Snacks, Star Wars Fruit Flavored Snacks, Scooby Doo Fruit Flavored Snacks, among others.

1 Settlement Agreement, “General Mills will remove the Challenged Claims from
 2 packaging and promotional materials, unless such product ceases to contain the
 3 Challenged Ingredient.”⁴ SA ¶ 5.2. General Mills is required to implement the
 4 injunctive relief “within a commercial reasonable time, but no later than two (2)
 5 years after the date of Final Approval.” SA ¶ 5.3.⁵ “General Mills shall comply with
 6 the injunctive relief provisions for a period of two (2) years from the Compliance
 7 Date.”⁶ SA ¶ 5.4.

8 **C. The Notice Plan and Settlement Administration**

9 Because this is an injunctive relief settlement that will not waive the class
 10 members’ right to seek damages, Rule 23(c)(2) gives this court discretion to
 11 determine whether notice is appropriate under Rule 23(b)(2). *See Stathakos v.*
 12 *Columbia Sportswear Co.*, 2018 WL 582564, at *3 (N.D. Cal. Jan. 25, 2018). Courts
 13 in the Ninth Circuit typically do not require notice in Rule 23(b)(2) actions like this
 14 one because the Class does not have a right to opt out and the settlement does not
 15 release the Class Members’ monetary claims. *Id*; *see also Moreno v. San Francisco*
 16 *Bay Area Rapid Transit Dist.*, 2019 WL 343472, at *3 (N.D. Cal. Jan. 28, 2019);
 17 *Lilly v. Jamba Juice Co.*, 2015 WL 1248027, *8-9 (N.D. Cal. Mar. 18, 2015).

18 Although notice is typically not required in a Rule 23(b)(2) settlement, the
 19 Parties here propose, subject to the Court’s approval, that Kroll Settlement
 20 Administration (“Kroll”) will serve as the Settlement Administrator and will be
 21 responsible for administering the Notice plan. *See* Declaration of James R.
 22 Prutsman filed concurrently herewith (“Prutsman Decl.”), ¶¶ 1-13. Kroll has

23 ⁴ “Challenged Ingredient” means “the synthetic, racemic, or industrial versions of malic acid.” SA
 24 ¶ 2.2.

25 ⁵ “To allow for supply chain issues, General Mills will not be in violation of the injunction for the
 26 distribution or sale of any Products with packaging produced before the two-year period but sold
 27 after that period.” SA ¶ 5.3.

28 ⁶ “Compliance Date” means the date within two (2) years of the date of Final Approval (defined
 below) by which General Mills must have completed the packaging change described in Section
 5.2 of the Agreement. SA ¶ 2.7.

1 significant experience with administrating class action settlements and
 2 implementing class action notice plans. Prutsman Decl., ¶¶ 1-6. The forms of the
 3 proposed Notices, agreed upon by Class Counsel and General Mills, subject to this
 4 Court's approval and/or modification, are attached to the Settlement Agreement as
 5 Exhibits B and C. The notice plan will establish a settlement website, will provide
 6 for publication notice in San Diego Union Tribune in accordance with CLRA notice
 7 requirements under California Civil Code § 1750, *et seq.*, and will provide targeted
 8 online notice through social media platforms like Facebook and Instagram.
 9 Prutsman Decl., ¶ 7-13.

10 **D. The Right to Object to the Settlement**

11 If any Class Member wishes to object to the Settlement, the Class Member
 12 must submit a written objection to the Notice Administrator. SA ¶ 9.6. The written
 13 objection may be submitted by mail, express mail, electronic transmission, or
 14 personal delivery, but to be timely, it must be delivered to the Notice Administrator
 15 (not just postmarked or sent) prior to the Objection Deadline. SA ¶ 9.6.⁷ Immediately
 16 upon receipt of any objection, the Notice Administrator shall forward the objection
 17 and all supporting documentation to counsel for the Parties. Prior to the hearing on
 18 Final Approval, Class Counsel shall file all such objections and supporting
 19 documentation with the Court. SA ¶ 9.6b.

20 Because the settlement agreement only releases class member claims for
 21 injunctive relief, it is not necessary to allow class members to exclude themselves
 22 from the settlement. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558
 23 (2011) (Rule 23 “provides no opportunity for (b)(1) or (b)(2) class members to opt
 24 out, and does not even oblige the District Court to afford them notice of the action.”);
 25 *Moreno*, 2019 WL 343472, at *3; *Lilly*, 2015 WL 1248027 at *8-9.

26
 27
 28 ⁷ The Settlement Agreement outlines the procedures for objecting. SA ¶ 9.6a.

