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13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **OAKLAND DIVISION**

16 MATTHEW EDWARDS, et al., individually  
17 and on behalf of all others similarly situated,  
18 Plaintiffs,

19 v.

20 NATIONAL MILK PRODUCERS  
21 FEDERATION, aka COOPERATIVES  
22 WORKING TOGETHER; DAIRY FARMERS  
OF AMERICA, INC.; LAND O’LAKES, INC.;  
23 DAIRYLEA COOPERATIVE INC.; and  
AGRI-MARK, INC.,  
24 Defendants.

Case No. 11-CV-04766-JSW

[consolidated with 11-CV-04791-JSW  
and 11-CV-05253-JSW]

CLASS ACTION

**PLAINTIFFS’ UNOPPOSED NOTICE  
OF MOTION AND MOTION FOR  
PRELIMINARY APPROVAL OF  
SETTLEMENT**

Date: August 26, 2016  
Time: 11:00 a.m.  
Dept: Courtroom 5  
Judge: Hon. Jeffrey S. White

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on August 26, 2016 at 11:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Judge Jeffrey S. White of the United States District Court of the Northern District of California, Oakland Division, in Courtroom 5, 2nd Floor, located at 1301 Clay Street, Oakland, CA 94612, plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

- 1) preliminarily approving the proposed class action settlement of this case with all defendants; and
- 2) approving the manner and form of notice.

This unopposed motion is based on this notice of motion and motion for preliminary approval of settlement, the following memorandum of points and authorities, the declarations in support, the accompanying settlement agreement and proposed form of notice, the pleadings and the papers on file in this action, and such other matters as the Court may consider.

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## I. INTRODUCTION

Plaintiffs seek preliminary approval of their class action settlement and notice plan under Rule 23(e). The settlement class is defined to mean the classes previously certified by this Court, with the released claims the same as those set forth in the operative complaint. The settlement in the amount of \$52 million is approximately 30% percent of plaintiffs' total estimated damages. And the settlement is to be distributed evenly among two tiers of class members making claims, in order to ensure fairness and maximize the cash going to class members as opposed to administrative expense.

This recovery to the class is outstanding, particularly given defendants' pending motions for summary judgment, to decertify, and to strike plaintiffs' expert economist. The proposed settlement was reached with the assistance of the retired Hon. Layn R. Phillips, after extensive negotiations between experienced and informed counsel, including multiple mediation sessions and subsequent discussions. Without any obvious deficiencies, the settlement agreement readily meets the standards for preliminary approval. *See* Sections III & IV(A).

As when notice was provided regarding class certification, the proposed notice program is designed to reach at least 75% percent of class members. Moreover, the notice is written in plain English and Spanish, clearly conveys to class members their options and rights, and provides concise explanation regarding what class members may expect from this settlement. All of this constitutes notice in the reasonable manner required under Rule 23(e). *See* Section IV(B).

Accordingly, plaintiffs respectfully request an order: (1) preliminarily approving the proposed class action settlement; and (2) approving the manner and form of notice.

## II. PROCEDURAL HISTORY

On September 26, 2011, indirect purchasers of milk and other fresh milk products sued defendants for violating the antitrust and consumer protection statutes of various states. Plaintiffs alleged that defendants participated in an unlawful conspiracy to pay farmers to prematurely send their cows to slaughter in order to reduce supplies of raw milk. Defendants moved to dismiss, which the Court denied on October 30, 2012.<sup>1</sup>

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<sup>1</sup> ECF No. 123.

Plaintiffs then moved for class certification, which defendants vigorously opposed in multiple rounds of briefing, including a *Daubert* motion. The Court found that “a key common question [is] whether Defendants violated the indirect purchaser antitrust laws from the class states” and that “Plaintiffs’ expert set forth a damages model that is capable of calculating the allegedly inflated prices that class members paid in each class state as a result of the nationwide conspiracy.” The Court certified sixteen indirect purchaser Classes.<sup>2</sup> Defendants then petitioned the Ninth Circuit for permission to appeal, which was denied on December 3, 2014.

On January 16, 2015, the first mediation took place before the Hon. Phillips, but the case was not resolved. Defendants then sought a writ of certiorari with the Supreme Court, which was denied on April 27, 2015. On May 15, 2015, notice went out to millions of class members.<sup>3</sup>

After the close of fact discovery, the parties then filed cross motions for summary adjudication, and defendants filed a *Daubert* motion to exclude the opinions of Dr. Sunding, as well as a motion to decertify the Classes. These motions were set for hearing on March 4, 2016, but taken off calendar by the Court.<sup>4</sup>

The parties then had another mediation session before the Hon. Phillips on May 16, 2016. The mediation did not result in an agreement.<sup>5</sup> The parties continued to discuss resolution, however, and subsequently reached the agreement that plaintiffs now respectfully request the Court to preliminarily approve.<sup>6</sup>

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<sup>2</sup> ECF Nos. 266 & 287.

<sup>3</sup> Declaration of Elaine T. Byszewski in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement (“Byszewski Decl.”), ¶ 2.

