

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Breeanne Buckley Peni, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff,

v.

DAILY HARVEST, INC., SECOND BITE
FOODS, INC. d/b/a “STONE GATE FOODS”,
SMIRK’S LTD., AND MOLINOS ASOCIADOS
SAC,

Defendants.

Civil Action No. 22-cv-05443
Honorable Denise Cote

**JOINT DECLARATION OF PLAINTIFF’S COUNSEL IN SUPPORT OF PLAINTIFF’S
UNOPPOSED MOTION TO PRELIMINARILY APPROVE CLASS ACTION
SETTLEMENT, APPOINT CLASS COUNSEL, APPROVE PROPOSED CLASS
NOTICE, AND SCHEDULE A FINAL APPROVAL HEARING**

William D. Marler, James R. Peluso, and Jeffrey A. Bowersox, pursuant to 28 U.S.C. § 1746, hereby declare that the foregoing is true and correct to the best of their knowledge:

1. We submit this Joint Declaration in support of the accompanying Unopposed Motion to Preliminarily Approve Class Action Settlement, Appoint Class Counsel, Approve Proposed Class Notice, and Schedule a Final Approval Hearing.¹

2. We are counsel for Plaintiff Breeanne Buckley Peni and the proposed Class Counsel for the putative Settlement Class.

3. We have personal knowledge of the facts set forth in this declaration, and if called upon to testify, we could and would testify competently thereto.

¹ All capitalized terms herein shall have the meanings ascribed by the Settlement Agreement (Exhibit 1).

4. This action is part of the coordinated Daily Harvest Litigation (the “Litigation”).

5. After several months of arms-length negotiations and settlement discussions—including multiple in-person conferences and telephonic conferences with the Hon. Sarah L. Cave, Magistrate Judge, and several in-person and remote conferences with retired NAM Judge Peter B. Skelos—Plaintiff and Defendants Smirk’s Ltd. (“Smirk’s”) and Molinos Asociados SAC (“Molinos”) entered into a Settlement Agreement (the “SA”) in this matter, a true and correct copy of which is attached hereto as **Exhibit 1**.

6. The following exhibits are submitted in support of the motion herein:

- Exhibit 1 Executed Settlement Agreement
- Exhibit A Proposed Third Amended Class Action Complaint;
- Exhibit B Proposed Preliminary Approval Order;
- Exhibit C Proposed Settlement Notice;
- Exhibit D Proposed Final Judgment;
- Exhibit E Proposed Claim Form;
- Exhibit F Proposed Allocation Matrix;
- Exhibit G Firm Resumes of the Proposed Class Counsel; and
- Exhibit H Class Counsel Unreported Cases.

7. The proposed settlement resolves all litigation against Defendants Smirk’s and Molinos (the “Settling Defendants”) arising out of Plaintiff’s and the putative Class Members’ consumption of Daily Harvest’s French Lentil + Leek Crumbles (“the Product” or “the Crumbles”).

8. The Court previously issued an Order Granting Preliminary Approval of a class settlement with defendants Daily Harvest and Stone Gate (Doc. 77), and the Final Approval Hearing is scheduled for October 15, 2024. (Doc. 78).

9. The parties have similarly agreed to a class settlement mechanism with Smirk's and Molinos to potentially resolve over four hundred fifty (450) individual claims asserted against the Settling Defendants. The settlement globally resolves these claims without the need to litigate, at hundreds of individual trials, issues of proof specific to any class member, such as causation or damages. The class mechanism allows all putative Class Members to join the Settlement and will provide certainty and finality to those Class Members who do not opt-out.

FACTUAL AND PROCEDURAL BACKGROUND.

10. The Crumbles were manufactured for Daily Harvest by Stone Gate Foods using an ingredient known as tara flour. This tara flour was supplied to Stone Gate Foods by Smirk's, which sourced it from Molinos.

11. Plaintiff alleges that consumption of the tara flour-containing product caused her to experience personal injuries, characterized by onset of gastrointestinal illness symptoms, which resulted in medical treatment, hospitalization, and surgical cholecystectomy.

12. On June 27, 2022, Plaintiff Peni filed her Class Action Complaint alleging causes of action for strict liability, breach of warranty, and negligence against Daily Harvest, Inc. (Doc. 1). On August 17, 2022, Plaintiff amended her complaint to add Stone Gate Foods as a defendant. (Doc. 21). Following a motion to compel arbitration by Daily Harvest that was granted on November 10, 2022 (Doc. 36), Stone Gate moved to dismiss the class action allegations in the Amended Complaint. (Doc. 41). Plaintiff then stipulated to discontinue her claims against Stone

Gate Foods without prejudice (Doc. 47), pending ongoing settlement negotiations to globally resolve the Litigation. (Doc. 44, 51-64).

13. Plaintiff's case has since been subject to the Court's Coordinated Order in the Litigation, which was entered "to enhance judicial efficiency, avoid undue burden and promote the just and coordinated resolution of all the cases that involve the same subject matter as the Daily Harvest Litigation." (*In re: Daily Harvest, Inc. Products Liability Litigation*, Case No. 1:22-cv-05987 at Doc. 165, Coordination Order dated April 28, 2023).

14. Specifically, Plaintiff's action is one of eighty-four (84) active lawsuits in New York federal and state courts filed in the Litigation against the Settling Defendants, of which sixty-one (61) suits are pending in the Southern District of New York. This includes *Albright v. Daily Harvest Inc., et al* (Case No. 22-cv-05987 DLC) currently pending before this Court.

15. Your declarant, William D. Marler of the law firm Marler Clark, Inc. PS, represents eighty (80) of the plaintiffs with active lawsuits filed in New York federal and state courts, and approximately two-hundred sixty (260) additional putative Class Members.

16. Plaintiff Peni is represented by your declarant James R. Peluso of the law firm Dreyer Boyajian LLP, which represents thirty (30) additional putative Class Members.

17. Your declarant, Jeffrey A. Bowersox of Bowersox Law Firm, PC, represents one (1) of the plaintiffs with active lawsuits filed in New York federal and state courts, and seventy-seven (77) additional putative Class Members.

18. In total, approximately four hundred forty-nine (449) putative Class Members are represented by counsel who have signed the proposed Settlement Agreement. (Ex. 1).²

² Other than the 449 Claimants represented by Class Counsel, approximately sixty (60) additional Claimants are represented by thirty-five (35) other counsel across the U.S.

19. In brief, the Settling Parties engaged in extensive investigation and other litigation efforts throughout the prosecution of the Litigation, including, inter alia: (1) researching and drafting the initial and amended complaints in the Litigation; (2) researching the applicable law with respect to the claims in the Litigation and the potential defenses thereto; (3) engaging in significant fact discovery, including document and witness discovery, exchange of scientific studies about the use of tara flour in food, and disclosure of medical records for hundreds of claimants; (4) engaging in extensive settlement discussions; and (5) participating in court-assisted mediation and settlement conferences.

20. After extensive arm's length negotiations, the Parties reached an agreement to settle the Litigation against the Settling Defendants for the amount of \$7,671,000.

21. The Parties thereafter worked to draft and finalize the terms of the Settlement in the Settlement Agreement. (Ex. 1).

22. Pursuant to the Settlement Agreement, upon the Court's granting of the Preliminary Approval Order, Plaintiff Peni shall file the Third Amended Class Action Complaint against the Settling Defendants. (Ex. A).

23. The claims against the Settling Defendants would then be stayed in all pending actions, and then dismissed if the Court grants a Final Judgment approving the Class Settlement. (Ex. D).

24. We can state as of record that there was no collusion of any kind between counsel for the Settling Parties and that all negotiations culminating in the proposed Settlement were at arm's length and hard-fought.

25. As demonstrated by the attached resumes of the proposed Class Counsel (Ex. G, Firm Resumes), your declarants have substantial experience in the litigation, certification, and

settlement of class action cases, and specifically in cases involving outbreaks of food and waterborne illnesses. (Ex. H, Unreported Decisions).

26. Based on our experience, the Settling Defendants' counsel are also highly experienced in this type of litigation.

27. It is our joint considered opinion that counsel for each Settling Party has fully evaluated the strengths, weaknesses, and equities of the Parties' respective positions and believe that the proposed Settlement Agreement fairly resolves the Litigation.

28. In assessing the merits of the proposed Settlement, the proposed Class Counsel considered the risks and uncertainties of ultimately prevailing at trial in light of various factors. As with any litigated case, Plaintiff and the putative Class Members face an uncertain outcome at trial, including the risk of enforcing a judgment because of the limited insurance coverage available to satisfy the hundreds of claims asserted against the Settling Defendants.

29. The proposed Settlement Agreement eliminates the attendant risks of litigation by providing Plaintiff and the putative Class Members a substantial and certain recovery of valuable benefits in a timely manner and avoiding further delay and the risk of loss that might result from further litigation, trial, and appeals.

30. The undersigned have litigated all kinds of cases involving food and waterborne pathogens. The instant Litigation alleging foodborne illness caused by the consumption of tara flour is, to our knowledge, the first litigation of its kind. The Settling Defendants have raised a number of factual and legal defenses relative to the tara flour, including issues related to general and individual causation and the admissibility of scientific expert proof.

31. In addition, Molinos Asociados SAC is a foreign company based in Peru that does not have liability insurance and contests jurisdiction. The proposed settlement resolves all cross

claims among the defendants and, together with the Daily Harvest and Stone Gate settlement, would achieve a global settlement of this matter.

32. We further understand that the proposed settlement amount of \$7,671,000 is to be paid into the Settlement Fund by Citizens Insurance Company of America and The Hanover Insurance Company (collectively, “the Settling Insurers”) on behalf of Smirk’s. The Settling Insurers shall also contribute \$25,000 to cover Smirk’s portion of the Settlement Notice. Molinos, which is uninsured, will also contribute \$25,000 towards the Settlement Notice. This settlement is intended to resolve all Class Members’ claims under this Settlement Agreement. As further discussed below, the settlement with Smirk’s includes the remaining balance of Smirk’s insurance coverage.

