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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IN RE CONAGRA FOODS, INC.

Case No.: CV 11-05379-CJC (AGR<sub>x</sub>)

MDL No. 2291

ROBERT BRISEÑO, *et al.*, individually  
and on behalf of all others similarly  
situated,

ORDER GRANTING PLAINTIFFS’  
MOTION FOR FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT  
[Dkt. 813] AND GRANTING  
OBJECTOR M. TODD  
HENDERSON’S MOTION FOR  
ATTORNEY FEES, EXPENSES, AND  
SERVICE AWARD [Dkt. 814]

Plaintiffs,

v.

CONAGRA FOODS, INC.,

Defendant.

I. INTRODUCTION

In this over twelve-year-old class-action lawsuit, Plaintiffs challenge Defendant ConAgra Foods, Inc.’s (“ConAgra”) allegedly deceptive marketing of Wesson Oil products as “100% Natural.” After years of investigation and litigation—including

1 extensive discovery and motion practice, a Ninth Circuit appeal regarding the district  
2 court’s order certifying eleven statewide consumer damages classes, and diligent  
3 mediation efforts with two separate judges—the parties reached a settlement (the  
4 “Original Proposed Settlement”) by accepting a court proposal from Magistrate Judge  
5 Douglas F. McCormick. Under the Original Proposed Settlement, Defendant agreed to  
6 pay (1) \$0.15 for each unit of Wesson Oil purchased to households submitting valid  
7 claim forms (to a maximum of 30 units without proof of purchase, and unlimited units  
8 with proof of purchase), with no cap, (2) an additional \$575,000 fund for New York and  
9 Oregon class members submitting valid claims as compensation for statutory damages  
10 under those states’ consumer protection laws, and (3) an additional \$10,000 fund for  
11 those in all classes submitting valid proof of purchase more than thirty units at \$0.15 for  
12 each such purchase above 30, with class counsel paying any non-funded claims (i.e.  
13 claims above the \$10,000 ConAgra provided) from any attorney fee awarded. (Dkt. 779  
14 [“Original Settlement Order”] at 7.) Defendant further agreed to “take no position” on an  
15 application by class counsel for fees and expenses of \$6,850,000. (*Id.*) Objector M.  
16 Todd Henderson objected to the Original Proposed Settlement on the grounds that it  
17 contained a clear sailing agreement, a reverter provision, and an award of fees  
18 disproportionate to the class’ recovery. (Dkt. 666 at 5–20.)

19  
20 The Ninth Circuit reversed this Court’s approval of the Original Proposed  
21 Settlement, explaining that courts must now scrutinize even post-class certification  
22 settlements for potentially unfair collusion in the distribution of funds between the class  
23 and class counsel. *Briseño v. Henderson*, 998 F.3d 1014, 1019 (9th Cir. 2021). The  
24 Circuit remanded to this Court to take a closer look at terms in the settlement that could  
25 indicate that the interests of class counsel and ConAgra were placed above the class’  
26 interests. *Id.* On remand, the Court declined to approve the Original Proposed  
27 Settlement, determining that it “include[d] too many indicators that class counsel’s and  
28

1 ConAgra’s self-interest unduly influenced the outcome of the negotiations.” (Original  
2 Settlement Order at 12.)

3  
4 The parties have now reached a new proposed settlement agreement (the “New  
5 Proposed Settlement”). Under the New Proposed Settlement, Defendant agrees to create  
6 a non-reversionary common fund of \$3 million with payments to class members  
7 substantially similar to those under the Original Proposed Settlement. (Dkt. 807 [Motion  
8 for Preliminary Approval of Class Action Settlement, hereinafter “Mot.”] at 8.)  
9 Significantly, however, the New Proposed Settlement contains no reverter provision, no  
10 clear sailing agreement, and class counsel seeks no attorney fees. (*Id.* at 10.)

11  
12 In November 2022, the Court preliminarily approved the New Proposed  
13 Settlement. The settlement administrator, JND Legal Administration LLC (“JND”) then  
14 gave notice under the Class Action Fairness Act, direct email notice to class members  
15 who filed a claim under the Original Proposed Settlement, print notice in *People*  
16 Magazine, digital notice by Google Display Network, Facebook, and Instagram, and  
17 notice under the Consumers Legal Remedies Act. (*See* Dkt. 813-1, Ex. 1 [Declaration of  
18 Gretchen Eoff, hereinafter “Eoff Decl.”] ¶¶ 3–9.) The deadline to opt-out or object  
19 passed on March 22, 2023, and JND received only 9 valid requests for exclusion, and no  
20 one objected to the Settlement. (Eoff Decl. ¶¶ 18–19.) The deadline to file claims was  
21 May 22, 2023. (Dkt. 821 [Supplemental Declaration of Gretchen Eoff, hereinafter  
22 “Supp. Eoff Decl.”] ¶ 5.) After conducting a detailed claim validity review, JND  
23 determined there are 274,360 valid claims for 6,536,436 units, resulting in a per unit  
24 payment of approximately \$0.14866. (Dkt. 831-1 [Third Supplemental Declaration of  
25 Gretchen Eoff, hereinafter “3d Eoff Decl.”] ¶ 8.)

26  
27 Now before the Court is Plaintiffs’ unopposed motion for final approval of the  
28 New Proposed Settlement, including an award of class counsel’s costs and Plaintiffs’

1 service award. (Mot.; Dkt. 831 [Supplement to Mot.].) Also before the Court is  
2 Henderson’s motion for attorney fees, expense reimbursement, and incentive award  
3 totaling \$250,000. (Dkt. 814 [hereinafter “Henderson Mot.”].) For the following  
4 reasons, both motions are **GRANTED**.

5  
6 **II. BACKGROUND**

7  
8 **A. Early Procedural History, Including Class Certification**

9  
10 For over ten years, bottles of Wesson Oil had a label touting the product as “100%  
11 Natural.” In 2011, Plaintiffs sued ConAgra, alleging that the “natural” claim was false  
12 and misleading because the oil contains genetically modified organisms, and that they  
13 paid more for the oil because of that false and misleading claim. They filed putative class  
14 actions asserting state-law claims against ConAgra in eleven states, and those cases were  
15 consolidated in this action. *Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1123 (9th Cir.  
16 2017). The case was originally assigned to Judge Margaret M. Morrow.

