

1 CHAVEZ & GERTLER LLP
2 Mark A. Chavez (CA Bar No. 90858)
3 Nance F. Becker (CA Bar No. 99292)
4 42 Miller Avenue
5 Mill Valley, California 94941
6 Tel: (415) 381-5599
7 Fax: (415) 381-5572
8 mark@chavezgertler.com
9 nance@chavezgertler.com

7 BRAUN LAW GROUP, P.C.
8 Michael D. Braun (Bar No. 167416)
9 1999 Avenue of the Stars, Ste. 1100
10 Los Angeles, California 90067
11 Tel: (310) 836-6000
12 Fax: (310) 836-6010
13 mdb@braunlawgroup.com

11 LAW OFFICES OF ANDREW KIERSTEAD
12 Andrew S. Kierstead (Bar. No. 132105)
13 1001 SW 5th Avenue, Suite 1100
14 Portland, Oregon 97204
15 Tel: (508) 224-6246
16 Fax: (508) 244-4356
17 ajkier@aol.com

16 Attorneys for Plaintiffs Nicholas Miller, Jeffrey Borneman,
17 and the Proposed Class

18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**

21 NICHOLAS MILLER and JEFFREY)
22 BORNEMAN, individually and on)
23 behalf of all others similarly situated,)
24 Plaintiffs,)
25 vs.)
26 WISE COMPANY INC.,)
27 Defendant.)
28

Case No: 5:17-cv-00616-JAK-PLA

CLASS ACTION

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL**

Hrg. Date: May 7, 2018

Time: 8:30 a.m.

Ctrm: 10B

Hon. John A. Kronstadt

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. SUMMARY OF CLAIMS AND DEFENSES 1

III. STATUS OF THE PROCEEDINGS 5

IV. SETTLEMENT TERMS..... 6

A. Settlement Class..... 6

B. Settlement Benefits 6

1. Monetary Benefits 7

2. Injunctive Relief 7

3. Attorneys’ Fees, Expenses, and Service Awards 7

4. Settlement Administration 8

C. Notice Plan..... 8

V. ARGUMENT 9

A. Preliminary Approval of the Settlement is Appropriate..... 9

1. The Settlement is the Product of Informed and Non-Collusive Negotiations 10

2. The Settlement Has “No Obvious Deficiencies” 11

3. The Proposed Relief Does Not Grant Preferential Treatment To The Class Representatives Or Segments of the Class..... 11

4. The Strength of Settlement Class Members’ Claims Compared to the Amount Offered by the Settlement..... 12

5. The Complexity, Time, and Expense of Continued Litigation . 13

6. The Views of Experienced Counsel 14

7. The Stage of Proceedings and the Amount of Discovery Completed..... 14

B. The Settlement Class Should Be Certified 15

1. The Requirements of Fed. R. Civ. P. 23(a) Are Satisfied 15

a. The Settlement Class Is So Numerous that Joinder of Individual Members Is Impracticable..... 16

b. There Are Questions of Law and Fact Common to the Settlement Class 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- c. Plaintiffs’ Claims Are Typical of the Claims of the Settlement Class 17
- d. The Interests Of the Class Representatives Are Aligned with the Interests of the Settlement Class 18
- e. The Settlement Class is ascertainable 19
- 2. The Requirements of Rule 23(b)(3) Are Satisfied 20
 - a. Common Questions Predominate Over Potential Individual Questions..... 20
 - b. A Class Action Is the Superior Method to Fairly and Efficiently Adjudicate this Matter 21
- 3. Class Counsel Are Well-Qualified to Represent the Settlement Class..... 22
- C. The Notice Program Satisfies All Applicable Requirements 22
 - 1. Appointment of a Settlement Administrator 23
 - 2. Method of Notice 23
 - 3. Contents of the Notice Program 24
- VI. CONCLUSION 24

TABLE OF AUTHORITIES

CASES

1

2

3 *Amchem Prods., Inc. v. Windsor*

4 521 U.S. 591 (1997) 20, 21

5 *Bravo v. Gale Triangle, Inc* (No. CV1603347BROGJSX)

6 2017 WL 708766 (C.D. Cal. Feb. 16, 2017)..... 8

7 *Brown v. Hain Celestial Group, Inc.*

8 2014 WL 6483216 (N.D. Cal. Nov. 18, 2014) 18

9 *Chavez v. Blue Sky Natural Beverage Co.*

10 268 F.R.D. 365 (N.D. Cal. 2010)..... 18

11 *Class Plaintiffs v. City of Seattle*

12 955 F.2d 1268 (9th Cir. 1992)..... 9

13 *Consolidated Rail Corp. v. Town of Hyde Park*

14 47 F.3d 473 (2d Cir. 1995)..... 16

15 *Curtis-Bauer v. Morgan Stanley & Co.* (No. C 06-3903 TEH)

16 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008)..... 10

17 *Eisen v. Carlisle & Jacquelin*

18 417 U.S. 156 (1974) 23

19 *Ellis v. Costco Wholesale Corp.*

20 657 F.3d 970 (9th Cir. 2011)..... 17, 18

21 *Gen. Tel. Co. of Sw. v. Falcon*

22 457 U.S. 147 (1982) 17

23 *Hanlon v. Chrysler Corp.*

24 150 F.3d 1011 (9th Cir. 2008)..... *passim*

25 *Harris v. Vector Mktg. Corp.* (No. C-08-5198 EMC)

26 2012 WL 381202 (N.D. Cal. Feb. 6, 2012) 8

27 *Hunt v. Check Recovery Sys., Inc.*

28 241 F.R.D. 505 (N.D. Cal. 2007)..... 17

In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.

789 F. Supp.2d 935 (N.D. Ill. 2011) 14

1 *In re ConAgra Foods, Inc.*
 2 90 F.Supp.3d 919 (C.D. Cal. 2015) 16

3 *In re Corrugated Container Antitrust Litig.*
 4 643 F.2d 195 (5th Cir. 1981)..... 19

5 *In re Elan Secs. Litig.*
 6 385 F.Supp.2d 363 (S.D.N.Y. 2005)..... 15

7 *In re First Capital Holdings Corp. Financial Products Securities Litig.*
 8 MDL No. 901 (C.D. Cal. June 10, 1992)..... 11

9 *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*
 10 55 F.3d 768 (3d Cir. 1995)..... 15

11 *In re Mego Fin. Corp. Sec. Litig.*
 12 213 F.3d 454 (9th Cir. 2000)..... 18

13 *In re NVIDIA Corp. Derivative Litig.* (No. C-06-06110-SBA(JCS))
 14 2008 WL 5382544 (N.D. Cal. Dec. 22, 2008)..... 9

15 *In re Prudential Sec. Ltd. P’ship Litig.*
 16 163 F.R.D. 200 (S.D.N.Y. 1995) 15

17 *In re Sunrise Sec. Litig.*
 18 131 F.R.D. 450 (E.D. Pa. 1990) 14

19 *In re Syncor ERISA Litig.*
 20 516 F.3d 1095 (9th Cir. 2008)..... 9

21 *In re Tableware Antitrust Litig.*
 22 484 F.Supp.2d 1078 (N.D. Cal. 2007) 9

23 *In re Wells Fargo Home Mtg. Overtime Pay Litig.*
 24 571 F.3d 953 (9th Cir. 2009)..... 20

25 *Johns v. Bayer Corp.*
 26 280 F.R.D. 551 (S.D. Cal. 2012)..... 21

27 *Johnson v. Gen. Mills, Inc.*
 28 278 F.R.D. 548 (C.D. Cal. 2012) 18

Jordan v. County of Los Angeles
 669 F.2d 1311 (9th Cir.1982)..... 16

1 *Lilly v. Jamba Juice Co.* (No. 13-CV-02998-JST)
 2 2015 WL 1248027 (N.D. Cal. Mar. 18, 2015)..... 10, 11