<sup>4</sup> *Id.*, ¶ 3

<sup>5</sup> *Id.*, ¶ 4

<sup>6</sup> *Id.*, ¶ 5 & Ex. A, cited herein as the Settlement Agreement.

### III. SUMMARY OF KEY SETTLEMENT TERMS

#### A. The Settlement Class

The proposed settlement class is defined in terms of the classes already certified by the Court<sup>7</sup>:

All consumers who, from 2003 to the present, as residents of Arizona, California, District of Columbia, Kansas, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, Oregon, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin, indirectly purchased milk and/or other fresh milk products (including cream, half & half, yogurt, cottage cheese, cream cheese, and/or sour cream) for their own use and not for resale.

The class representatives previously appointed by the Court have been provided with the material terms of the settlement agreement and have not raised any objections.<sup>8</sup>

#### B. The Settlement Consideration

The total settlement amount is \$52 million in cash.<sup>9</sup>

#### C. Release of Claims

If the settlement becomes final, plaintiffs and class members who have not opted out will release all federal and state law claims against the defendants relating to the conduct alleged in plaintiffs' complaint.<sup>10</sup>

#### D. Notice of the Settlement

Plaintiffs submit a proposed notice and a plan for the dissemination of notice. As set forth in the declaration of notice administrator Gilardi & Co. LLC, the proposed notice program has three parts.<sup>11</sup> First, comprehensive internet notice will utilize sponsored links on the Google and Yahoo!/Bing networks and targeted banner advertising resulting in an estimated 59 million unique impressions (177 million gross impressions frequency capped at three times by unique IP address).

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<sup>7</sup> Settlement Agreement, ¶ 1. The notice of pendency was disseminated to classes with a period extending to 2012, *see* ECF No. 312, but the settlement notice is to be disseminated to classes with a period extending to the present, as originally certified, *see* ECF No. 266.

<sup>8</sup> Byszewski Decl., ¶ 13.

<sup>9</sup> Settlement Agreement, ¶ 18.

<sup>10</sup> Settlement Agreement, ¶ 15.

<sup>11</sup> *See* Declaration of Alan Vasquez for Gilardi & Co. LLC ("Vasquez Decl."), ¶¶ 17-22. *See also* Byszewski Decl., ¶ 6.



Second, a case-dedicated website will be established at [www.freshmilkpricefixing.com](http://www.freshmilkpricefixing.com) to provide reliable and accurate information to class members. The administrator that plaintiffs will later propose for the electronic distribution of funds – Sipree, Inc. – will host the settlement notice website to ensure the most efficient and cost effective processing of claims. Because claims will be submitted via the website, hosting by Sipree will enable it to directly pull the information submitted by class members. Third, the notice administrator will issue a party-neutral press release through PR Newswire – one of the most cost effective ways to supplement notice efforts. Gilardi estimates that at least 75 percent of class members will receive notice. Moreover, the notice is written in plain English and Spanish, clearly conveys to class members their options and rights, and provides concise explanation regarding what class members may expect from this settlement.<sup>12</sup>

**E. Plan of Distribution**

As will be set forth in greater detail in plaintiffs’ motion for final approval, an online claims process will permit class members to submit a simple claim opting for cash, which will be distributed in fixed amounts. No proof of purchase will be required. The claim form will require an email address, so that the cash can be distributed electronically, in order to maximize the settlement funds going to class members, as opposed to administrative expenses. Those submitting a claim for cash will receive an electronic notification via email that will permit them to choose an online account, *e.g.*, Amazon, PayPal, or Google Wallet account, for the money to be distributed into. Any class member whose claim form identifies it as purchasing milk and fresh milk products in an amount that exceeds normal household purchases will receive a higher fixed amount. The fixed amounts to be paid to class members shall be determined once the number submitting claims for cash has been determined, with the goal of complete exhaustion of funds.<sup>13</sup>

Any cash remaining after the round one cash distribution may be distributed in a round two. The second round of distribution would be in the form of grocery loyalty cards automatically loaded

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<sup>12</sup> *Id.*, ¶ 20 & Ex. D (notice of settlement).

<sup>13</sup> Byszewski Decl., ¶ 11. *See also In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (affirming use of claimant-fund-sharing settlement and rejecting objectors’ argument that the “notice was deficient for failing to provide an estimate as to how much of an award each claimant would receive” and instead holding that the notice “did not need to and could not provide an exact forecast of how much each class member would receive”).

with a fixed dollar amount, based on triggering purchases of milk or fresh milk products in any amount. This would continue until complete exhaustion of funds is achieved. Alternatively, depending on the amount remaining, it may be distributed as *cy pres* to the Attorneys General for the class jurisdictions for use in prosecuting consumer antitrust claims.<sup>14</sup> Under no circumstances will there be reversion to defendants.<sup>15</sup> Plaintiffs also note that the provision of cash value via a grocery loyalty card would not be deemed a coupon settlement under CAFA.<sup>16</sup>