17  
18 ConAgra moved to dismiss Plaintiffs’ Complaint in August 2011. (Dkt. 24.) After  
19 Judge Morrow granted that motion (Dkt. 54), Plaintiffs amended their Complaint (Dkt.  
20 80), and ConAgra once again moved to dismiss in February 2012 (Dkt. 84). Judge  
21 Morrow granted in part and denied in part the second motion to dismiss. (Dkt. 138.)  
22 Then, there was extensive discovery, including multiple discovery motions filed over the  
23 years. (*See, e.g.*, Dkts. 196, 202, 426, 511, 550.)

24  
25 Plaintiffs filed a motion for class certification (Dkt. 241), which Judge Morrow  
26 denied (Dkt. 350). Plaintiffs then filed a second motion for class certification, seeking to  
27 certify eleven separate classes defined as follows:  
28

1 All persons who reside in the States of California, Colorado,  
2 Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon,  
3 South Dakota, or Texas who have purchased Wesson Oils  
4 within the applicable statute of limitations periods established  
5 by the laws of their state of residence (the “Class Period”)  
6 through the final disposition of this and any and all related  
7 actions.

8 *Briseño*, 844 F.3d at 1123–24. In a 140-page opinion, Judge Morrow granted Plaintiffs’  
9 second motion for class certification, certifying eleven statewide consumer damages  
10 classes under Federal Rule of Civil Procedure 23(b)(3). *In re ConAgra Foods, Inc.*, 90 F.  
11 Supp. 3d 919 (C.D. Cal. 2015); (Dkt. 545). In a 24-page opinion and a separate 6-page  
12 memorandum disposition, the Ninth Circuit affirmed. *Briseño v. ConAgra Foods, Inc.*,  
13 844 F.3d 1121 (9th Cir. 2017); *Briseño v. ConAgra Foods, Inc.*, 674 F. App’x 654 (9th  
14 Cir. 2017). The United States Supreme Court denied ConAgra’s petition for writ of  
15 certiorari. *Conagra Brands, Inc. v. Briseño*, 138 S. Ct. 313 (2017).

16 **B. ConAgra’s Initial Agreement to Sell Wesson Oil and Removal of the**  
17 **Disputed Label**

18 In May 2017, ConAgra agreed to sell Wesson Oil to the J.M. Smucker Company.  
19 *Briseño*, 998 F.3d at 1019. About two months later, ConAgra voluntarily removed the  
20 disputed label and stopped marketing Wesson Oil products as “natural.” *Id.*  
21 ConAgra maintains that this litigation played no role in either decision. *Id.*  
22

23 In early 2018, the J.M. Smucker deal fell through after a regulatory agency announced  
24 that it would oppose the transaction. *Id.*; (Dkt. 739 [Declaration of United States  
25 Magistrate Judge Douglas F. McCormick, hereinafter “McCormick Decl.”] ¶ 8.b.)  
26 ConAgra began looking for a new buyer for Wesson Oil. *Briseño*, 998 F.3d at 1019.  
27  
28

1           **C.     Original Settlement Efforts**

2  
3           The parties then requested an opportunity to try to settle before litigation  
4 proceeded. Beginning in early 2018, the parties negotiated before retired Judge Edward  
5 A. Infante until the Court referred the parties to Magistrate Judge McCormick for further  
6 settlement discussions. (Dkt. 743 ¶¶ 181–85; Dkt. 807-2 ¶¶ 201–04); *see Briseño*, 998  
7 F.3d at 1019. From June 2018 to November 2018, Magistrate Judge McCormick spent  
8 approximately 100 hours helping the parties reach a settlement. (McCormick Decl. ¶ 2.)  
9

10           Magistrate Judge McCormick learned early on “that the dollar value of the  
11 injunctive relief contained within any settlement agreement would be an issue,” and that  
12 because the issue “would be expensive for each side to litigate,” “avoiding the costs of  
13 the injunctive-relief valuation litigation should be a primary factor in motivating both  
14 sides to resolve this action.” (*Id.* ¶ 8.) He also “foresaw additional litigation about how  
15 to deal with the eleven different statewide classes that had been certified,” and “believed  
16 that avoiding the costs of additional class-related litigation should be another primary  
17 factor in motivating both sides to resolve this action.” (*Id.* ¶ 9.)  
18

19           Magistrate Judge McCormick’s approach to helping the parties settle proceeded in  
20 two phases. First, he helped the parties determine how much ConAgra would agree to  
21 pay as relief to the class members. (*Id.* ¶ 12.) Second, and only after the first phase was  
22 substantially decided, he helped the parties determine how much Plaintiffs’ attorneys  
23 would recover in fees. (*Id.*)  
24

25           By late October 2018, Magistrate Judge McCormick had helped the parties arrive  
26 at an agreement on a “claims-made” fund that would pay class members \$0.15 for each  
27 unit of Wesson product purchased, with no proof of purchase required for up to 30 units.  
28 (McCormick Decl. ¶ 10.a.) He “understood that the 15 cents per unit was an amount

1 considerably more than the price premium attributed to the ‘100% Natural’ label by  
2 Plaintiffs’ own expert.” (*Id.*) The agreement also included a \$575,000 fund to be  
3 allocated to members of the New York and Oregon state classes as compensation for  
4 statutory damages. (*Id.* ¶ 10.b.) At this point, given the parties’ difficulty resolving  
5 “issues related to class administration and notice and the value of injunctive relief,”  
6 Magistrate Judge McCormick “concluded that [he] would have to make a court proposal  
7 to resolve those issues as well as the issue of attorney’s fees.” (*Id.* ¶ 11.) Settling the  
8 issue of fees was tricky because while “[c]lass counsel believed that the lodestar amount  
9 they would seek in any fee litigation would be substantially more than \$10 million given  
10 the thousands of hours spent on this matter,” ConAgra “maintained that the amount of  
11 attorney’s fees they were willing to pay was limited.” (*Id.* ¶ 13.)

