GUTRIDE SAFIER LLP
ADAM J. GUTRIDE (State Bar No. 181446)
adam@gutridesafier.com
SETH A. SAFIER (State Bar No. 197427)
seth@gutridesafier.com
KRISTEN SIMPLICIO (State Bar No. 263291)
kristen@gutridesafier.com
100 Pine Street, Suite 1250
San Francisco, California 94111
Telephone: (415) 336-6545
Facsimile: (415) 449-6469

TYCKO & ZAVAREEI LLP
HASSAN A. ZAVAREEI (State Bar No. 181547)
hzavareei@tzlegal.com
1828 L Street, N.W., Suite 1000
Washington, DC 20036
Telephone: (202) 973-0900
Facsimile: (202) 973-0950

Attorneys for Plaintiff and the Class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ROHINI KUMAR, an individual, on behalf of herself, the general public and those similarly situated Plaintiff, v. SAFEWAY, INC., Defendant,	Case No. RG 14726707 **CLASS ACTION** PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT Date: March 16, 2018 Time: 10:00 a.m. Department: 21 Reservation No.: R-1904127 Honorable Judge Winifred Y. Smith

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I. INTRODUCTION

On October 27, 2017, this Court preliminarily approved this class action settlement between Plaintiff and Defendant Safeway, Inc. ("Safeway"). It scheduled a final approval hearing for March 16, 2018 to determine whether (1) the proposed settlement is just, fair, reasonable, and adequate for the Class such that it should be granted final approval; (2) certification of the Settlement Class should be made final; (3) the Court should enter the proposed judgment; (4) the Court should award Plaintiff's Counsel attorneys' fees and expenses in the amount set forth in the Settlement Agreement; and (5) the Court should award Plaintiff an incentive for her time and risks undertaken in the Litigation.

Under the terms of the Settlement Agreement,[1] each Settlement Class Member who submits a Valid Claim shall receive a Settlement Benefit as follows:

- For each Product purchased between May 23, 2010 and July 31, 2015, inclusive, a Voucher having a face value of $1.50, or at the election of the Class member, $0.50 in cash.
- For each bottle of Safeway Select Extra Virgin Olive Oil purchased between August 1, 2015 and December 16, 2016, inclusive, a Voucher having a face value of $0.75, or at the election of the Class member, $0.25 in cash.[2]

(Settlement Agreement ¶ 4.4.) Additionally, the Settlement Agreement also requires changed practices—discussed more fully herein—to discontinue "Imported from Italy" label statements and mandate colored glass bottles to more fully ensure that olive oil labeled "extra virgin" does not degrade prior to purchase.

Subject to this Court's approval, Safeway will also pay Plaintiff $6,490 to compensate her for a general release and for the time she spent and risk she incurred serving as a class representative. Safeway has also agreed to pay Class Counsel attorneys' fees and costs as awarded by this Court, up to a maximum of $1,426,500. Notice has been provided to the class via notices issued to Safeway shoppers at the checkout register when they purchase Safeway Select brand olive

[1] Unless otherwise stated, the meaning of capitalized terms is that defined in the Settlement Agreement.

[2] As discussed in Plaintiff's Preliminary Approval Motion, the reason for the different recovery values is that in the latter time period the products were not labeled "Imported from Italy."

oil (aka "Catalina coupons"), as well as over 75 million online banner ads and over 13 million Facebook ads targeted at likely class members. An article about the settlement also appeared the website www.topclassactions.com.[3] A Settlement Website contained further detailed information as well as an online claim form and an online "opt-out" form, along with contact information for counsel. (Declaration of H. Jake Hack ("Hack Decl.") ¶¶ 3-6.)

As the Settlement is the product of a non-collusive, adversarial negotiation, Plaintiff respectfully requests that this motion be granted and final judgment entered.