3 *Lucas v. Breg, Inc.*(No. 15-CV-00258-BAS-NLS)
 4 2016 WL 6125681 (S.D. Cal. Sept. 30, 2016)..... 20

5 *Martin v. Monsanto Co.* (No. EDCV162168JFWSPX)
 6 2017 WL 1115167 (C.D. Cal. Mar. 24, 2017)..... 18

7 *McBean v. City of New York*
 8 233 F.R.D. 377 (S.D.N.Y. 2006) 15

9 *Nen Thio v. Genji, LLC*
 10 14 F.Supp.3d 1324 (N.D. Cal. 2014) 12

11 *O’Connor v. Boeing N. Am., Inc.*
 12 184 F.R.D. 311 (C.D. Cal. 1998) 19

13 *Ortega v. Natural Balance, Inc.*
 14 300 F.R.D. 422 (C.D. Cal. 2014) 22

15 *Phillips Co. v. Shutts*
 16 472 U.S. 797 (1985) 21

17 *Satchell v. Fed. Exp. Corp.* (No. C 03-2659 SI)
 18 2007 WL 1114010 (N.D. Cal. Apr. 13, 2007) 11

19 *Saulsberry v. Meridian Fin’l Serv., Inc.* (No. CV146256JGBJPRX)
 20 2016 WL 3456969 (C.D. Cal. Apr. 14, 2016) 19

21 *Sciortino v. PepsiCo, Inc.* (No. 14-CV-00478-EMC)
 22 2016 WL 3519179 (N.D. Cal. June 28, 2016) 11

23 *Smith v. Am. Greetings Corp.* (No. 14-CV-02577-JST)
 24 2015 WL 4498571 (N.D. Cal. July 23, 2015)..... 13

25 *Staton v. Boeing Co.*
 26 327 F.3d 938 (9th Cir.2003)..... 12, 16

27 *Torrisi v. Tucson Elec. Power Co.*
 28 8 F.3d 1370 (9th Cir.1993)..... 10

Twigg v. Sears, Roebuck & Co.
 153 F.3d 1222 (11th Cir. 1998)..... 23

1 *Wal-Mart Stores, Inc. v. Dukes*
2 131 S. Ct. 2541 (2011) 16

3 *Weinberger v. Kendrick*
4 698 F.2d 61 (2d Cir. 1982)..... 13

5 *Wolin v. Jaguar Land Rover N. Am., LLC*
6 617 F.3d 1168 (9th Cir. 2010)..... 21

7 **STATUTES**

8 California’s Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, *et seq.*..... 5

9 California’s Fair Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*..... 5

10 California’s Unfair Competition Law, Cal. Civil Code §§ 17200 *et seq.*..... 5

11

12 **OTHER AUTHORITIES**

13 Manual for Complex Litigation, Fourth, § 21.632 9

14 W. Rubenstein, *Newberg on Class Actions* (5th ed. 2012) 20

15 A. Conte, *Newberg on Class Actions* (4th ed. 2002)..... 10, 16, 19

16

17 **RULES**

18 Fed. R. Civ. P. 23..... *passim*

19

20

21

22

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 This is a consumer class action for false advertising and unfair business
3 practices against Defendant Wise Company, LLC (“Wise”). After substantial
4 formal and informal discovery and two mediation sessions overseen by highly-
5 respected former judge and JAMS mediator Hon. Dickran Tevrizian (Ret.), the
6 parties have executed a Settlement Agreement (“S.A.,” Exh. 1 to the Declaration of
7 Nance F. Becker [“Becker Decl.”] filed herewith) that resolves all of the alleged
8 claims in exchange for significant injunctive and monetary relief. Wise has agreed
9 to modify its website and packaging to completely eliminate the representations
10 with which Plaintiffs take issue, and the parties have agreed to a claims-based
11 process by which each of the over 20,000 Settlement Class Members can obtain a
12 cash rebate of 20% of the price they paid to purchase the products at issue. About
13 78% of Settlement Class members – those whose names and contact information
14 are known to Wise – will receive direct notice of the Settlement, with the remainder
15 notified through an ambitious Internet and social media campaign. (S.A. sec. F,
16 Becker Decl. ¶ 11.)

17 Both parties, represented by experienced class action counsel, believe that the
18 Settlement is fair, reasonable, and in the interests of the members of the proposed
19 Settlement Class, and ask the Court to grant preliminary approval. (*Id.* ¶ 14.)

20 **II. SUMMARY OF CLAIMS AND DEFENSES**

21 Wise is a privately-held company headquartered in Utah that specializes in
22 the manufacture and sale of “survival food,” specifically marketing its Long-Term
23 Food Kits to “preppers” and other individuals who wish to stockpile food in
24 preparation for natural or man-made disasters. Utilizing the slogan “Be Wise. Be
25 Ready,” it claims to be the “nation’s leader in emergency preparedness.”

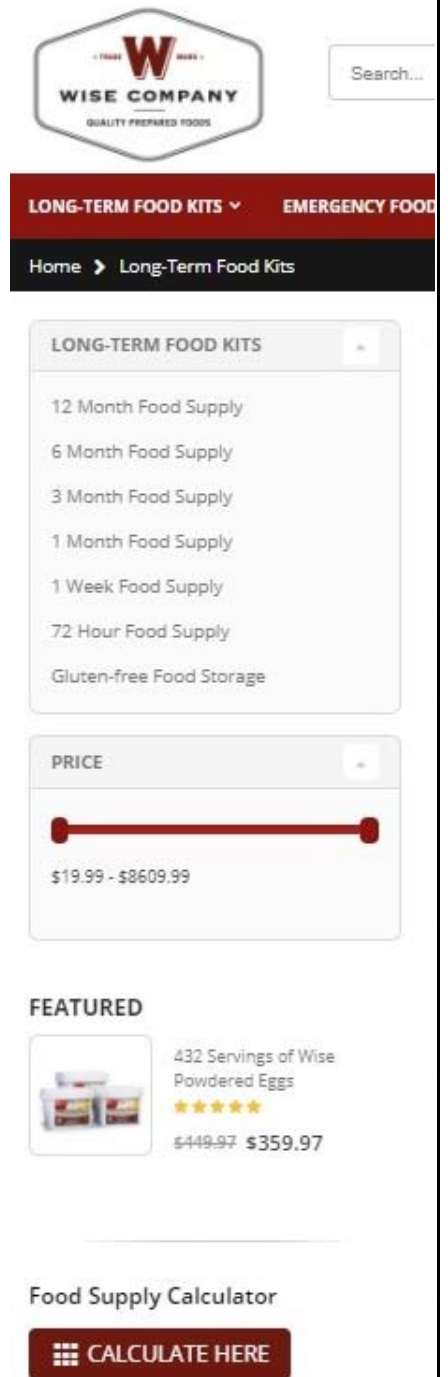
26 Long-Term Food Kits are the mainstay of Wise’s product offerings, and for
27 years have been sold in incremental sizes categorized by the period of time each is
28 meant to last, *e.g.*, “1 Month Food Supply,” “12 Month Food Supply.” These

1 products are sold directly to consumers through the Wise Website,
2 <http://www.wisefoodstorage.com>, as well as through retail outlets. The cost of a
3 Long-Term Food Kit during the Class Period ranged from about \$75 to \$7,000.