**F. Costs of Settlement Administration**

The settlement agreement specifies that the portion of the common fund going towards settlement notice and distribution shall not exceed \$2 million.<sup>17</sup> This is exceedingly reasonable given that there are approximately 73 million class members to whom notice must be disseminated and, upon election, cash distributed. Plaintiffs have been able to minimize projected administrative expenses related to settlement through the use of a simple claims form, to trigger distribution of fixed amounts, to be delivered using electronic means by Sipree. Each of these elements has enabled plaintiffs to maximize the amount of cash going directly to class members.<sup>18</sup>

**G. CAFA Notices**

The settlement agreement provides that defendants will submit all materials required to be sent to appropriate Federal and State officials pursuant to the Class Action Fairness Act.<sup>19</sup>

**IV. ARGUMENT**

**A. The Court Should Preliminarily Approve the Settlement**

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement of class action claims. Approval of a settlement is a multi-step process, beginning with preliminary approval, followed by notice to the class and the filing of any objections, and concluding with a

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<sup>14</sup> Byszewski Decl., ¶ 11.

<sup>15</sup> Settlement Agreement, ¶ 22.

<sup>16</sup> *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 951-52 (“settlement giv[ing] class members \$12 to spend on any item carried on the website of a giant, low-cost retailer....does not constitute a coupon settlement within the meaning of CAFA”); *see also id.* at 951 (collecting cases).

<sup>17</sup> Settlement Agreement, ¶ 20.

<sup>18</sup> Byszewski Decl., ¶ 6.

<sup>19</sup> Settlement Agreement, ¶ 31.

motion for final approval and fairness hearing.<sup>20</sup> Preliminary approval is thus not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the “range of possible approval.”<sup>21</sup> Preliminary approval establishes an “initial presumption” of fairness, such that notice may be given to the class and the class may have a full and fair opportunity to consider the proposed settlement.<sup>22</sup>

Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed 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 within the range of possible approval.<sup>23</sup> The “initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.”<sup>24</sup>

### **1. The Settlement Is the Result of Arm’s-Length Negotiations**

This settlement arises out of extended, informed, arm’s-length negotiations between counsel for the parties. The parties reached agreement after almost five years of litigation, including multiple motions to dismiss, multiple rounds of class certification briefing, completion of merits discovery, cross motions for summary judgment, and multiple motions to decertify and to strike the plaintiffs’ expert economist. After a failed initial mediation before the Hon. Phillips, the parties made some progress at the second, and ultimately resolved the case during a series of post-mediation discussions facilitated by the Hon. Phillips.<sup>25</sup>

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<sup>20</sup> See Manual for Complex Litigation (Fourth) § 21.632, 320-21 (2004). All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

<sup>21</sup> *Id.*; see also *Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-302 (E.D. Cal. 2011).

<sup>22</sup> *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

<sup>23</sup> See *Bickley v. Schneider*, No. 08-cv-05806-JSW, 2016 WL 4157355, at \*1 (N.D. Cal. Apr. 25, 2016); *Zepeda v. PayPal, Inc.*, No: C 10-2500 SBA, 2015 WL 6746913, at \*4 (N.D. Cal. Nov. 5, 2015); *Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2012 WL 5838198, at \*1 n.1 (N.D. Cal. Aug. 17, 2012); *Tableware*, 484 F. Supp. 2d at 1079.

<sup>24</sup> *Officers for Justice v. San Fran. Civ. Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982).

<sup>25</sup> See *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (finding the presence of a neutral mediator “a factor weighing in favor of a finding of non-collusiveness”).

The settlement itself also bears no signs of collusion or conflict. In its opinion in *In re Bluetooth*, the Ninth Circuit admonished that courts must, at the final approval stage, ensure that the settlement, taken as a whole, is free of collusion or any indication that the pursuit of the interests of the class counsel or the named plaintiffs “infected” the negotiations.<sup>26</sup> The Ninth Circuit has pointed to three factors as troubling signs of a potential disregard for the class’s interests during the course of negotiation: (a) when class counsel receive a disproportionate distribution of the settlement; (b) when the parties negotiate a “clear sailing” arrangement that provides for the payment of attorneys’ fees separate and apart from class funds; or (c) when the parties arrange for fees not awarded to plaintiffs’ counsel to revert to the defendants rather than the class.<sup>27</sup>

Here, none of those signs are present. The proposed settlement is a common fund, all-in settlement with no possibility of reversion. The funds will be used to cover costs and fees and compensate the class. There is no “clear sailing” provision, no payment of fees separate and apart from the class funds, and no “kicker” provision like the one in *In re Bluetooth* that would allow unawarded fees to revert to the defendants.<sup>28</sup> Instead, the proposed class notice informs class members that class counsel will make a request to the Court for attorneys’ fees in the amount of up to one third of the settlement fund.<sup>29</sup>

In short, these non-collusive negotiations between sophisticated sets of counsel, assisted by a neutral mediator, support preliminary approval of the settlement agreement. As the Ninth Circuit has stated, “We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.”<sup>30</sup>

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<sup>26</sup> *Id.* at 946-48.

<sup>27</sup> *Id.* at 947. While these signs are of less concern when a class has already been certified, *id.*, still none exist in the present agreement.

