



Food and Dietary Supplement Class Action Litigation: Developments and Strategies

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Healthy and Natural Claims Are Most Commonly Targeted

- **Healthy**
 - Product explicitly labeled “healthy” includes ingredients that are not sufficiently nutritious.
- **Looks Healthy**
 - Consumers may believe a product is healthier than it is due to true statements that emphasize positive aspects of the product or images, such as fruits or vegetables, displayed on the product’s packaging.
- **Specific Health Claim**
 - Representations on a product regarding its health benefits are overstated, lack support, or are offset by other factors.
- **Natural**
 - Natural, all natural, nothing artificial, no preservatives.
 - Does not qualify for reasons such as the presence of GMOs or synthetic ingredients, or the product’s processing.

“Natural” Claims

- **What is the meaning of 'natural' on the label of food?**
- From a food science perspective, whether to define a food product that is 'natural' often depends on whether the food has probably been sufficiently processed that it is no longer a product of the earth.



“Natural” Claims – USDA’s Position

- **USDA’s longstanding policy: (1) product does not contain any artificial flavor/color/chemical preservative per 21 C.F.R. § 101.22; and (2) product/ingredients are only minimally processed**
- **NATURAL:**
A product containing no artificial ingredient or added color and is only minimally processed. Minimal processing means that the product was processed in a manner that does not fundamentally alter the product. The label must include a statement explaining the meaning of the term natural (such as "no artificial ingredients; minimally processed").



Natural and Glyphosate

- *Parks v. Ainsworth Pet Nutrition LLC.* (S.D.N.Y. 2019).
- Class action against Rachael Ray Nutrish dog food.
- Suit did not claim the dog food was made with unnatural ingredients, but that “trace amounts” of glyphosate, the main active ingredient in Roundup herbicide, were contained in the food and that “any level” of the chemical rendered the ‘natural’ label false and misleading.”
- Dismissing case, court held:
 - The suit did not say how much of the chemical was found or if it was harmful.
 - A reasonable customer would not be so absolutist as to require that ‘natural’ means there is no glyphosate, even an accidental and innocuous amount, in the products
 - “The presence of negligible amounts of glyphosate in a dog food product that do not have harmful, ‘toxic’ or ‘carcinogenic’ effects is not likely to affect consumers’ decisions in purchasing the product and is thus not harmful.”



Health Claims

- *Lanovaz v. Twinings North America Inc.* (9th Cir. 2018)
- Class action seeking to enjoin Twinings from selling products with allegedly misleading health claims
 - That green, black and white teas had fewer antioxidants than the company's labels and website indicated.
 - That nutrient claims such as a "natural source of antioxidants" because the products did not have at least 10 percent of the FDA's daily recommended intake of the nutrient.
 - Plaintiff claimed she overpaid for the products and would not have purchased them had she known they did not meet the minimum requirements for antioxidant claims.
- 9th Circuit affirmed finding that she could not seek injunctive relief because the plaintiff had said at her deposition that she would not repurchase products even if company removed the labels at issue.
- "Consider buying" is insufficient.



Structure Function Health Claims

- *Kaufman v. CVS Caremark Corporation*, (1st Cir. 2016).
- Dietary supplement claims that Vitamin E:
 - “supports antioxidant **health**”;
 - “maintain **healthy** blood vessels”;
 - “supports heart **health**”; and
 - “supports the immune system.”
- All are “structure/function claims” under **FDCA** section 43(r)(6)(A).
 - Statements that “describe[] the role of a **nutrient** or dietary ingredient intended to affect the structure or function in humans.” 21 U.S.C. § 343(r)(6)(A).
 - Manufacturer of a dietary supplement may make such statements if it has “substantiation that such statement is truthful and not misleading.” 21 U.S.C. § 343(r)(6)(B).
 - While plaintiffs usually have to prove falsity, a lack of substantiation case can be made in challenging structure function claims.