33. Indeed, in light of the risks, uncertainties, limited insurance coverage, and delays associated with continued litigation, the proposed Settlement addresses these risks by providing guaranteed monetary benefits to the putative Class Members who participate in the Settlement Program.

34. For all of the reasons set forth in the motion papers herein, your declarants submit that the proposed Settlement Agreement is fair, reasonable, and is in the best interest of Plaintiff and the putative Class Members.

SUMMARY OF THE TERMS OF THE PROPOSED SETTLEMENT.

A. The Proposed Rule 23(b)(3) Class

35. For the purposes of settlement, the Settling Parties request that the Court conditionally certify that the proposed settlement class (the “Settlement Class”) be defined as follows, with French Lentil + Leek Crumbles being the brand name:

All persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles

and directly suffered personal injuries caused by consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles.

36. Should the Court grant preliminary approval of the Settlement, Plaintiff proposes to file a Third Amended Class Action Complaint against the Settling Defendants in the form attached hereto as "Exhibit A." The claims against the Settling Defendants would then be stayed in all pending actions, and then dismissed if the Court grants the Final Judgement. (Ex. D).

B. The Proposed Class Notice

37. The Settlement Agreement provides for the proposed Class Notice and settlement claims procedure to be administered by a neutral third-party Settlement Administrator, who is responsible for disseminating the Class Notice, establishing the Settlement Website, receiving Opt-Out requests and Objections, receiving Claim Forms, reviewing and evaluating claims, allocating individual awards to class members, and distributing settlement proceeds to approved claimants. A summary of the proposed timetable for the notice and administration process is detailed below.

38. The Settlement Agreement provides for dissemination of a Notice of Proposed Class Action Settlement (Exhibit C) within twenty (20) business days of entry of the Preliminary Approval Order. (SA ¶ 7). Class Counsel shall provide the Settlement Administrator with the Class Notice List, which will include the names, last known email addresses, and, if no e-mail addresses are available, postal addresses, to the extent available, belonging to all Class Members. (SA ¶ 6).

39. Shortly after receiving the Class List, the Settlement Administrator will send the Settlement Notice via email and if unavailable or returned as undeliverable, then by U.S. Mail.

(SA ¶ 7). The Settlement Notice will provide Class Members with pertinent information regarding the Settlement as well as direct them to the Settlement Website, and the contact information for Class Counsel. The Settlement Notice shall advise the Class Members of their rights under the Settlement, including the procedures specifying how to request exclusion from the Settlement or submit an objection to the Settlement. (SA ¶ 9).

40. On the date of issuance of the Settlement Notice, the Settlement Administrator shall post the Settlement Website, which will include the Settlement Agreement, the Settlement Notice, relevant pleadings and Court orders regarding the Settlement, and a list of frequently asked questions mutually agreed upon by the Parties. Contact information for the Settlement Administrator, including a toll-free number, as well as Settlement Class Counsel's contact information will also be provided. (SA ¶ 1.44).

41. The form and method of the Class Notice agreed to by the Settling Parties satisfies all due process considerations and meets the requirements of Rule 23(e)(1)(B). The proposed Settlement Notice describes plainly: (i) the terms and effect of the Settlement Agreement; (ii) the time and place of the Final Approval Hearing; (iii) how the recipients of the Class Notice may object to the Settlement; (iv) the nature and extent of the release of claims; (v) the procedure and timing for objecting to the Settlement; and (vi) the form and methods by which Class Member may either participate in or exclude themselves from the Settlement. (Exhibit C).

C. Monetary Terms

42. The proposed Settlement Agreement provides for a monetary settlement of Seven Million, Six Hundred and Seventy-One Thousand Dollars (\$7,671,000.00) to be allocated among the Class Members who submit an approved Claim Form through a claims process (the "Settlement Program") to be administered by the court-appointed Settlement Administrator. (SA

¶ 32). The settlement will completely resolve the litigation of all claims as to the Settling Defendants, permitting the Court to dismiss said claims and enter judgment if the settlement is approved following the Final Approval Hearing.

43. The proposed Settlement Agreement provides that the settlement administration costs will be paid from the Settlement Fund. (SA ¶ 1). The proposed Settlement Agreement allocates up to \$500,000 for the Settlement Administrator's expenses, in addition to the \$500,000 previously allocated for the Daily Harvest-Stone Gate Settlement. Any remaining funds shall be distributed to claimants on a pro rata basis. (SA ¶ 31).

D. Opt-Out Procedure and Holdbacks

44. Class Members have thirty-five (35) days from the Notice Date to opt-out of the proposed Settlement. (SA ¶ 1.31). Opt-out requests may be submitted online or by mail. (SA ¶ 13).

45. It is agreed that Smirk's will withhold a portion of its total contribution to the Settlement Fund for a specified period of time to cover its reasonable material exposure relative to the potential litigation or claims from Opt-Outs (the "Class Action Hold Back Amount"). Any remaining funds from this hold back will be distributed pro rata to members of the Class Action no later than December 31, 2026.

46. It is also agreed that Smirk's and its insurers will hold back \$753,712.16 for claims already made against the Citizens/Hanover policies (the "Claims Hold Back Amount"). Within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover shall provide the plaintiff with a written statement of the amounts paid, along with reference claim numbers used in the resolution of the unrelated pending claims against Smirk's, once all such claims are resolved. If any of the \$753,712.16 is not paid on those other claims,

within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover will pay the remainder of the unpaid amount to the Qualified Settlement Fund and it will then be distributed to the members of the Class Action on a pro rata basis.

E. Claim Forms, Monetary Awards, and Appeals

47. The net Settlement Funds will be distributed to Class Members who file a Claim Form and meet the Eligibility Requirements for the payment of a Monetary Benefit. Each Claim Form shall be evaluated by the Settlement Administrator pursuant to the Allocation Matrix to determine the amount of the Monetary Benefit award. (SA ¶¶ 26-28, 32-35). The Settlement Program includes a Cure Period to submit any supplemental Required Documentation in support of the Claim. (SA ¶ 36). Class Members shall have the right to serve an Appeal upon the Settlement Administrator if their claim is denied. A Claimant who disagrees with the appeal ruling of the Settlement Administrator may appeal to the Court within fourteen (14) days of the Settlement Administrator's appeal determination by submitting a written statement to the Court at Attn: Hon. Judge Denise Cote, Case No. 1:22-cv-05443-DLC, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, outlining the Claimant's position and why the Claimant believes the Settlement Administrator has erred. The appeals process shall not result in any modification of substantive eligibility criteria. The Court shall issue a determination on the appeal in writing, which shall be served on the Claimant (and the Claimant's counsel, where applicable) and the Settlement Administrator. Decisions of the Court are final and binding. (SA ¶ 37).

48. By submitting a Claim Form, a Class Member shall be deemed to have submitted to the jurisdiction of the Court with respect to the Claim, including, but not limited to, the terms of the Settlement Agreement and the releases provided for in the Final Approval Order and

Judgment. (SA ¶ 38).

F. Attorney's Fees and Costs

49. The proposed Class Counsel are not requesting an award of attorneys' fees directly from the Settlement Fund. Rather, Class Counsel and the attorneys for individual Class Members shall be compensated pursuant to the retainer agreements between Plaintiffs, Class Members, and their respective counsel. (SA ¶ 55). If a Class Member is not represented by counsel and does not have an attorney lien resulting from previous representation relating to the Crumbles, then any Monetary Benefit awarded to said Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement. In effect, Class Counsel is requesting that the Court impose a 1/3 attorney's fee award for any Monetary Benefit paid to Unrepresented Claimants, however, that the value of said fee award be deposited back into the Settlement Fund. Class Counsel submits that the proposed 1/3 reduction represents a fair method of allocating the Settlement Funds to Unrepresented Claimants and treats each Class Member equitably.

G. Dismissal and Release of Claims

50. Upon entry of the Final Approval Order, the Settlement Class Members shall be deemed to have forever released any and all claim against the Settling Defendants for any damages arising from or related to personal injury caused by the consumption of the French Lentil + Leek Crumbles. (SA ¶ 56). These releases are also described in the proposed Settlement Form Notice (Exhibit C) and Claim Form (Exhibit E).

H. Summary of Proposed Timetable

51. The parties request that the Court schedule a Final Approval Hearing 143 days after the order granting preliminary approval. *See* 2 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 6:18 (11th ed. 2014) ("Courts have consistently held that 30 to 60 days

between the mailing (or other dissemination) of class notice and the last date to object or opt out, coupled with a few more weeks between the close of objections and the settlement hearing, affords class members an adequate opportunity to evaluate and, if desired, take action concerning a proposed settlement.”).

52. To afford the putative class adequate notice and opportunity to be heard, Plaintiff proposes the following timetable of settlement-related events:

EVENT	TIME FOR COMPLIANCE
Deadline for Parties to deposit funds into Qualified Settlement Fund (“QSF”) for administration costs.	Within 10 business days after entry of preliminary approval order.
Deadline for publication and emailing of settlement notice to begin.	20 business days after entry of preliminary approval order.
Deadline for class members to: <ul style="list-style-type: none"> • Submit an Opt-Out request to be excluded from the Settlement; • File an Objection to the Settlement; and/or • File intention to appear at Final Approval Hearing. 	35 days after first publication/emailing of notice.
Deadline for attorneys representing any Class Member objecting to the Settlement to enter their appearance.	75 days after first publication/ mailing of notice.
Deadline for Class Members to submit a Claim Form.	75 days after first publication/emailing of notice.
Deadline for the Settling Parties to file motion for final approval of the proposed Settlement.	No later than fourteen (14) days prior to the Final Approval Hearing.

Deadline for Parties to file all papers in response to any timely and valid Objections.	Fifteen (15) business days prior to Final Approval Hearing.
Final Approval Hearing.	143 days after Preliminary Approval Hearing.

THE METHOD OF DISTRIBUTING THE SETTLEMENT FUNDS IS FAIR AND ADEQUATE.

53. The method of distributing the Settlement Funds pursuant to the Settlement Agreement’s claims process (“Settlement Program”) is fair and adequate.

54. The negotiated terms of the Settlement Program, including the Allocation Matrix, is the product of extensive work by and among the counsel who drafted and executed the Settlement Agreement, and who, as discussed, represent over four-hundred forty-nine (449) putative Class Members.