4 Plaintiffs Nicholas Miller and Jeffrey Borneman allege that Wise’s online
5 advertising and marketing includes material misrepresentations and omissions about
6 its Long-Term Food Kits. Plaintiffs claim that although Wise markets its Long-
7 Term Food Kits based on the length of time each will
8 purportedly feed a stated number of adults and/or
9 children, the kits do not contain anywhere near
10 enough calories to healthily sustain consumers for
11 those periods of time. According to Plaintiffs’ expert
12 dietitian, an average adult who relied on the number
13 of servings of food contained in any of the Long-
14 Term Food Kits for the stated times would receive
15 only *one-quarter to one-third* of the minimum number
16 of calories needed to survive. Nor do the Long-Term
17 Food Kits contain the quantity of protein and other
18 nutrients required to maintain good health. The
19 challenged marketing practices include the following.

20 The first step in purchasing a product is to click
21 through the drop-down menu pictured at right. As
22 Plaintiffs’ marketing expert explains:

23 Any consumer who is interested in purchasing a
24 Long-Term Food Kit must first select the
25 “Long-Term Food Kits” menu bar. Next, the
26 consumer must select a drop-down menu for
27 one of the following categories: “12 Month
28 Supply,” “6 Month Supply,” “3 Month
Supply,” or “1 Month Supply.” *** After
selecting one of the product categories, the
consumer is then given a choice of specific



1 food kits to select, which are also named for a length of time (e.g.,
2 “1-Month Emergency Food Box”) or a number of servings (e.g.,
3 “720 Servings,” “4320 Servings,” “2880 Servings”). The product
4 categories and product names clearly represent to the consumer that
5 the products will provide healthy nutrition (which includes the
6 necessary calories) for the stated period of time.

6 (Decl. of Dean Fueroghne in Support of Class Cert. [Dkt. 24-6] ¶ 23; Website
7 Excerpts [Dkt. 24-8, Exh. B] pp. B-11-18.¹)

8 After selecting a particular food kit on the Wise Website, the consumer is
9 presented with a further “Description” of the product that includes a graphic
10 element entitled: “How many people will this feed and for how long?” This graphic
11 has been present on the Website since its inception. (Stipulated Fact 8.²) Taking the
12 “720 Serving Bucket” (a “6-Month Food Supply”) as an example, Wise answers the
13 question: “How long will 720 servings last?” with a line bar graphic showing that
14 for 1 person, the food kit provides a “1 Year Supply (2 servings/day),” and for 4
15 people or 2 adults and 4 children, a “3 Month Supply (2 servings/day).” (Website
16 Excerpts p. B-62.) And Wise describes its 2160-serving “12 Month Food Supply”
17 as follows: “For instance, our 2160-serving package of long-term food supplies can
18

19 ¹ Due to the length of these exhibits, Plaintiffs have not refiled them but incorporate
20 the documents as filed in support of their Motion for Class Certification.

21 ² On October 26, 2017, the parties stipulated to the following key facts pertinent to
22 class certification and the merits:

- 23 1. The number of servings in each of the Long-Term Food Kits did not change
24 during the Class Period.
- 25 2. The number of Calories per serving was identified in the Nutrition Facts Panel
26 for ... each of the food products included in the Long-Term Food Kits and did
27 not change during the Class Period.
- 28 3. The total number of Calories provided by each of the Long-Term Food Kits
did not increase during the Class Period.
4. The amount of protein, vitamins, and minerals in each of the food products
included in the Long-Term Food Kits was identified in the Nutrition Facts Panel
and did not change during the Class Period.
5. Apart from changes in appearance, and changes to the amount of sodium and
transfat, the Nutrition Labels for each of the food products included in the Long-
Term Food Kits did not change during the Class Period

The Stipulation is submitted as Exh. 4 to the Becker Decl. (Becker Decl. ¶ 9.)

1 provide two adults with three daily servings of healthy, nutritious meals for an
2 entire year.” (*Id.*, p. B-80.)

3 Another key component of the Wise Website that has been present since 2013
4 (Stipulated Fact 7) is an interactive “Food Supply Calculator.” The Food Supply
5 Calculator (one link to which is pictured in the graphic above) encourages the
6 consumer to “Calculate your food storage goal: Customize your food storage to your
7 family size and your specific needs.” The Food Supply Calculator web page
8 (Website Excerpts p. B-6) states that: “Here, on our website, we offer a unique food-
9 storage calculator system that can help you to determine exactly how much food you
10 and your family should purchase in order to eat regularly and healthily during an
11 emergency event.” The consumer is instructed to enter the number of adults and
12 children they would like to feed, and then the Calculator provides “the
13 recommendations for your food storage goals.”

14 Each of the named Plaintiffs is a California resident who purchased a Long-
15 Term Food Kit through the Wise Website: Mr. Miller purchased the “56 Serving
16 Grab & Go Entrée and Breakfast Pack” (later called “Emergency Freeze Dried
17 Breakfast and Entrée Bucket – 56 Servings”), a “1 Month Food Supply,” for
18 \$124.99 plus \$16.00 shipping and handling (Dkt. 24-3, ¶ 4 and Becker Decl. Exh.
19 2), and Mr. Borneman purchased the “One Month Emergency Food Box for 1
20 Person” (later called “1 Month Emergency Food & Drink Supply”) (Dkt. 24-2, ¶ 4
21 and Becker Decl. Exh. 3). They contend that the above (and other) representations
22 by Wise regarding the amount and quality of the food products contained in its
23 Long-Term Food Kits are a material part of its bargain with its customers, who
24 reasonably rely on Wise’s promise to help them calculate and stockpile the amount
25 of food they will need to get through a disaster. Had Plaintiffs and other consumers
26 known that the Long-Term Food Kits do not, in fact, contain sufficient food to
27 sustain them for the advertised periods of time, they would not have purchased the
28 products, or at a minimum would have paid a significantly lower amount

1 commensurate with the amount of time the food supply would actually last. Based
2 on those allegations, Plaintiffs seek restitution, damages, and injunctive relief
3 pursuant to California’s Fair Advertising Law (“FAL,” Cal. Bus. & Prof. Code §§
4 17500 *et seq.*); Unfair Competition Law (“UCL,” Cal. Civil Code §§17200 *et seq.*);
5 and the Consumers Legal Remedies Act (“CLRA,” Cal. Civil Code §§1750 *et seq.*).

6 Wise does not dispute the facts regarding the nutritional content of its
7 products or claim that the Long-Term Food Kits are, by themselves, sufficient to
8 sustain consumers for the advertised periods of time. However, Wise denies that its
9 marketing materials in fact represent that the food kits will do so, and contends that
10 because the nutrition labels for the food products contained in the kits are truthful
11 (which is not disputed), Plaintiffs have no claim. (Becker Decl. ¶ 13.) Wise also
12 denies that the case is suitable for class certification. (*Ibid.*)

13 **III. STATUS OF THE PROCEEDINGS**

14 The Action was filed in February, 2017 and has proceeded expeditiously. The
15 parties exchanged Rule 26 disclosures and attended an initial Case Management
16 Conference. Plaintiffs have propounded and Wise has responded to several sets of
17 requests for production, interrogatories, and requests for admission. Plaintiffs have
18 also deposed Wise’s Person Most Knowledgeable about marketing and other
19 matters. Wise has produced about 13,000 pages of documents as well as summary
20 sales information (which it has designated confidential) showing the number of
21 individuals who purchased each of the Long-Term Food Kits, the purchase channel
22 (Wise Website, over the phone, through a third party, etc.), the number of products
23 sold, and the price of the products during the relevant years. (Becker Decl. ¶ 8.)

24 Plaintiffs filed a Motion for Class Certification on October 9, 2017 (Dkt. 24).
25 The motion included supporting declarations from a well-credentialed dietitian, an
26 expert in consumer advertising/marketing, and a financial expert. Rather than
27 embarking on further costly discovery that Wise proposed to oppose certification,
28 the parties agreed to stay the proceedings to give them an opportunity to engage in

1 settlement discussions and mediation. The Court approved the stipulation.