<sup>28</sup> Settlement Agreement, ¶ 24. This Court has previously recognized that a fee award of 33 percent is “in line with most fee awards under California law.” *Wolph v. Acer American Corp.*, No. C 09-01314-JSW, 2013 WL 5718440 (N.D. Cal. Oct. 21, 2013).

<sup>29</sup> Vasquez Decl., Ex. D.

<sup>30</sup> *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

## 2. The Settlement Has No Obvious Deficiencies

Given the relatively untested antitrust immunity statutes at issue, as well as the complex econometric modeling employed by Dr. Sunding and subject to a pending *Daubert* motion, there was a risk faced by the class of no recovery. So this settlement represents an excellent recovery for the class – ensuring \$52 million in cash for the class.<sup>31</sup> In his report on the merits, Dr. Sunding estimated total class damages to be \$181 million.<sup>32</sup> Thus, this settlement represents recovery of almost 30% of total damages suffered by indirect purchasers.

The Ninth Circuit has affirmed the approval of a strikingly similar settlement. In *Rodriguez v. West Publishing Corp.*, the district court approved a \$49 million antitrust settlement, representing thirty percent of the total damages, estimated by the class expert to be \$158 to \$168 million. Noting that “courts do not traditionally factor treble damages into the calculus for determining a reasonable settlement value,” the Court held that the “negotiated amount is fair and reasonable no matter how you slice it.”<sup>33</sup> *Rodriguez* also stated that the fact of a cash settlement was a “good indicator of a beneficial settlement.”<sup>34</sup> So too here.

And plaintiffs did not enter into the settlement agreement without a thorough understanding of the strengths and weaknesses of their case, which has been extensively litigated over the past five years. In advance of filing the pending motions, the parties conducted comprehensive discovery. Defendants have collectively produced over half a million documents and each responded to 20 written interrogatories and 30 requests for admission. Plaintiffs deposed a Rule 30(b)(6) witness for each of the defendants. And plaintiffs deposed defendants’ litigation experts, Mr. Kaplan (twice) and Mr. Gallagher, as well as defendants’ consultant during the course of the conspiracy, Dr. Brown. The parties submitted multiple sets of expert declarations at both class certification and merits, including extensive regression modeling of the overcharge and its pass through to consumers. Given

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<sup>31</sup> Byszewski Decl., ¶7.

<sup>32</sup> ECF No. 343-46.

<sup>33</sup> 563 F.3d at 964-65.

<sup>34</sup> *Id.* at 965.

the developed stage of litigation and the risk that plaintiffs faced with the pending motions and at trial, there are no obvious deficiencies regarding the settlement.<sup>35</sup>

Thus, the second consideration also supports preliminary approval.

**3. The Settlement Does Not Provide Improper Preferential Treatment for Segments of the Class or the Class Representatives**

**a. All class members, including the class representatives, can recover their share of the settlement**

The allocation of the settlement fund among class members is fair. A plan of distribution of class settlement funds is subject to the “fair, reasonable and adequate” standard that applies to approval of class settlements.<sup>36</sup> A plan of distribution that compensates class members based on the extent of their injuries is generally considered fair and reasonable.<sup>37</sup>

As set forth above, an online claims process will permit class members to submit a simple claim form opting for cash, which will be distributed in a fixed amount. No proof of purchase will be required. Any class member whose claim form identifies it as purchasing milk products in an amount that exceeds normal household purchases will receive a higher fixed amount.<sup>38</sup>

The amount of compensation is fixed because a detailed accounting of milk and fresh milk purchases over a decade on claims in the context of an estimated 73 million member settlement class would result in excessive administrative expense. Given the magnitude of the class, such precision would defeat the important objective of returning as much money as possible to class members.<sup>39</sup>

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<sup>35</sup> Byszewski Decl., ¶¶ 8-10.

<sup>36</sup> *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001).

<sup>37</sup> *E.g.*, *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-01663-JST, 2015 WL 7454183, at \*8 (N.D. Cal. Nov. 23, 2015) (“Such a plan ‘fairly treats class members by awarding a pro rata share’ to the class members based on the extent of their injuries.”); *Noll v. eBay, Inc.*, 306 F.R.D. 593, 601, 607 (N.D. Cal. 2015) (approving *pro-rata* distribution as fair and reasonable); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5159441, at \*7-8 (N.D. Cal. Sept. 2, 2015) (same).

<sup>38</sup> That said, “it is an inherent feature of the class-action device that individual class members will often claim differing amounts of damages – that is why due process requires that individual members of a class certified under Rule 23(b)(3) be given an opportunity to opt out of the settlement class to pursue their claims separately.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 824 & n.5 (2012).

<sup>39</sup> Byszewski Decl., ¶ 12.