55. To receive a settlement award (“Monetary Benefit”), each Class Member must submit a Claim Form with the Required Documentation by the Claim Deadline. (SA ¶¶ 32-35).

56. The court-appointed Settlement Administrator will review each Class Member’s claim pursuant to a set of uniform criteria in considering, evaluating, and making individual settlement awards. (SA ¶ 32); (Ex. F, Allocation Matrix).

57. The Allocation Matrix provides for five categories of claimants: (1)(A) No Direct Personal Injury But Consequential Monetary Damages, (1)(B) Personal Injury But No Medical Treatment, (2) Personal Injury With Medical Treatment, (3) Personal Injury With Hospitalization, (3) Personal Injury With Cholecystectomy, and (5) Enhancement Awards. (Ex. F). Each category will be funded by a gross amount as set forth in the Allocation Matrix. Based on the current number of known claimants, the estimated Monetary Benefit payable to claimants in Categories 1A, 1B, 2, 3 and 4 is \$165, \$335, \$5,000, \$10,000, and \$43,330, respectively. Claimants in Categories 2, 3

and 4 are also eligible to apply for an Enhancement Award per the criteria in Category 5.

58. As discussed above, the Settlement Program includes a Cure Period and process to file an Appeal of the Settlement Administrator's determination in evaluating and making settlement awards.

59. Any amounts remaining in the Settlement Fund after the Settlement Administrator applies the Allocation Matrix pursuant to the Settlement Program, or any later payment of Hold-Back amounts back into the Fund, shall be paid to Qualified Class Members on a pro rata basis. (SA ¶ 35).

60. Accordingly, the method for processing claims and distributing the Settlement Fund among the Class Members is fair and adequate.

61. And of course, any Class Member has the right to exclude themselves from the Settlement Class and pursue their own claim. (SA ¶ 13).

THE PROPOSED CLASS SETTLEMENT SATISFIES THE CRITERIA FOR PRELIMINARILY APPROVAL UNDER RULE 23.

62. For the reason discussed in the accompanying Memorandum of Law, certification of the proposed Settlement Class, for settlement purposes only, satisfies the criteria for preliminary approval under Rule 23(b)(3).

63. First, the proposed Class satisfies the requirements of Rule 23(a), including: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the settlement class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the settlement class; and (4) the representative parties will fairly and adequately protect the interests of the settlement class.

64. Second, the proposed Class satisfies the requirements of Rule 23(b)(3), whereby questions of law or fact common to class members predominate over any questions affecting only

individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

65. Lastly, the proposed Settlement Agreement satisfies the requirements of Rule (23)(e)(2), including (1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members.

THE PROPOSED PLAINTIFF'S COUNSEL SHOULD BE APPOINTED AS CLASS COUNSEL.

66. The proposed Class Counsel have the capabilities and resources to provide adequate representation to the class. As discussed, Plaintiff and the putative Class Members are represented by counsel experienced in class action litigation including directly analogous cases. Indeed, proposed Class Counsel have been appointed class counsel in some of the largest outbreaks of food and waterborne illnesses in New York State and the nation. (Ex. G). Moreover, Class Counsel's work in this case on behalf of Plaintiff and the putative Class Members in the Related Litigation has been substantial.

67. Accordingly, Plaintiff requests that the Court appoint Marler Clark, Inc., P.S., Bowersox Law Firm, P.C., O'Connor & Partners, PLLC, Heisman Nunes & Hull LLP, and Dreyer Boyajian LLP as Class Counsel.

68. Counsel for Plaintiff is not currently aware of any disputes as to settlement approval, distribution of proceeds, or competing claims.

69. Accordingly, Plaintiff requests that the Court approve the Motion for Preliminary Approval of the Settlement.

Dated: October 8, 2024

Respectfully submitted,

/s/ William D. Marler

MARLER CLARK, INC. P.S.
180 Olympic Drive S.E.
Bainbridge Island, Washington 98110
Telephone: (206) 346-1888
bmarler@marlerclark.com

/s/ James R. Peluso

James R. Peluso (Bar Roll # JP2875)
DREYER BOYAJIAN LLP
75 Columbia Street
Albany, New York 12210
Telephone: (518) 463-7784
jpeluso@dblawnny.com

/s/ Jeffrey A. Bowersox

BOWERSOX LAW FIRM, P.C.
385 1ST Street, Suite 215
Lake Oswego, OR 97034
Telephone: (503) 452-5858
jeffrey@bowersoxlaw.com

Counsel for Plaintiff and the Proposed Class

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Breeanne Buckley Peni, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

Civil Action No. 22-cv-05443

DAILY HARVEST, INC. and SECOND
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MOLINOS ASOCIADOS SAC,

Defendants.

- Exhibit A Third Amended Class Action Complaint
- Exhibit B Proposed Preliminary Approval Order
- Exhibit C Settlement Notice
- Exhibit D Proposed Final Approval Order
- Exhibit E Proof of Claim Form
- Exhibit F Allocation Matrix

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement (the “Agreement” or “Settlement”) is made and entered into by and among the following parties, as hereinafter defined: (1) Plaintiff Breeanne Buckley Peni (collectively “Plaintiff” or “Named Plaintiff”), on behalf of herself and the Settlement Class Members, and (2) Defendant Smirk’s Ltd., (“Smirk’s”) and (3) Defendant Molinos Asociados SAC (“Molinos”) (the “Settling Defendants” and together with Plaintiff, the “Settling Parties” or “Parties”). Subject to the Court’s approval, the Parties hereby stipulate and agree that, in consideration of the promises and covenants set forth in the Agreement and upon the occurrence of the Effective Date, this class action lawsuit shall be settled, compromised, and dismissed upon the terms and conditions contained herein.

US.363346399.01

RECITALS, EXHIBITS, AND DEFINITIONS INCORPORATED

The following Recitals and Definitions, as well as all Exhibits attached to this document, are hereby expressly incorporated by reference as part of this Settlement Agreement. Terms used in this Agreement are defined below or indicated in parentheses elsewhere in this Agreement.

RECITALS

- A. On June 27, 2022, plaintiff Breeanne Buckley Peni filed a Class Action Complaint alleging Strict Liability, Breach of Warranty, and Negligence against Daily Harvest, Inc., in the Southern District of New York in a case styled *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc.*, Case No. 1:22-cv-05443.
- B. Around this same time, a number of related actions were filed against the Settling Defendants, as well as Daily Harvest, Inc. (“Daily Harvest”) and Second Bite Foods, Inc., d/b/a “Stone Gate Foods” (“Stone Gate Foods”), which are not parties to this Agreement, but are subject to a companion Settlement Agreement and Class Action Settlement pending in the Southern District of New York and assigned to the Honorable Denise Cote. Those filed in federal court were transferred to the District Court for the Southern District of New York and assigned to the Honorable Denise Cote. Those filed in New York State Supreme Court have been consolidated for discovery purposes and remain in that Court; and since that time, they have been following the directives of the Hon. Denise Cote of the Southern District of New York in these proceedings.

- C. These lawsuits and claims (collectively, the “Daily Harvest Litigation” or “Litigation”) all seek to recover damages in connection with personal injuries allegedly caused by the consumption of French Lentil + Leek Crumbles (“Crumbles”) manufactured by Stone Gate Foods and distributed and sold by Daily Harvest. These Crumbles contained tara flour, an imported food ingredient manufactured by Molinos in Peru and imported into the United States by Smirk’s.
- D. On April 28, 2023, the District Court for the Southern District of New York entered a Coordination Order for all Related Actions in the Daily Harvest Litigation.
- E. The Parties engaged in substantial written discovery, including e-discovery production of thousands of pages of company documents by the Settling Defendants in response to Plaintiff’s discovery requests and depositions of Smirk’s and Molinos’ employees and executives. Plaintiffs and claimants involved in the Litigation, in turn, produced medical records, fact sheets and other documents related to their claims against the Settling Defendants. Two of the bellwether plaintiffs were also deposed along with their family members.
- F. On November 13, 2023, the Settling Parties participated in a full-day, in-person settlement conference with the Honorable Sarah L. Cave, United States Magistrate Judge. At the conclusion of the hard-fought settlement conference, Plaintiff and the Settlement Class agreed in principle to settle the claims against Daily Harvest and Stone Gate Foods, subject to the negotiation of a settlement agreement between the plaintiff, Daily Harvest, and Stone Gate Foods (hereinafter

“the Daily Harvest-Stone Gate Settlement Agreement”) and Court approval.

- G. On May 22, 2024, the Court issued an Order Granting Preliminary Approval of a class settlement with defendants Daily Harvest and Stone Gate (Doc. 77) and has scheduled a Final Approval Hearing for October 15, 2024. (Doc.78).
- H. To avoid the costs, disruption, and distraction of further Litigation, the Settling Parties to this Agreement (Plaintiff, Smirk’s, and Molinos) have concluded that it is desirable that the Litigation between them be settled and dismissed on terms modeled after the Daily Harvest-Stone Gate Foods Settlement Agreement.
- I. The Settling Parties agree that the Litigation has been prosecuted by Plaintiff and defended by the Settling Defendants in good faith and in compliance with Rule 11 of the Federal Rules of Civil Procedure, and that the Litigation involving the Settling Parties is being voluntarily settled after receiving advice of counsel and Court-assisted mediation efforts.
- J. Class Counsel have conducted extensive investigation relating to the claims and the underlying events and transactions alleged in the Litigation. Class Counsel have analyzed the evidence adduced through the extensive discovery conducted by the Settling Parties during the course of this Litigation and has researched the applicable law with respect to the claims of Plaintiff and the Settlement Class Members against the Settling Defendants and the potential defenses thereto, allowing Class Counsel to verify the reasonableness and adequacy of the Settlement.
- K. Based upon their investigation as set forth above, and considering the risks and

costs of further litigation between the Settling Parties, Plaintiff and Class Counsel have concluded that the terms and conditions of this Settlement, as embodied herein, are fair, reasonable, adequate and equitable to Plaintiff and the Settlement Class Members, and in their best interests, and that a settlement of the Litigation and the prompt provision of effective relief to the Settlement Class are in the best interests of the Settlement Class Members after considering: (1) the monetary benefit the Settlement Class Members will receive from the Settlement; (2) the attendant risk of litigation against the Settling Defendants; and (3) the desirability of permitting the proposed settlement to be consummated as provided by the terms of this Agreement.