Structure Function Health Claims



- *Dachauer v. NBTY Inc.* (9th Cir. 2019).
- 9th Circuit dismissed action claiming that the labels on Nature's Bounty Inc. vitamin E supplements falsely advertise health benefits holding:
 - Not enough evidence that structure/function claims under FDCA are false or misleading simply because the supplements advertise that they “promote immune, heart and circulatory health” but do not actually prevent cardiovascular disease.
 - No evidence that “a supplement endangered users by increasing their risk of death could prove that a structure/function claim that omitted the risk was misleading.”
 - “Manufacturers need not also have evidence that those structural or functional effects reduce the risk of developing a certain disease.”

No Added Sugar



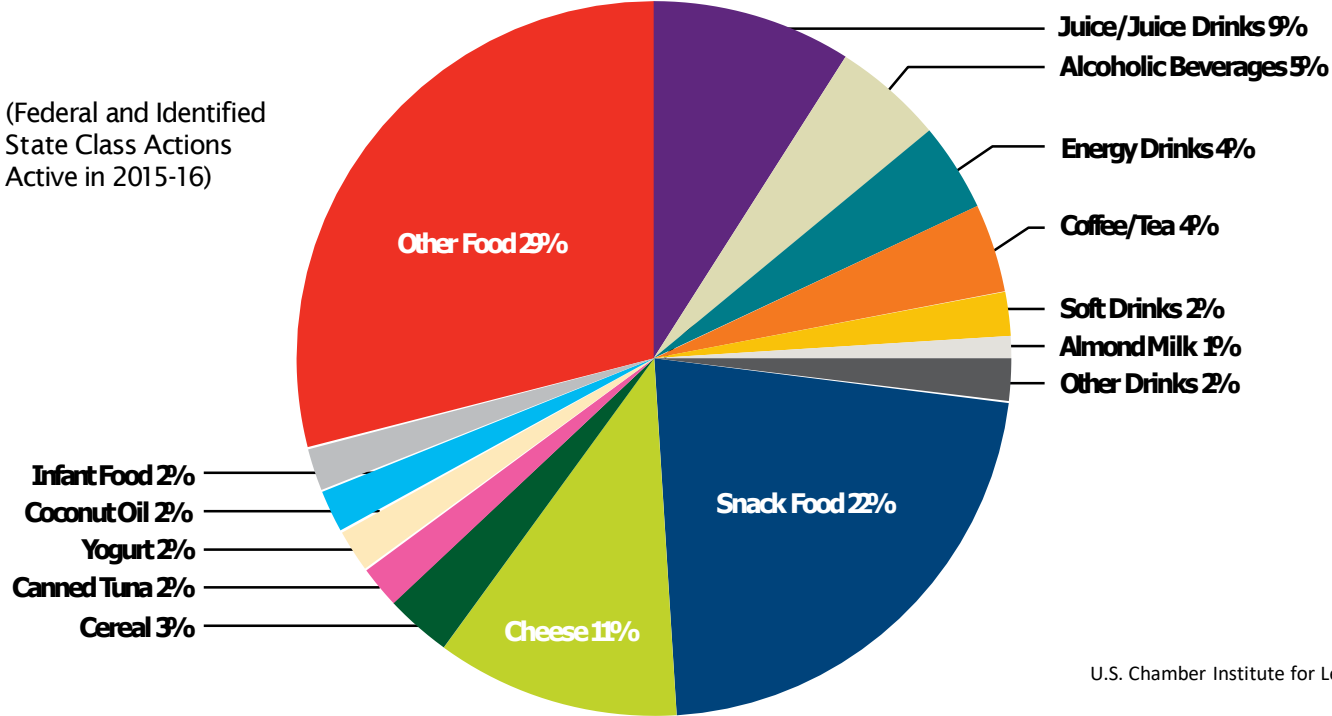
- *Casey v. Odwalla, Inc.* (C.D. Cal. 2018).
- Plaintiff would not have purchased the product in absence of the “No **Added Sugar**” label.
 - Inclusion of this phrase is impermissible under the FDCA, because the Juices “do not resemble or substitute for a food that normally contains **added sugar** because fruit and vegetable juices do not normally contain **added sugar.**”
 - “No **Sugar Added**” on the Juices is misleading, as it makes consumers believe that other 100% Juices without the “No **Added Sugar**” label contain **added sugar** and are therefore not as healthy.
 - As a result of this deceptive labeling, consumers pay a premium for Defendants' products.
 - Court held, issue hinges on the interpretation of the word “substitute,” and had to give the FDA deference and whose interpretation of the word sides with Defendant.