2 **IV. SETTLEMENT TERMS**

3 **A. Settlement Class**

4 The parties have agreed to certification of the following Settlement Class
5 pursuant to Federal Rule of Civil Procedure 23(b)(3):

6 All persons who purchased one or more of the following products (“Eligible
7 Products”) for shipment to California during the period February 15, 2013
through December 31, 2017:

8 1-Month Emergency Food Supply Box;
56 Serving Breakfast/Entrée Bucket;
9 84 Serving Grab and Go Bucket;
240 Serving Long Term Food Supply Package;
10 3-Month Emergency Food Supply Box;
360 Serving Long Term Food Supply Package;
11 6-Month Emergency Food Supply Box;
720 Serving Long Term Food Supply Package;
12 1080 Serving Long Term Food Supply Package;
12-Month Emergency Food Supply Box;
13 1440 Serving Long Term Food Supply Package;
2160 Serving Long Term Food Supply Package;
14 2880 Serving Long Term Food Supply Package;
4320 Serving Long Term Food Supply Package;
15 Ultimate Emergency Prepper Pack, 1 Month for 2 adults;
Ultimate Emergency Prepper Pack, 1 Month for 4 adults;
16 Ultimate Emergency Prepper Pack, 3 Months for 1 adult;
Ultimate Emergency Prepper Pack, 3 Months for 2 adults.
17

18 (S.A. Definitions, pp. 4, 6.³) Excluded from the Settlement Class are: (1) the current
19 and former employees, officers and directors of Wise and its agents, subsidiaries,
20 parents, successors, predecessors, and assigns; (2) the judge to whom this case is
21 assigned and the judge's immediate family; and (3) any person who executes and
22 files a timely request for exclusion from the Class. (*Ibid.*)

23 **B. Settlement Benefits**

24 The Settlement provides compensation for consumers who have purchased
25 Wise Long-Term Food Kits during the Class Period, and additional relief that will
26 protect the public and prospective future purchasers from being misled.
27

28

³ The definitions used in the Settlement Agreement are adopted and used herein.

1 **1. Monetary Benefits**

2 The Settlement provides cash rebates ranging from \$15 to \$1,400 per Eligible
3 Product purchased during the Class Period, contingent on the submission of a
4 simple Claim Form. (S.A. sec. D-1 and Exh. A.) Known Customers – those who
5 purchased their Eligible Products directly from Wise, and whose identity, contact
6 information, and purchase history is known to Wise – will be provided a summary
7 of their Eligible Product purchases at the time notice is disseminated, and will only
8 need to verify that they are the purchaser. Unknown Customers – those who
9 purchased their products from third parties and whose identities are not known to
10 Wise – will be asked to submit a receipt or other documentation of their purchase,
11 and will be compensated on the basis of the average price for which each of their
12 Eligible Products was sold in the year of purchase. (S.A. sec. D-1.) Eligibility
13 determinations will be made by the Settlement Administrator.

14 **2. Injunctive Relief**

15 The Settlement (sec. D-2) provides significant injunctive relief in the form of
16 a commitment from Wise to make specific modifications to its website and
17 packaging, such that none of the Eligible Products will be marketed or displayed in
18 conjunction with any claim, in words or graphics, that the food kit contains an “X
19 Day” or “X Month” supply. The “Food Calculator” will also be permanently
20 eliminated. In addition, following Final Approval any Eligible Product packaging
21 that refers to an “X Day” or “X Month” supply will be modified to remove such
22 references.

23 **3. Attorneys’ Fees, Expenses, and Service Awards**

24 Wise has agreed that Class Counsel are entitled to an award of attorneys’
25 fees, costs and expenses for their work on the litigation and resolution of the
26 Action. (S.A. sec. H.) However, neither the amount of the award nor a “not-to-
27 exceed” amount have been negotiated. Plaintiffs will file a motion asking the Court
28 to determine and award their reasonable fees, costs and expenses at least 14 days

1 before the Opt-Out and Objection Deadline. Wise has agreed to pay the amounts
2 awarded by the Court over and above the compensation to be paid to the Settlement
3 Class Members.

4 Wise has also agreed not to oppose a request by Plaintiffs for service awards
5 of up to \$3,000 to each of the Class Representatives. (S.A. sec. I.) “Generally, in the
6 Ninth Circuit, a \$5,000 incentive award is presumed reasonable. *See Harris v.*
7 *Vector Mktg. Corp.*, No. C-08-5198 EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb.
8 6, 2012).” *Bravo v. Gale Triangle, Inc.*, No. CV1603347BROGJSX, 2017 WL
9 708766, at *19 (C.D. Cal. Feb. 16, 2017).

10 Plaintiffs’ request for service awards will be filed with their motion for an
11 award of attorneys’ fees, costs and expenses. Exhibit 8 to the Becker Declaration
12 sets forth the hours spent on the case by Class Counsel and the Class
13 Representatives to date, and estimated future time.

14 **4. Settlement Administration**

15 Wise will pay up to \$110,000 to cover cost for the Settlement Administrator
16 to administer and implement the Settlement, including the Notice Plan and claims
17 process. (S.A. sec. G-3.)

18 **C. Notice Plan**

19 As set forth in Settlement Agreement sec. F and Exhibits B-1, B-2, B-3, B-4,
20 and B-5 thereto, Wise customers will receive notice of the Settlement terms and the
21 rights and responsibilities of the Settlement Class Members through U.S. Mail,
22 email, social media, and the Internet. The Notice Plan includes:

- 23 1. U.S. Mail and email notice to all Settlement Class Members whose
24 names and contact information are known to Wise, subject to updates to be
25 provided by the Settlement Administrator (S.A. sec. F-1, F-2);
- 26 2. Internet notice, through a digital notice campaign utilizing a mix of
27 media channels including desktop and mobile web services, banner ads on targeted
28 websites, and notice banner ads with links to the Settlement Website. The details of

1 the plan will be designed by the Settlement Administrator. (S.A. sec. F-3.a; *see*
2 Becker Decl. ¶ 12.)

3 3. Publication by Wise on a conspicuous location on the Wise Website,
4 the Wise Facebook page, and Wise’s Twitter account. (S.A. sec. F-3.b.)

5 4. The creation of a Settlement Website where Settlement Class Members
6 can obtain copies of the Detailed Notice, a fillable and printable Claim Form, the
7 Court’s orders, and other documents pertinent to the Settlement. (S.A. sec. F-3.c.)

8 **V. ARGUMENT**

9 **A. Preliminary Approval of the Settlement is Appropriate**

10 There exists a “strong judicial policy that favors settlements, particularly
11 where complex class action litigation is concerned.” (*In re Syncor ERISA Litig.*, 516
12 F.3d 1095, 1101 (9th Cir. 2008), citing *Class Plaintiffs v. City of Seattle*, 955 F.2d
13 1268, 1276 (9th Cir. 1992).) Settlements are particularly favored “in class actions
14 and other complex cases where substantial judicial resources can be conserved by
15 avoiding formal litigation.” (*In re NVIDIA Corp. Derivative Litig.*, No. C-06-
16 06110-SBA(JCS), 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008).)