II. BACKGROUND FACTS AND DETAILS OF SETTLEMENT

A. Litigation History

On May 23, 2014, Plaintiff filed her complaint. She alleged that the labeling and marketing of the Safeway Select olive oil products as "Imported from Italy" and "Extra Virgin" violated the Tariff Act of 1930, as amended, 19 U.S.C. 1304, and its implementing regulations, 19 C.F.R. section 134.46; the Food Drug and Cosmetic Act, 21 U.S.C. sections 301 *et seq.,* and its implementing regulations, 21 C.F.R. sections 101.18 *et seq.*; the U.S. Department of Agriculture regulations regarding Olive Oil and Olive-Pomace Oil, 75 Fed. Reg. 22363 (Apr. 28, 2010); the Sherman Food, Drug and Cosmetic Law, California Health and Safety Code ("Cal. Health & Saf. Code") sections 109875 *et. seq.*; and California law regarding grades of olive oil, Cal. Health & Saf. Code § 112877. She made claims for violations of the California Consumer Legal Remedies Act, Civil Code sections 1780 *et seq.* ("CLRA"), false advertising under California Business and Professions Code sections 17500 *et seq.*; unfair business practices under California Business and Professions Code sections 17200 *et seq.*; breach of contract; breach of the covenant of good faith and fair dealing; and fraud, deceit and/or misrepresentation. Plaintiff sought to pursue these claims on behalf of herself and all purchasers of the Safeway Select olive oil in California between May 23, 2010 and the present. She alleged that the false labeling caused people to purchase the Products who would not otherwise have done so, and that the Products were sold at a higher retail

[3] Notice was also published each week for four successive weeks in the East County Times, which is printed under the East Bay Times newspaper group. (Id. at ¶ 6.)

price than they would have been sold without the misstatements. She sought to recover, on behalf of the class, the dollar amount of the "premium" price that she contended was attributable to the alleged misrepresentations.

On July 22, 2014, Defendant demurred to and moved to strike the complaint. Defendant argued, *inter alia*, that Plaintiff lacked standing to sue and that she had failed to plead a claim for relief. Plaintiff opposed the motions. On September 2, 2014, the Court issued orders sustaining in part and overruling in part the demurrer and denying the motion to strike. The orders allowed all the claims and causes of action to proceed, except that the Court dismissed Plaintiff's claims for breach of contract and breach of the duty of good faith and fair dealing.

Plaintiff conducted substantial discovery from Safeway and third parties. Her counsel retained and obtained opinions from two experts: an expert in olive oil quality, who tested the Safeway products, and an economics expert, who conducted a hedonic regression of the effect of the challenged label statements on the pricing of those products. Both drafted lenghty reports and were deposed. Safeway also designated competing experts, whom Plaintiff deposed.

On June 26, 2015, Plaintiff moved for class certification. Defendant opposed the motion. On May 24, 2016, the Court certified two classes: an "Extra Virgin Olive Oil Class" and an "Imported from Italy Class." Following further briefing regarding the form and content of class notices, notice was provided to the classes which were defined as follows:

> (1) "Extra Virgin Olive Oil Class: All California citizens who, between May 23, 2010 and December 16, 2016, purchased, in California, any Safeway Select brand Extra Virgin Olive Oil products" and (2) "Imported From Italy Class: All California citizens who, between January 1, 2012 and July 31, 2015, purchased, in California, any of the following Safeway Select brand products: Extra Virgin Olive Oil; Extra Light in Flavor Olive Oil; and Pure Olive Oil."

B. Settlement History

The proposed settlement was reached following significant, hard fought litigation and several rounds of arms-length settlement discussions between capable counsel. (Prelim. Gutride Decl. ¶ 6.) The Parties attended five separate in-person mediations or settlement conferences with Judge Evelio Grillo of the Alameda Superior Court and Judge William Cahill (retired) of JAMS

ADR, Inc. ("JAMS") in San Francisco, California, the last of which took place on June 21, 2017. (*Id.*) The Parties did not negotiate about Attorneys' Fees and Costs or any potential Incentive Award until they first agreed on the material terms of the settlement, including the definition of the Settlement Class, notice, class benefits, claims process, and scope of release. (*Id.*)

C. Settlement Summary

The Settlement Agreement includes the following material terms and conditions.