- L. Plaintiff asserts her firm belief that she would prevail in the Litigation and maintains that there is no merit to the Settling Defendants' Defenses or Claims of no fault. Additionally, Plaintiff specifically identifies the tara flour manufactured by Molinos in Peru and imported by Smirk's, and used in Daily Harvest's Crumbles, as the cause of her injuries and damages and those of all Class Members. Nonetheless, Plaintiff considers it desirable to resolve the Class Action and Litigation on the terms stated herein, to avoid further expense and delay of payments to Class Members in need.
- M. The Settling Defendants dispute and deny liability and contend that they would prevail in the Litigation. By entering into this Agreement, the Settling Defendants are not admitting to any intentional or negligent action or to any wrongdoing or liability whatsoever. The Settling Defendants, while continuing to deny all

allegations of wrongdoing and disclaiming liability with respect to the Litigation, consider it desirable to resolve the Class Action and Litigation on the terms stated herein, in order to avoid further expense, inconvenience, and interference with ongoing business operations, and to dispose of burdensome Litigation with the Plaintiff and Settlement Class. It is acknowledged that the amount paid in settlement is less than the total claim of Class Members.

- N. Daily Harvest, Stone Gate Foods, Smirk's and Molinos have also initiated separate claims against each other and have litigated those claims in various jurisdictions. As a condition of this Settlement, within five (5) business days following the "Final Judgment Date"—i.e., the date on which the Court grants final approval of the settlement—all parties, including Daily Harvest and Stone Gate Foods, shall dismiss with prejudice any and all claims, cross-claims, and counterclaims by and between them that remain pending in any court. Furthermore, until the Final Judgment Date, the running of any statute of limitations applicable to any such claim, cross-claim, or counterclaim shall be tolled.
- O. Plaintiff, Daily Harvest, Stone Gate, Smirk's, and Molinos will cooperate in all respects in seeking a stay of all pending litigation until the Final Judgment Date.
- P. The Settling Defendants hereby consent, solely for the purposes of the Settlement set forth herein, to (1) certification of a Settlement Class under Rule of Civil Procedure 23(B)(3) of all persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles and

suffered personal injuries caused by consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles, and (2) appointment of Plaintiff's Counsel as Class Counsel for the Settlement Class Members and Plaintiff as the Class Representative of the Settlement Class; provided, however, that if this Agreement fails to receive Court approval or otherwise fails to become effective, including, but not limited to, the judgment not becoming final as provided in Sections 42 and 43 of this Agreement, then the Settling Defendants (1) will retain all claims, rights and defenses they had immediately preceding the execution of this Agreement, including the right to object to the propriety of class certification in all other contexts and for all other purposes, (2) the parties agree that the Settlement Class must be decertified, and (3) all parties in the Litigation will revert to the positions they occupied immediately preceding the execution of this Agreement and proceed thereafter as if the Settlement Class had never been certified. The fact that the Settling Defendants conditionally consented herein to certification of the Settlement Class shall not be used against the Settling Defendants by any Party or non-party to this Agreement for any purpose in the Litigation or any other action, lawsuit, or proceeding of any kind whatsoever.

Q. This Settlement reflects a compromise between the Settling Parties, and nothing in this Agreement shall constitute or be used as evidence of liability, by or against any Settling Party, or by any non-party to this Agreement, for any purpose, except

as prescribed in this Agreement. This Agreement shall in no event be construed or deemed to be a concession by Plaintiff, or any Settlement Class Member, of the truth, or lack thereof, of any allegation or the validity, or lack thereof, of any claim asserted against the Settling Defendants in the Litigation between the Settling Parties. Nor shall this Settlement be construed or deemed to be an admission or concession by the Settling Defendants with respect to the validity, or lack thereof, of any claims or defenses asserted in the Litigation or of any fault or liability or wrongdoing whatsoever.

- R. Under no circumstances shall this Settlement be construed or deemed to be relevant to, admissible in, or otherwise available for use by any Party or non-party to this Agreement as evidence in the Litigation or any other claim, action, lawsuit, arbitration, or proceeding of any kind whatsoever, except for the fact of this Settlement, the amount of the Settlement (to evidence the amount of contribution claims of the Settling Defendants), and citation to any of the Court's orders approving the Settlement or otherwise available for citation, or upon written consent by Class Counsel and the Settling Defendants' counsel and as prescribed in paragraph P above.
- S. This Agreement is contingent upon the issuance by the Court of both the proposed Preliminary Approval Order and Final Approval Order, with no material alterations from the proposed orders attached hereto as Exhibits B and D, and the Final Approval Order becoming final, as set forth in Section 40 below. Should the Court not issue the Preliminary Approval Order and Final Approval Order, or

should the Final Approval Order not become final, the Settling Defendants do not waive, and instead expressly reserve, all rights to defend against claims in the Litigation.

T. NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among the Settling Parties, through their respective counsel, that subject to final approval of the Court, after a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and in consideration of the benefits flowing to the Parties from the Settlement set forth herein, that all Released Claims shall be compromised, settled, released, and dismissed with prejudice, upon and subject to the following terms and conditions.

DEFINITIONS

As used in this Agreement and the attached Exhibits (which are an integral part of the Agreement and are incorporated in their entirety by reference), the following terms shall have the meanings set forth below, unless this Agreement specifically provides otherwise. Other capitalized terms in this Agreement but not defined in this section shall have the meanings ascribed to them elsewhere in this Agreement.

1.1 “**Action**” means the Third Amended Consolidated Class Action Complaint to be filed by the Plaintiff under the caption *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc., Second Bite Foods, Inc. d/b/a “Stone Gate Foods”, Smirk’s Ltd., and Molinos Asociados SAC*, Case No. 1:22-cv-05443-DLC.

1.2 “**Administrative Expenses**” means: (a) the reasonable costs, fees, and expenses that are incurred by the Settlement Administrator in connection with providing notice to the

Settlement Class and administering the Settlement, including but not limited to distributing the Net Settlement Fund to the Settlement Class Members; (b) fees and expenses incurred in connection with the Fund; (c) taxes; (d) expenses related to the Settlement Administrator's evaluation of claims; and (e) costs associated with the Settlement Administrator resolving medical liens.

1.3 “**Agreement**” means this Class Action Settlement Agreement, containing all terms, conditions, and Exhibits, which constitutes the entire agreement between the Parties.

1.4 “**Allocation Matrix**” refers to the document outlining how the Settlement Administrator shall review, evaluate, and award Monetary Benefits to qualified Class Members, attached hereto as Exhibit F.

1.5 “**Approved Claimant**” means a Settlement Class Member who submits a timely Proof of Claim Form to the Settlement Administrator, that the Settlement Administrator has found satisfies all the requirements set forth on the Claim Form in accordance with the requirements established by this Settlement.

1.6 “**Benefit**” or “**Monetary Benefit**” means the payment available to a Claimant who files a valid Claim under this Agreement. The specific Benefit received is subject to review, validation, and adjustments by the Settlement Administrator based upon the terms and conditions of this Agreement.

1.7 “**Claim**” means a completed and signed Proof of Claim Form submitted by a Settlement Class Member, or on their behalf, to the Settlement Administrator in accordance with the instructions on the Claim Form and the terms of this Settlement.

1.8 “**Claim Form Deadline**” or “**Claims Deadline**” means the date by which a Claim Form must be postmarked via United States First Class Mail or via electronic submission by 11:59 p.m. Eastern Time to be considered timely. The Claim Form Deadline shall be clearly set forth in the Preliminary Approval Order as well as in the Settlement Notice and/or the Claim Form and shall be the seventy-fifth (75th) consecutive day after the Notice Date. If the Claim Form Deadline is on a weekend or holiday, the Claim Form Deadline shall extend to the next business day following the weekend or holiday.

1.9 “**Claim Period**” means the period of time during which a Settlement Class Member must submit a Claim Form to the Settlement Administrator to be eligible to receive a Monetary Benefit as part of the Settlement, which shall begin on the Notice Date and end on the Claim Form Deadline. The Claim Period shall be set forth in the Preliminary Approval Order.

1.10 “**Claimant**” means a Settlement Class Member who submits a Claim.

1.11 “**Class Counsel**” means the law firms of Marler Clark, Inc. PS, Dreyer Boyajian LLP, O’Connor & Partners, PLLC, Heisman Nunes & Hull LLP and Bowersox Law Firm, P.C.

1.12 “**Class**” or “**Class Members**” means all persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles and suffered personal injuries caused by consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person’s personal injuries arising from consumption of the Crumbles. Specifically excluded from the Class are (i) any Governmental Entity; (ii) subsidiaries, divisions, corporate affiliates, owners, officers, current employees, and directors of the Settling Defendants; (iii) any assigned judges and members of their staffs and immediate families; and (iv) Class Counsel.

1.13 “**Class Notice List**” means the names, mailing addresses, and email addresses of all potential Class Members compiled by the Settlement Administrator from information provided by Class Counsel and the Settling Defendants, including from Daily Harvest’s records of all individuals to whom it sold or shipped the Crumbles, to be used by the Settlement Administrator for the sole purpose of performing the Settlement Administrator’s obligations pursuant to this Settlement Agreement.

1.14 “**Class Action Complaint**” means the complaint in the form attached hereto as Exhibit A to be filed by Plaintiffs upon entry by the Court of the Preliminary Approval Order.

1.15 “**Court**” means the United States District Court for the Southern District of New York.

1.16 “**Crumbles**” means Daily Harvest’s French Lentil + Leek Crumbles product, all units of which the Settling Defendants have represented contained tara flour as an ingredient.

1.17 “**Smirk’s Counsel**” means the law firm of Haworth Barber & Gerstman LLC.

1.18 “**Molinos’ Counsel**” means the law firm of Bond Schoeneck & King PLLC.