12  
13 On November 8, 2018, Magistrate Judge McCormick made the following court  
14 proposal to the parties: (1) Plaintiffs’ counsel would agree to seek and ConAgra would  
15 agree not to oppose attorney fees and expenses of \$6,850,000, (2) the parties would agree  
16 that injunctive relief would be valued at \$27,000,000, and (3) Magistrate Judge  
17 McCormick would review final proposals from the parties’ proposed claims  
18 administrators and select a claims administrator by November 30, 2018. (*Id.* ¶ 14.) Both  
19 sides accepted the proposal, and Magistrate Judge McCormick selected Plaintiffs’ choice,  
20 JND, to serve as the settlement administrator. (*Id.* ¶ 16.)

21  
22 In December 2018, ConAgra agreed to sell the Wesson brand to Richardson  
23 International. *Briseño*, 998 F.3d at 1019; (McCormick Decl. ¶ 18). After the deal closed  
24 in February 2019, the parties revised the settlement terms to clarify that the negotiated  
25 injunctive relief would apply to ConAgra only if it reacquired the Wesson brand. (Mot.  
26 at 6 n.3); *Briseño*, 998 F.3d at 1019. In March 2019, Plaintiffs filed a motion for  
27 preliminary settlement approval of the Original Proposed Settlement. (Dkt. 650.)  
28



1           **D.     The Original Proposed Settlement**

2  
3           The Original Proposed Settlement provided that ConAgra would not label,  
4 advertise, or market Wesson Oils as “natural,” absent future legislation or regulation.  
5 (Dkt. 652, Ex. 1 ¶ 3.3.) It also provided class members the following monetary benefits:

- 6  
7           (a) \$0.15 for each unit of Wesson Oils purchased to households submitting  
8           valid claim forms (to a maximum of 30 units without proof of purchase,  
9           and unlimited units with proof of purchase), with no cap,  
10           (b) an additional fund of \$575,000 to be allocated to New York and Oregon  
11           class members submitting valid claim forms, as compensation for  
12           statutory damages under those states’ consumer protection laws, and  
13           (c) an additional fund of \$10,000 to compensate those in all classes  
14           submitting valid proof of purchase receipts for more than thirty  
15           purchases, at \$0.15 for each such purchase above 30, with class counsel  
16           paying any non-funded claims (i.e. claims above the \$10,000 ConAgra  
17           provided) from any attorney fees awarded in this case.

18 (Id. ¶ 3.1.)

19           The Original Proposed Settlement also provided that “Class Counsel shall make a  
20 Fee and Expense Application to the Court for an award of \$6,850,000, to be paid by  
21 Conagra.” (Id. ¶ 8.1.1.1.) ConAgra agreed to “take no position” on the application,  
22 “consistent with its agreement negotiated with the assistance of Magistrate Judge  
23 McCormick as mediator.” (Id. ¶ 8.1.1.2.) If the Court awarded less than \$6,850,000 in  
24 attorney fees, the parties agreed that “the relevant amount of the overpayment of  
25 attorneys’ fees and costs paid by Conagra shall be returned to Conagra.” (Id. ¶ 8.1.1.3.)  
26 Henderson objected to the Original Proposed Settlement on the grounds that (1) it  
27 contained “all the signs of impermissible self-dealing identified by the Ninth Circuit in  
28 *Bluetooth*” and (2) there was “no justification for class counsel’s disproportionate fee.”  
(Dkt. 666 at 5–20.)



1           **E.     The Court’s Approval of the Original Proposed Settlement**

2  
3           In April 2019, the Court granted preliminary approval of the Original Proposed  
4 Settlement and appointed JND as settlement administrator. (Dkt. 654.) After giving  
5 notice, JND received 97,880 timely claims for 2,792,794 units, and one untimely claim  
6 for 10 units, for a total maximum payout of \$993,919. (Dkt. 688-1 ¶ 10.) One person  
7 opted out, and Henderson objected. (*Id.* ¶¶ 7, 9; Dkt. 666.)

8  
9           In October 2019, the Court granted final approval of the Original Proposed  
10 Settlement, including attorney fees, costs, and incentive awards. *In re Conagra Foods,*  
11 *Inc.*, 2019 WL 12338387 (C.D. Cal. Oct. 8, 2019); (Dkt. 695). The Court reasoned that  
12 the amount offered in settlement was fair and reasonable given its serious doubts about  
13 the strength of Plaintiffs’ case and the obstacles inherent in continued litigation, including  
14 problems of proof and management and risks of decertification or dispositive motions. *In*  
15 *re Conagra Foods*, 2019 WL 12338387, at \*3. The Court placed great weight on the fact  
16 that the parties’ settlement agreement resulted from a court proposal from Magistrate  
17 Judge McCormick. *See id.* at \*\*1, 4, 5. Indeed, the Court assumed that in helping the  
18 parties negotiate the Original Proposed Settlement, Magistrate Judge McCormick took  
19 into account the interests of the class and what was fair.

20  
21           The Court also concluded that the requested attorney fees were fair and reasonable,  
22 especially considering the case’s extensive litigation history and the fact that Plaintiffs’  
23 counsel sought only about half of their lodestar. *Id.* at \*6. Although it recognized and  
24 “appreciate[d] [the] Objector’s high-level concerns regarding an apparent trend toward  
25 class action settlements disproportionately benefitting attorneys,” the Court explained  
26 that “the amount of attorney fees in the [Original Proposed Settlement], while high,  
27 reflect[ed] the long history of this case and the impressive result achieved given the  
28 weakness of Plaintiffs’ case.” *Id.* at \*\*7–8.

1           **F.     The Ninth Circuit’s Opinion**

2  
3           The Ninth Circuit reversed. *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021).  
4 It “h[e]ld that under the newly revised Rule 23(e)(2) standard, courts must scrutinize  
5 settlement agreements—including post-class certification settlements—for potentially  
6 unfair collusion in the distribution of funds between the class and their counsel.” *Id.* at  
7 1019. The Circuit expressed concern that the Original Proposed Settlement provided a  
8 “disproportionate distribution” to counsel and contained a “clear sailing” agreement and a  
9 “reverter” provision. *Id.* at 1026–27. Accordingly, the Circuit stated that this Court  
10 “should give a hard look at the settlement agreement to ensure that the parties have not  
11 colluded at class members’ expense.” *Id.* at 1027–28.