1. Class Certification

The parties have agreed to the certification of two Settlement Classes defined as:

> **Extra Virgin Olive Oil Settlement Class**: all Persons and Businesses who, between May 23, 2010 and December 16, 2016, purchased, at any Safeway retail store in the United States, any Safeway Select Extra Virgin Olive Oil.
>
> **Pure Or Extra Light Olive Oil Settlement Class**: all Persons and Businesses who, between January 1, 2012 and July 31, 2015, purchased, at any Safeway retail store in the United States, any Safeway Select Pure Olive Oil or Safeway Select Extra Light in Flavor Olive Oil.[4]

(Settlement Agreement ¶¶ 1.10, 2.21, 2.24, 2.42.)

2. Class Benefit and Changed Practices.

First, each Settlement Class Member who submits a Valid Claim shall receive a Settlement Benefit as follows:

- For each Product purchased between May 23, 2010 and July 31, 2015, inclusive, a Voucher having a face value of $1.50, or at the election of the Settlement Class member, $0.50 in cash.
- For each bottle of Safeway Select Extra Virgin Olive Oil purchased between August 1, 2015 and December 16, 2016, inclusive, a Voucher having a face value of $0.75, or at the election of the Settlement Class member, $0.25 in cash.

(*Id.* ¶ 4.4.) The reason for the different recovery values is that in the latter time period the products

[4] The Settlement Class excludes are (1) the Honorable Judges Winifred Smith; Wynne Carvill; Evelio Grillo; William Cahill (Ret.); (2) any member of their immediate families; (3) any government entity; (4) Defendant; (5) any entity in which Defendant has a controlling interest; (6) any of Defendant's past or present subsidiaries, parents, affiliates, officers, directors, employees, legal representatives, heirs, successors, or assigns; (7) counsel for the Parties; and (8) any Persons who timely exclude themselves from the Settlement Class(es).

were not labeled "Imported from Italy."

Vouchers are redeemable at any Safeway or Vons store. They can be used as the equivalent of cash for the purchase of any item except for dairy products, gasoline, prescription pharmaceuticals, alcohol, or tobacco products. They do not expire, are fully transferrable, and one or more Vouchers can be used towards any purchase.

Proof of Purchase is not required for claims of up to five Products purchased per Household. Proof of Purchase *is* required for claims for more than five Products. (*Id.* ¶ 4.5.) However, the proof of purchase requirements are easy to meet: the claimant need only provide his or her Safeway Club Card number (or telephone number linked to a Safeway Club Card account). The claimant will then receive payment for *each* purchase of a Product shown in the Club Card records. No other proof of purchase is required. The claimant can specify multiple club card accounts. The claimant also has the option to provide a store receipt.

The Settlement Agreement also contemplates changed practices, some of which have already occurred, as well as injunctive relief. Subsequent to the initiation of and as a result of the Litigation, Safeway already removed the phrase "Imported from Italy" from all olive oil products imported into the United States. (*Id.* ¶ 3.1.) It also started using dark glass bottles to protect the oil from degradation by light. Safeway further agreed that, for a period of three years after the Effective Date, it shall be enjoined by the Court as follows:

1. Not to use the phrases "Imported from Italy," "from Italy," "Made in Italy," "Produced in Italy," or any other phrase suggesting that the olive oil in the bottle originates from Italy on the marketing or labeling of any Product, unless the Product is entirely composed of oil from olives grown and pressed in Italy.

2. If Defendant uses a phrase such as "Packed in Italy" or "Bottled in Italy" on the marketing or labeling for any Product, such phrase shall be immediately followed by the words, in the same font type and size, "olive oil from various countries*". In addition, on the same label panel where the phrase "Packed in Italy" or "Bottled in Italy" appears, there must be:

    a. The additional phase "*Olives grown and pressed in [countries]" or

    b. The phrase "*See [back/side] panel," in which case the language in 2(a) must appear on the [back/side] panel.