1 **E. Release of Claims**

2 In exchange for the Settlement consideration, Plaintiffs and each Settlement
 3 Class member, will provide a release that is set forth in paragraph 7.1 of the
 4 Settlement Agreement. The release covers claims “that relate to any labeling or other
 5 claim that was, or could have been, alleged in the Action to be false, misleading, or
 6 non-compliant with federal or state laws or regulations concerning the presence or
 7 absence of malic acid, or that relate to claims arising out of allegations of false or
 8 misleading advertising of the Products provided any such claim(s) involves an
 9 identical factual predicate to claims asserted in the Litigation and seek injunctive
 10 relief.” SA ¶ 7.1. “This release expressly does not extend to claims for damages or
 11 personal injury regarding the Products.” SA ¶ 7.1. The Released Claims are defined
 12 in Paragraph 2.26 of the Settlement Agreement and the Released Persons are defined
 13 in Paragraph 2.27 of the Settlement Agreement.

14 **F. Class Counsel’s Fees and Expenses and Plaintiffs’ Incentive
 15 Awards**

16 The Settlement Agreement “does not provide for an attorneys’ fees and costs
 17 award, nor does it provide for a plaintiffs’ incentive award.” SA ¶ 10.1. Rather,
 18 Plaintiffs may petition the Court for reasonable attorneys’ fees and costs at the
 19 appropriate time.” (*Id.*). “However, that request, inclusive of attorneys’ fees, costs,
 20 and incentive awards to named Class Representatives, and all expenses, shall not
 21 exceed \$600,000.” (*Id.*). “General Mills reserves all rights to oppose any petitions
 22 for such fees, costs, and incentive awards.” (*Id.*).

23 “Should the Court grant an award of attorneys’ fees, costs, and incentive
 24 awards to Class Representatives, and all expenses that, when aggregated, is less than
 25 \$600,000, General Mills shall pay the difference between the sum of the attorneys’
 26 fees, costs, and incentive awards to class members, and all expenses and \$600,000
 27 to a *cy pres* organization that is acceptable to the Parties and approved by the Court.”
 28 SA ¶ 10.3. “Plaintiffs shall propose a *cy pres* organization in its motion for final

1 approval" and "General Mills reserves all rights to propose an alternative *cy pres*
 2 beneficiary and/or contest that proposed by Plaintiffs." SA ¶ 10.3.

3 If the Court grants Plaintiffs' Motion for Preliminary Approval, then Plaintiffs
 4 will fully address the reasonableness of the requested fee, expenses, and incentive
 5 awards in their forthcoming Motion for Attorneys' Fees, Costs, and Incentive
 6 Awards.

7 **IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL**

8 Approval of a proposed class action settlement is governed by Federal Rule
 9 of Civil Procedure 23(e). "[T]he 2018 amendment to Rule 23(e) establishes core
 10 factors district courts must consider when evaluating a request to approve a proposed
 11 settlement." *Zamora Jordan v. Nationstar Mortg., LLC*, No. 2:14-CV-0175-TOR,
 12 2019 WL 1966112, at *2 (E.D. Wash. May 2, 2019).

13 Rule 23(e) now provides that the Court may approve a class action settlement
 14 "only after a hearing and only on a finding that it is fair, reasonable, and adequate
 15 after considering whether:

- 16 (A) the class representatives and class counsel have adequately represented
 17 the class;
- 18 (B) the proposal was negotiated at arm's length;
- 19 (C) the relief provided for the class is adequate, taking into account:
 - 20 (i) the costs, risks, and delay of trial and appeal;
 - 21 (ii) the effectiveness of any proposed method of distributing relief to
 22 the class, including the method of processing class-member claims;
 - 23 (iii) the terms of any proposed award of attorney's fees, including
 24 timing of payment; and
 - 25 (iv) any agreement required to be identified under Rule 23(e)(3); and
- 26 (D) the proposal treats class members equitably relative to each other."

27 Fed. R. Civ. P. 23(e)(2); *Dashnaw v. New Balance Athletics, Inc.*, 2019 WL
 28 3413444, at *5 (S.D. Cal. July 29, 2019) (Lorenz J.).