12  
13           **G.     Discovery**

14  
15           On remand, Magistrate Judge McCormick filed a declaration describing the  
16 settlement negotiations, including how the parties reached their settlement by accepting  
17 his court proposal. From that declaration, it became clear that the Court was mistaken in  
18 its belief that in making his court proposal Magistrate Judge McCormick considered the  
19 class’ interests and what outcome was fair or right. As Magistrate Judge McCormick put  
20 it, the court proposals he makes to resolve cases “do not represent [his] evaluation of  
21 what is the ‘right’ outcome,” and instead “represent [his] evaluation of the terms that  
22 have the best chance of being accepted by both sides.” (McCormick Decl. ¶ 14.)

23  
24           After Magistrate Judge McCormick’s declaration was filed, Plaintiffs renewed  
25 their request that the Court grant final approval of the Original Proposed Settlement.  
26 (Mot.) ConAgra filed a response supporting approval of the settlement. (ConAgra  
27 Resp.) Before his opposition was due, Henderson asked the Court to permit him to seek  
28 discovery. (Dkt. 746.) To address the Ninth Circuit’s concerns and to develop the record

1 for appeal, the Court allowed Henderson to conduct limited discovery into discussions  
2 between Plaintiffs and ConAgra, and information or material shared with Magistrate  
3 Judge McCormick. (Dkt. 750 at 4.)

#### 4 5 **H. The Court’s Order on Remand Denying Plaintiffs’ Motion for Approval** 6 **of the Original Proposed Settlement**

7  
8 After analyzing the additional information received on remand, the Court  
9 concluded that the Original Proposed Settlement included too many indicators that class  
10 counsel’s and ConAgra’s self-interest unduly influenced the outcome of the parties’  
11 settlement negotiations. (Original Settlement Order at 12.) The Court noted that “[t]he  
12 disproportion between the amount the class recovered and the amount of fees class  
13 counsel recovered is staggering—with class claims totaling less than \$1 million while  
14 class counsel received almost seven times that amount—and is especially concerning  
15 given the parties’ knowledge that the claims rate under the settlement would be low.”  
16 (*Id.*) Further contributing to the Court’s discomfort with the Original Proposed  
17 Settlement was “[t]he fact that class counsel previously rejected a settlement offer with  
18 equal payments to the class and class counsel,” the fact that the Original Proposed  
19 Settlement contained a clear sailing provision and a reverter clause, and the fact that  
20 Magistrate Judge McCormick expressly stated that he did not consider what was fair or  
21 right in proposing the terms but rather only considered what terms “ha[d] the best chance  
22 of being accepted by both sides.” (*Id.* at 12–13.) The Court denied Plaintiffs’ motion for  
23 reconsideration of the Original Settlement Order. (Dkt. 795.)

#### 24 25 **I. The New Proposed Settlement**

26  
27 The parties returned to the drawing board, spending six months negotiating a  
28 settlement that the parties believed “would cure the deficiencies in the former agreement,

1 as previously noted by this Court and the Ninth Circuit, satisfy the parties, and provide  
2 relief to the Classes who have awaited payout for over a decade.” (Dkt. 807 at 8.) The  
3 New Proposed Settlement, unlike the Original Proposed Settlement, provides that  
4 ConAgra will fund a \$3 million non-reversionary common fund. (New Proposed  
5 Settlement § 2.32.5.) Class Members who timely submit a valid claim form (or who  
6 previously submitted a valid claim form), with a maximum of one claim form per  
7 household, may receive compensation of \$0.15 per unit of Wesson Oil purchased during  
8 the class period. (*Id.* §§ 4.1.2, 4.1.3.) \$575,000 of the fund will be allocated to members  
9 of the New York and Oregon classes who submit valid claim forms, in proportion to the  
10 number of units purchased, as compensation for statutory damages under those states’  
11 consumer protection laws, with pro rata adjustment according to the number of claimants.  
12 (*Id.* § 4.2.1.)

13  
14 The \$3 million common fund will also be used to pay service awards to Plaintiffs  
15 in the amounts of \$3,000 for those who sat for depositions and \$1,000 for those that were  
16 targets of discovery but did not sit for depositions, for a total aggregate service award  
17 amount of \$25,000. (*Id.* §§ 9.5, 9.6; Mot. at 7.) It will also be used to pay class counsel’s  
18 expenses of \$978,671.10. (Dkt. 813-1 [Joint Declaration of Counsel, hereinafter  
19 “Counsel Decl.”].) Class counsel does not seek any attorney fees.

20  
21 The New Proposed Settlement includes specific releases to ConAgra, including  
22 (1) forever releasing and discharging it from any liability for all claims of any nature that  
23 have or could have been brought in connection with the subject of this litigation and all  
24 claims that could be brought based on information discovered after the settlement is final,  
25 with the exception of claims arising from bodily injury allegedly suffered in connection  
26 with Wesson Oil Products, (2) expressly waiving and releasing any and all provisions,  
27 rights, and benefits conferred by California Civil Code § 1542 or of any comparable  
28 statute, law, or principle of common law, and (3) expressly waiving and releasing

1 ConAgra from any liability for claims arising under California’s Unfair Competition  
2 Law. (*Id.* §§ 8.1, 8.3, 8.4.)

### 3 4 **J. Claims Made Under the New Proposed Settlement**

5  
6 JND received 2,045,653 claims for 22,242,104,755 units. (3d Eoff Decl. ¶ 3.)  
7 This included 97,880 claims for 2,792,794 units under the Original Proposed Settlement  
8 and 1,947,773 claims for 22,239,311,961 units under the New Proposed Settlement. (*Id.*)  
9 JND’s “detailed claims analysis” revealed “validity issues and . . . indicia of fraud,”  
10 including “duplicate claims; claims filed in clusters from the same mailing address;  
11 claims filed from non-U.S. Internet Protocol (IP) addresses; or using slight name  
12 variations to avoid duplicate detection; and larger than expected claimed units purchased  
13 for private, household/non-commercial use.” (*Id.* ¶¶ 4–5.) After a preliminary fraud  
14 review, JND emailed the 1,498,820 people “claiming more units than would be expected  
15 for private household use requesting sufficient confirmation of claimed units.” (*Id.* ¶ 6.)  
16 5,742 of those people responded. (*Id.*)