3. If the countries required by Paragraph 2 are listed in abbreviation format, then on the

same label where those abbreviations appear, there must be a glossary of abbreviations, e.g. "CH=Chile, TU=Tunisia".

4. If Defendant uses the phrase "Extra Virgin" or term "EVOO" on any Product, it must do all of the following:

a. Package the Product in a green or brown glass container.

b. Include a "best by" or "use by" date not later than eighteen months after the date of bottling.

(*Id.* ¶ 3.2.)

Class Counsel believes that the provision of the above benefits adequately compensates Class Members for the harm they suffered, in light of the risks of litigation. (Prelim. Gutride Decl. ¶¶ 8-12.) In particular, there may be substantial difficulties establishing: (1) that Safeway's marketing and advertising of the Products was likely to deceive reasonable persons as to their true geographic origin; (2) that the country of origin of the Products was material to reasonable persons; (3) that Safeway failed to employ adequate procedures to ensure that the Safeway Select Extra Virgin Olive Oil was, in fact, extra virgin at the time of bottling and through its "Best By" date; (4) that Safeway should be held liable for procedures employed by its foreign suppliers; (5) that damages should be awarded; and (6) the appropriate measure of damages. (*Id.* ¶¶ 14-17)

Even if Plaintiff's claims were successful, the "best case" recovery may not be better than the settlement remedy. Plaintiffs' economics expert Colin Weir performed a regression analysis to calculate the price premiums attributable to the claims here and the total amount of damages that might be obtained on a nationwide basis. That amount is $12,958,546, which equates to an average of approximately $0.73 per Product. (*Id.* ¶ 10.) As Class Members can receive up to $0.50 in cash or $1.50 in vouchers per bottle purchased, they can obtain a recovery that approaches or exceeds the maximum they could obtain at trial. Given the risks associated with this litigation, this recovery is excellent.

The Parties have selected an experienced Claim Administrator (Kurtzman Carson Consultants) to administer the settlement under the supervision of Plaintiff and the Court.

3. Settlement Release

The Settlement includes a simple "res judicata" release to bind Class Members. A broader

release applies to Plaintiff. Defendant likewise releases any claims it might have against Plaintiff. (Settlement Agreement, ¶¶ 8.1-8.3.)

4. Administrative Expenses, Attorneys' Fees and Costs, Incentive Award

All costs of notice and administration of the Settlement will be paid by Safeway. Plaintiff's counsel requests payment of $6,490 for Plaintiff. The incentive fee is designed to compensate the named Plaintiff for (1) the time and risk she took in prosecuting this action (including the risk of liability for Defendants' costs) and (2) agreeing to a release broader than the one that will bind settlement class members. Plaintiff also requests payment of her attorneys' fees and costs in the amount of $1,426,500. The reasonableness of Plaintiff's request is discussed in more detail in Plaintiff's separately submitted memorandum of points of authority in support of her application for attorneys' fees, costs and an incentive award.

D. Class Notice

The claim administrator (Kurtzman Carson Consultants) established a settlement website at http://www.safewayoliveoilsettlement.com/, which contains the settlement notices, a contact information page that includes address and telephone numbers for the claim administrator and the parties, the settlement agreement, the signed order of preliminary approval, online and printable versions of the claim form and the opt out forms, and answers to frequently asked questions. (Hack Decl. ¶ 3, Exhibit D.) In addition, this motion for final approval and application for attorneys' fees, costs, and incentive awards will be placed on the website upon filing.

The claims administrator served over 89,318,579 million banner ad impressions nationwide across desktop, mobile and social media which were targeted at settlement class members. (*Id.* ¶ 4.) The ads appeared during the period from December 5, 2017 through December 27, 2017 and then January 9, 2018 through January 16, 2018, and linked to the Settlement Website. (*Id.*) Additional notice has been provided to the class via a Print Publication Notice via a weekly advertisement in the *East County Times* that ran for four weeks. (*Id.* ¶ 6.) Finally, notice was provided directly at the point of sale to all purchasers of Safeway Select Olive Oil at Safeway stores for a 60-day period, utilizing Safeway's Catalina coupon system.