1.19 “**Effective Date**” means the fifth (5th) business day after the Final Approval Order becomes a final, non-appealable judgment. If no appeal is taken, the Effective Date shall be the fifth (5th) business day after the latest possible deadline for an appeal. (For avoidance of doubt, the Parties shall not assume the lack of an appeal even if no person or entity would seem to have standing to appeal from entry of the Final Approval Order.) If an appeal is taken and approval of the Settlement is affirmed in its entirety, the date on which the Final Approval Order becomes final would be five business days after the date on which such affirmance is no longer subject to further appeal or review. If a petition for a writ of certiorari is filed in the United States Supreme

Court but is denied, the date on which the Final Approval Order becomes final would be five business days after the date on which the Supreme Court denies the petition.

1.20 “**Eligibility Requirements**” means the requirements necessary to qualify as a Qualified Claimant.

1.21 “**Execution Date**” means the date on which all Parties execute this Agreement, but if not all Parties execute it on the same day, then the date on which the last Party executes the Agreement.

1.22 “**Final Approval Hearing**” means the hearing set by the Court in the Preliminary Approval Order pursuant to Rule 23(i) of the Federal Rules of Civil Procedure to consider, among other things, final approval of the Settlement.

1.23 “**Final Judgment**” means the issuance of an order granting final approval to the Settlement and final judgment substantially in the form of the Final Approval Order attached hereto as Exhibit D, to be entered by the Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure granting final approval of the Settlement embodied herein.

1.24 “**Class Action Hold Back Amount**” refers to the portion of the Total Settlement Fund Value to be held back by Smirk’s or its insurers, Citizens Insurance Company of America (“Citizens”) and The Hanover Insurance Company (“Hanover”), for a prescribed period of time, based on Smirk’s determination of the estimated value of claims made by Class Members who may choose to opt out of the Settlement. Any remaining funds will be paid to members of the Class Action no later than December 31, 2026.

1.25 “**Claims Hold Back Amount**” means the \$753,712.16 that Smirk’s and its insurers will hold back from the Citizens/Hanover policies for claims already made against the

policies. Within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover shall provide the plaintiff with a written statement of the amounts paid, along with reference claim numbers used in the resolution of the unrelated pending claims against Smirk's, once all such claims are resolved. If any of the \$753,712.16 is not paid on those other claims, within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover will pay the remainder of the unpaid amount to the Qualified Settlement Fund and it will then be distributed to the members of the Class Action on a pro rata basis.

1.26 **"Net Settlement Fund"** means the Qualified Settlement Fund less any Administrative Expenses.

1.27 **"Notice Date"** is the date, to be set by the Court in the Preliminary Approval Order, by which the Settlement Administrator must commence the process of providing Settlement Notices to Class Members in the manner set forth in this Agreement and in the Preliminary Approval Order.

1.28 **"Objection"** means an objection timely filed with the Court and sent to the Settlement Administrator, who will provide copies to Class Counsel and the Settling Defendants' counsel, by a member of the Settlement Class objecting to any aspect of the Settlement.

1.29 **"Objection Deadline"** which shall be set forth in the Preliminary Approval Order, means seventy-five (75) days after the Notice Date.

1.30 **"Opt-Out"** means a request by a member of the Settlement Class to be excluded from the Settlement Class by following the opt-out procedures set forth in the Preliminary Approval Order and the Class Notice.

1.31 **"Opt-Out Deadline,"** which shall be set forth in the Preliminary Approval Order,

means thirty-five (35) days after the Notice Date.

1.32 **“Preliminary Approval Order”** means the order, substantially in the form attached hereto as Exhibit B, to be entered by the Court granting preliminary approval of this Agreement as within the range of reasonableness for possible final approval, such that notice of the potential settlement should be provided to Class Members; approving Class Notice to the Class Members as described in Section 7 below as being the best notice practicable under the circumstances; and setting the Final Approval Hearing to consider final approval of the Settlement and any objections thereto.

1.33 **“Proof of Claim Form”** or **“Claim Form”** means the claim form, lien questionnaire, and HIPAA forms, substantially as they appear in Exhibit E attached hereto, which a Settlement Class Member must complete and timely submit to the Settlement Administrator should that Settlement Class Member seek compensation pursuant to the Settlement. The Claim Form (whether submitted in hard copy or online through the Settlement Website or by email) will require each Class Member to attest under oath that he or she meets the Eligibility Requirements and to submit the Required Documentation to prove their entitlement to compensation, if any, from the Settlement Fund.

1.34 **“Qualified Class Member”** means a Settlement Class Member who submits a timely completed Proof of Claim Form that the Settlement Administrator, in consultation with the Settling Parties, determines satisfies all the Eligibility Requirements required by this Settlement. Subject to Court approval of the Settlement, a Qualified Class Member will be entitled to a Monetary Benefit from the Settlement in an amount to be determined by the Settlement Administrator.

1.35 “**Qualified Settlement Fund**” or “**Fund**” refers to the class action qualified settlement fund (26 CFR § 1.468B-1) to be established and approved by the Court.

1.36 “**Released Claims**,” as set forth fully in Sections 56 through 60, means any and all suits, claims, controversies, previously assigned claims by Stone Gate and Daily Harvest, rights, agreements, promises, debts, liabilities, accounts, reckonings, demands, judgments, obligations, covenants, contracts, or causes of action of every nature, character, and description, in law or in equity, (including, but not limited to, any claims for damages, interest, attorneys’ fees, expert or consulting fees, and any other costs, expenses or liability whatsoever), whether based on federal, state, local, statutory, or common law or any other law, rule or regulation, whether known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, whether class or individual in nature, including both known claims and unknown claims, that (1) have been asserted in the Action by Plaintiff or in the Litigation by any Settlement Class Member against the Settling Defendants, or (2) could have been asserted in any forum by the Plaintiff or the Settlement Class Members against any of the Settling Defendants or Released Parties, which in any way arise out of, are related to, or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Action, including, but not limited to, claims for personal or monetary injuries (including loss of consortium) related to any person’s purchase or consumption of Crumbles. Notwithstanding the foregoing, “Released Claims” does not include claims relating to the enforcement of the Settlement or its terms.

1.37 “**Released Party**” and “**Released Parties**” means any and all of the Settling Defendants and the Settling Insurers and each of their respective past and present insurers,

subsidiaries, parents, successors, predecessors, assigns, corporate affiliates, controlled persons, controlling persons, owners, family members and partners, and as to each of the foregoing, their current or former legal representatives, heirs, executors, administrators, trustees, beneficiaries, managers, officers, directors, agents, employees, corporate affiliates, and attorneys.

1.38 **“Required Documentation”** means any documentation required to establish proof of purchase of Daily Harvest’s French Lentil + Leek Crumbles, medical expenses, or other out-of-pocket costs relevant to the submission of a Claim.

1.39 **“Settlement”** means the settlement described in this Settlement Agreement.

1.40 **“Settlement Administrator”** means Edgar Gentle of Gentle Turner & Benson, LLC | P.O. Box 361930, Hoover, AL 35236-1930, www.SMcrumblesettlement.com, crumblesettlement@gtandslaw.com.

1.41 **“Settlement Notice”** means the Notice in the form attached hereto as Exhibit C, to be disseminated as provided for the Preliminary Approval Order.

1.42 **“Settlement Distribution Schedule”** or **“Settlement Program”** means the settlement program to be administered by the Settlement Administrator for the review, evaluation, and award of Monetary Benefits to qualified Class Members.

1.43 **“Settlement Email”** refers to SMsettlement@crumblesettlement.com, the Settlement email address established by the Settlement Administrator to facilitate the administration of the Settlement.

1.44 **“Settlement Website”** refers to the website established by the Settlement Administrator at www.SMcrumblesettlement.com, to facilitate the administration of the Settlement. This includes providing Class Members the ability to submit a Proof of Claim Form

through the website, via the Settlement email, or by regular mail. The Settlement Website will not include any of the Settling Defendants' logos or trademarks. The Settlement Email and the Settlement Website shall be activated when Class Notice is commenced. The Settlement Website shall include, in downloadable format, the following: (i) the Settlement Notice; (ii) the Preliminary Approval Order; (iii) the Settlement Agreement (including all of its exhibits); (iv) the Class Action Complaint; (v) a Question and Answer section agreed to in good faith by the Settling Parties anticipating and answering Settlement-related questions from prospective class members; (vi) contact information for the Settlement Administrator, including a Toll Free number, as well as Class Counsel; (vii) all preliminary and final approval motions filed by the Parties, and any orders ruling on such motions; and (viii) any other materials agreed upon by the Parties and/or required by the Court. The Settlement Administrator shall maintain the Settlement Website until such time as the Settlement is fully administered. The Settlement Website shall also allow Claimants to provide updated contact information.

1.45 “**Settling Insurers**” shall refer to Smirk’s insurers: Citizens Insurance Company of America, Hanover Insurance Company, the Hanover Insurance Group, and, their parents, subsidiaries and Affiliated Companies.

1.46 “**Settling Defendants**” means Smirk’s Ltd. and Molinos Asociados SAC.

1.47 “**Settling Parties**” means Plaintiff, Smirk’s Ltd., and Molinos Asociados SAC.

1.48 “**Taxes**” means (i) all federal, state and/or local taxes of any kind (including any interest or penalties thereon) on any income earned by the Settlement Fund; (ii) the reasonable expenses and costs incurred in connection with determining the amount of, and paying, any taxes owed by the Settlement Fund (including, without limitation, the reasonable expenses of tax

attorneys and accountants); and (iii) all taxes imposed on payments by the Settlement Fund, including withholding taxes.

1.49 “**Total Settlement Fund Value**” means seven million, six hundred and seventy-one thousand dollars (\$7,671,000) to be paid into the Qualified Settlement Fund by Citizens and Hanover, on behalf of Smirk’s, in full settlement of all Class Members’ claims under this Settlement Agreement.

1.50 “**Uncashed Settlement Checks**” means any checks mailed to Settlement Class Members that remain uncashed after a period of one hundred and eighty (180) days from the date of distribution of the checks to Settlement Class Members.

1.51 “**Unrepresented Claimant**” refers to any Class Member that is not represented by legal counsel.