17  
18 After reviewing those responses, JND removed 1,771,293 claims for  
19 22,235,568,319 units as invalid because they were either duplicates or had indicia of  
20 fraud. (*Id.* ¶ 8.) Therefore, JND determined there are 274,360 valid claims for 6,536,436  
21 units. (*Id.*) This means that class members submitting valid claims will receive a  
22 payment of approximately \$0.14866 cents per unit. (*Id.*)

### 23 24 **III. DISCUSSION**

25  
26 In deciding whether to grant the motion for final approval, the Court analyzes  
27 (1) the fairness of the New Proposed Settlement and (2) the class response to the notice.  
28 The Court then turns to Henderson’s motion for fees, expenses, and an incentive award.

1           **A. Fairness of the New Proposed Settlement**

2  
3           Although there is a “strong judicial policy that favors settlements, particularly  
4 where complex class action litigation is concerned,” *Linney v. Cellular Alaska P’ship*,  
5 151 F.3d 1234, 1238 (9th Cir. 1998), a settlement of class claims requires court approval.  
6 Fed. R. Civ. P. 23(e). This is because “[i]ncentives inhere in class-action settlement  
7 negotiations that can, unless checked through careful district court review of the resulting  
8 settlement, result in a decree in which the rights of class members, including the named  
9 plaintiffs, may not be given due regard by the negotiating parties.” *Staton v. Boeing Co.*,  
10 327 F.3d 938, 959 (9th Cir. 2003) (cleaned up).

11  
12           Rule 23(e) governs class action settlement approval. Courts may approve class  
13 action settlements that are “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).  
14 They must consider whether (A) the class representatives and class counsel have  
15 adequately represented the class, (B) the proposal was negotiated at arm’s length, (C) the  
16 relief provided for the class is adequate, and (D) the proposal treats class members  
17 equitably relative to each other. *Id.* 23(e)(2)(A–D).

18  
19           **1. Adequacy of Class Counsel and the Class Representatives**

20  
21           Class counsel and the class representatives have ably represented the class. For  
22 over a decade, they have shown competent and respectable advocacy in briefing and oral  
23 argument before this Court and before the Ninth Circuit, achieving victories including  
24 overcoming a motion to dismiss and attaining class certification and Ninth Circuit  
25 affirmance of class certification. With the class representatives’ help, counsel have  
26 conducted and responded to significant discovery. And they have reached a significant  
27 settlement even after Judge Morrow dismissed their original complaint. (*See* Dkt. 54.)  
28

1 As Judge Morrow concluded in both of her orders regarding class certification,  
2 there is no evidence of a conflict of interest between Plaintiffs and the class. (Dkt. 350);  
3 *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 976 (C.D. Cal. 2015), *aff'd sub*  
4 *nom. Briseno v. ConAgra Foods, Inc.*, 674 F. App'x 654 (9th Cir. 2017), and *aff'd sub*  
5 *nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). Plaintiffs' claims  
6 are identical to the class claims, and they have every incentive to vigorously pursue those  
7 claims. Nor is there any evidence Plaintiffs' counsel will not adequately represent or  
8 protect the interests of the class. They have extensive experience litigating complex  
9 matters, including class action litigation. (*See* Dkt. 350 [Judge Morrow's Order Denying  
10 Class Certification] at 51 [noting class counsel's background in class action litigation]);  
11 *ConAgra Foods*, 90 F. Supp. 3d at 976 (explaining in Judge Morrow's Order Granting  
12 Class Certification that this analysis remained unchanged); (*see also* Counsel Decl.) And  
13 they have remained devoted to this case, putting in nearly 12 years of work.

## 14

## 15 **2. Arm's Length Negotiation**

## 16

17 The Court has found no evidence of collusion during the negotiations leading to  
18 the New Proposed Settlement. The New Proposed Settlement is the product of six  
19 months of renewed negotiations between counsel that vigorously litigated the viability of  
20 Plaintiffs' claims, the propriety of class action treatment, and numerous other issues, and  
21 engaged in contentious discovery. (Dkt. 807 at 8; Mot. at 4); *see Hashemi*, 2022 WL  
22 2155117, at \*6 ("The parties extensively negotiated the Settlement over several months  
23 prior to mediation and ultimately reached a final agreement only after arms-length  
24 negotiations before mediator Mr. Picker."). And as discussed more thoroughly below,  
25 the New Proposed Settlement does not have any of the traditional hallmarks of collusion,  
26 including a clear sailing agreement, a reverter provision, or disproportionate class  
27 recovery and fee awards. The Court is satisfied that the New Proposed Settlement was  
28 negotiated at arm's length.



1                   **3. Adequacy of Class Relief**

2  
3                   In determining whether class relief is “adequate,” courts consider “(i) the costs,  
4 risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of  
5 distributing relief to the class, including the method of processing class-member claims;  
6 (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and  
7 (iv) any agreement required to be identified under Rule 23(e)(3).” *Id.* 23(e)(2)(C).<sup>1</sup> The  
8 Court finds the proposed relief to be adequate.

9  
10                   **a. Costs, Risks, and Delay of Trial and Appeal**

11  
12                   The New Proposed Settlement provides substantial recovery to the class. Although  
13 the ultimate \$0.14866 per unit recovery may appear modest, it is fair and reasonable. In  
14 this case, Plaintiffs sought a “price premium” for the allegedly misleading labeling rather  
15 than a full refund. This significantly limited the damages they sought. Judge Morrow  
16 narrowed Plaintiffs’ theory even further, ruling that the appropriate measure of damages  
17 was not the full price premium, but rather only the portion of that premium attributable to  
18 consumers’ belief that “100% Natural” meant that the products were GMO-free. (Dkt.  
19 350 at 61–62.) Based on Judge Morrow’s ruling, Plaintiffs’ own expert estimated that the  
20 maximum recovery they could obtain at trial was 10.2 cents per unit. (Dkt. 652-4 [Expert  
21 Report of Colin B. Weir] ¶ 35.)

