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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.

JOSHUA D. HOLYOAK,

Objector.

Case No. 11-cv-04766-JSW

OBJECTION OF JOSHUA D. HOLYOAK

Date: December 16, 2016
Time: 9:00 a.m.
Courtroom: 5
Judge: Hon. Jeffrey White

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SUMMARY OF ARGUMENT

Class members' interests are compromised by the excessive fee award sought by class counsel. While class counsel claims they are seeking 33.33%, they have grossly underestimated the actual percentage. Class counsel's calculation *includes* notice and administration expenses in the denominator and *excludes* litigation expenses in the numerator. While the Ninth Circuit gives courts the option to calculate percentage fee awards based on the gross or net fund, courts have held that notice and administration expenses should be deducted before calculating fee awards because such costs are not a *benefit* to the class and instead create perverse incentives for class counsel to overspend. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). The Ninth Circuit and other courts include litigation "expenses" with the attorneys' fees in the numerator when calculating the percentage of recovery. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). When calculated correctly to exclude notice and administrtion costs and include litigation expenses, class counsel's request actually amounts to 39.4%. This is "clearly excessive" under Ninth Circuit law. *See Dennis*, 697 F.3d at 868. In accord with this Court's preferred methodology, the fee award should be reduced to *at most* 25 percent of the recovery for the class, after administrative expenses have been deducted. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942, 945 (9th Cir. 2011). Indeed, an award of the 25% benchmark is *more than* reasonable given that this is a megafund case with a total settlement fund over $50 million. Decreasing the fee award to the appropriate benchmark will return over $7.2 million to the class.

Finally, the definition of the class is deficient because it fails to set a definitive end date. This failure deprives class members who enter the class after the notice program ends and the deadlines

for excluding oneself or objecting to the Settlement have passed of their Rule 23 rights. *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 617, 628 (1997); *see also Cruz v. Dollar Tree Stores*, No. 07-2050, 2009 U.S. Dist. LEXIS 62817, at *3-5 (N.D. Cal. July 2, 2009). The Court should amend the class definition to end on the date of preliminary approval.

For these reasons, Holyoak requests that the Settlement and fee request be rejected.

ARGUMENT

I. The Objector Is a Member of the Class.

Objector Joshua D. Holyoak has been a resident of Missouri since June 2008. *See* Declaration of Joshua D. Hoyoak ("Holyoak Decl.") ¶ 2. Objector Holyoak has regularly purchased milk and fresh milk products for his personal and family use as a resident of Missouri since 2008. *See id.* ¶ 3. Objector Holyoak has submitted a claim on the www.boughtmilk.com settlement website. *See id.* ¶ 5. Objector Holyoak therefore is a member of the Settlement class with standing to object to the Settlement. Fed. R. Civ. P. 23(e)(5).

The Center for Class Action Fairness, through attorney Anna St. John, represents Objector Holyoak *pro bono*. Holyoak gives notice of his intent to appear at the fairness hearing through counsel, where he wishes to discuss matters raised in his Objection. Holyoak does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on to the docket by any settling party or objector. Holyoak reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval. Holyoak joins the objections of any other objectors to the extent those objections are not inconsistent with this one.

II. The Court Has a Fiduciary Duty to the Unnamed Members of this Class.

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp.*, 618 F.3d 988, 994–95 (9th Cir. 2010) (internal quotation and citation omitted). This fiduciary role is necessary because "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage," when counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class' interest in securing the largest possible recovery for its members." *Id.* at 994 (internal quotation and citation omitted); *see also Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) … protects unnamed class members 'from unjust or unfair settlements.'"). "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23 ("2003 Advisory Committee

Notes"). Thus, encompassed within the court's fiduciary duty is "the Court's responsibility to avoid awarding plaintiffs' counsel a 'windfall' at the expense of the class—a special concern where 'the recovered fund runs into the multi-millions.'" *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) (quoting *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)).

There is thus no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal. 2010). In accord with its fiduciary role, "the court cannot accept a settlement that the *proponents* have not shown to be fair, reasonable and adequate." *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (emphasis added) (internal quotation and citation omitted).

It is insufficient that the settlement was at "arm's length" and without express collusion between the parties. "Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

III. The 39.4% Fee Request is Improper under Ninth Circuit Law; the Court Should Award a Reduced Fee Amount that Will Augment Class Recovery.