E. Class Response

As of the filing of this motion, no objections have been filed. (Hack Decl. ¶ 10.) Only four persons have opted out. (*Id.* at ¶ 9.) The deadline for objections, exclusion requests and claims is February 16, 2018. Complete information on the claims rate, objections, and exclusion requests will be provided to the Court on March 2, 2018.

III. ARGUMENT

A. Standard for Final Approval

"To prevent collusion or unfairness to the Class, the settlement or disapproval of a class action requires court approval." *Malibu Outrigger Board of Governors v. Superior Cour*t (1980) 103 Cal.App.3d 572, 578-79. The standard for approval is whether the proposed class action settlement as a whole is fair, adequate and reasonable. *See Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801; *see also Wershba v. Apple Computer, Inc*. (2001) 91 Cal. App. 4th 224, 234; *7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal. App. 4th 1135, 1145. There is a "strong judicial policy that favors settlement," particularly (like here) "where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 2176; Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (4th ed. 2002) ("*Newberg*") § 11:41 (citations omitted). This Court has broad discretion in determining whether a proposed class action settlement is fair. *See Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1138. In exercising this discretion, the Court must generally give "[d]ue regard…to what is otherwise a private consensual agreement between the parties." *Dunk*, 48 Cal. App. 4th at 1801. The Court's inquiry "must be limited to the extent necessary to reach a reasonable judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *Id.* (citations omitted.)

The Court must "explore[] all the relevant factors" bearing on approval of a class action settlement. *See Hanlon v. Chrysler Corp.,* (9th. Cir. 1998) 150 F.3d at 1026. Those "relevant factors" include the strength of plaintiff's case; the risk, expense, complexity, and likely duration of

further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and view of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *See Wershba*, 91 Cal. App. 4th at 244-45. This list of factors is not exclusive. The trial court is free to engage in a balancing and weighing of factors, depending on the circumstances of each case. *Id*. at 245. The Court, however, is not to engage in a mini-trial on the merits:

> [T]he role of the court in passing upon the propriety of the settlement of a…class action is a delicate one….[W]e recognize that since '[t]he very purpose of compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial.' Rather, in the words of the Supreme Court,…it must reach an 'intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense, and likely duration of such litigation…[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of the law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein (2d Cir. 1972) 464 F.2d 689, 691-93, *cert denied sub nom, Benson v. Newman* (1972) 409 U.S. 2039; *see also Dunk*, 48 Cal. App. 4th at 1801 (citing *Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("ultimately, the court's determination in nothing more than 'an amalgam of delicate balancing, gross approximation and rough justice")).[5]

B. All of the Relevant Factors Favor Approval

1. A Presumption of Fairness is Applicable to this Settlement.

There is a presumption that a proposed settlement is fair and reasonable when it is the result of arms' length negotiations, there has been investigation and discovery that are sufficient to permit counsel and the court to act intelligently, and counsel are experienced in similar litigation. *See Dunk*

[5] To the extent that they are not inconsistent with California jurisprudence, California courts are advised to look for guidance to Rule 23 of the Federal Rules of Civil Procedure and federal cases applying Rule 23. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *see also Green v. Obledo* (1980) 29 Cal. 3d 126, 145-46; *Dunk*, 48 Cal. App. 4th at 1801 fn. 7.

48 Cal. App. 4th at 1800-01; *Newberg* §11.41 at 11-88. All these factors are easily satisfied.

a. Settlement Was Reached Through Arms' Length Negotiation.

The proposed settlement herein is the product of over 2,300 hours of active, hard-fought litigation, and protracted and equally hard-fought settlement discussions and negotiations over the course of many years between counsel for Plaintiff and counsel for Defendants, including five in-person mediations conducted by Judges Cahill and Grillo. (Prelim. Gutride Decl. ¶¶ 4-6.)