1 “Under Rule 23(e), both its prior version and as amended, fairness,
 2 reasonableness, and adequacy are the touchstones for approval of a class-action
 3 settlement.” *Zamora*, 2019 WL 1966112, at *2. “The purpose of the amendment to
 4 Rule 23(e)(2) is [to] establish a consistent set of approval factors to be applied
 5 uniformly in every circuit, without displacing the various lists of additional approval
 6 factors the circuit courts have created over the past several decades.” *Id.* Factors that
 7 the Ninth Circuit have typically considered include (1) the strength of plaintiffs’
 8 case; (2) the risk, expense, complexity, and likely duration of further litigation; (3)
 9 the risk of maintaining class action status throughout the trial; (4) the amount offered
 10 in settlement; (5) the extent of discovery completed and the stage of the proceedings;
 11 and (6) the experience and views of counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d
 12 1011, 1026 (9th Cir. 1998);⁸ *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575
 13 (9th Cir. 2004).

14 “While the Ninth Circuit has yet to address the amendment to Rule
 15 23(e)(2)....the factors in amended Rule 23(e)(2) generally encompass the list of
 16 relevant factors previously identified by the Ninth Circuit.” *Zamora*, 2019 WL
 17 1966112, at *2 (alteration in original). Indeed, “[t]he goal of this amendment is not
 18 to displace any factor, but rather to focus the court and the lawyers on the core
 19 concerns of procedure and substance that should guide the decision whether to
 20 approve the proposal.” Fed. R. Civ. P. 23(e)(2) advisory committee’s note to 2018
 21 amendment. “Accordingly, the Court applies the framework set forth in Rule 23 with
 22 guidance from the Ninth Circuit’s precedent, bearing in mind the Advisory
 23 Committee’s instruction not to let ‘[t]he sheer number of factors’ distract the Court
 24 and parties from the ‘central concerns’ underlying Rule 23(e)(2).” *In re Extreme
 25 Networks, Inc. Securities Litigation*, 2019 WL 3290770, at *6 (N.D. Cal. July 22,

26
 27 ⁸ In *Hanlon*, the Ninth Circuit also instructed district courts to consider “the reaction
 28 of the class members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026. This
 consideration is more germane to final approval and will be addressed at the
 appropriate time.

1 2019); *see also Hefler v. Wells Fargo & Co.*, 2018 WL 6619983, at *4 (N.D. Cal.
 2 Dec. 18, 2018).

3 **V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY**
 4 **APPROVAL**

5 **A. Plaintiffs and Class Counsel Have Adequately Represented the**
 6 **Class**

7 Rule 23(e)(2)(A) requires the Court to consider whether “the class
 8 representatives and class counsel have adequately represented the class.” Fed. R.
 9 Civ. P. 23(e)(2)(A). This analysis is “redundant of the requirements of Rule 23(a)(4)
 10 and Rule 23(g), respectively.” *Final approval criteria—Rule 23(e)’s multifactor test*,
 11 4 NEWBERG ON CLASS ACTIONS § 13:48 (5th ed.). A determination of adequacy of
 12 representation requires that “two questions be addressed: (a) do the named plaintiffs
 13 and their counsel have any conflicts of interest with other class members and (b) will
 14 the named plaintiffs and their counsel prosecute the action vigorously on behalf of
 15 the class?” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000), *as*
 16 *amended* (June 19, 2000) (citing *Hanlon*, 150 F.3d at 1020); *see also Hefler*, 2018
 17 WL 6619983, at *6.

18 The proposed class representatives in this action have no conflicts of interest
 19 with other class members and each have prosecuted this action vigorously on behalf
 20 of the Class. Each of the named Plaintiffs have suffered the same injuries as the
 21 absent class members because each purchased the General Mills Fruit Flavored
 22 Snack Products, for personal and household use, in reliance on the “No Artificial
 23 Flavors” statement on the product label. FAC ¶¶ 68-84. Each of the named Plaintiffs
 24 are dedicated to vigorously pursue this action on behalf of the class and each have
 25 kept themselves informed about the status of the proceedings. Marron Decl., ¶ 20.
 26 Accordingly, the named Plaintiffs have adequately represented the Class.

27 Class Counsel have also vigorously represented the Class and have no
 28 conflicts of interest. The Settlement was negotiated by counsel with extensive