17 Courts employ a two-step process to review proposed class action
18 settlements. First, there is preliminary approval and notice to the class, and then
19 final approval. (Manual for Complex Litigation, Fourth, § 21.632.) At the
20 preliminary approval stage, the Court “make[s] a preliminary determination on the
21 fairness, reasonableness, and adequacy of the settlement terms.” (*Id.*; *see also* Fed.
22 R. Civ. P. 23(e).) Preliminary approval should be granted where the settlement falls
23 “within the range of possible approval.” (*In re Tableware Antitrust Litig.*, 484
24 F.Supp.2d 1078, 1080 (N.D. Cal. 2007).) The Court should consider whether “the
25 proposed settlement appears to be the product of serious, informed, non-collusive
26 negotiations, has no obvious deficiencies, does not improperly grant preferential
27 treatment to class representatives or segments of the class, and falls within the range
28 of possible approval.” (*Lilly v. Jamba Juice Co.*, No. 13-CV-02998-JST, 2015 WL

1 1248027, at *7 (N.D. Cal. Mar. 18, 2015).) “The proposed settlement need not be
2 ideal, but it must be fair and free of collusion, consistent with a plaintiff’s fiduciary
3 obligations to the class.” (*Id.*, citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027
4 (9th Cir. 1998).)

5 At the final approval stage, a court “must balance a number of factors: the
6 strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of
7 further litigation; the risk of maintaining class action status throughout the trial; the
8 amount offered in settlement; the extent of discovery completed and the state of the
9 proceedings; the experience and views of counsel; the presence of a governmental
10 participant; and the reaction of the class members to the proposed settlement.” (*Id.*,
11 citing *Hanlon*, 150 F.3d at 1026) [citations omitted].) “In some cases, one factor
12 alone may prove determinative in finding sufficient grounds for court approval.”
13 (*Curtis-Bauer v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 WL 4667090,
14 at *3 (N.D. Cal. Oct. 22, 2008), citing *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d
15 1370, 1376 (9th Cir.1993).)

16 Analysis of the above factors demonstrates that the Settlement is well within
17 the required “range of possible approval” and that preliminary approval should,
18 accordingly, be granted.

19 **1. The Settlement is the Product of Informed and Non-**
20 **Collusive Negotiations**

21 “[C]ourts respect the integrity of counsel and presume the absence of fraud
22 or collusion in negotiating the settlement, unless evidence to the contrary is
23 offered.” (H. Newberg, A. Conte, *Newberg on Class Actions* §11.51 (4th ed. 2002).)
24 There is an initial presumption of fairness when a proposed class settlement is the
25 product of arm’s-length negotiations, sufficient investigation has been undertaken
26 to allow the parties and the court to make an informed decision, and the counsel
27 involved are competent and experienced. (*Id.*, §11.41; see *In re First Capital*
28

1 *Holdings Corp. Fin'l Prod. Sec. Litig.*, MDL No. 901 at *2 (C.D. Cal. June 10,
2 1992).

3 Class Counsel in this case are well-respected and highly-experienced in class
4 action and consumer litigation. (Becker Decl. ¶¶ 15-26 and Exh. 5, 6, 7.) Before
5 reaching this Settlement, Class Counsel vigorously pursued the litigation,
6 conducted broad discovery, consulted with experts, and deposed Wise. (*Id.* ¶ 8.)
7 The Parties had ample opportunity to evaluate the respective strengths and
8 weaknesses of the action. The settlement negotiations were at arms'-length and
9 included two mediation sessions overseen by a respected and experienced mediator.
10 The use of a mediator supports a finding that "the parties reached the settlement in a
11 procedurally sound manner and that it was not the result of collusion or bad faith by
12 the parties or counsel." (*Sciortino v. PepsiCo, Inc.*, No. 14-CV-00478-EMC, 2016
13 WL 3519179, at *4 (N.D. Cal. June 28, 2016), citing *Satchell v. Fed. Exp. Corp.*,
14 No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ["The
15 assistance of an experienced mediator in the settlement process confirms that the
16 settlement is non-collusive"].)

17 **2. The Settlement Has "No Obvious Deficiencies"**

18 The proposed settlement has no obvious deficiencies. It provides monetary
19 relief that is not contingent on future purchases (*i.e.*, not in the form of coupons).
20 The claims process is simple, easy to do, and designed to encourage claims. The
21 Notice program is far-reaching and reasonable. The monetary relief is adequate
22 based on the hurdles that would be faced if litigation were to continue and Plaintiffs
23 would have to obtain class certification and establish both liability and damages on
24 a class-wide basis. The absence of any obvious deficiencies weighs in favor of
25 preliminary approval of the Settlement. (*Lilly*, 2015 WL 1248027 at *7.)

26 **3. The Proposed Relief Does Not Grant Preferential Treatment** 27 **To The Class Representatives Or Segments of the Class**

28 The Class Representatives do not receive any unduly preferential treatment

1 under the Settlement. With the exception of modest Service Awards for their time
2 and effort devoted to investigating and prosecuting the claims on behalf of the
3 Class, the Class Representatives are treated the same as every other member of the
4 Settlement Class. “[T]he Ninth Circuit has recognized that service awards to named
5 plaintiffs in a class action are permissible and do not render a settlement unfair or
6 unreasonable.” (*Nen Thio v. Genji, LLC*, 14 F.Supp.3d 1324, 1335 (N.D. Cal.
7 2014), citing *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.2003).). The
8 Plaintiffs’ support for the settlement is not conditioned upon Court approval of the
9 Service Awards. (S.A. sec. I.) All Settlement Class members will receive the same
10 relief, based directly on the dollar value of their purchases; no preferential
11 subclasses have been created.

12 **4. The Strength of Settlement Class Members’ Claims**
13 **Compared to the Amount Offered by the Settlement**

14 Wise denies any wrongdoing, fault, or liability, denies that it violated any
15 law, denies that it damaged the Plaintiffs or Class Members in any way, and
16 contends that the Action has merit. (S.A. Recitals 4, 8.) Wise also disputes that
17 class certification is appropriate.

18 Plaintiffs believe their claims have merit. Plaintiffs recognize, however, the
19 inherent risks of litigating their claims through class certification, potential
20 summary judgment, trial, and potential appeals, and of achieving a result better than
21 that offered by the Settlement here. (Becker Decl. ¶ 13.) The Settlement, in contrast,
22 provides certainty of recovery. There is a very real risk that the Settlement Class
23 could obtain no better outcome against Wise through continued litigation, trial, and
24 appeal. (*Ibid.*)

25 The Settlement provides monetary relief for the economic loss attributable to
26 Wise’s alleged misrepresentations and omissions to all Settlement Class Members.
27 The existence of a uniform measure of the harm caused to each Settlement Class
28 Member is disputed: Plaintiffs and their expert believe damages can and should be

1 based on the difference between what was promised and what was received (the
2 “benefit-of-the-bargain” model), based on the 2,000-calorie-per-day diet used by
3 the FDA. (See Falkenhagen Decl., Dkt. 24-5.) Wise, on the contrary, contends that
4 because the amount of food “required” by each consumer varies, damages must be
5 determined on an individualized basis. (Becker Decl. ¶ 13.)

6 In addition to providing the agreed monetary compensation, the Settlement
7 will cause Wise to substantially change its marketing practices. Wise has already
8 made changes to its website, and will make significant additional changes to its
9 product names, descriptions, and packaging that will benefit both online and brick-
10 and-mortar purchasers. (S.A. sec. D-2.) These additional benefits strongly weigh in
11 favor of approving the Settlement. (*See, e.g., Smith v. Am. Greetings Corp.*, No. 14-
12 CV-02577-JST, 2015 WL 4498571, at *8 (N.D. Cal. July 23, 2015) [finding that
13 defendant’s changing some of the practices the plaintiffs challenged in the litigation
14 counted as additional benefits to the total “recovery” beyond the payment of past
15 monetary damages, and granting preliminary approval to the settlement].)