Prior to settlement, Plaintiff had engaged in significant discovery, including but not limited to reviewing documents and written discovery responses, third-party-discovery, and deposing Defendants' corporate representatives and employees and its designated experts. (*Id.*, ¶ 4.) Plaintiff also retained her own experts. The parties did not negotiate about attorneys' fees or expenses until they had reached agreement on all other material terms of the Settlement, including the class benefit and notice. (Prelim. Gutride Decl. ¶ 6.) This Settlement was accordingly the "product of hard-fought adversarial negotiations by the parties." *Wershba*, 91 Cal. App. 4th at 245.

b. The Settlement Is the Result of Significant Investigation and Discovery.

In determining whether a settlement is fair, adequate and reasonable, courts often consider "[t]he extent of discovery completed and the stage of the proceedings." *Dunk*, 48 Cal. App. 4th at 1801. This Settlement was achieved after over three years of active litigation. (Prelim. Gutride Decl. ¶¶ 2, 4.) Apart from formal discovery, Plaintiff's counsel engaged in significant independent investigation, including commissioning tests of Defendants' products, hiring experts, and obtaining and reviewing documents from sources other than Defendant. (Final Gutride Decl. ¶ 10-16.)

c. Counsel For the Parties are Experienced Class Action Attorneys.

All parties are represented by counsel with significant experience in class action litigation, including litigation related to consumer class actions.[6] Plaintiff's counsel was familiar with the legal and factual issues of the case, including damage analyses and litigation risk analyses. (Prelim.

[6] True and correct copies of the firm resumés of Plaintiff's Counsel—Gutride Safier LLP and Tycko & Zavareei LLP—were submitted as part of the class certification briefing the Court reviewed in certifying a California class. Updated resumes are attached as Exhibit A to the declarations of Hassan Zavareei and Adam Gutride.

Gutride Decl. ¶¶ 3-5, 7, 10, 14-18; Final Gutride Decl. ¶¶ 33-34.) Such experience underscores the presumption of fairness. *See Wershba*, 91 Cal. App. 4th at 245.

d. To Date, No Objections Have Been Filed.

There was a comprehensive notice campaign, complete with print publication notice, point of sale notice via coupons at Safeway stores, and an internet advertising campaign which generated 89,318,579 impressions. (Hack Decl. ¶ 4.) Nevertheless, as of January 31, 2018 only 4 class members have opted out and none have objected. (Id. ¶ 10-11.)[7] Where only an extremely small percentage of the class has reacted negatively, the law strongly favors final approval. *See, e.g.*, *Newberg* at § 11.41; *Wershba*, 91 Cal. App. 4th at 244-45.

For all of the above reasons, it appropriate for the Court to presume that the proposed Settlement is fair, adequate and reasonable under California law.

2. Additional Relevant Criteria Confirm That The Settlement Is Fair, Adequate and Reasonable.

In addition to the factors establishing a presumption of fairness, in deciding whether to grant final approval to a class action settlement, California courts consider several additional factors, including without limitation: (a) the amount offered in the settlement; (b) the risks inherent in continued litigation; (c) the complexity and stage of the proceedings when settlement was reached; (d) the experience and views of counsel; and (e) the reaction of the class. *See Dunk*, 48 Cal. App. 4th at 1801. Again, this "list of factors is not exhaustive and should be tailored to each case." *Id.*

In considering these factors "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . ." *Officers for Justice*, 688 F.2d at 625; *7-Eleven Owners for Fair Franchising v. Southland Corp.*, (2000) 85 Cal. App. 4th at 1151. Applied to the instant matter, all of these factors also favor final approval.

a. The Settlement Consideration Is Significant And Appropriate.

[7] In connection with their reply papers, the parties will file an updated declaration from the claim administrator regarding opt-outs and objections.