1 experience in consumer class action litigation. *See* Marron Decl., ¶¶ 23-48 & Ex. 2
 2 (firm resume of Law Offices of Ronald A. Marron). Through the discovery process,
 3 Class Counsel has obtained sufficient information and documents to evaluate the
 4 strengths and weaknesses of the case. Marron Decl., ¶ 17. *See Final approval*
 5 *criteria—Rule 23(e)(2)(A): Adequate representation*, 4 NEWBERG ON CLASS
 6 ACTIONS § 13:49 (5th ed.) (“if extensive discovery has been done, a court may
 7 assume that the parties have a good understanding of the strengths and weaknesses
 8 of their respective cases and hence that the settlement's value is based upon such
 9 adequate information.”). The information reviewed by class counsel includes the
 10 function and effect of dl-malic acid in the Products during the class period and the
 11 labels for each of the Products at issue in use during the class period. Marron Decl.,
 12 ¶ 17. Based on their experience, Class Counsel concluded that the Settlement
 13 provides exceptional results for the class while sparing the class from the
 14 uncertainties of continued and protracted litigation. Marron Decl., ¶ 21. *See, e.g., In*
 15 *re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (“The
 16 recommendations of plaintiffs' counsel should be given a presumption of
 17 reasonableness.”); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 976 (9th Cir. 2009)
 18 (Deference to Class Counsel's evaluation of the Settlement is appropriate because
 19 “[p]arties represented by competent counsel are better positioned than courts to
 20 produce a settlement that fairly reflects each party's expected outcome in
 21 litigation.”). Accordingly, adequacy of representation is satisfied.

22 **B. The Settlement was Negotiated at Arm's Length**

23 Rule 23(e)(2)(B) requires the Court to consider whether “the proposal was
 24 negotiated at arm's length.” Fed. R. Civ. P. 23(e)(2)(B). “This inquiry aims to root
 25 out settlements that may benefit the plaintiffs' lawyers at the class's expenses,
 26 sometimes called ‘collusive settlements.’” *Final approval criteria—Rule*
 27 *23(e)(2)(B): Arm's length negotiation*, 4 NEWBERG ON CLASS ACTIONS § 13:50 (5th
 28 ed.). Here, the settlement was negotiated at arm's length after hard-fought litigation

1 and discovery. The Parties did not begin settlement discussions until after the *Hilsley*
 2 and *Morris* Courts had entered orders on General Mills' motions to dismiss. Marron
 3 Decl., ¶ 18. Settlement discussions also did not begin until after the Parties had
 4 exchanged written discovery and documents, which speaks to the fundamental
 5 fairness of the process. Marron Decl., ¶ 18. *See Nat'l Rural Telecommunications*
 6 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement
 7 following sufficient discovery and genuine arms-length negotiation is presumed
 8 fair."). Moreover, the Parties attended two full-day mediation sessions before Jill R.
 9 Sperber, Esq. Marron Decl., ¶ 14. Following the denial of Plaintiffs' original Motion
 10 for Preliminary Approval, the Parties participated in an additional full-day mediation
 11 session with Judge Papas. Marron Decl., ¶ 16. The settlement discussions continued
 12 into the week thereafter with the involvement of Judge Papas and under his auspices
 13 as mediator until the Parties memorialized their revised Class Action Settlement
 14 Agreement. Marron Decl., ¶ 16.

15 The settlement negotiations were hard-fought, with both Parties and their
 16 counsel thoroughly familiar with the applicable facts, legal theories, and defenses on
 17 both sides. Marron Decl., ¶ 19.

18 **C. The Relief Provided to the Class is Adequate**

19 Rule 23(e)(2)(C) requires that the Court consider whether "the relief provided
 20 for the class is adequate, taking into account: (i) the costs, risks, and delay of trial
 21 and appeal; (ii) the effectiveness of any proposed method of distributing relief to the
 22 class, including the method of processing class-member claims; (iii) the terms of any
 23 proposed award of attorney's fees, including timing of payment; and (iv) any
 24 agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P.
 25 23(e)(2)(C). "Before the Rule arrives at the articulation of sub-factors, its general
 26 directive asks whether the class's relief is adequate." *Final approval criteria—Rule*
 27 *23(e)(2)(C): Adequate relief*, 4 NEWBERG ON CLASS ACTIONS § 13:51 (5th ed.). "In
 28 evaluating the value of the class members' claims, the court need not decide the

1 merits of the case nor substitute its judgment of what the case might be worth for
 2 that of class counsel; however, ‘the court must at least satisfy itself that the class
 3 settlement is within the ‘ballpark’ of reasonableness.’” *Id.* (citation omitted).