22  
23  
24 <sup>1</sup> Before Congress codified these factors in 2018, the Ninth Circuit instructed district courts to apply the  
25 following factors in determining whether a settlement agreement was fair, reasonable, and adequate:  
26 “[1] the strength of plaintiffs’ case; [2] the risk, expense, complexity, and likely duration of further  
27 litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in  
28 settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience  
and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class  
members to the proposed settlement.” *Roes, 1-2 v. SFBSM Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir.  
2019); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). The Court still considers these factors  
to the extent that they shed light on the Rule 23(e) inquiry.

1           The class’ substantial recovery is especially noteworthy given the costs, risks, and  
2 delay of additional litigation. This case has always presented problems of proof,  
3 including proving that the oil is not “100% natural,” that customers relied on that  
4 representation, and that they actually bought the oil so many years ago. It also presented  
5 problems of damages, including differences in how much people valued the “100%  
6 natural” statement and issues with Plaintiffs’ damages model. And it presented problems  
7 of management, as the eleven subclasses involve violations of different state laws,  
8 different theories of recovery, and different class periods. (*See* Dkt. 545 at 139–40.)  
9 Given these issues, if litigation proceeds, motion practice—including possible motions  
10 for summary judgment and motions to sever and remand to different states—will also  
11 present both costs and risks. (*See* Dkt. 700 [Transcript of October 7, 2019 hearing] at  
12 16–17 [ConAgra’s counsel representing that it was considering filing such motions if  
13 litigation had continued]; Dkt. 745 [“Conagra strongly believes that—in the absence of  
14 an approved settlement—Conagra will be successful in securing decertification of the  
15 certified classes and/or prevailing at summary judgment.”].) Indeed, Judge McCormick  
16 expressed the view that Plaintiffs’ claims were weak. (McCormick Decl. ¶ 10 [“My own  
17 initial reaction to Plaintiffs’ mislabeling claims was similar; I thought both Judge Carney  
18 and many Orange County jurors would view those claims skeptically.”].) And this Court  
19 was seriously considering decertifying one or more classes because of the difficulty  
20 managing them as currently certified. Given the substantial cost and risks of further  
21 litigation, and the Court’s serious doubts about the strength of Plaintiffs’ case, this factor  
22 weighs in favor of approving the New Proposed Settlement.

23  
24                           **b.       Effectiveness of Proposed Method of Distributing Relief**

25  
26           Next, the Court must consider “the effectiveness of any proposed method of  
27 distributing relief to the class, including the method of processing class-member claims.”  
28 Fed. R. Civ. P. 23(e)(2)(C). “Often it will be important for the court to scrutinize the

1 method of claims processing to ensure that it facilitates filing legitimate claims.” Fed. R.  
2 Civ. P. 23 advisory committee’s note to 2018 amendment. “A claims processing method  
3 should deter or defeat unjustified claims, but the court should be alert to whether the  
4 claims process is unduly demanding.” *Id.*

5  
6 Here, the relief distribution is straightforward. Class members that submitted  
7 claim forms under the Original Proposed Settlement and did not opt out of the New  
8 Proposed Settlement had their previous claim form treated as valid. (New Proposed  
9 Settlement § 4.4.) And class members were able to easily complete and submit claim  
10 forms under the New Proposed Settlement by mail or online. (*Id.* § 4.1.) 2,045,653  
11 claims were filed. (3d Eoff Decl. ¶ 3.) This procedure for filing claims is not unduly  
12 demanding.

13  
14 JND also recommends paying claimants with valid claims who provided an email  
15 address electronically by virtual prepaid card and any claimants who did not provide an  
16 email by check. (*Id.* ¶ 12.) This distribution method appears effective.

17  
18 **c. Attorney Fees and Markers of Collusion**

19  
20 Next, the Court must consider “the terms of any proposed award of attorneys’ fees,  
21 including timing of payment,” in determining whether class relief is adequate. Fed. R.  
22 Civ. P. 23(e)(2)(c). Courts must scrutinize settlements for three factors that tend to show  
23 collusion: (1) when counsel receives a disproportionate distribution of the settlement,  
24 (2) when the parties negotiate a “clear sailing arrangement,” under which the defendant  
25 agrees not to challenge a request for agreed-upon attorney fees, and (3) when the  
26 agreement contains a “kicker” or “reverter” clause that returns unawarded fees to the  
27 defendant, rather than the class. *Briseno*, 998 F.3d at 1022.

1           Beginning with the markers of collusion, the New Proposed Settlement does not  
2 contain a reverter clause that returns unawarded amounts to ConAgra. Rather, if there are  
3 more funds in the common fund than needed to satisfy claims, then cash payment  
4 amounts will be increased so that all funds in the common fund are used. (Settlement  
5 § 4.1.4.) The New Proposed Settlement also does not have a clear sailing arrangement.  
6 Finally, counsel is not seeking fees under the New Proposed Settlement, so there is not a  
7 concern about class recovery and attorney fees being disproportionate. The New  
8 Proposed Settlement therefore contains no traditional markers of collusion.

9  
10                           **d.     Agreements Required to Be Identified Under Rule 23(e)(3)**

11  
12           The Court must also consider whether there is “any agreement required to be  
13 identified under Rule 23(e)(3),” Fed. R. Civ. P. 23(e)(2)(C)(iv)—that is, “any agreement  
14 made in connection with the proposal,” *id.* 23(e)(3). The parties have identified no  
15 agreement other than the New Proposed Settlement.

16  
17                           **4.     Equitable Class Member Treatment**

18  
19           The final Rule 23(e) factor turns on whether the proposed settlement “treats class  
20 members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2). “Matters of concern  
21 could include whether the apportionment of relief among class members takes  
22 appropriate account of differences among their claims, and whether the scope of the  
23 release may affect class members in different ways that bear on the apportionment of  
24 relief.” Fed. R. Civ. P. 23 advisory committee’s note to 2018 amendment.