Here, the benefits to Class Members are clear, demonstrable and immediate. Plaintiff achieved her desired goal in this litigation—i.e., obtaining cash refunds for class members and changed practices, including clearer marketing and improved bottling practices to protect "extra virgin" oil. Settlement Class members can also obtain double their cash recovery in the form of Safeway vouchers, which are likely to be of value to them because they can be used like cash for nearly all purchases at Safeway. It is likely that persons who purchase Safeway store-brand products like the Products at issue are regular Safeway shoppers. Based on the calculations of Plaintiff's damages expert Colin Weir, the amount of the price premium is approximately 73 cents per product. (Prelim. Gutride Decl. ¶ 10.) As Class Members can receive up to $0.50 in cash or $1.50 in vouchers per bottle purchased, they can obtain a recovery in this settlement that is, at a minimum, 88% of what they could obtain at trial, and if they choose the voucher option, would be more than 177% of what they could obtain at trial. Safeway also has agreed to remove the offending representation and change its packaging to improve oil quality; both changes will benefit consumers. While the monetary value of the changed practices for improved extra virgin quality cannot be quantified, Plaintiff's expert has estimated that the removal of the phrase "Imported from Italy" will save class members nearly $5.3 million over a five year period. (Declaration of Colin Weir in Support of Plaintiff's Motion for Preliminary Approval ("Weir Decl.") at ¶ 90.) Thus, Plaintiff's counsel according believes that the refund and changed practices provided by the Settlement is a good result, as good or better than the likely recovery at trial. (Prelim. Gutride Decl. ¶¶ 9-11.)

The Settlement provides no preferential treatment for Plaintiff or other Class Members. Plaintiff will receive no more than a $6490 incentive award to compensate her for the time she spent on this litigation and risks of undertaking this litigation, including the potential liability for costs of suit and her broad release against Defendants. Nor does the Settlement provide excessive compensation for Plaintiff's attorneys.[8]

[8] *See* Plaintiff's Application For Attorneys' Fees, Costs and Incentive Award.

b. The Settlement Extinguishes All The Risks Involved In Litigating.

The Court must next weigh the settlement benefits against the risk of continued litigation. *See Dunk*, 48 Cal. App. 4th at 1801-02. This balancing further supports approval of the Settlement.

With this Settlement, Plaintiff has achieved her desired goal in this litigation—i.e., obtaining refunds, improved bottling practices to protect "extra virgin" oil, and changes to Defendant's labeling practices. At trial, Plaintiff might, in the best-case scenario, obtain a 100% refund of the price "premium" charged by Defendant for each Product, calculated as the difference between the retail price of Products with and without the alleged "Imported from Italy" misrepresentations. (Prelim. Gutride Decl. ¶ 10.) Because class members are eligible to receive between 68.5% and more than 200% what they could obtain even under the best case scenario after trial, recovery is excellent, and presents none of the problems identified in *Kullar v. Foot Locker Retail, Inc.,* 168 Cal. App. 4th 116 (2008).

In addition to risks inherent to proving the damages as discussed in the preliminary approval papers (*see, e.g.,* Prelim. Gutride Decl. ¶ 15), there are numerous additional risks in continuing with this Litigation. (*Id.* ¶¶ 14, 16.) Plaintiff would have been required to prove that the "Imported from Italy" phrase was unlawful or likely to mislead reasonable persons. While Plaintiff maintains that Defendant's conduct violated federal and state country-of-origin marking regulations, Defendant has offered testimony that for decades its products have passed regular customs inspections, which Defendant contends proves that it has complied with applicable regulation, foreclosing liability under federal or state law. Plaintiff also would have been required to prove that Defendants' policies and procedures for handling its extra olive oil were insufficient, resulting in a high likelihood that the products were not extra virgin at the time of sale or through the best by date. A jury would have been required to weigh expert testimony. There was a risk Plaintiff would lose at trial. (*Id.*)

This Court, which has maintained oversight of these proceedings, is uniquely situated to evaluate the risks of continued litigation. Because the Settlement provides immediate and substantial relief, without the attendant risks of future litigation, it warrants final approval. *See, e.g., 7-Eleven*, 85 Cal. App. 4th at 1145 (a full and fair assessment of a settlement "is nearly assured

when all discovery has been completed and the case is ready for trial").

c. The Complexity, Expense, and Likely Duration of Continued Litigation Against Defendants Favors Final Approval.