4 Here, the Settlement Class Members are receiving a substantial direct benefit
 5 from General Mills’ removal of the “No Artificial Flavors” labeling statement. SA
 6 ¶¶ 5.1, 5.2. The injunctive relief provided by this settlement has value because it
 7 protects the class from further exposure to misleading advertising. Indeed, the
 8 “primary form of relief available under [California’s consumer protection laws] to
 9 protect consumers from unfair business practices is an injunction.” *McGill v.*
 10 *Citibank, N.A.*, 2 Cal. 5th 945, 954 (2017) (quoting *In re Tobacco II Cases*, 46 Cal.
 11 4th 298, 320 (2009)). In fact, similar settlements providing meaningful injunctive
 12 relief for the Class, and monetary amounts only for attorney’s fees, costs, and
 13 incentive payments to the named plaintiffs, have been approved by numerous district
 14 courts in this Circuit. *See, e.g., Littlejohn*, 2019 WL 2514720, at *5 (approving
 15 settlement that affords “meaningful injunctive relief.”); *Lyons v. CoxCom, Inc.*, No.
 16 08-cv-2047-HCAB (S.D. Cal. Aug. 23, 2010) (granting final approval of Rule
 17 23(b)(2) settlement where class members did not receive a direct monetary benefit
 18 but were required to release monetary claims); *Carr*, 51 F. Supp. 3d at 970 (same);
 19 *Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 91074261 (N.D. Cal. Aug. 1, 2016)
 20 (same); *Johnson v. Triple Leaf Tea Inc.*, 2015 WL 8943150, at *1 (N.D. Cal. Nov.
 21 16, 2015) (same); *In re Quaker Oats Labeling Litig.*, 2014 WL 12616763, at *1
 22 (N.D. Cal. July 29, 2014) (“The parties have shown...that a settlement providing
 23 only injunctive relief is appropriate here given the value of that relief and the limited
 24 possibility of recovering damages and distributing them in an economically-feasible
 25 manner.”). Further, class members are repeat purchasers of the Products, so they are
 26 likely to encounter and benefit from the injunctive relief in the future. *See*
 27 Declaration of Jeveny Hammer ¶ 6 (“To my knowledge, a significant percent of Fruit
 28

1 Flavored Snacks' purchasers are repeat buyers who have purchased the Fruit
 2 Flavored Snacks before and are likely to do so again.”).

3 The value of the injunctive relief in this case is particularly great given the *de*
 4 *minimums* amount of monetary damages that would be available at trial assuming
 5 Plaintiffs were to prevail. Here, the Products at issue generally cost less than \$5.00
 6 per unit. FAC ¶ 94.⁹ Damages in this action would not be based on the full purchase
 7 price of the Products, but rather the price premium that is associated with the
 8 challenged labeling claims like “no artificial flavors.” *See Townsend v. Monster*
 9 *Beverage Corp.*, 303 F. Supp. 3d 1010, 1048 (C.D. Cal. 2018) (“The proper measure
 10 of restitution in a mislabeling case is the amount necessary to compensate the
 11 purchaser for the difference between a product as labeled and the product as
 12 received.”) (quoting *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F.Supp.3d
 13 1050, 1118 (C.D. Cal. 2015)). General Mills has submitted an expert report opining
 14 that the “No Artificial Flavors” labeling claim is not material to consumers and
 15 therefore price premium damages cannot be proven. Marron Decl., ¶ 7.

16 Even if Plaintiffs were to prove that there is a price premium associated with
 17 the challenged labeling claims, the potential recovery would likely be a minimal
 18 amount given the fact that the Products at issue are low priced fruit snack products.
 19 It would be economically infeasible to distribute this small sum of money to the class
 20 members. *See, e.g., Johnson*, 2015 WL 8943150, at *6 (holding that injunctive relief
 21 settlement was “fair, reasonable, and adequate” when considering “the realistic
 22 range of outcomes[,] including the amount Plaintiff might receive if she prevailed at
 23 trial.”); *Carr*, 51 F. Supp. 3d at 977 (“this suit has obtained injunctive relief for the
 24 class, so it is inaccurate to say that the Class is getting ‘nil.’ While the Court would

25
 26 ⁹ *See* <https://www.walmart.com/ip/Scooby-Doo-Fruit-Snacks-10-ct-0-8-oz/16935522> (last visited
 27 September 13, 2021) (showing that Scooby Doo Fruit Flavored Snacks sell for \$2.32 at Walmart);
<https://www.target.com/p/mott-39-s-fruit-flavored-snacks-pack-of-22-/A-51127752> (last visited
 28 September 13, 2021) (showing that Mott’s Fruit Flavored Snacks sell for \$3.99 at Target);
<https://www.target.com/p/fruit-gushers-tropical-flavored-fruit-snacks-6ct-/A-13025858> (last
 visited September 13, 2021) (showing that Gushers Fruit Snacks sell for \$2.39 at Target).

1 have preferred that the Settlement provide the Class with some compensation, the
 2 arguments Class Counsel have made concerning the attendant difficulties of
 3 administering such relief are legitimate[.]”).

4 In any event, the settlement release only covers claims for injunctive relief
 5 and class members are not giving up their right to bring additional claims for
 6 monetary damages. SA ¶ 7.1. Because the release is narrowly tailored to cover
 7 claims for injunctive relief, the Court should find that the settlement is fair,
 8 reasonable, and adequate.