"While attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement, Fed. R. Civ. Proc. 23(h), courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *Bluetooth*, 654 F.3d at 941. The benchmark for a reasonable award in the Ninth Circuit in a case alleging economic injury is 25% of the class benefit. *Id.* at 942. Plaintiffs claim that their request amounts to 33.33%. *See* Motion for Attorneys' Fees, Costs, and Incentive Awards ("Fee Motion"), Dkt. 436 at 8. While a request of 33.33% would be excessive under the benchmark in its own right, the request is in fact even more excessive because Plaintiffs improperly calculate the percentage they seek.

First, class counsel improperly includes notice and administration costs in their calculation. Plaintiffs calculate their request based on fees of $17,333,333 million and a gross fund of $52,000,000. *See* Fee Motion, Dkt. 436 at 8. But the amount of the fund from which class members will recover will be immediately reduced to $50 million as a result of the $2 million paid to a third party for notice and administration costs. *See* Settlement Agreement, Dkt. 425-1 at 11. The notice and administration expenses should be excluded in calculating the percentage. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). *Second*, class counsel's percentage calculation improperly excludes the $2,396,886 in litigation expenses class counsel is seeking. *See* Fee Motion at 15. Plaintiffs' litigation expenses should be included as part of the fees sought by counsel in calculating the percentage. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 863 (9th Cir. 2012) (calculating percentage versus benchmark based on "$2 million in fees and costs").

When the $2 million notice and administration costs are excluded and the $2.4 million litigation expenses are included, plaintiffs' request amounts to 39.4% ($19,730,219/$50,000,000). The requested 39.4% is "clearly excessive" under the Ninth Circuit's 25% benchmark. *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012). At a minimum, any award to plaintiffs' counsel should not exceed the Ninth Circuit's 25% benchmark. Indeed, because this is a megafund case of $52 million, an award of 25% is more than fair. A benchmark award of $12.5 million in fees and costs (25% of $50 million) would still provide a 1.56 multiplier on class counsel's lodestar and return over $7.2 million to the class.

A. The notice and administration expenses should be excluded from the fee calculation.

The $2 million notice and administrative costs should be excluded in calculating class counsel's award. The Ninth Circuit gives courts the discretion to calculate the percentage-of-recovery on the gross or net fund. *In re Online DVD*, 779 F.3d 934 (9th Cir. 2015). Courts have recognized that the better approach is to calculate percentage-of-recovery *after* expenses have been deducted from the settlement. In *Redman v. RadioShack,* the Seventh Circuit explained:

> But the roughly $2.2 million in administrative costs should not have been included in calculating the division of the spoils between class counsel and class members. **Those costs are part of the settlement but not part of the**

> **value received from the settlement by the members of the class**. The costs therefore shed no light on the fairness of the division of the settlement pie between class counsel and class members.

768 F.3d at 630 (Posner, J.) (emphasis added); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (Posner, J.) (excluding administration expenses in calculating fee percentage because such expenses are "costs, not benefits"). *See also Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, 2004 U.S. Dist. LEXIS 8608, at *20-*21 (S.D.N.Y. May 14, 2004) ("In order to determine a reasonable fee for the services of counsel, it is necessary to understand what counsel has actually accomplished for their clients, the class members. This can only be done when the expenses paid by the class are deducted from the gross settlement."); *In re Cardinal Health Inc. Secs. Litig.*, 528 F. Supp. 2d 752, 771 (S.D. Ohio 2007) ("The net recovery more truly approximates the amount of money that benefits the Class. Because the percentage approach is meant to align the attorneys' fees with the amount of money the class receives, the net recovery is a more appropriate metric."); 2003 Advisory Committee Notes ("fundamental focus is the result *actually achieved* for class members" (emphasis added)). Put simply, attorneys' fees should be calculated based on the class benefit and "fees paid to the settlement administrator—do[] not constitute a benefit to the class members." *Myles v. AlliedBarton Security Svcs., LLC*, No. 12-5761 JD, 2014 U.S. Dist. LEXIS 159790, at *16 (N.D. Cal. Nov. 12, 2014).