Another factor for the Court to consider in assessing fairness is the complexity, expense and likely duration of the litigation had the Settlement not been reached. *See Dunk*, 48 Cal. App. 4th at 1801; *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.* (9th Cir. 1977) 550 F.2d 1173, 1178; *Girsh v. Jepson* (3rd Cir. 1975) 521 F.2d 153, 157. In weighing this factor, the Court must compare the benefits of the Settlement to the expenses and delay involved in achieving an equivalent or more favorable result at trial. *See Young v. Katz* (5th Cir. 1971) 447 F.2d 431, 434.

The only thing that is assured from additional litigation is additional expenditure of time and money. Even if this Court or a jury might ultimately award each Settlement Class Member more damages and equitable relief, and even if Plaintiff defeated Safeway's appeals from judgment, the time and expense required could be astronomical. It could be years before Class Members received anything.

d. The Experience and Views of Counsel Favor Final Approval.

Plaintiff's counsel supports the settlement as fair, reasonable, adequate and in the best interests of the Class as a whole. (Prelim. Gutride Decl. ¶¶ 8-12.) The opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See, e.g., In re First Capital Holdings Corp. Fin. Prods. Sec. Litig*. (C.D. Cal. June 10, 1992) 1992 U.S. Dist. LEXIS 14337, at *8 (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement); *Dunk*, 48 Cal. App. 4th at 1802.

e. The Settlement Enjoys Overwhelming Class Support.

It is also appropriate for the Court to conclude that the settlement is fair, adequate, and reasonable when relatively few Class Members opt-out or object. *See Wershba*, 91 Cal. App. 4th at 244-45; *Hanlon*, 150 F.3d at 1027 ("the fact that the overwhelming majority of the Class willingly approved the offer and stayed in the Class presents at some objective positive as to the fairness"). A certain number of objections are to be expected in a class action with a notice campaign and a potentially large number of class members. *See Newberg* at § 11.41. If, however, only a small

number of objections are made, that fact can (and should) be viewed as indicative of the adequacy of the settlement. *See 7-Eleven*, 85 Cal. App. 4th at 1152–1153 (response of absent class members was "overwhelmingly positive" where only 1.5 percent elected to opt out).

Here, the exact number of class members in not knowable; however, because Safeway sold millions of bottles of Safeway Select Olive Oil nationwide during the class period, the number of purchasers is significant. Yet, as of February 1, 2018, no objections have been received, and only four people have opted out. (Hack Decl. ¶¶ 9-10.)

This Court is not tasked with determining whether a different settlement would be "better," "fairer," "more reasonable." *See, e.g., 7-Eleven*, 85 Cal. App. 4th at 1145 ("the [trial] court's determination [of the fairness of a class action settlement agreement] is nothing more than an amalgam of delicate balancing, gross approximation, and rough justice") (citation omitted). Rather, the question before the Court is, giving due regard to what "is otherwise a private consensual agreement between the parties," whether this proposed settlement is fair, reasonable, and adequate to all concerned. *See Dunk*, 48 Cal. App. 4th at 1801; *see also Hanlon*, 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."). The answer to that question in this case is "yes." The most meaningful benchmark for evaluating a class action settlement is whether it "secures an adequate advantage for the class." *Newberg* at § 11:46. This Settlement Agreement clearly satisfies that test.

IV. CONCLUSION

For the foregoing reasons, and the reasons provided in the concurrently filed application for approval of attorneys' fees, costs and incentive award, Plaintiff requests that the Court enter final judgment certifying the settlement class and approving the settlement, granting her application for an incentive award of $6,490.00, and awarding her counsel $1,426,500.00 in fees and costs.

DATED: February 2, 2018

GUTRIDE SAFIER LLP

By:_____
Adam Gutride, Attorneys for Plaintiff