“Diet” Sodas



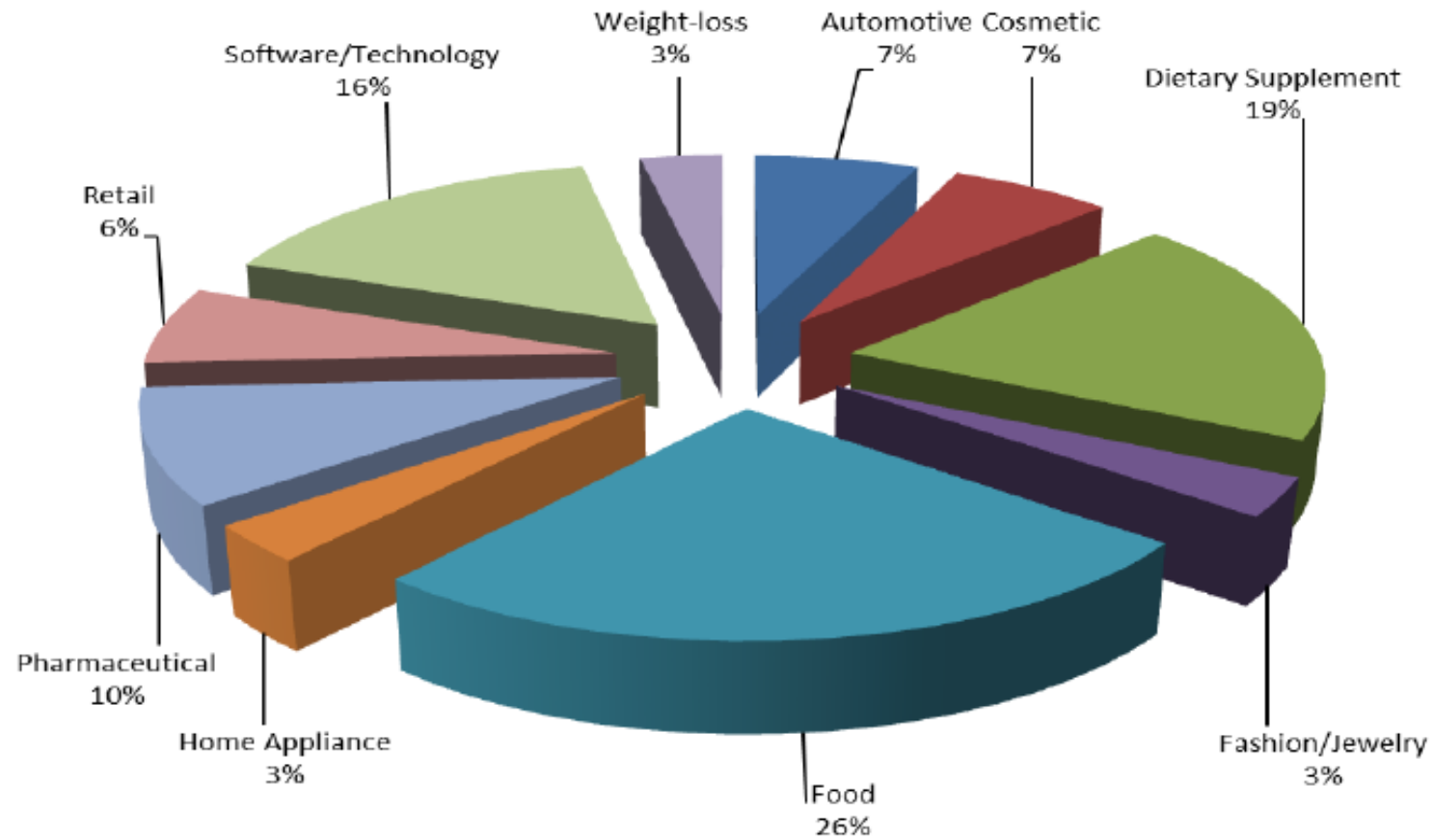
- Class actions claiming Diet Dr. Pepper, Diet Coke and Diet Pepsi falsely advertised as helping with weight loss.
- Dismissing cases, courts held:
 - Not plausible that reasonable consumers would believe consuming Diet Dr. Pepper leads to weight loss or healthy weight management absent a change in lifestyle.
 - Not marketed as health food products, “diet” meant to differentiate the product from regular.
 - Complaints cherry-picked definitions for “diet” leaving out that “diet” soft drinks merely have relatively less sugar than regular.
 - Plaintiff’s survey only reinforces that reasonable consumers believe diet soft drinks can lead to weight loss.
 - Whether aspartame causes weight gain, based on studies showing a correlation between sweeteners and excess glucose associated with diabetes, court held correlation is not causation and studies do not supply causal link between diet soda and weight gain.
- *Becerra v. Dr. Pepper/Seven Up Inc.* (N.D. Cal. 2018).
- *Becerra v. The Coca-Cola Co.* (N.D. Cal. 2018).
- *Excevarria v. Dr. Pepper/Seven Up Inc.* (S.D.N.Y. 2018); affirmed (2nd Cir. 2019).
- *Manuel v. Pepsi-Cola* (S.D.N.Y. 2019).