1.52 The word “or” means “and/or.”

1.53 The plural includes the singular and vice versa.

SETTLEMENT FUND

1. In consideration for the Settlement and Releases given herein and subject to the rights, terms, and conditions set forth in this Agreement, the Settling Defendants or Settling Insurers on Smirk’s behalf, will make certain payments to the Qualified Settlement Fund, consistent with the requirements and timing set forth below. Specifically, if Preliminary Approval of the Settlement is granted, Molinos and the Settling Insurers on Smirk’s behalf, will each make contributions to pay for administrative costs related to Class Notice, as set forth in Section 4. If Final Approval of the Settlement is granted, then the Settling Insurers, on Smirk’s behalf, will make additional contributions to the Settlement Fund, subject to the hold back

amounts set forth in Sections 18 through 24, and 1.24 and 1.25, to pay for additional Administrative Expenses, with the remainder of the Fund to be distributed to Settlement Class Members in the manner set forth in this Agreement. The Settlement Fund shall also be supplemented by any remaining holdback amounts after the prescribed period. The Total Settlement Fund Value is seven million, six hundred and seventy-one thousand dollars (\$7,671,000), subject to the rights, terms, and conditions of this Agreement. Neither the Settling Defendants, Settling Insurers, nor any of their past, present, or future corporate affiliates shall be liable or obligated to pay any monies, or incur any expenses, for any reason, other than the amounts expressly provided for in this Agreement.

CLASS SETTLEMENT PROCEDURES

2. **Preliminary Motion for Approval.** As soon as practicable after the Execution Date of this Agreement, but no sooner than the Settling Defendants advise Class Counsel that they are prepared to transmit notices to governmental authorities pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715(b), Class Counsel shall move for an order granting Preliminary Approval to this Settlement Agreement as within the range of possible final approval and (i) conditionally certifying the Settlement Class for purposes of this Settlement only; (ii) approving Class Notice to the Settlement Class Members as described in Section 7; (iii) approving the Claim Form in a form substantially similar to the one attached hereto as Exhibit E; and (iv) setting a hearing to consider final approval of the Settlement and any Objections thereto. The Settling Defendants shall have no obligation to make separate filings in support of the motion but may voluntarily do so. If the Court elects to hold a hearing before deciding whether to enter the Preliminary Approval Order, the Settling Defendants shall

appear at the hearing to confirm their agreement with the terms of the Settlement.

3. **Amended Class Action Complaint.** Pursuant to this Agreement, upon entry of the Preliminary Approval Order, the Plaintiff shall file an Amended Class Action Complaint in the form attached hereto as Exhibit A. The Class Action Complaint shall seek certification of the Class under Federal Rule of Civil Procedure 23(B)(3) as exactly defined herein and approved by the Court in the Preliminary Approval Order.

4. **Notice Funding.** Within ten (10) business days after the Court enters the Preliminary Approval Order, Molinos and the Settling Insurers, on behalf of Smirk's, shall each contribute \$25,000, for a total of \$50,000, to the Qualified Settlement Fund, to be used by the Settlement Administrator to provide Class Notice. Where Class Members are known by the parties to be represented by counsel for purposes of asserting Released Claims, the parties shall provide that information to the Settlement Administrator and the Settlement Administrator will send a copy of the Notice to those counsel.

5. **CAFA Notice.** Within ten (10) business days after Class Counsel have moved the Court to enter of the Preliminary Approval Order, the Settling Defendants shall serve notices of the Settlement to government authorities as required by CAFA, and shall, within five (5) business days after service of such CAFA Notice, certify to Class Counsel in writing that such service has been made. The Settling Parties agree to request that the Court not schedule the Final Approval Hearing until at least 90 days after the Settling Defendants have transmitted CAFA notices (*i.e.*, no earlier than 100 days after Class Counsel moved the Court to enter the Preliminary Approval Order). The costs of preparing and serving CAFA notices shall be paid by Smirk's and shall not be paid from the Fund.

CLASS NOTICE

6. **Class Notice List.** Within one (1) business day after entry of the Preliminary Approval Order, Class Counsel will provide the Settlement Administrator with the names, mailing addresses, and email addresses of all individuals reasonably known to them who received or consumed Crumbles or have asserted a claim relating to personal injury caused by consumption of Crumbles (and, where applicable, their counsel). Daily Harvest has already provided the Settlement Administrator with its records showing all individuals to whom it sold or shipped the Crumbles, along with the dates and amounts of Crumbles shipped (the “Crumbles Information”). This information will be provided to and used by the Settlement Administrator for the sole purpose of performing the Settlement Administrator’s obligations pursuant to this Settlement Agreement, including Notice and administration of the Settlement Program, and shall otherwise remain confidential and not be disclosed or used for any other purpose at any time. The Settlement Administrator will compile the information from Class Counsel and the Settling Defendants into a Class Notice List and will provide the Class Notice List to Class Counsel and the Settling Defendants.

7. **Notice to the Class.** Unless this date is adjusted by the Court, within twenty (20) business days after the entry of the Preliminary Approval Order, the Settlement Administrator shall cause the Settlement Notice substantially in the form attached here to as Exhibit C to be sent via electronic mail to all persons on the Class Notice List. If an email address is not available for an individual on the Class Notice List, or an email is returned as undeliverable, the Settlement Notice will be sent to the individual’s last known mailing address via U.S. mail. The Settlement Administrator shall activate the Settlement Website for

public accessibility no earlier and no later than the Notice Date.

8. **Certification of Compliance.** The Parties shall supervise the Settlement Administrator in the performance of the notice functions set forth in this Section. Prior to the Final Approval Hearing, in connection with the motion for final approval of the Settlement, Class Counsel shall serve and file a sworn statement from the Settlement Administrator evidencing compliance with the provisions of the Preliminary Approval Order concerning the distribution of the Settlement Notice to the Settlement Class as well as a summary of activity and visits to the dedicated Settlement Website.

OBJECTIONS BY SETTLEMENT CLASS MEMBERS

9. Any Class Member, who has not opted out, on his or her own, or through an attorney hired at his or her own expense, may object to the terms of the Settlement. Any such Objection must be filed with the Court and sent to the Settlement Administrator, who will provide copies to Class Counsel and the Settling Defendants' counsel no later than the Objection Deadline. To be effective, any such Objection must be in writing and include the contents described below:

- (a) Identification of the objection as pertaining to the case by reference to the case name, number, and court, which is *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc. et al.*, Case No. 1:22-cv-05443-DLC.
- (b) The name, address, telephone number, and, if available, the email address of the Person objecting, and if represented by counsel, of the objector's counsel;

- (c) A written statement of all grounds for the Objection, accompanied by any legal support for such Objection;
- (d) A statement of whether the objector intends to appear at the Final Approval Hearing, either with or without counsel;
- (e) A statement of facts that establish the objector's membership in the Settlement Class, including all information required by the Claim Form;
- (f) A detailed list of all other objections submitted by the objector or the objector's counsel to any class action settlement in any court in the United States in the previous five (5) years. If the objector or the objector's counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, the objector shall affirmatively state that fact in the written materials provided in connection with the Objection to this Settlement; and
- (g) The objector's signature or other duly authorized representative of the objector (along with documentation setting forth such representation) and the signature of the objector's attorney, if the objector is represented.

10. Any Class Member who fails to timely file and serve a written Objection containing all of the information listed in the items (a) through (g) directly above, including notice of his/her intent to appear at the Final Approval Hearing, shall not be permitted to object to the Settlement and shall be foreclosed from seeking any review of the Settlement or the terms of the Agreement by any means, including, but not limited to, an appeal.

11. If any Objection is received by the Settlement Administrator, the Settlement Administrator shall forward the Objection and all supporting documentation to counsel for the Settling Parties. The failure of the Class Member to comply with the filing requirements listed above shall be grounds for striking and/or overruling the Objection, even if the Objection is otherwise timely submitted to the Settlement Administrator.

12. A Class Member who objects to the Settlement may also submit a Claim Form on or before the Claim Form Deadline, which shall be processed in the same way as all other Claim Forms. A Class Member shall not be entitled to an extension to the Claim Form Deadline on the grounds that the Class Member has also submitted an objection.

OPT-OUT REQUESTS

13. Class Counsel believes this Settlement is fair, reasonable, adequate and equitable to the Settlement Class Members. However, if any Class Member wishes to Opt-Out of (in other words, be excluded from) this Settlement, the Class Member may do so by completing the online exclusion form at the Settlement Website; downloading and timely submitting to the Settlement Administrator a completed exclusion form; or submitting to the Settlement Administrator a written request for exclusion, as described in the Notice, submitted online or postmarked no later than the Opt-Out Deadline. Opt-Out requests not submitted online or postmarked by the Opt-Out Deadline shall not be valid. Class Members who elect to Opt-Out of this Settlement shall not be permitted to object to this Settlement, to intervene, or to submit a Claim. Class Members shall be encouraged, but not required, to provide their email addresses and telephone numbers in their requests for exclusion. So-called “mass” or “class” opt-outs shall not be allowed. Any request for exclusion must be made individually by each person who seeks to Opt-Out. For the

avoidance of doubt, any Class Member who does not individually and timely Opt-Out of this Settlement will be deemed a member of, and will be included within, the Settlement Class.

14. If a Class Member submits both a Claim Form and an Opt-Out request, the Settlement Administrator shall promptly contact that Class Member to discuss and obtain clarification as to whether the Class Member intended to Opt-Out or to seek monetary benefits from the Settlement.

15. The named Plaintiff affirmatively supports this Settlement and agrees not to Opt-Out of this Settlement. Class Counsel also affirmatively support this Settlement and, accordingly, neither Plaintiff nor Class Counsel shall in any way encourage any Class Member to Opt-Out, nor shall the Settling Defendants or their counsel discourage any Class Member from participating in this Settlement. Notwithstanding the above, Class Counsel, in accord with their ethical obligations, are free to advise individual clients represented by Class Counsel of the legal rights and remedies associated with an Opt-Out.