25  
26           Under the New Proposed Settlement, class members receive differing payouts  
27 depending on how many bottles of Wesson Oil they bought. This difference in treatment  
28 is appropriate and reasonable. The New Proposed Settlement also treats New York and

1 Oregon class members differently than class members from other states based on their  
2 particular states' consumer protection laws, which provide for statutory damages. This  
3 distinction is also reasonable. The release is also the same for all class members. The  
4 New Proposed Settlement therefore treats class members equitably.

## 5 6 **5. Class Counsel's Costs**

7  
8 Class counsel seek to be compensated out of the settlement fund for their out-of-  
9 pocket costs incurred from the beginning of this case in June 2011 through July 23,  
10 2019—the date on which they filed the motion for final approval of the Original  
11 Proposed Settlement—in the amount of \$978,671.10. (Mot. at 6; Counsel Decl. ¶¶ 25,  
12 33.) These costs and expenses include money spent on expert witness fees, external and  
13 internal reproduction of documents produced in the case, document hosting platform  
14 costs, travel expenses, court filing fees, computer research, telephone, postage, delivery  
15 costs, making court appearances, and paying for transcripts. (Counsel Decl. ¶ 34; Dkt.  
16 663.) The requested costs and expenses do not included costs associated with the appeal  
17 of the Court's order granting final approval of the Original Proposed Settlement,  
18 subsequent discovery, or negotiation and approval of the New Proposed Settlement.  
19 (Counsel Decl. ¶ 34.) The Court has reviewed the affidavits of counsel and the attached  
20 exhibits supporting the award of costs and finds that the requested costs are reasonable  
21 and should be awarded out of the settlement fund.

## 22 23 **6. Incentive Awards for the Named Plaintiffs**

24  
25 Finally, Plaintiffs request service awards of \$3,000 for each of the six Plaintiffs  
26 who were deposed and \$1,000 for each of the seven Plaintiffs who were not deposed, for  
27 a total aggregate service award amount of \$25,000. (Mot. at 7; Counsel Decl. ¶ 38.)  
28 Incentive awards are payments to class representatives for their service to the class in

1 bringing the lawsuit. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir.  
2 2013). Courts routinely approve this type of award to compensate representative  
3 plaintiffs for the services they provide and the risks they incur during class action  
4 litigation. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *Vasquez*  
5 *v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 499 (E.D. Cal. 2010). Incentive awards in  
6 this district typically range from \$3,000 to \$5,000. See *In re Toys R Us-Del., Inc.-Fair &*  
7 *Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014)  
8 (collecting cases). A \$5,000 payment is “presumptively reasonable.” *Bellinghausen v.*  
9 *Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015). When evaluating the  
10 reasonableness of incentive awards, courts consider “the actions the plaintiff has taken to  
11 protect the interests of the class, the degree to which the class has benefitted from those  
12 actions,” and the time the plaintiff spent pursuing the litigation. *Staton*, 327 F.3d at 977.

13  
14 The requested incentive awards are reasonable and appropriate. Plaintiffs have  
15 participated in this litigation for over a decade, and have reviewed pleadings, responded  
16 to discovery requests, communicated with counsel, and reviewed and approved the terms  
17 of the Original Proposed Settlement and the New Proposed Settlement, and many have  
18 prepared for and testified at depositions. (Counsel Decl. ¶ 39.) Moreover, the awards are  
19 within the range of incentive awards typically approved in this district and lower than  
20 what courts consider “presumptively reasonable.” See *Bellinghausen*, 306 F.R.D. at 266.

21  
22 In sum, having considered the Rule 23(e)(2) factors, the Court concludes that the  
23 New Proposed Settlement is “fair, reasonable, and adequate.”

## 24 25 **B. Response to Notice**

26  
27 As explained, JND gave direct email notice to class members who filed a claim  
28 under the Original Proposed Settlement, print notice in *People Magazine*, digital notice

1 by Google Display Network, Facebook, and Instagram, and CAFA and CLRA notice.  
2 (Eoff Decl. ¶¶ 4–9.) It also advertised through TopClassActions.com and  
3 ClassAction.org. (*Id.* ¶¶ 12–13.) JND also created a settlement website, a toll-free help  
4 line, and a dedicated email address. (*Id.* ¶¶ 14–17.) The hotline received 366 calls, and  
5 the email address received 707 emails. (*Id.* ¶ 17.) JND received 2,045,653 claims for  
6 22,242,104,755 units (97,880 claims for 2,792,794 units under the Original Proposed  
7 Settlement and 1,947,773 timely claims for 22,239,311,961 units under the New  
8 Proposed Settlement). (3d Eoff Decl. ¶ 3.)

9  
10 JND received only nine valid requests for exclusion (in addition to nine it deemed  
11 invalid due to “[i]nadequate statement[s]”), and no one objected to the New Proposed  
12 Settlement. (Eoff Decl. ¶¶ 18–19.) This indicates very strong overall support for the  
13 New Proposed Settlement and supports final approval. *See, e.g., Hashemi*, 2022 WL  
14 18278431, at \*6 (“Very few objections and opt-outs create a strong presumption that the  
15 Settlement is beneficial to the Class and thus warrants final approval.”); *In re Lifelock*,  
16 *Inc. Mktg. & Sales Practices Litig.*, 2010 WL 3715138, at \*6 (D. Ariz. Aug. 31, 2010)  
17 (explaining that low number of timely written objections and requests for exclusion  
18 supported settlement approval); *National Rural Telecommunications Cooperative v.*  
19 *DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (“The absence of a single  
20 objection to the Proposed Settlement provides further support for final approval of the  
21 Proposed Settlement. It is established that the absence of a large number of objections to  
22 a proposed class action settlement raises a strong presumption that the terms of a  
23 proposed class settlement action are favorable to the class members.”).

24  
25 **C. Henderson’s Motion for Fees, Expenses, and Incentive Award [Dkt. 814]**

26  
27 Objector Henderson seeks \$241,231 in attorney fees, \$6,179 in expenses, and  
28 \$2,500 as an incentive award, for a total award of \$250,000. (Henderson Mot. at 1, 25.)