16 Finally, the Settlement is advantageous to the Settlement Class Members
17 because the Released Claims do not include any claims for personal injuries that
18 they might have sustained as a result of the nutritional deficiencies Plaintiffs allege.
19 (Release, S.A. sec. B.)

20 **5. The Complexity, Time, and Expense of Continued Litigation**

21 Prosecuting Plaintiffs’ claims through trial and appeal would be lengthy and
22 complex, and impose significant costs on the Parties. Continued proceedings would
23 likely include substantial motion practice (including completion of class
24 certification briefing and any summary judgment motions), expert depositions, trial,
25 and potential appeal.

26 The Settlement, in contrast, delivers real and substantial remedies to the
27 Settlement Class without further risk or delay. This factor favors preliminary
28 approval. (*See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re*

1 *Sunrise Sec. Litig.*, 131 F.R.D. 450, 455 (E.D. Pa. 1990) [approving a class action
2 settlement because, in part, the settlement “will alleviate ... the extraordinary
3 complexity, expense and likely duration of this litigation”].)

4 **6. The Views of Experienced Counsel**

5 Courts consider the opinions of experienced counsel when determining
6 whether a settlement is fair, reasonable, and adequate. (*Hanlon*, 150 F.3d at 1026.)
7 Class Counsel have extensive experience litigating complex class actions. They
8 have achieved class action settlements that have been approved by many courts
9 across the country and recovered substantial monetary benefits for Class Members.
10 (Becker Decl. ¶¶ 17-26 and Exh. 5, 6, 7.) The Settlement Class Members were well-
11 represented by experienced and fully prepared counsel at the bargaining table. Class
12 Counsel believe the Settlement to be excellent, readily satisfying the standard of
13 being within the range of possible approval. (*Id.* ¶ 13.)

14 **7. The Stage of Proceedings and the Amount of Discovery** 15 **Completed**

16 Class Counsel reviewed and analyzed a rolling production of over 13,000
17 pages of documents as well as sales information produced by Wise (including in the
18 course of mediation and thereafter); deposed the person designated by Wise as most
19 knowledgeable about its products and marketing practices; consulted at length with
20 experts regarding the nutritional, marketing, and damages issues and obtained
21 expert reports in support of class certification; and conducted extensive legal
22 research. (Becker Decl. ¶¶ 8, 9.)

23 The pertinent question is whether Class Counsel have sufficient information
24 to ensure “effective representation.” (*In re AT&T Mobility Wireless Data Servs.*
25 *Sales Tax Litig.*, 789 F. Supp.2d 935, 966 (N.D. Ill. 2011).) Courts have repeatedly
26 explained that it does not matter whether the discovery is labelled “formal” or
27 “informal;” instead “the pertinent inquiry is what facts and information have been
28 provided.” (*Id.*; see also *McBean v. City of New York*, 233 F.R.D. 377, 384-85

1 (S.D.N.Y. 2006); *In re Elan Secs. Litig.*, 385 F.Supp.2d 363, 370 (S.D.N.Y. 2005).)
2 Here, Class Counsel were well-informed of the important facts and relevant legal
3 issues when negotiating this Settlement. This factor favors preliminary approval of
4 the Settlement.

5 **B. The Settlement Class Should Be Certified**

6 Courts favor the use of settlement classes “to foster negotiated conclusions to
7 class actions.” (*In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab.*
8 *Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).) Certification of a settlement class “actually
9 enhances absent class members’ opt-out rights because the right to exclusion is
10 provided simultaneously with the opportunity to accept or reject the terms of a
11 proposed settlement.” (*In re Prudential Sec. Ltd. P’ship Litig.*, 163 F.R.D. 200, 205
12 (S.D.N.Y. 1995).) When granting preliminary approval of a class action settlement,
13 it is appropriate for a court to certify a class for settlement purposes. (*See Amchem*
14 *Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997).)

15 The proposed Settlement Class – consisting of all purchasers of Eligible
16 Products in California during the Class Period, as set forth more fully above –
17 meets all of the requirements for certification pursuant to Fed. R. Civ. P. Rules
18 23(a) and 23(b)(3). Settlement Class Members who exclude themselves or “opt
19 out” will cease to be Settlement Class members, will not be bound by the
20 Settlement or Release, and will not be eligible to submit a claim. (S.A. sec. J.)

21 **1. The Requirements of Fed. R. Civ. P. 23(a) Are Satisfied**

22 Rule 23(a) sets forth the following prerequisites for certifying a class: “(1)
23 the class is so numerous that joinder of all members is impracticable, (2) there are
24 questions of law or fact common to the class, (3) the claims or defenses of the
25 representative parties are typical of the claims or defenses of the class, and (4) the
26 representative parties will fairly and adequately protect the interests of the class.”
27 Each of these requirements is satisfied here.

28

1 **a. The Settlement Class Is So Numerous that Joinder of**
2 **Individual Members Is Impracticable**

3 To meet the numerosity requirement, a proposed class must be “so numerous
4 that joinder of all members is impracticable.” (Fed. R. Civ. P. 23(a)(1).) Although
5 there is no specific numerical threshold, joining more than 100 plaintiffs is
6 considered to be impracticable. (See *Jordan v. County of Los Angeles*, 669 F.2d
7 1311, 1319 & n. 10 (9th Cir.1982).) In its notice of removal, Wise conceded that the
8 class consists of over 100 class members. (Dkt. 1 at 3:9, 3:17-22, Dkt. 6 at p.1, ¶ 4.)
9 Its subsequently-produced records indicate there were 21,270 sales of eligible
10 products to Settlement Class Members. (Becker Decl. ¶ 5.) That is more than
11 sufficient to establish that joinder would be impracticable. (See, e.g., *Staton, supra*,
12 327 F.3d at 953 [class of 15,000 met numerosity requirement]; *Consol. Rail Corp.*
13 *v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) [numerosity presumed
14 where class consists of forty or more members]; *Newberg, supra*, § 24.18.)

15 **b. There Are Questions of Law and Fact Common to the**
16 **Settlement Class**

17 Rule 23(a)(2) requires the existence of a question of law or fact that is
18 common to all Settlement Class Members and capable of class-wide resolution, the
19 determination of which is central to the validity of all Class Members’ claims.
20 (*Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. 349-50, 131 S.Ct. 2541, 2551 (2011).)
21 “All questions of fact and law need not be common to satisfy the Rule. The
22 existence of shared legal issues with divergent factual predicates is sufficient, as is a
23 common core of salient facts coupled with disparate legal remedies ‘within the
24 class.’” (*In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 972 (C.D. Cal. 2015), *aff’d*
25 *sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), and *aff’d*
26 *sub nom. Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 WL 53421 (9th Cir.
27 Jan. 3, 2017), quoting *Hanlon*, 150 F.3d at 1019.)

28 Several questions of law and fact common to all Settlement Class Members

1 exist, including, but not limited to, the following:

- 2 • whether the Wise Website and product packaging contains deceptive
- 3 statements and/or omissions about the quantity and quality of food in Wise’s
- 4 Long-Term Food Kits, which was consistent throughout the Class Period (see
- 5 footnote 1 above);
- 6 • whether those representations would be material to the reasonable consumer
- 7 deciding whether to purchase a Long-Term Food Kit;
- 8 • and whether consumers have been harmed.