There are two tiers of fixed amounts, however, in recognition that certain entities have made purchases of a higher order of magnitude than normal households. So there will be two different levels of fixed cash payments, based on class member's purchases and the total number of class members making claims. For example, the regular fixed amount may be \$30, or it may be higher or lower depending on the numbers of all class members making claims, with the higher fixed cash payment above that amount. But the fixed amounts to be paid to class members will not be set until the number submitting claims for cash has been determined. This flexibility will permit fixed amounts likely to achieve complete exhaustion of funds.<sup>40</sup>

**b. The service awards for the class representatives reflect the work they have undertaken on behalf of the class**

Plaintiffs intend to seek service awards for the 18 class representatives in the amount of \$5,000 each, for a total of \$90,000. The class representatives have been actively involved in the litigation of this case. Each has responded to 37 interrogatories and 39 document requests. Defendants have deposed each representative at length.<sup>41</sup> As the Ninth Circuit recognized in *In re Online DVD-Rental Antitrust Litig.*, “incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class ‘are fairly typical in class action cases.’”<sup>42</sup> And the Court affirmed approval of “incentive awards of \$5,000 each for nine class representatives,” over the objection that the award was “significantly larger than the \$12 each unnamed class member will receive.”<sup>43</sup> Instead, the Court found the award “well within the usual norms of modest compensation paid to class representatives.”<sup>44</sup> This Court has also permitted incentive awards in an amount similar to that sought here.<sup>45</sup>

In short, the fairness of the proposed allocation of the common fund also supports preliminary approval.

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<sup>40</sup> *Id.* See also *In re Online DVD Rental Antitrust Litig.*, 779 F.3d at 945-946 (affirming use of claimant-fund-sharing settlement).

<sup>41</sup> Byszewski Decl., ¶ 13.

<sup>42</sup> 779 F.3d at 943.

<sup>43</sup> *Id.* at 941, 942.

<sup>44</sup> *Id.* at 943.

<sup>45</sup> *Wolph*, 2013WL 5718440, at \*6 (Oct. 21, 2013) (approving \$2,000 incentive awards).

**4. The Settlement Amount Falls Within the Range of Possible Approval**

To grant preliminary approval, this Court must decide that the settlement falls within the range of possible approval.<sup>46</sup> As discussed above, the \$52 million settlement amount certainly falls within a reasonable range given the possibility of no recovery. Moreover, recovery of an estimated 30 percent of damages represents an outstanding recovery by any measure. In short, there is no question that the settlement is fair, adequate and reasonable, and in the best interests of the plaintiffs and the settlement class.<sup>47</sup>

Plaintiffs respectfully request that the Court preliminarily approve the settlement agreement.

**B. The Proposed Manner and Form of Notice Satisfies Rule 23**

Rule 23(e)(1) requires that a court approving a class action settlement “direct notice in a reasonable manner to all class members who would be bound by the proposal.”<sup>48</sup> A class action settlement 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.”<sup>49</sup>

The proposed plan for notice is substantially the same as the notice earlier approved by the Court,<sup>50</sup> and already provided to the certified Rule 23(b)(3) classes, as “the best notice that is practicable under the circumstances.”<sup>51</sup> Then, as now, the proposed plan of notice is supported by an experienced notice and claims administrator, which has worked cooperatively with counsel to develop the proposed plan of notice. Gilardi submits a declaration in support of the proposed notice plan attesting to its adequacy and constitutionality.<sup>52</sup>

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<sup>46</sup> See *Zepeda*, 2015 WL 6746913, at \*4; *Fraley*, 2012 WL5838198, at \*1 n.1; *Tableware*, 484 F. Supp. 2d at 1079.

<sup>47</sup> Byszewski Decl., ¶ 14.

<sup>48</sup> Fed. R. Civ. P. 23(e)(1).

<sup>49</sup> *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); see also Fed. R. Civ. P. 23(c)(2)(B) (describing specific information to be included in the notice).

<sup>50</sup> ECF No. 317 (April 23, 2015).

<sup>51</sup> Fed. R. Civ. P. 23(c)(2)(B).

<sup>52</sup> See Vasquez Decl., ¶¶ 1-6. Cf. ECF No. 306-1 (earlier Vasquez declaration dated March 27, 2015).



Moreover, the proposed long form of the notice of settlement follows, as closely as possible, the language recommended by this District's Procedural Guidance for Class Action Settlements<sup>53</sup> and required by the Ninth Circuit.<sup>54</sup> And the other short form notices, such as the banner advertisements and sponsored links, will link to the [www.freshmilkpricefixing.com](http://www.freshmilkpricefixing.com) website that will contain the long form notice of settlement, key court documents, and other important information about the case. With this motion, plaintiffs provide proposals for the long form of the notice of settlement and the short form online banner notices.<sup>55</sup>

The Supreme Court "has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."<sup>56</sup> Here, the proposed notice plan will ensure that the vast majority of class members receive notice. The class members here include approximately 73 million residents of the 15 states and the District of Columbia.<sup>57</sup> Between 94 and 99 percent of American households are believed to purchase fluid milk products.<sup>58</sup>

In these circumstances, any form of direct notice is impracticable. Indeed, courts have interpreted Rule 23 so as not to require any form of direct notice:

The best practicable notice under the circumstance is notice by publication in newspapers. In view of the millions of members of the class, notice to class members by individual postal mail, email or radio or television advertisements, is neither necessary nor appropriate. The publication notice ordered is appropriate and sufficient in the circumstances. The timeline for notice provides reasonable, appropriate and ample opportunity for class members to oppose the settlement if they wish to do so.<sup>59</sup>

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<sup>53</sup> See <http://www.cand.uscourts.gov/ClassActionSettlementGuidance> (last visited August 4, 2016).