If notice and administration expenses are included when calculating attorneys' fees, class counsel is being awarded a *commission* on those costs. As Judge Posner observed, this creates "perverse incentives" for class counsel to overspend on third parties. *Redman,* 768 F.3d at 630; *see also In re Volkswagen & Audi Warranty Extension Litig.*, 2015 U.S. Dist. LEXIS 16646, at *40 (D. Mass. Feb. 10, 2015) ("Counting administration fees as part of the settlement valuation for attorneys' fees purposes might also inadvertently incentivize the establishment of costly and inefficient administration procedures which would inflate the benefits valuation without increasing actual benefit for class members."). Instead, if class counsel is paid *after* administration expenses are deducted, class counsel is incentivized to optimize settlement administration expenses. This also promotes judicial efficiency because when class counsel's incentives are aligned to optimize expenses, courts do not have to waste resources monitoring settlement administration expenses for cost overruns. "Put another way,

incentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can *post hoc* judicial review." *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994).

Here, rather than rewarding class counsel with a commission on the $2 million in notice and administration costs paid to the settlement administrator, class counsel's fees should be calculated *after* the $2 million is deducted from the settlement fund.

B. The litigation expenses should be included in calculating the percentage award.

Class counsel's 33.33% calculation is based on $17.3 million in fees ($17.3M/$52M) and fails to include the $2.4 million class counsel is seeking for litigation expenses. *See* Fee Motion, Dkt. 436 at 15. In a number of cases, the Ninth Circuit and other courts include litigation "expenses" with the attorneys' fees in the numerator when calculating the percentage of recovery. *See Dennis*, 697 F.3d at 863 (calculating percentage versus benchmark based on "$2 million in fees and costs"); *In re Imax Sec. Litig.*, No. 06 Civ. 6128 (NRB), 2012 U.S. Dist. LEXIS 86513, at *46-47 (S.D.N.Y. Jun. 20, 2012) (refusing to award 25% fee recovery because fees plus expenses totaled 39% of the settlement amount).

If litigation expenses are not included in the numerator, class counsel is incentivized to treat resources as a litigation expense (because they will be reimbursed) and to increase those expenses (inflating the common fund value), knowing that such reimbursable litigation expenses will not be counted against the 25% benchmark. For example, included in class counsel's $2.4 million litigation expenses is $1.6 million for experts and consultants. *See* Declaration of Elaine T. Byszewski, Dkt. 436-1 ¶ 42. Every dollar class counsel spent on their experts was not just a dollar taken from the class, but effectively allowed class counsel to earn a *commission* of an additional 33.3 cents in attorneys' fees ($533,152 commission on the $1.6 million expert/consulting fees). Indeed, the danger of such commissions is compounded by the fact that class counsel has greater control over litigation expenses than third-party administration expenses. If those litigation expenses are included in the numerator

when calculating the fee percentage, the litigation expenses are counted against the percentage benchmark and class counsel will be incentivized to optimize those expenses.

At a minimum, however, if the court is to exclude litigation "expenses" from the numerator when calculating an attorney award under the percentage-of-the-fund approach, the court should also exclude those same expenses from the denominator. In *In re Transpacific Passenger Air Transportation Antitrust Litigation* ("*Transpacific*"), the court excluded both administration expenses *and* litigation expenses before calculating attorneys' fees. 2015 U.S. Dist. LEXIS 67904, *14-*16 (N.D. Cal. May 26, 2015). The district court observed that there was no authority requiring attorneys' fees to be calculated based on the gross fund and instead employed its "longstanding preference for using the net" fund, noting the multiple authorities that endorse that approach. *Id.* (citing *Redman*, 768 F.3d at 633 ("the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation"); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. at 471 ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses"); *Myles,* 2014 U.S. Dist. LEXIS 159790, at *16 ("the fees paid to the settlement administrator—do[] not constitute a benefit to the class members")). In *Transpacific*, the court concluded that when expenses were deducted, the requested fees actually totaled 42% of the class benefit rather than the 33% argued by class counsel. 2015 U.S. Dist. LEXIS 67904 at *15-*16. The district court reduced fees from the requested $13.1 million to $9 million. *Id.* at *18.

Accordingly, the $2.4 million litigation expenses should be included in the numerator (added to the fees) when calculating class counsel's fee request or, at a minimum, be deducted from the gross fund prior to calculating attorneys' fees.