1 He argues that because of his “persistence” “over three years of litigating his objection,”  
2 “[t]he class will receive about \$2 million in this new settlement instead of under \$1  
3 million,” and that he should receive a 25% benchmark award from the \$1 million he  
4 added to the class’ relief. (*Id.* at 1–2, 7–8.) He asks that these awards be paid out of class  
5 counsel’s expense reimbursement, or in the alternative, from the common fund. (*Id.*)  
6

7 “Under certain circumstances, attorneys for objectors may be entitled to attorneys’  
8 fees from the fund created by class action litigation.” *Rodriguez v. Disner*, 688 F.3d 645,  
9 658 (9th Cir. 2012). Specifically, if their objections “result in an increase to the common  
10 fund, the objectors may claim entitlement to fees on the same equitable principles as class  
11 counsel.” *Id.*; see *In re Sw. Airlines Voucher Litig.*, 898 F.3d 740, 745 (7th Cir. 2018)  
12 (“[B]ecause of the skewed incentives in some class action settlements, objectors who  
13 bring those incentives back into balance by increasing a settlement’s benefit to a class  
14 may be compensated for their efforts.”). To be entitled to an award, an objector must  
15 have “produce[d] an improvement in the settlement worth more than the fee they are  
16 seeking; otherwise they have rendered no benefit to the class.” *In re Sw. Airlines*  
17 *Voucher Litig.*, 898 F.3d 740, 745 (7th Cir. 2018).  
18

19 Here, it does appear that Henderson’s efforts produced a significant increase in the  
20 settlement amount. Under the Original Proposed Settlement, “ConAgra would pay class  
21 members a maximum of \$993,919.” *Briseno*, 998 F.3d at 1021. Under the New  
22 Proposed Settlement, ConAgra is paying the class \$2 million (plus \$1 million for class  
23 counsel’s expenses). Under similar circumstances, courts have awarded objectors a  
24 benchmark 25% of the increase obtained. See, e.g., *In re Easysaver Rewards Litig.*, 2021  
25 WL 230013, at \*3 (S.D. Cal. Jan. 22, 2021) (approving “Objector’s request for \$805,000  
26 in fees” when the “Objector’s challenges led to the preservation of approximately \$3.23  
27 million more of the common fund for the *cy pres* beneficiaries” because it was “right  
28 about at the 25% benchmark typically used in the percentage method”); *Arnett v. Bank of*

1 *Am., N.A.*, 2014 WL 5419125, at \*3 (D. Or. Oct. 22, 2014) (finding that when the  
2 objector’s challenges to class counsel's requested expenses led to a \$38,267.11 increase  
3 in the settlement fund, a fee award to objector’s counsel of 25% of this amount—  
4 \$9,566.78—was appropriate, plus \$3,169.53 in expenses).

5  
6 Henderson’s counsel’s lodestar confirms that the 25% benchmark he requests is  
7 reasonable. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002)  
8 (“Calculation of the lodestar, which measures the lawyer’s investment of time in the  
9 litigation, provides a check on the reasonableness of the percentage award.”); *Bluetooth*,  
10 654 F.3d at 943 (encouraging a “comparison between the lodestar amount and a  
11 reasonable percentage award”). The lodestar of \$587,937.50 includes 786.5 hours of  
12 work over a four-year period at hourly rates of between \$450 and \$900. (Henderson Mot.  
13 at 18; Dkt. 814-1 [Declaration of Theodore H. Frank] ¶ 29.) The Court has reviewed the  
14 documentation supporting the lodestar amount and finds that the hourly rates and hours  
15 spent are reasonable. And the fact that the benchmark amount Henderson seeks is less  
16 than half of the lodestar confirms the reasonableness of the benchmark award.

17  
18 The Court has also reviewed the expenses for which Henderson seeks  
19 reimbursement and finds that they are reasonable. The \$2,500 incentive award for  
20 Henderson is also reasonable. *See, e.g., Easysaver Rewards Litig.*, 2021 WL 230013, at  
21 \*4 (awarding an objector fees, expenses, and “a modest incentive award of \$2,500”); *In*  
22 *re Apple Inc. Sec. Litig.*, 2011 WL 1877988, at \*5 (N.D. Cal. May 17, 2011) (awarding  
23 objector fees, expenses, and \$1,000 incentive award).

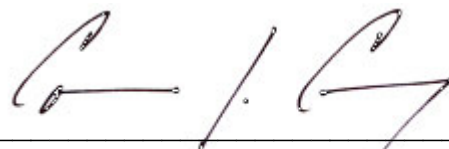
24  
25 The final question is from where the money for Henderson’s payment should  
26 come: class counsel’s expense reimbursement or the common fund. It seems to the Court  
27 inequitable for the payment to come from class counsel’s expense reimbursement.  
28 Although class counsel spent years and significant resources litigating this case, it is not

1 seeking any fees. In addition, the common practice in this circuit is to “award objectors  
2 fees and expenses from the common fund.” *In re Transpacific Passenger Air*  
3 *Transportation Antitrust Litig.*, 2015 WL 4776946, at \*2 (N.D. Cal. Aug. 13, 2015)  
4 (awarding objector fees, but rejecting objector’s “request that her fees be paid from Class  
5 Counsel’s award, rather than the Settlement Fund”); *see In re Riverstone Networks, Inc.*,  
6 256 F. App’x 168, 169 (9th Cir. 2007) (affirming award of objector’s fees and costs “to  
7 be paid from the settlement fund”); *Sobel v. Hertz Corp.*, 53 F. Supp. 3d 1319, 1334 (D.  
8 Nev. 2014) (“Given the size of the common fund and the reasonable figure requested by  
9 class counsel, the Court finds that [the objectors] are entitled to fees from the common  
10 fund rather than class counsel or Hertz.”). Henderson will therefore be awarded  
11 \$250,000 from the common fund.

12  
13 **IV. CONCLUSION**

14  
15 For the foregoing reasons, Plaintiffs’ motion for final approval of the New  
16 Proposed Settlement is **GRANTED**. Henderson’s motion for attorney fees, expense  
17 reimbursement, and an incentive award is also **GRANTED**, and Henderson is awarded  
18 \$250,000 from the common fund.

19  
20 DATED: September 18, 2023



21  
22 CORMAC J. CARNEY

23 UNITED STATES DISTRICT JUDGE

24  
25 CC: FISCAL