<sup>54</sup> *E.g.*, *In re Online DVD Rental Antitrust Litig.*, 779 F.3d at 946; *Lane*, 696 F.3d at 826; *Rodriguez*, 563 F.3d at 962.

<sup>55</sup> Vasquez Decl., ¶¶ 18, 20 & Exs. C (banner notices) & D (long form notice of settlement).

<sup>56</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 339, 317 (1950).

<sup>57</sup> Vasquez Decl., ¶ 9.

<sup>58</sup> *Id.*

<sup>59</sup> *In re MetLife Demutualization Litig.*, 262 F.R.D. 205, 208 (E.D.N.Y. 2009).

Particularly with the advent of the Internet and the ability to reach class members through targeted advertising, courts have increasingly recognized the ability of an indirect notice campaign to satisfy the requirements of Rule 23.<sup>60</sup>

Because direct contact information is not readily available for state class members, plaintiffs propose a comprehensive indirect notice plan that is designed “to inform those affected”<sup>61</sup> and will reach at least 75 percent of class members. The proposed notice plan has three parts:

*Internet Notice Campaign:* An internet notice campaign will use sponsored links on Google and Yahoo!/Bing’s networks, in addition to targeted banner advertising through the Xaxis network. An internet campaign allows the notice administrator to direct the notice towards residents of the class states, with frequency capped at five times exposure to each unique IP address. The notice administrator will serve an estimated 59 million unique impressions (177 million gross impressions frequency capped at three times by unique IP address) to reach a minimum of 75 percent of class members. An Internet notice campaign has the additional benefit of allowing real-time monitoring of the implementation, with adjustments to the placement of the notice to ensure that goals are met.<sup>62</sup>

*Case-Dedicated Website:* A case-dedicated website will also be established to provide class members with a source of reliable and accurate information. The website will post relevant case documents, such as the complaint, class certification order, settlement agreement, settlement notice, and motions for approval and for attorneys’ fees. The website will provide contact information for the notice administrator and class counsel, and will provide answers to the most frequently asked questions. Going forward, the case-dedicated website will function as a permanent

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<sup>60</sup> See, e.g., *In re Google Referrer Header Privacy Litig.*, No. 10-cv-04809, 2014 U.S. Dist. LEXIS 41695 at \*24-25 (N.D. Cal. Mar. 26, 2014) (approving indirect notice campaign that included Internet-based notice, press release, website dedicated to the settlement, and a toll-free number where class members could receive additional information); *Natalie Pappas v. Naked Juice Co. of Glendora, Inc., et al.*, Case No. 11-cv-08276 JAK, 2014 WL 12382279, at \* 5 (C.D. Cal. Jan. 2, 2014) (approving indirect notice campaign of online banner and pop-up advertisements and published notice in *People* and *Parade* magazines and in *USA Today*).

<sup>61</sup> *Mullane*, 339 U.S. at 315.

<sup>62</sup> Vasquez Decl., ¶¶ 17-18 & Ex. C (examples of proposed banner advertising).

place where class members can go to receive information regarding this case. Additionally, the website will provide the long form of notice in both English and Spanish.<sup>63</sup>

*Press Release:* Finally, the notice administrator will also release a neutral press release about the settlement of the case through the PR Newswire. Press releases are one of the most cost effective ways to supplement notice efforts and provide an opportunity for media outlets to pick up the story and post to print publications and websites.<sup>64</sup>

Courts have found that notice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23. Here, the notice administrator believes that notice will reach at least 75 percent of class members.<sup>65</sup> These notice provisions meet the requirements of Rule 23 and will allow the class a full and fair opportunity to review and respond to the proposed settlement.

### C. The Proposed Schedule for Dissemination of Notice and Final Approval

Plaintiffs propose the following schedule for the dissemination of class notice and final approval:

| Event  | Deadline  |
|--|---|
| Hearing and order re preliminary approval  | August 26, 2016   |
| Notice campaign to begin, including internet, dedicated website, and press release   | September 2, 2016<br>[one week from preliminary approval order]     |
| Last day for motion for attorneys' fees, costs, expenses, and service awards   | October 14, 2016<br>[two weeks before objection deadline]           |
| Last day to file objections to the settlement or requests for exclusion from the class   | October 28, 2016<br>[eight weeks from notice]                       |
| Last day for motion in support of final approval of settlement   | November 11, 2016<br>[two weeks after objection deadline]           |
| Last day for response to objections, reply in support of motion for final approval, and reply in support of motion for attorneys' fees, costs, | December 2, 2016<br>[two weeks prior to the final fairness hearing] |

<sup>63</sup> *Id.*, ¶ 20 & Ex. D.

<sup>64</sup> *Id.*, ¶ 22.