Trends in Class Action Filings



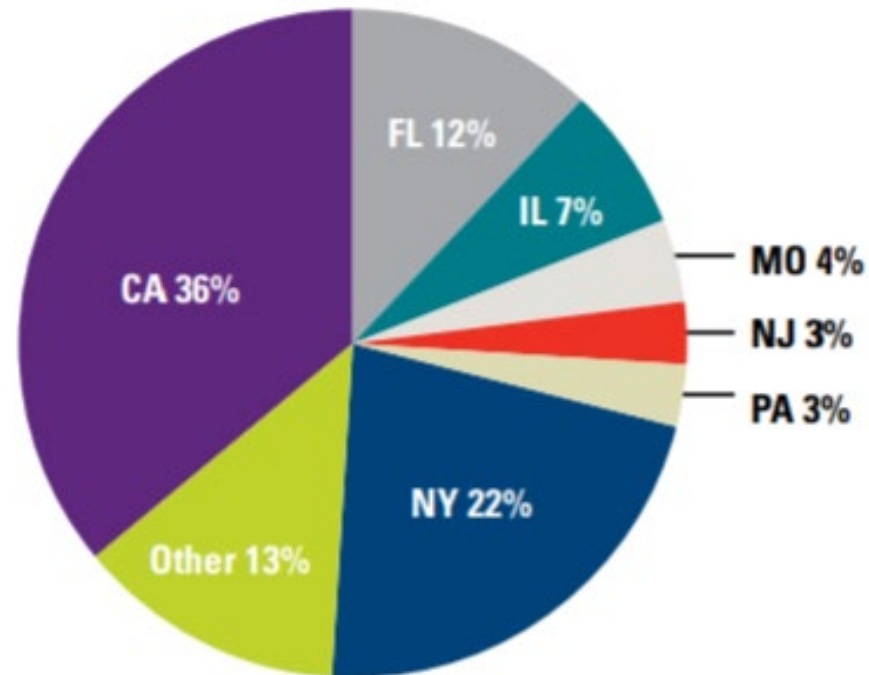
U.S. Chamber Institute for Legal Reform Data

Trends in Class Action Filings



Where Cases Are Filed

- California, New York, Florida, Illinois most popular
- Missouri, Pennsylvania, New Jersey
- Reduction in filings in Florida and Missouri