C. Class should be awarded no more than 25% of the class benefit ($12.5 million for fees and expenses), which would return over $7.2 million to the class.

If the $2 million notice and administration costs are excluded from the gross settlement fund ($52 million total less $2 million notice and administration expenses) and the $2.4 million litigation expenses are included in the numerator ($2.4 million litigation expenses plus $17.33 million in fees), then plaintiffs' request amounts to 39.4% ($19,730,219/$50,000,000). This amount is untenable under

Ninth Circuit law. In *Dennis v. Kellogg Co.*, the parties sought $2 million in fees and expenses of a $10.64 million common fund. 697 F.3d at 868. The Ninth Circuit found that a portion of the relief was illusory and that the actual value of the common fund was $5.14 million. *Id.* The Ninth Circuit concluded that "the dollar value of the settlement fund plummets to $5.14 million, and the $2 million attorneys' fees award becomes 38.9% of the total, which is **clearly excessive** under our guidelines." *Id.* (emphasis added). The 39.4% fee percentage requested here is even *worse* than *Dennis* and must be rejected.

If plaintiffs are awarded 33% of recovery, the actual amount of fees and expenses would total $16,666,667, which would return $3.1 million to the class. That amount would still be too high, however, because there is no reason to depart upwards from the 25% benchmark. Ninth Circuit guidelines require that the district court should not depart from the benchmark unless there are "special circumstances" justifying the departure. *See Bluetooth*, 654 F.3d at 942. Here, circumstances dictate that the 25% benchmark is *more* than fair for several reasons.

First, plaintiffs cannot defend an upward departure based on recovery because class counsel grossly overestimate that class members will recover 30% of their damages. The "foremost" consideration in the reasonableness of a fee award is the benefit obtained for the class. *Bluetooth*, 654 F.3d at 942 (citing *Rodriguez v. West Publishing Corp,* 563 F.3d 948, 964-65 (9th Cir. 2009), plaintiffs argue that the $52 million settlement fund is 30% of the $181 million damages suffered by the class. *See* Fee Motion at 9. But *Rodriguez* gives district courts the discretion to compare the settlement amount to the treble damages available under the applicable statute. 563 F.3d at 964-65 ("At the same time, treble damages are a fact of life in antitrust litigation. In some cases a court, asked to approve a settlement, may believe the class's claim is so strong that the merits of the amount negotiated cannot reasonably be evaluated without measuring it against the likelihood of a treble as well as a single damages recovery."). In *In re Compact Disc Minimum Advertised Price Antitrust Litig.,* the district court rejected the reasoning in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 465, 468-70 (2d Cir. 1974) that recovery should be compared to single rather than treble damages because it was the "traditional" analysis used by the courts. 216 F.R.D. 197, 210 (D. Me. 2003). The court explained that "if a

settlement reflects a potential damage recovery, it should logically reflect the other parts of that recovery (trebling and attorney fees) that the statute awards automatically." *Id.*; see also *In re Auction Houses Antitrust Litig.*, 2001 U.S. Dist. LEXIS 1713, *32-33 (S.D.N.Y. Feb. 22, 2001) (observing that "plaintiffs and defendants all are rational economic actors. … To ignore the fact that plaintiffs and defendants both consider the possibility of trebling in coming to their respective assessments is to ignore economic reality."). In this case, treble damages would total $543 million and thus, the Settlement provides only 9.6% recovery of damages, not 30% as claimed by plaintiffs. Further, if class counsel were awarded the fees sought, the class would receive only $30,179,781 ($52,000,000 less $21,820,219 ($2,000,000 notice/administration, $90,000 incentive awards, $2,396,886, $17,333,333)). *See* Fee Motion at 15. With 73 million class members, *see* Motion for Preliminary Approval, Dkt. 425 at 5, **each class member would receive only $0.41**. Hardly an "exceptional result" as plaintiffs claim. *See* Fee Motion at 9.