<sup>65</sup> *Id.*, ¶ 23.

|                              |  |
|------------------------------|--|
| expenses, and service awards |  |
| Final Fairness Hearing       | December 16, 2016 at 9:00 a.m.<br>[five weeks after motion for final approval],<br>unless otherwise ordered by the Court |
| Last day to file claims      | January 31, 2017   |

## V. CONCLUSION

With this settlement, plaintiffs have guaranteed recovery of \$52 million for class members. The settlement was reached only after extensive negotiations and with the assistance of the Hon. Layn Phillips. Plaintiffs respectfully request that this Court enter an order: (1) preliminarily approving the proposed class action settlement; and (2) approving the manner and form of notice.

Respectfully submitted,

DATED: August 12, 2016

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*Class Counsel*

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

MATTHEW EDWARDS, et al., individually and  
on behalf of all others similarly situated,

Plaintiffs,

v.

NATIONAL MILK PRODUCERS  
FEDERATION, aka COOPERATIVES  
WORKING TOGETHER; DAIRY FARMERS OF  
AMERICA, INC.; LAND O’LAKES, INC.;  
DAIRYLEA COOPERATIVE INC.; and AGRI-  
MARK, INC.,

Defendants.

Case No. 11-CV-04766-JSW

[consolidated with 11-CV-04791-JSW  
and 11-CV-05253-JSW]

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS’ UNOPPOSED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

[PROPOSED] ORDER

Now before the Court is Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement. The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and the Court hereby GRANTS the Motion for Preliminary Approval.

WHEREAS, plaintiffs, on behalf of themselves and on behalf of the proposed settlement class, and defendants National Milk Producers Federation, on behalf of itself and Cooperatives Working Together, Land O’Lakes, Inc., Dairy Farmers of America, Inc., Dairylea Cooperative, Inc., and Agri-Mark, Inc. have agreed, subject to Court approval, to settle the above captioned litigation upon the terms set forth in the settlement agreement;

WHEREAS, this Court has reviewed and considered the settlement agreement entered into among the parties, the record in this case, the briefs and arguments of counsel, and supporting exhibits;

WHEREAS, plaintiffs have moved, unopposed, for an order granting preliminary approval of the settlement agreement;

WHEREAS, the proposed settlement class refers collectively to the sixteen classes already certified by the Court in its Order Regarding Motion for Class Certification (ECF No. 266) and its subsequent order certifying a class for the state of West Virginia (ECF No. 287). For purposes of clarity these orders together define the certified classes as:

All consumers who, from 2003 to the present, as residents of Arizona, California, the District of Columbia, Kansas, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, Oregon, South Dakota, Tennessee, Vermont, West Virginia, and/or Wisconsin, indirectly purchased milk and/or other fresh milk products (including cream, half & half, yogurt, cottage cheese, cream cheese, and/or sour cream) for their own use and not for resale.

Excluded are (1) Defendants and their co-conspirators; (2) any entity in which Defendants have a controlling interest; (3) Defendants’ officers, directors, and employees; (4) Defendants’ legal representatives, successors, and assigns; (5) governmental entities; and (6) the Court to which this case is assigned.

1 NOW, THEREFORE, IT IS HEREBY ORDERED:

2 1. The Court does hereby preliminarily approve the settlement agreement, subject to further  
3 consideration at the final fairness hearing described below.

4 2. A final approval hearing shall be held before this Court on **December 16, 2016, at 9:00**  
5 **a.m., in Courtroom 5, 2nd Floor, at the United States District Court, located at 1301 Clay**  
6 **Street, Oakland, California**, to determine whether the proposed settlement on the terms and  
7 conditions provided for in the settlement agreement is fair, reasonable and adequate to the settlement  
8 class and should be approved by the Court; whether final judgment should be entered; the amount of  
9 fees, costs, and expenses that should be awarded to plaintiffs' counsel; and the amount of any service  
10 awards to be awarded to the class representatives. Any class member may appear at the fairness  
11 hearing to be heard on any of these determinations, regardless of whether the class member has  
12 previously filed written objections. The Court may change the day of the fairness hearing without  
13 further notice to the members of the settlement class.

14 3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court has already  
15 certified the following classes, which the settlement agreement uses to in turn define the settlement  
16 class.<sup>1</sup> Accordingly the Court approves the dissemination of notice to the settlement class as follows:

17 All consumers who, from 2003 to the present, as residents of Arizona,  
18 California, District of Columbia, Kansas, Massachusetts, Michigan,  
19 Missouri, Nebraska, Nevada, New Hampshire, Oregon, South Dakota,  
20 Tennessee, Vermont, West Virginia, and/or Wisconsin, indirectly  
purchased milk and/or other fresh milk products (including cream, half  
& half, yogurt, cottage cheese, cream cheese, and/or sour cream) for  
their own use and not for resale.

21 Excluded are (1) Defendants and their co-conspirators; (2) any entity in  
22 which Defendants have a controlling interest; (3) Defendants' officers,  
23 directors, and employees; (4) Defendants' legal representatives,  
successors, and assigns; (5) governmental entities; and (6) the Court to  
which this case is assigned.