9 ***1. The Costs, Risks, and Delay of Trial and Appeal Support***

10 ***Preliminary Approval***

11 The costs, risks, and delay of trial and appeal further support preliminary
 12 approval. Proceeding in this litigation in the absence of settlement poses various
 13 risks such as failing to certify a class, having summary judgment granted against
 14 Plaintiffs, or losing at trial. Such considerations have been found to weigh heavily
 15 in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan*
 16 *Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) (“Settlement
 17 avoids the complexity, delay, risk and expense of continuing with the litigation and
 18 will produce a prompt, certain, and substantial recovery for the Plaintiff class.”).
 19 Even if Plaintiffs are able to certify a class, there is also a risk that the Court could
 20 later decertify the class action. *See In re Netflix Privacy Litig.*, 2013 WL 1120801,
 21 at *6 (N.D. Cal. Mar. 18, 2013) (“The notion that a district court could decertify a
 22 class at any time is one that weighs in favor of settlement.”) (internal citations
 23 omitted). The Settlement eliminates these risks by ensuring Class Members a
 24 recovery that is “certain and immediate, eliminating the risk that class members
 25 would be left without any recovery . . . at all.” *Fulford v. Logitech, Inc.*, 2010 U.S.
 26 Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010).

27 ***2. The Proposed Method of Distributing Relief to the Class Is Effective***

28 “[T]he goal of any distribution method is to get as much of the available

1 damages remedy to class members as possible and in as simple and expedient a
 2 manner as possible.” *Final approval criteria—Rule 23(e)(2)(C)(ii): Distribution*
 3 *method*, 4 NEWBERG ON CLASS ACTIONS § 13:53 (5th ed.). Because this settlement
 4 provides injunctive relief, Settlement Class Members will automatically receive the
 5 benefits of the Settlement without having to file a claim form.

6 **3. *The Proposed Attorneys’ Fee Award is Fair and Reasonable***

7 As discussed above, the Settlement Agreement provides that Class Counsel
 8 may request an award of attorneys’ fees and costs up to \$600,000, subject to this
 9 Court’s approval. SA ¶ 10.1. Class Counsel’s fee request will be based on the
 10 lodestar method, which is the proper method for calculating attorneys’ fees in an
 11 injunctive relief settlement. *See Littlejohn*, 2020 WL 3536531, at *2 (affirming fee
 12 award based on lodestar method in an injunctive relief settlement); *Carr*, 51 F. Supp.
 13 3d at 978 (“because there is no common fund, the lodestar analysis applies to Class
 14 Counsel’s [fee] request.”). If the Court grants Plaintiffs’ Motion for Preliminary
 15 Approval, then Plaintiffs will fully address the reasonableness of the requested fee
 16 and incentive awards in their forthcoming Motion for Attorneys’ Fees, Costs, and
 17 Incentive Awards.

18 **4. *No Side Agreements Were Made in Connection with the Proposed***
 19 ***Settlement***

20 Rule 23(e)(3) requires that the Parties “must file a statement identifying any
 21 agreement made in connection with the [settlement] proposal.” Fed. R. Civ. P.
 22 23(e)(3). No agreements were made in connection with the settlement aside from the
 23 Settlement Agreement itself. Marron Decl., ¶ 23.

24 **D. The Proposed Settlement Treats Class Members Equitably**
 25 **Relative to Each Other**

26 Rule 23(e)(2)(D) requires the Court to consider whether the settlement
 27 agreement “treats class members equitably relative to each other.” Fed. R. Civ. P.
 28 23(e)(2)(D). “A distribution of relief that favors some class members at the expense

1 of others may be a red flag that class counsel have sold out some of the class
 2 members at the expense of others, or for their own benefit.” *Final approval*
 3 *criteria—Rule 23(e)(2)(D): Intra-class equity*, 4 NEWBERG ON CLASS ACTIONS §
 4 13:56 (5th ed.). Here, the settlement treats each class member equally because each
 5 Settlement Class Member will automatically receive the benefits afforded by the
 6 injunctive relief.

7 **VI. THE COURT SHOULD PROVISIONALLY CERTIFY THE CLASS**
 8 **AND ENTER THE PRELIMINARY APPROVAL ORDER**

9 The Ninth Circuit has recognized that certifying a settlement class to resolve
 10 consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When
 11 presented with a proposed settlement, a court must first determine whether the
 12 proposed settlement class satisfies the requirements for class certification under Rule
 13 23. In assessing those class certification requirements, a court may properly consider
 14 that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)
 15 (“Confronted with a request for settlement-only class certification, a district court
 16 need not inquire whether the case, if tried, would present intractable management
 17 problems . . . for the proposal is that there be no trial.”). For the reasons below, the
 18 Class meets the requirements of Rule 23(a) and (b).