More important, even where class counsel achieves an exemplary settlement, district courts of this Circuit have hewed closely to the benchmark. *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 456 (E.D. Cal. 2013) (reducing fee from requested 33.3% to 25% despite attaining between 30-57% of maximum damages available); *Dickerson v. Cable Communs., Inc.*, 2013 U.S. Dist. LEXIS 167152, at *17 (D. Or. Nov. 25, 2013) (refusing to deviate upward to 30% of the fund despite a "good result" and even where that 30% was below the accrued lodestar); *Hopkins v. Stryker Sales Corp.*, 2013 U.S. Dist. LEXIS 16939 (N.D. Cal. Feb. 6, 2013) (reducing request from 33.3% to 30% although each class member recovered 85-100% of maximum recovery without even having to file a claim form).

Second, plaintiffs cannot defend their 33% request simply by citing other courts that have awarded such a percentage. *See* Fee Motion at 11 n.39 & n.40. That other courts have departed from the benchmark does not create "special circumstances" in this case justifying an upward departure. *See Bluetooth*, 654 F.3d at 942. Indeed, the circumstances of those cases vary greatly. In *Burden v. SelectQuote Insurance Services*, one of the cases cited by plaintiffs (Fee Motion at 11 n.39), the court awarded class counsel $250,000 of the $750,000 settlement fund, justifying the departure in part because "[a]warding fees at a rate higher than the 25% benchmark is appropriate in cases involving a relatively small

settlement fund." 2013 U.S. Dist. LEXIS 109110, *13-14 (N.D. Cal. Aug. 2, 2013). Like *SelectQuote*, and unlike this Settlement, most of the cases cited by plaintiffs involved relatively small settlements. *See Lusby v. GameStop Inc.,* No. 2015 U.S. Dist. LEXIS 42637, at *9 (N.D. Cal. Mar. 31, 2015) (awarding 33% of $750,000 settlement fund); *Davis v. Cole Haan, Inc.*, 2015 U.S. Dist. LEXIS 153434, at *16-17 (N.D. Cal. Nov. 12, 2015) (decreasing $125,000 fee request to $11,914 in attorneys' fees of the $36,103 recovery); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450 (E.D. Cal. 2013) (granting 33% fee award in $1.2 million settlement). This case is the opposite of those cases. In fact, in a megafund case like this—extraordinary large common fund—typical fee awards are much *less* than the 25% benchmark.

Percentage awards in megafund cases are "substantially less than the 25% benchmark applicable to typical class settlements in this Circuit." *Alexander v. FedEx Ground Package Sys.*, 2016 U.S. Dist. LEXIS 78087, *5 (N.D. Cal. June 15, 2016) (awarding 16.4% of common fund). While class counsel can cherry-pick examples of courts awarding fees equal to or greater than the percentage they seek here, empirical research shows that such cases are outliers because "the median attorney's fee award in a sample of 68 'megafund' class action settlements over a 16-year period was 10.2%." *In re High-Tech Emple. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118052, at *50 (N.D. Cal. Sept. 2, 2015). A reasonable percentage should be a sliding scale because of economies of scale to prevent a windfall for plaintiffs' attorneys at the expense of the class. *See Silverman v. Motorola,* 739 F.3d 956, 959 (7th Cir. 2013). "It is generally not 150 times more difficult to prepare, try and settle a $150 million case than it is to try a $1 million case." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y. 1998). "There is considerable merit to reducing the percentage as the size of the fund increases. In many instances the increase is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id.* at 486 (quoting *In re First Fidelity Secs. Litig.*, 750 F. Supp. 160, 164 n.1 (D.N.J. 1990)). Thus, "[i]n cases with exceptionally large common funds, courts often 'account[] for these economies of scale by awarding fees in the lower range.'" *In re Citigroup Inc. Bond Litig.,* 988 F. Supp. 2d at 374 (quoting *Goldberger,* 209 F.3d at 52). Awarding the 25% benchmark

here would more than fairly compensate class counsel because 25% is over twice the average percentage awarded in megafund cases.