Food and Dietary Supplement Class Action Litigation

Risk Management

Nury H. Yoo, Counsel, Keller and Heckman LLP



7g Protein



No Added Sugar



No Artificial Colors, Flavors, or Preservatives



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Nutrition Facts

1 servings per container	
Serving size	12 fl. oz.
Amount Per Serving	
Calories	140
<small>% Daily Value*</small>	
Total Fat 10g	13%
Saturated Fat 9g	45%
Trans Fat 0g	
Cholesterol 40mg	13%
Sodium 500mg	22%
Total Carbohydrate 12g	4%
Dietary Fiber 5g	18%
Total Sugars 4g	
Includes 0g Added Sugars	0%
Protein 7g	
<small>Not a significant source of vitamin D, calcium, iron, and potassium</small>	
<small>*The % Daily Value (DV) tells you how much a nutrient in a serving of food contributes to a daily diet. 2,000 calories a day is used for general nutrition advice.</small>	

INGREDIENTS: ICEBERG LETTUCE, OATS, ALMOND MILK (ALMONDS, WATER), DRIED CRANBERRIES (CRANBERRIES, SUGAR), SUNFLOWER SEEDS, GORGONZOLA CHEESE (PASTEURIZED MILK, CHEESE CULTURES, SALT, ENZYMES, CITRIC ACID), PARSLEY JUICE (FOR COLOR), SPINACH JUICE, NATURAL WALNUT FLAVOR, CHIA SEEDS, STEVIA

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Food and Dietary Supplement Class Action Litigation: Settlement Considerations

Marisol Corral Mork
Squire Patton Boggs

Notable Settlements



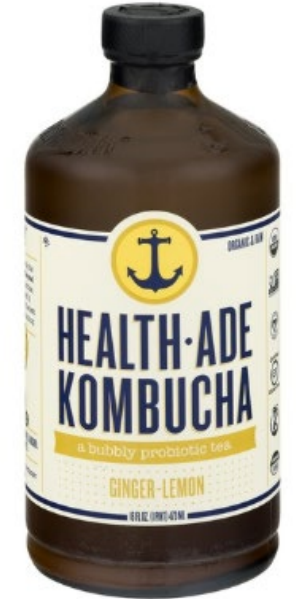
\$7,000,000



\$3,000,000



\$2,300,000



\$4,000,000

Rule 23 Amendments

- Amendments went into effect December 1, 2018.
- Primarily alter rules governing federal class action notice, settlement, and appeal.

Rule 23(e) Amendments - Settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

Rule 23(e) Amendments - Settlements

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

Rule 23(e) Amendments - Settlements

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(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

Rule 23(e) Amendments - Settlements

(2) **Approval of the Proposal**. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

Rule 23(e) Amendments - Settlements

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Rule 23(e) Amendments - Settlements

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

Rule 23(e) Amendments - Settlements

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Northern District of California

Procedural Guidance for Class Action Settlements

Updated November 1, 2018 and December 5, 2018

NOTE: *This updated guidance, first published November 1, 2018, was modified December 5, 2018 to include the following clarification: the first sentence of the guidance has been revised to reflect that even though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge.*

Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties should consider this guidance during settlement negotiations. Parties should also consider the suggested language below when drafting class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

Northern District of California's Guidance on Class Action Settlements

- <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>
- Provides guidance for preliminary approval, final approval, and post-distribution accounting.
- Checklist for other courts? Courts in other jurisdictions are raising questions and requiring additional information about class action settlements.

N.D. Cal. Guidance – Preliminary Approval

- 1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:
 - a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.
 - b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.
 - c. If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.
 - d. If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.

N.D. Cal. Guidance – Preliminary Approval

- e. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.
- f. The proposed allocation plan for the settlement fund.
- g. If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.
- h. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.

N.D. Cal. Guidance – Preliminary Approval

2) SETTLEMENT ADMINISTRATION—In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel’s firms’ history of engagements with the settlement administrator over the last two years.

N.D. Cal. Guidance – Preliminary Approval

3) NOTICE—The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

N.D. Cal. Guidance – Preliminary Approval

11) PAST DISTRIBUTIONS—Lead class counsel should provide the following information for at least one of their past comparable class settlements (i.e. settlements involving the same or similar clients, claims, and/or issues):

- a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each cy pres recipient, the administrative costs, and the attorneys' fees and costs.
- b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases.

N.D. Cal. Guidance – Post Distribution

1) Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting, which provides the following information:

The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.

Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

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Questions?

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