16. Any Class Member who does not file a timely request to Opt-Out as provided above shall be bound by this Settlement Agreement and all subsequent proceedings, orders, and judgments in this Litigation, and shall be precluded from asserting Released Claims in any forum against any Released Party.

SETTLEMENT FUND HOLD BACK

17. The Settlement Administrator shall scan and electronically send copies of all Opt-Out requests in PDF format (or such other format as shall be agreed) to the Settling Defendants' Counsel and to Class Counsel expeditiously (and not more than five (5) business days) after the Settlement Administrator receives such a request. The Settlement Administrator will provide a

full and complete list of Opt-Out requests (“Opt-Out List”) to the Settling Defendants’ Counsel and to Class Counsel within five (5) business days after the Opt-Out Deadline.

18. Once the Settlement Administrator provides the Opt-Out List, Smirk’s shall have fourteen (14) days to reasonably determine, at its sole discretion, the amount, if any, that it will hold back from payment into the Qualified Settlement Fund after entry of the Order for Final Approval, consistent with Sections 44 and 45, to cover its reasonable material exposure relative to the potential litigation or claims by the Opt-Outs (“Class Action Hold Back Amount”) and will identify the Class Action Hold Back Amount to the Settlement Administrator and Plaintiffs’ Class Counsel. If the Class Action Hold Back Amount is ten (10) percent or less of the Total Settlement Fund Value, Plaintiff and Plaintiff’s counsel cannot object to the Class Action Hold Back Amount.

19. In the event that Smirk’s determines that the Hold Back Amount must exceed 10% of the Total Settlement Fund Value, and Plaintiff and Class Counsel do not agree that the amount is reasonable, then the Parties shall engage in good faith negotiations, employing the assistance of Retired Judge Peter B. Skelos, if needed, to reach agreement on any Class Action Hold Back Amount exceeding ten (10) percent of the Total Settlement Fund Value. The Claim Period and Objection Deadline shall be extended during the period of such good faith negotiations, and the Settlement Administrator shall post this information about the extension on the Settlement Website. If necessary, the Settling Parties shall inform the Court of the need to postpone the Final Approval Hearing, and the Settlement Administrator shall post to the Settlement Website information about any adjourned date for the Final Approval Hearing.

20. Should the Parties be unable to agree on a Class Action Hold Back Amount exceeding ten (10) percent of the Total Settlement Fund Value, after good faith negotiations, then any Party to this Agreement has the right to terminate its participation in the Settlement in its sole discretion pursuant to Section 80.

21. Should the Settling Defendants determine that the Class Action Hold Back amount is ten (10) percent or less of the Total Settlement Fund Value, or the Parties agree to a greater Class Action Hold Back Amount, the Settlement Administrator shall promptly post the Class Action Hold Back Amount to the Settlement Website, and the Objection Deadline shall become the fourteenth (14th) day after such posting, which shall also be promptly posted by the Settlement Administrator on the Settlement Website. The Claims Deadline shall be extended by the number of days of the extension period in Section 19. For avoidance of doubt, unless otherwise ordered by the Court, no individualized notice of this information need be provided by email, mail, or other means to Class Members or their counsel; such updated information need only be posted by the Settlement Administrator to the Settlement Website. The sole exception is that the Settlement Administrator shall communicate any adjourned date for the Final Approval Hearing to Class Members who previously have submitted a valid Objection. For purposes of clarity, the Objector Deadline and Claims Period have been set intentionally by the Settling Parties to fall a reasonable time after communication to the Class of any Class Action Hold Back Amount, so that Class Members may make an informed decision, following the communication of the Class Action Hold Back Amount, to participate in the Settlement.

22. Class Counsel believes this Settlement is fair, reasonable, adequate and equitable to the Settlement Class Members. However, a Class Member who validly opts out may rescind

that Opt-Out, and submit a Claim Form, at any time prior to the Final Approval Hearing. In this event, any such person shall be considered a member of the Class upon Final Approval, and Smirk's (on a pro rata basis) shall subtract from the Class Action Hold Back Amount and redeposit into the Fund the proper amount correlating to Smirk's determination of the estimated value of the previously opted-out claims, under Section 18.

23. The Settling Defendants or their respective Settling Insurers, shall pay into the Settlement Fund the balance of the Class Action Hold Back Amount not reasonably used by them to resolve Opt-Out claims or litigation by December 31, 2026, or once all of the Opt-Out claims or Opt-Out litigation are resolved, whichever date is later. Such balance shall be distributed to all Qualified Claimants on a pro rata basis within 30 days thereafter.

24. It is agreed that Smirk's and its insurers will hold back \$753,712.16 from the Citizens/Hanover policies for claims already made against the policies. Within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover shall provide the plaintiff with a written statement of the amounts paid, along with reference claim numbers used in the resolution of the unrelated pending claims against Smirk's, once all such claims are resolved. If any of the \$753,712.16 is not paid on those other claims, within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover will pay the remainder of the unpaid amount to the Qualified Settlement Fund and it will then be distributed to the members of the Class Action on a pro rata basis.

SETTLEMENT ADMINISTRATOR RESPONSIBILITIES AND COSTS

25. The Parties agree that Edgar Gentle of Gentle Turner & Benson, LLC will serve as the Settlement Administrator, and Mr. Gentle, and his firm will provide class notice and

administration services as provided in this Agreement. Class Counsel solicited bids from at least three qualifying firms and conferred before selecting a firm to serve as Settlement Administrator. If a Motion to Appoint Mr. Gentle as Settlement Administrator with the responsibilities and authority set forth in this Agreement is required, Plaintiffs will make such motion, and the Settling Defendants will not object.

26. The Settlement Administrator shall be responsible for, among other things, providing Notice as set forth in Section 7, administering the Settlement Website and the Qualified Settlement Fund; the Opt-Out and Objections process and reporting requirements; processing, evaluating, accepting or rejecting Claim Forms; and the determination and payment of Monetary Benefits under the Settlement Program described herein and in the Allocation Matrix, attached hereto as Exhibit F. The Settlement Administrator is authorized to communicate with Potential Settlement Class Members, including those who have opted out, about their potential claims and the operation and benefits of the Settlement Program.

27. To prevent the payment of fraudulent Claims and to pay only Valid Claims, the Settlement Administrator will use adequate and customary procedures and standards. The Settlement Administrator will use the Crumbles Information provided by Daily Harvest, as well as all information and documentation he deems relevant to analyze and evaluate claims submitted, including but not limited to, medical records and billing, other economic loss information, and written statements provided by Class Members and/or their individual counsel related to claims made within the Class Settlement, to assess the validity of Claims. If the Settlement Administrator or Parties detect or reasonably suspect any fraud, the Settlement Administrator may require additional information from any Person who has submitted a claim or deny claims the Settlement Administrator deems to be

fraudulent, subject to the supervision of the Parties and the ultimate oversight by the Court.

28. The Settlement Administrator will also undertake other administrative tasks in a rational, responsive, cost-effective, and timely manner, including forwarding to Class Counsel, with copies to Settling Defendants' Counsel, documents and other materials received in connection with the administration of the Settlement promptly upon receipt, and making available for inspection by Class Counsel and Settling Defendants' Counsel any documentation related to the Settlement submitted to the Settlement Administrator, and any correspondence related to the Settlement sent or received by the Settlement Administrator, at any time upon reasonable notice. The Settlement Administrator will provide reports respecting opt-out requests, objections, claims received, processed, and paid, deidentified under HIPAA, to Class Counsel and Settling Defendants' Counsel (at least) monthly, including, without limitation, reports regarding any requests for exclusion received from Class Members and will provide reports and settlement administration information related to opt-out requests, objections, claims processing, and payment processing, deidentified under HIPAA, to the Court as the Court may require, on a quarterly basis.

29. The Settlement Administrator shall keep all information received, including the identity and mailing addresses of the Potential Settlement Class Members, confidential. The Parties agree that this information may not be used for any purpose other than effectuating the terms of the Settlement or the duties or obligations arising hereunder.

30. The Settlement Administrator shall maintain reasonably detailed records of his activities under the Settlement, including all such records as are required by applicable law, in accordance with its normal business practices, which will be made available to the Parties upon request.

31. The Settlement Administrator will prepare invoices for review and approval by Class Counsel, the Settling Defendants' counsel and, if required, the Court. All fees and expenses incurred by the Settlement Administrator in connection with Notice and administering claims and performing the other tasks set forth in this Agreement will be paid from the Qualified Settlement Fund. The Settlement Administrator's total costs for class notice and class administration will be paid from the Settlement Fund, with up to \$500,000 allocated for this Settlement, on top of the \$500,000 previously allocated for the Daily Harvest-Stone Gate Foods Settlement, unless the Court explicitly orders otherwise. In all circumstances, such fees and expenses shall be paid solely from the Fund, and any remaining funds shall be distributed to claimants on a pro rata basis. Neither the Settling Defendants, Settling Insurers, nor any of their past, present, or future corporate affiliates shall be obligated to pay any additional settlement administration fees, expenses, costs, or disbursements in connection with this Settlement, other than the amounts expressly provided for in this Agreement.

SETTLEMENT PROGRAM

32. Subject to the rights and limitations set forth in this Agreement, every Settlement Class Member shall have the right to submit a Claim for a Monetary Benefit. A Claim shall be a Valid Claim only if submitted on the Claim Form, which may be accessed online, pursuant to and in compliance with the procedures set forth herein. Submission of a Claim, regardless of whether it is determined to be a Valid Claim, shall confer no rights or obligations on any Party, any Class Member, or any other Person, except as expressly provided herein. The Settlement Administrator shall establish an Allocation Matrix prior to the filing of the Preliminary Approval Motion, to be posted on the Settlement Website prior to when the Class Notice is sent, outlining

how Claims will be graded and paid, to be referenced in the Preliminary Approval Motion and the Class Notice. Within the same time frame, the Claim Form will also be posted on the Settlement Website.