24 4. The Court approves, as to form and content, the notice of the proposed settlement  
25 agreement, attached to Declaration of Alan Vasquez, subject to the provisions of Paragraph 6 of this  
26

27 <sup>1</sup> The notice of pendency was disseminated to classes with a period extending to 2012, *see* ECF  
28 No. 312, but the settlement notice will be disseminated to classes with a period extending to the  
present, as originally certified, *see* ECF No. 266.



1 order. The Court further finds that the proposed notice campaign substantially meets the  
2 requirements of Federal Rule of Civil Procedure 23 and due process, is the best notice practicable  
3 under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

4 5. The Court confirms and appoints Gilardi & Co. LLC and Sipree, Inc. as the settlement  
5 notice administrators. The settlement notice administrators shall commence all aspects of the  
6 approved notice campaign, including internet, dedicated website and press release, as more fully set  
7 forth in the Vasquez declaration, no later than September 2, 2016.

8 6. Prior to publication of the settlement notice approved above, the settlement notice  
9 administrators are ordered to accurately conform all dates in the approved settlement notice to the  
10 dates approved by the terms of this Order.

11 7. Class Counsel shall file their motion for attorney fees, costs, and service awards, and all  
12 supporting documentation and papers, no later than October 14, 2016.

13 8. Any person who desires to file an objection to the settlement or request exclusion from  
14 the settlement class shall do so by October 28, 2016, in conformance with the provisions of the  
15 settlement notice as approved above.

16 9. In particular, all written objections and supporting papers, if any, must (a) clearly identify  
17 the case name and number (*Edwards v. National Milk Producers Federation*, Case No. 11-CV-  
18 04766-JSW); (b) be submitted to the Court either by mailing them to the Class Action Clerk, United  
19 States District Court for the Northern District of California, 1301 Clay Street, Oakland, CA 94612,  
20 or by filing them in person at any location of the United States District Court for the Northern  
21 District of California; and (c) be filed or postmarked on or before October 28, 2016.

22 10. Class counsel shall file their motion for final approval of settlement, and all supporting  
23 documentation and papers, no later than November 11, 2016.

24 11. Class counsel may file a written response to any objections to the settlement agreement,  
25 or to the application for attorneys' fees, reimbursement of expenses, and class representative service  
26 awards, no later than 14 days before the final fairness hearing, or by December 2, 2016.

27 12. At the final approval hearing, class counsel shall provide the Court with any updated  
28 information available as of that date concerning any requests for exclusion received from the

1 settlement class, any objections received from the settlement class, or any other communications  
2 received in response to the notice of settlement.

3 13. At or after the fairness hearing, the Court shall determine whether the settlement  
4 agreement, the motion for attorney's fees and expenses, and any service awards shall be approved.

5 14. All reasonable expenses incurred in notifying the settlement class and administering the  
6 settlement shall be paid as set forth in the settlement agreement.

7 15. Neither the settlement agreement, nor any of its terms or provisions, nor any of the  
8 negotiations or proceedings connected with it, shall be construed as an admission or concession by  
9 plaintiffs or defendants, respectively, of the truth or falsity of any of the allegations made, or of any  
10 liability, fault or wrongdoing of any kind.

11 16. The Court adopts the following schedule proposed in the motion:

| Event   | Deadline   |
|---|--|
| Hearing and order re preliminary approval   | August 26, 2016  |
| Notice campaign to begin, including internet, dedicated website, and press release  | September 2, 2016<br>[one week from preliminary approval order]  |
| Last day for motion for attorneys' fees, costs, expenses, and service awards  | October 14, 2016<br>[two weeks before objection deadline]  |
| Last day to file objections to the settlement or requests for exclusion from the class  | October 28, 2016<br>[eight weeks from notice]  |
| Last day for motion in support of final approval of settlements   | November 11, 2016<br>[two weeks after objection deadline]  |
| Last date for defendants to rescind the agreement based on opt-outs   | November 27, 2016<br>[30 days from the last day to opt out]  |
| Last day for response to objections, reply in support of motion for final approval, and reply in support of motion for attorneys' fees, costs, expenses, and service awards | December 2, 2016<br>[two weeks prior to the final fairness hearing]  |
| Final Fairness Hearing  | December 16, 2016 at 9:00 a.m.<br>[five weeks after motion for final approval],<br>unless otherwise ordered by the Court |

Last day to file claims

January 31, 2017

17. The Court reserves the right to adjourn, continue or otherwise change the date of the fairness hearing without further notice to the members of the settlement class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed settlement agreement. The members of the settlement class as advised to confirm the date of the final approval hearing as set forth in the settlement notice. The Court may approve the settlement agreement, with such modifications as may be agreed to by the settling parties, if appropriate, without further notice to the settlement class.

IT IS SO ORDERED.

DATED: \_\_\_\_\_

\_\_\_\_\_  
HONORABLE JEFFREY S. WHITE  
UNITED STATES DISTRICT COURT JUDGE

1 Submitted by:

2 DATED: August 12, 2016

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