9 Accordingly, the commonality requirement is easily met.

10 **c. Plaintiffs’ Claims Are Typical of the Claims of the**
11 **Settlement Class**

12 A plaintiff’s claim “is typical if it arises from the same event or practice or
13 course of conduct that gives rise to the claims of other class members and his or her
14 claims are based on the same legal theory.” (*Hunt v. Check Recovery Sys., Inc.*, 241
15 F.R.D. 505, 511 (N.D. Cal. 2007) [quot. marks and citations omitted].) To be found
16 typical, a plaintiff must show that other class members have been similarly injured
17 by the same course of conduct that is not unique to the named plaintiff. (*Ellis v.*
18 *Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011).) However,
19 representative claims “need not be substantially identical;” they are “typical” so
20 long as they are “reasonably co-extensive with those of absent class members.”
21 (*Hanlon*, 150 F.3d at 1020.) Typicality is, thus, generally satisfied if the named
22 plaintiff is part of the class and has suffered the same injury as other class members.
23 (*Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982).)

24 Here, the claims asserted by Plaintiffs Miller and Borneman are typical of the
25 claims of the class because they, like all class members, were subjected to the same
26 misleading information on the Wise Website. Among other things, they were
27 required to click through the Long-Term Food Kit drop down menu and select a
28 product represented as a “1-Month,” “3-Month,” “6-Month,” or “12-Month” Food

1 Supply, and they were presented with the same Food Calculator and graphics
2 purporting to inform the consumer how long the food supply would last and how
3 many people it would feed.

4 In this respect, this case is highly analogous to *Martin v. Monsanto Co.*, No.
5 EDCV162168JFWSPX, 2017 WL 1115167 (C.D. Cal. Mar. 24, 2017), in which
6 this District certified as a class action claims that Monsanto’s pesticide products
7 contained a smaller quantity of solution than promised. That different products were
8 involved did not defeat typicality because the alleged misrepresentations regarding
9 the amount of solution “ha[d] nothing to do with the unique characteristics of the
10 various ... products; they have to do only with what is allegedly shared by all those
11 products.” (*Id.* at *4-5, quoting *Brown v. Hain Celestial Group, Inc.*, 2014 WL
12 6483216, at *14 (N.D. Cal. Nov. 18, 2014). See also *Chavez v. Blue Sky Natural
13 Beverage Co.*, 268 F.R.D. 365 (N.D. Cal. 2010) [certifying as a class action claims
14 that defendant misrepresented the origins of its line of beverage products]; *Johnson
15 v. Gen. Mills, Inc.*, 278 F.R.D. 548 (C.D. Cal. 2012) [applying the *Hanlon*
16 “reasonably co-extensive test” and certifying claims that defendant falsely
17 advertised its “YoPlus” yogurt products as promoting digestive health].)

18 **d. The Interests Of the Class Representatives Are**
19 **Aligned with the Interests of the Settlement Class**

20 The adequacy requirement is satisfied if the class representative(s) will fairly
21 and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). This
22 requires that the Plaintiffs have no conflict of interest with the proposed Settlement
23 Class and be represented by competent counsel. (*In re Mego Fin. Corp. Sec. Litig.*,
24 213 F.3d 454, 462 (9th Cir. 2000); *Hanlon*, 150 F.3d at 1020; *Ellis*, 657 F.3d at 985
25 [adequacy depends on “an absence of antagonism between representatives and
26 absentees, and a sharing of interest between representatives and absentees”].) When
27 class representatives and members seek the common goal of the largest possible
28 recovery for the class, their interests do not conflict. (*In re Corrugated Container*

1 *Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981).)

2 Here, Plaintiffs have selected as proposed Class Counsel attorneys with
3 extensive qualifications and experience in consumer litigation and class action
4 procedure. (*See* Becker Decl ¶¶ 15-26 and Exh. 5, 6, 7.) Their motivation for
5 bringing suit is to protect other consumers from Wise’s deceptive advertising, not to
6 enrich themselves. (Miller Decl. [Becker Decl. Exh. 3] ¶ 10; Borneman Decl.
7 [Becker Decl. Exh. 2] ¶ 10.) Each understands his responsibilities as a class
8 representative and has committed to fulfilling them. (*Ibid.*) There is no conflict
9 between the Plaintiffs and any member of the class.

10 **e. The Settlement Class is ascertainable**

11 A class is ascertainable “if the description of the class is definite enough so
12 that it is administratively feasible for the court to ascertain whether an individual is
13 a member.” (*O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal.
14 1998).) It is “enough that the class definition describes a set of common
15 characteristics sufficient to allow a prospective plaintiff to identify himself or
16 herself as having a right to recover based on the description.” (*Saulsberry v.*
17 *Meridian Fin’l Serv., Inc.*, No. CV146256JGBJPRX, 2016 WL 3456969 (C.D. Cal.
18 Apr. 14, 2016) at *4, 14.) “‘Administrative feasibility means that identifying class
19 members is a manageable process that does not require much, if any, individual
20 factual inquiry.’ *Newberg* § 3:3. However, ‘the class need not be so ascertainable
21 that every potential member can be identified at the commencement of the action.’
22 [Citations.]” (*Lilly*, 308 F.R.D. at 237.)

23 Here, the Settlement Class is objectively defined as all California consumers
24 who purchased specific Eligible Products. The identity of consumers who
25 purchased their products directly from Wise and the prices they paid are known to
26 Wise and will be provided to the Settlement Administrator. Settlement Class
27 Members who purchased products from third parties can readily self-identify based
28 on the notice to be provided.

1 **2. The Requirements of Rule 23(b)(3) Are Satisfied**

2 Rule 23(b)(3) requires that “questions of law or fact common to the members
3 of the class predominate over any questions affecting only individual members of
4 the class, and that a class action is superior to other available methods for the fair
5 and efficient adjudication of the controversy.” Both requirements are satisfied here.

6 **a. Common Questions Predominate Over Potential**
7 **Individual Questions**

8 The “predominance inquiry tests whether proposed classes are sufficiently
9 cohesive to warrant adjudication by representation.” (*Amchem Prods., Inc.*, 521
10 U.S. at 623; *In re Wells Fargo Home Mtg. Overtime Pay Litig.*, 571 F.3d 953, 957
11 (9th Cir. 2009).) “For purposes of the predominance requirement, a common issue
12 is one where ‘the same evidence will suffice for each member to make a prima facie
13 showing [or] the issue is susceptible to generalized, class-wide proof,’ while an
14 individual issue is one where ‘the members of a proposed class will need to present
15 evidence that varies from member to member.’ W. Rubenstein, *Newberg on Class*
16 *Actions* § 4.50 (5th ed. 2012). Where common issues are the central feature of the
17 litigation, predominance is likely satisfied.” (*Lucas v. Breg, Inc.*, No. 15-CV-
18 00258-BAS-NLS, 2016 WL 6125681 (S.D. Cal. Sept. 30, 2016) at *12.)

19 The common questions discussed above would clearly predominate any trial
20 of this action. For purposes of determining Wise’s liability as well as the
21 compensation due, the differences between the products at issue and any minor
22 changes to the Wise Website over time are immaterial. (See *Allen v. Similasan Corp.*,
23 306 F.R.D. 635, 647-48 (S.D. Cal. 2015) [holding that “[t]he ‘reasonable consumer’
24 standard is an objective one and may be used to prove the effect of the advertising as
25 to the whole class,” and finding that defendant’s changes to its product labels during
26 the class period were insufficient to defeat predominance where key representations
27 regarding the efficacy of the products remained essentially the same.].) Similarly
28 here, a finding that Wise had a duty to disclose (or not), and that it violated the duty

1 (or not), will provide a “common answer [] apt to drive the resolution of th[is]
2 litigation.” (*Wal-Mart*, 564 U.S. at 350.) The predominance requirement is satisfied.