Further, if the 25% benchmark is awarded here, class counsel would still yield a multiplier of 1.56, which falls within the typical range of multipliers for megfund settlements. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 n.6 (9th Cir. 2002) (in cases where the common fund is $50-200 million, in a majority of cases, the multiplier was in the 1.5-3.0 range). Because the multiplier is within the typical range, there is no reason to depart from the benchmark. "That contingency fee litigation doesn't always result in a recovery as large as plaintiff's counsel originally estimated is not a "special consideration" — it's the nature of the beast." *See Keirsey v. eBay, Inc.,* No. 12-CV-01200-JST, 2014 U.S. Dist. LEXIS 21371, 2014 WL 644738, at *3 (N.D. Cal. Feb. 18, 2014) (refusing to deviate from 25% to the requested 31% even though it would provide only a .23 multiplier on class counsel's lodestar); *Hawthorne v. Umpqua Bank*, 2015 U.S. Dist. LEXIS 56370 (N.D. Cal. Apr. 28, 2015) (refusing to deviate upward to 33% even where the fee request was less than lodestar, and class recovery was 38% of potential recovery).

Class counsel should be awarded no more than $12,500,000 in fees and expenses (25% of recovery) which would increase relief to class members by $7.2 million.

VIII. A Lawful Class Definition Requires an End Date.

This Court certified a class comprised of persons in certain qualifying states who purchased milk and milk products "from 2003 to the present." Order Regarding Motion for Class Certification (Dkt. 266) at 2; Settlement Agreement (Dkt 425-1) at 3. The class definition is flawed, however, because it does not establish a firm end-date for class membership.

"An implied prerequisite to certification is that the class must be sufficiently definite." *Whiteway v. FedEx Kinko's Office & Print Servs., Inc.*, No. C 05-2320 SBA, 2006 U.S. Dist. LEXIS 69193, at *10 (N.D. Cal. 2006). This means that, at the very least, every class definition should include: (1) a specification of a particular group at a particular time frame and location who were harmed in a particular way; and (2) a method of definition that allows the court to ascertain its membership. *Rowe*

v. E.I. Dupont De Nemours & Co., 262 F.R.D. 451, 455 (D.N.J. 2009). These principles are violated by a class definition that has no definite end date and is only bounded *de facto* by the issuance of a final approval order at an indeterminate future date.

This Court repeatedly has held that proposed classes with no fixed end date must be denied certification. *See In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, No. 06-02069, 2008 U.S. Dist. LEXIS 109446, at *15-16 (N.D. Cal. May 2, 2008); *Cruz v. Dollar Tree Stores*, No. 07-2050, 2009 U.S. Dist. LEXIS 62817, at *3-5 (N.D. Cal. July 2, 2009); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192, 2011 U.S. Dist. LEXIS 113550, at *5 (N.D. Cal. Oct. 3, 2011). The Supreme Court itself has "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem*, 521 U.S. at 628. Other courts analyzing proposed classes with no fixed end date have reached the same conclusion. *See Mueller v. CBS*, 200 F.R.D. 227, 236 (W.D. Pa. 2001); *Saur v. Snappy Apple Farms*, 203 F.R.D. 281, 285-86 (W.D. Mich. 2001); *Vickers v. GMC*, 204 F.R.D. 476, 478 (D. Kan. 2001); *Wike v. Vertrue*, No. 3:06-00204, 2010 U.S. Dist. LEXIS 96700 (M.D. Tenn. Sept. 15, 2010).

There are sound reasons for requiring a definite temporal boundary. First, Rule 23's notice requirement allows class members a sound platform for assessing the merits and demerits of the Settlement in deciding whether to object or opt-out. Those who become residents of the qualifying states and purchase milk after the completion of the notice program will be deprived of their rightful notice. Second, even if the late-purchasing class members were somehow to learn of the Settlement, the objection and opt-out deadline may have passed by that time. These class members thus would be deprived of their Rule 23(e)(5) right of objection and Rule 23(c)(2)(B) right to exclude themselves.

CONCLUSION

The Settlement does not afford effective notice to the class and denies late-entering class members their rights to object or opt out. The Court should revise the class definition to end on the date of preliminary approval. If the Court decides to approve the Settlement, plaintiffs' fee request should be denied. The Court should not award fees and expenses greater than 25% of the settlement fund after notice and administration expenses are deducted.

Dated: October 28, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case. In addition, I caused a courtesy copy of the foregoing document to be sent via first class mail to the following:

JSW Chamber's Copy
Hon. Jeffrey S. White
Oakland Courthouse, Courtroom 5 - 2nd Floor
1301 Clay Street, Oakland, CA 94612

DATED this 28th day of October, 2016.

/s/ Anna St. John

Anna St. John