19 **A. The Settlement Class Satisfied Rule 23(a)**

20 **1. Numerosity**

21 Rule 23(a)(1) requires that “the class is so numerous that joinder of all
 22 members is impracticable.” *See Fed. R. Civ. P. 23(a)(1)*. “As a general matter, courts
 23 have found that numerosity is satisfied when class size exceeds 40 members, but not
 24 satisfied when membership dips below 21.” *Slaven v. BP Am., Inc.*, 190 F.R.D. 649,
 25 654 (C.D. Cal. 2000). Here, the proposed Class is comprised of thousands of
 26 consumers who purchased the fruit snack Products – a number that obviously
 27 satisfies the numerosity requirement. Accordingly, the proposed Class is so
 28 numerous that joinder of their claims is impracticable.

1 2. ***Commonality***

2 Rule 23(a)(2) requires the existence of “questions of law or fact common to
 3 the class.” *See Fed. R. Civ. P. 23(a)(2)*. Commonality is established if plaintiffs and
 4 class members’ claims “depend on a common contention,” “capable of class-wide
 5 resolution ... [meaning] that determination of its truth or falsity will resolve an issue
 6 that is central to the validity of each one of the claims in one stroke.” *Wal-Mart*
 7 *Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Because the commonality
 8 requirement may be satisfied by a single common issue, it is easily met. 1H.
 9 Newberg & Conte, *Newberg on Class Actions* § 3.10, at 3-50 (1992).

10 There are ample issues of both law and fact here that are common to the
 11 members of the Class. All of the Class Members’ claims arise from a common
 12 nucleus of facts and are based on the same legal theories. Plaintiffs allege that
 13 General Mills misrepresented the fruit snack Products by claiming that the Products
 14 contain “No Artificial Flavors.” These alleged misrepresentations were made in a
 15 uniform manner to each of the class members. Accordingly, commonality is satisfied
 16 by the existence of these common factual issues. *See Arnold v. United Artists*
 17 *Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (commonality
 18 requirement met by “the alleged existence of common discriminatory practices”).

19 Plaintiffs’ claims are brought under legal theories common to the Class as a
 20 whole. Alleging a common legal theory alone is enough to establish commonality.
 21 *See Hanlon*, 150 F.3d at 1019 (“All questions of fact and law need not be common
 22 to satisfy the rule. The existence of shared legal issues with divergent factual
 23 predicates is sufficient, as is a common core of salient facts coupled with disparate
 24 legal remedies within the class.”). Here, all of the legal theories asserted by Plaintiffs
 25 are common to all Class Members. Given that there are virtually no issues of law
 26 which affect only individual members of the Class, common issues of law clearly
 27 predominate over individual ones. Thus, commonality is satisfied.

1 3. *Typicality*

2 Rule 23(a)(3) requires that the claims of the representative plaintiffs be
 3 “typical of the claims ... of the class.” *See Fed. R. Civ. P. 23(a)(3)*. “Under the rule’s
 4 permissive standards, representative claims are ‘typical’ if they are reasonably
 5 coextensive with those of absent class members; they need not be substantially
 6 identical.” *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement,
 7 the representative plaintiffs simply must demonstrate that the members of the
 8 settlement class have the same or similar grievances. *Gen. Tel. Co. of the Sw. v.*
 9 *Falcon*, 457 U.S. 147, 161 (1982).

10 The claims of the named Plaintiffs are typical of those of the Class. Like those
 11 of the Class, Plaintiffs’ claims arise out of their purchase of the General Mills fruit
 12 snack Products after relying on General Mills’ “No Artificial Flavors” labeling
 13 claims. Plaintiffs have precisely the same claims as the Class, and must satisfy the
 14 same elements of each of their claims, as must other Class Members. Supported by
 15 the same legal theories, the named Plaintiffs and all Class Members share claims
 16 based on the same alleged course of conduct. Therefore, Plaintiffs satisfy the
 17 typicality requirement.

18 4. *Adequacy*

19 The final requirement of Rule 23(a) is set forth in subsection (a)(4) which
 20 requires that the representative parties “fairly and adequately protect the interests of
 21 the class.” *See Fed. R. Civ. P. 23(a)(4)*. Adequacy of the class representatives and
 22 Class Counsel was fully addressed in Section V(A) above and will not be repeated
 23 here.