3 **b. A Class Action Is the Superior Method to Fairly and**
4 **Efficiently Adjudicate this Matter**

5 Rule 23(b)(3) requires a class action to be “superior to other available
6 methods for the fair and efficient adjudication of the controversy,” and sets forth the
7 following factors:

8 (A) the class members’ interest in individually controlling the
9 prosecution or defense of separate actions; (B) the extent and nature
10 of any litigation concerning the controversy already begun by or
11 against class members; (C) the desirability or undesirability of
concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

12 Where, as here, a court is deciding the certification question in the context of a
13 proposed settlement, questions regarding the manageability of the case for trial
14 purposes do not have to be considered. (See *Amchem*, 521 U.S. at 619.)

15 A class action is the only reasonable method to fairly and efficiently
16 adjudicate Settlement Class Members’ claims against Wise. (See, e.g., *Phillips Co.*
17 *v. Shutts*, 472 U.S. 797, 809 (1985) “[c]lass actions ... permit the plaintiffs to pool
18 claims which would be uneconomical to litigate individually ... [In such a case,]
19 most of the plaintiffs would have no realistic day in court if a class action were not
20 available”]; *Wolin v. Jaguar Land Rover N. Amer., LLC*, 617 F.3d 1168, 1175 (9th
21 Cir. 2010) [class certification proper where “recovery on an individual basis would
22 be dwarfed by the cost of litigating on an individual basis”].) Courts have also
23 generally found that “[j]udicial economy weighs in favor of a class action where, as
24 here, liability turns on whether [defendant’s conduct] was false or misleading.”
25 (*Johns v. Bayer Corp.*, 280 F.R.D. 551, 559 (S.D. Cal. 2012).)

26 Class resolution is clearly superior to other available methods for the fair and
27 efficient adjudication of this controversy. Despite the high cost of Wise’s products
28 – the Eligible Products range from \$75 to \$7,000 – such amounts are still woefully

1 insufficient to support individual litigation. That is especially so where, as here,
2 expert testimony regarding the sufficiency of the food supplies is required.

3 Nor is there any evidence that any class member has an individual interest in
4 controlling the prosecution of this case, or that other similar litigation is pending.
5 (See *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422, 430 (C.D. Cal. 2014).)

6 **3. Class Counsel Are Well-Qualified to Represent the**
7 **Settlement Class**

8 “An order certifying a class action ... must also appoint class counsel under
9 Rule 23(g).” Fed. R. Civ. P. 23(c)(1)(B). In so doing, courts should consider (i) the
10 work counsel has done in identifying or investigating potential claims in the action;
11 (ii) counsel’s experience in handling class actions, other complex litigation, and the
12 types of claims asserted in the action, (iii) counsel’s knowledge of the applicable
13 law; and (iv) the resources that counsel will commit to representing the class. (Fed.
14 R. Civ. P. 23(g)(1)(A).)

15 Here, proposed Class Counsel have worked diligently in identifying and
16 investigating potential claims in the Action. They have committed hundreds of
17 hours of legal services and incurred over \$45,000 in costs and expenses in litigating
18 this matter (including costs of mediation, deposition, and retaining three different
19 experts). (Becker Decl. ¶ 15.) Further, as noted, each Class Counsel has extensive
20 experience managing class actions and other complex litigation, including the types
21 of claims asserted in this action, and therefore has extensive knowledge of the
22 applicable law. Finally, Class Counsel have committed and will continue to
23 commit whatever resources are necessary to represent the Settlement Class, just as
24 they have done in the numerous class actions they have litigated and financed in the
25 past. (*Ibid.*)

26 **C. The Notice Program Satisfies All Applicable Requirements**

27 Notice serves to “afford members of the class due process which, in the
28 context of the Rule 23(b)(3) class action, guarantees them the opportunity to be

1 excluded from the class action and not be bound by any subsequent judgment.”
2 (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–74 (1974).) The Court must
3 “direct notice in a reasonable manner to all class members who would be bound by
4 the proposal.” (Fed. R. Civ. P. 23(e)(1).) And, notice must fairly describe the
5 litigation and the proposed settlement and its legal significance. (See, *e.g.*, *Twigg v.*
6 *Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) [“[The notice] must
7 also contain an adequate description of the proceedings written in objective, neutral
8 terms, that, insofar as possible, may be understood by the average absentee class
9 member[.]”].) The proposed Notice Plan satisfies those requirements.

10 **1. Appointment of a Settlement Administrator**

11 The Parties have agreed to the appointment of the highly experienced class
12 action administrator KCC to act as the Settlement Administrator, subject to the
13 approval of the Court. (S.A. Definitions, p. 6; Becker Decl. ¶ 12.) KCC has
14 significant experience as a class action notice provider and claims administrator.
15 (See www.kcellc.com.)

16 **2. Method of Notice**

17 As set forth above, the majority of Settlement Class Members (about 78%)
18 will receive direct, mailed and/or emailed notice of the proposed Settlement terms
19 and how it affects them. The Settlement Administrator will mail a detailed Mailed
20 Notice (S.A. Exh. B-1) and Claim Form (Exh. A) to all Known Customers for
21 whom Wise has a street address, and/or will electronically submit an Email Notice
22 (Exh. B-2) with links to a more Detailed Notice (Exh. B-5) and Claim Form to all
23 Known Customers for whom Wise has email address. (S.A. sec. F-2.a, b.) The
24 Settlement Administrator will conduct an NCOA and use reasonable efforts to
25 identify any Class Members whose notices are returned undelivered. (*Ibid.*) The
26 Known Customers will be assigned a Claim Number, have access to their purchase
27 history, and be told the amount of their calculated award. (S.A. sec. F-1.)
28

1 The Settlement Administrator will also create and activate a Settlement
2 Website that includes the Administrator's contact information; links to the Detailed
3 Notice; relevant case documents; a downloadable and a fillable copy of the Claim
4 Form; and a link to a location where Known Customers can obtain the Eligible
5 Product purchase information compiled by Wise. (S.A. sec. F-3.c.)

6 In addition, for a period of at least 75 days following Preliminary Approval if
7 granted, the Settlement Administer will implement a digital notice campaign
8 structured to reach Settlement Class Members (S.A. sec. F-3.a); and Wise will
9 publish the Summary Notice (S.A. Exh. B-3) in a conspicuous location on its
10 Website and Facebook page, with links to the Settlement Website (S.A. sec. F-3.b).
11 Wise will also send a tweet through its Twitter account in the form of S.A. Exh.B-4.

12 **3. Contents of the Notice Program**

13 The Notice documents provide information about the Settlement, along with
14 clear, concise, easily understood information about Settlement Class Members'
15 legal rights. The Notice documents collectively include a fair summary of the
16 Parties' respective litigation positions; the general terms of the Settlement;
17 instructions for how to opt-out of or object to the Settlement; the Settlement
18 Website address; the process and instructions for making a claim; and, as to be set
19 by the Court, the date, time and place of the Final Fairness Hearing.

20 The Notice documents contain information that a reasonable person would
21 consider material in making an informed, intelligent decision of whether to opt out
22 or remain a member of the Settlement Class and be bound by a final judgment, and
23 they inform individuals how they can readily obtain more detailed information.

24 The Notice documents and the Notice Program are the best notice practicable
25 under the circumstances, constitute due and sufficient notice to the Settlement Class,
26 and comply with Fed. R. Civ. P. 23 and due process requirements.

27 **VI. CONCLUSION**

28 For all of the reasons discussed above, the Court should grant this unopposed

1 Motion for Preliminary Approval and enter the Proposed Order submitted herewith.

2 Respectfully submitted,

3 Dated: March 29, 2018

CHAVEZ & GERTLER LLP

4 BRAUN LAW GROUP, PC

5 LAW OFFICES OF ANDREW KIERSTEAD

6 By: /s/ Nance F. Becker

7 Nance F. Becker

8 Attorneys for Plaintiffs and the
9 Putative Class

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28