24 B. **The Settlement Class Satisfies Rule 23(b)(2)**

25 Because the Settlement provides class members with injunctive relief without
 26 releasing claims for monetary damages, Plaintiffs seek certification under Rule
 27 23(b)(2). Certification under Rule 23(b)(2) is appropriate where a defendant has
 28 acted on “grounds that apply generally to the class, so that final injunctive relief or

1 corresponding declaratory relief is appropriate respecting the class as a whole.” Fed.
 2 R. Civ. P. 23(b)(2). “A class seeking monetary damages may be certified pursuant
 3 to Rule 23(b)(2) where [monetary] relief is ‘merely incidental to [the] primary claim
 4 for injunctive relief.’” *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1195 (9th
 5 Cir. 2001) (citing *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir.
 6 1986)).

7 Here, the settlement provides for injunctive relief and certification under Rule
 8 23(b)(2) is appropriate. Plaintiffs’ claims for damages, which are not at issue in the
 9 Settlement, are “incidental” to the First Amended Complaint’s primary claims for
 10 injunctive relief. *Dukes*, 131 S. Ct. at 2557. Plaintiffs’ primary claims under the
 11 CLRA were for injunctive relief, and the UCL and FAL are primarily equitable
 12 remedy statutes. *In re Tobacco II Cases*, 46 Cal. App. 4th at 320. Plaintiffs and the
 13 Class’ claims for restitution were secondary in that any compensation would have
 14 flowed directly out of Defendant’s misrepresentations or omissions. *See id.* at 2559
 15 (stating that damages are incidental when they “flow directly from liability to the
 16 class as a whole on the claims forming the basis of the injunctive or declaratory
 17 relief” (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998))).
 18 Plaintiffs’ basis for seeking corrective labeling also flows directly from why General
 19 Mills is liable to the Class as a whole: the Products’ allegedly false and deceptive
 20 marketing.

21 Further, if General Mills’ labeling conduct was unlawful as to one Plaintiff, it
 22 was unlawful as to the entire Class. *Id.* at 2557 (stating Rule 23(b)(2) injunctive
 23 relief is appropriate when defendant’s conduct is unlawful “as to all of the class
 24 members” and applies “when a single injunction or declaratory judgment would
 25 provide relief to each member of the class,” thereby benefitting each Class member
 26 equally). Here, the injunctive relief agreed to, in the form of corrective advertising,
 27 will afford relief to each member of the Class and benefit the Class equally. The
 28

1 Court should, therefore, certify the Class under Rule 23(b)(2) for settlement
 2 purposes.

3 **VII. PROPOSED SCHEDULE OF EVENTS**

4 In connection with Preliminary Approval of the Settlement, the Court should
 5 also set a date and time for the Final Approval Hearing. Other deadlines in the
 6 Settlement approval process, including the deadlines for requesting exclusion from
 7 the Settlement Class or objecting to the Settlement, will be determined based on the
 8 date of the Final Approval Hearing or the date on which the Preliminary Approval
 9 Order is entered. The Parties respectfully propose the following schedule:

EVENT	DEADLINE
Deadline for publishing Notice	14 days after entry of the Preliminary Approval Order.
Class Counsel to File a Motion for Attorneys' Fees, Costs, and Incentive Awards	14 days before objection deadline
Deadline to File Motion for Final Approval of Settlement	14 days before objection deadline
Objection Deadline	30 days prior to Final Approval Hearing
Responses to Objections Due	14 days prior to Final Approval Hearing
Final Approval Hearing	Approximately 100 days after Order Granting Preliminary Approval

25 **VIII. CONCLUSION**

26 For the foregoing reasons, Plaintiffs respectfully request that the Court grant
 27 preliminary approval, provisionally certify the Class, approve the proposed notice
 28 plan, and enter the Proposed Preliminary Approval Order.

1
2
3 DATED: September 13, 2021

4
5 Respectfully submitted,
6
7
8
9
10
11
12
13
14
15

/s/ Ronald A. Marron

RONALD A. MARRON

LAW OFFICES OF
RONALD A. MARRON
RONALD A. MARRON
ron@consumersadvocates.com
Michael T. Houchin
mike@consumersadvocates.com
Lilach Halperin
lilach@consumersadvocates.com
651 Arroyo Drive
San Diego, California 92103
Telephone: (619) 696-9006
Facsimile: (619) 564-6665

LAW OFFICE OF DAVID ELLIOT

DAVID ELLIOT
davidelliott@elliottlawfirm.com
2028 3rd Avenue
San Diego, CA 92101
Telephone: (858) 228-7997

***Counsel for Plaintiffs and the Proposed
Class***