33. At the election of the Class Member, a Claim Form may be submitted in paper via first class mail or online at the Settlement Website. If submitted by mail, a Claim Form must be postmarked or submitted online no later than the Claim Deadline. Class Members have sole responsibility for ensuring a mailed Claim Form is delivered to the Settlement Administrator, so Class Members who submit Claim Forms by mail may wish to do so by a means providing for proof of delivery. A Claim Form postmarked or submitted online after the Claim Deadline will not be a valid Claim and cannot be cured. For Claim Forms that are submitted online, the Class Member shall have the opportunity to upload Proof of Purchase image files (e.g., jpeg, tif, pdf). For the avoidance of doubt, each Class Member may file only a single Claim.

34. **Eligibility Requirements.** To be eligible for a Monetary Benefit, a Class Member must timely submit a completed Proof of Claim Form and all required documentation by the Claim Deadline. Qualified Class Members, as determined by the Settlement Administrator, shall receive a Benefit, provided the Proof of Claim Form and documentation submitted establish that the Claimant meets the following additional Eligibility Requirements:

Personal Injury Claim: (i) Proof of purchase through the Crumbles Information provided by Daily Harvest or other reliable information establishing that the Claimant, purchased, received, or consumed French Lentil + Leek Crumbles, and (ii) documentation or other reliable information, including, but not limited to, declaration(s) under penalty of perjury, supporting the allegation of damages

caused by the consumption of Crumbles; or

Monetary Damages Claim: (i) Proof of purchase through the Crumbles Information provided by Daily Harvest or other reliable information, establishing that the person whose injuries form the basis of the claim purchased, received, or consumed French Lentil + Leek Crumbles, and (ii) documentation or other reliable information, including, but not limited to, declaration(s) under penalty of perjury, supporting the allegation of monetary damages caused by that person's consumption of Crumbles.

35. **Relief to Qualified Class Members.** The Settlement Administrator shall determine the Monetary Benefit to be awarded to each Qualified Class Member pursuant to the Settlement Program described herein and the Allocation Matrix attached hereto as Exhibit F. Any amounts remaining in the Qualified Settlement Fund after the Settlement Administrator applies the Allocation Matrix, or any later payment of Hold-Back amounts back into the Fund, shall be paid to Qualified Class Members on a pro rata basis. As a result, the actual amount paid to Settlement Class Members may depend upon the number of Qualified Claims, and their merits.

36. **Cure Period Prior to Rejection of Timely Claim.** The Settlement Administrator shall receive and review Claim Forms and required documentation, if any. Claim Forms that do not meet the Eligibility Requirements shall be rejected. Prior to rejecting a timely submitted Claim, in whole or in part, the Settlement Administrator shall notify the Claimant in writing, by mail, first class postage pre-paid, to Claimant with an emailed copy to counsel for Claimant (if any) to give the Claimant (or counsel for Claimant) the chance to remedy any curable

deficiencies in the Proof of Claim Form within a period of twenty (20) days after such notice has been mailed or emailed.

37. **Appeal.** If any Claimant whose Claim has been rejected in whole or in part desires to contest such rejection, the Claimant must, within twenty (20) days, serve upon the Settlement Administrator a notice and statement of reasons indicating the Claimant's grounds for contesting the rejection along with any supporting documentation. The Settlement Administrator shall within twenty (20) days notify the Claimant of the Settlement Administrator's determination on the appeal. A Claimant who disagrees with the appeal ruling of the Settlement Administrator may appeal to the Court within fourteen (14) days of the Settlement Administrator's appeal determination by submitting a written statement to the Court at Attn: Hon. Judge Denise Cote, Case No. 1:22-cv-05443-DLC, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, outlining the Claimant's position and why the Claimant believes the Settlement Administrator has erred. The appeals process shall not result in any modification of substantive eligibility criteria. The Court shall issue a determination on the appeal in writing, which shall be served on the Claimant (and the Claimant's counsel, where applicable) and the Settlement Administrator. Decisions of the Court are final and binding, and Claimants have no further appeal rights beyond those set forth in this Settlement Agreement.

38. **Sole Remedy.** By submitting a Proof of Claim, a Claimant shall be deemed to have submitted to the jurisdiction of the Court with respect to the Claim, including, but not limited to, the terms of this Agreement and the releases provided for in the Judgment.

39. **Approved Class Claims List.** The Settlement Administrator's determination of

validity of Claims and Benefit amounts within a maximum of one hundred seven (107) days after the Final Approval Hearing. Following this determination, the Settlement Administrator shall provide Class Counsel and Settling Defendants' Counsel, subject to HIPAA requirements, with: (1) a list of Approved Class Member Claims ("Approved Claims List"); (2) a corresponding calculation of the total settlement payment approved by the Settlement Administrator for each Claim; and (3) upon request, the corresponding Proof of Claim Forms and required documentation, if any.

FINAL JUDGMENT AND SETTLEMENT APPROVAL ORDER

40. **Final Approval Order and Judgment.** No later than fourteen (14) days prior to the Final Approval Hearing, Plaintiff shall move for entry of an order of final approval, granting final approval of this Settlement and holding this Agreement to be final, fair, reasonable, adequate, and binding on all Settlement Class Members who have not excluded themselves as provided herein, and ordering that the settlement relief be provided as set forth in this Agreement, approving and ordering the releases as set forth in Section 56, and entering final judgment dismissing with prejudice all claims Class Members asserted in, or that they could have asserted in, this Litigation. The Final Approval Order shall, among other things, also:

- a) Dismiss Plaintiff's and the Settlement Class claims (including all individual claims and Settlement Class claims presented thereby) against the Settling Defendants on the merits and with prejudice, without fees or costs to any party;
- b) Bar and permanently enjoin all potential Settlement Class Members from
 - (i) filing, commencing, prosecuting, intervening in, or participating (as

Settlement Class Members or otherwise) in any lawsuit, arbitration or other legal proceeding in any jurisdiction based on or relating to the Released Claims;

- c) Without affecting the finality of the Final Approval Order for the purposes of appeal, retaining the Court's jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of this Agreement and the Final Approval Order, and for any other necessary purpose.
- d) Dismiss with prejudice all claims, crossclaims, and counterclaims by and between the plaintiffs, Daily Harvest, Stone Gate Foods, Smirk's, and Molinos that are pending in any court.

41. The Settling Defendants shall have no obligation to make separate filings in support of the Motion for Final Approval but shall appear at the hearing to confirm their agreement with the terms of the Settlement as provided herein.

42. **Effect of Non-Approval.** This Agreement is subject to and conditioned upon the issuance by the Court of the Final Approval Order, in substantially the same form as the proposed Final Approval Order attached as Exhibit D, that finally certifies the Settlement Class for the purposes of this Settlement, grants final approval of the Agreement, enters final judgment dismissing with prejudice the Plaintiff's and Settlement Class Members' claims and provides all other relief specified herein, which relief shall be subject to the terms and conditions of this Agreement and the Parties' performance of their continuing rights and obligations hereunder. If the Court does not enter the Final Approval Order in substantially the

same form as the proposed Final Approval Order attached as Exhibit D, the Settling Defendants shall have no obligation under this Agreement and the Parties will return to the status quo ante.

43. In the event that this Agreement is not approved by the Court in substantially its present form, any Objection to the Settlement is sustained by the Court, or the Settlement does not become final for any reason, including Termination pursuant to Section 80, the terms and provisions of this Agreement shall have no further force and effect with respect to the Parties or the Class Members, and shall not be used in this Action or in any other action, arbitration or proceeding for any purpose, and any order or judgment entered by the Court in accordance with the terms of this Agreement shall be treated as vacated, *nunc pro tunc*. In such event, this Agreement and all negotiations, proceedings, documents prepared, and statements made in connection with this Agreement shall be without prejudice to any Settling Party or Class Member and shall not be admissible or offered into evidence in any action or proceeding, and shall not be deemed, asserted, or construed to be an admission or confession by any Settling Party or any other person or entity of any fact, matter, or proposition of law, and shall not be used or asserted in any other manner or for any purpose, and all Settling Parties and Class Members shall stand in the same position as if this Agreement and Settlement had not been negotiated, made, or submitted to the Court.

44. **Funding.** Within twenty (20) business days after the Final Approval Order becomes final, where final means that the appeal period has passed, and no appeals have been filed or, if filed, such appeals have been dismissed, Molinos and the Settling Insurers, on behalf of Smirk's, shall send to the Settlement Administrator, to be paid into the Qualified Settlement Fund, the amount required for distribution.

45. The Settling Defendants' Payment pursuant to the Final Approval Order and Final Judgment shall be final and conclusive against all Settlement Class Members. All Settlement Class Members who have not opted out of the Settlement Class shall be bound by all terms of the Settlement, including the Final Judgment to be entered in this Action, and will be permanently barred and enjoined from bringing any action against the Settling Defendants or Released Parties with respect to any and all of the claims asserted in the Litigation.

USE OF SETTLEMENT FUND

46. The Settlement Fund shall be used to pay Administrative Expenses, and the remaining funds shall be distributed to Settlement Class Members according to the Settlement.

47. The Settlement Fund is intended to be a Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1. The Settlement Administrator, as administrator of the Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall be solely responsible for filing or causing to be filed all informational and other tax returns as may be necessary or appropriate (including, without limitation, the returns described in Treasury Regulation § 1.468B-2(k)) for the Settlement Fund. The Settlement Administrator shall also be responsible for causing payment to be made from the Settlement Fund of any Taxes owed with respect to the Settlement Fund. The Settling Defendants and Released Parties shall not have any liability or responsibility for any such Taxes. Upon written request, the Settling Defendants will provide to the Settlement Administrator the statement described in Treasury Regulation § 1.468B-3(e). The Settlement Administrator, as administrator of the Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall timely make such elections as are necessary or advisable to carry out this paragraph, including, as necessary, making a "relation

back election,” as described in Treasury Regulation § 1.468B-1(j), to cause the Qualified Settlement Fund to come into existence at the earliest allowable date, and shall take or cause to be taken all actions as may be necessary or appropriate in connection therewith.

48. All Taxes shall be timely paid out of the Settlement Fund, and without further order of the Court. Any taxes paid from the Settlement Fund and any tax returns prepared for the Settlement Fund (as well as the election set forth therein) shall be consistent with the previous paragraph and in all events shall reflect that all Taxes on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided herein. The Settling Defendants’ and Released Parties shall have no responsibility or liability for the acts or omissions of the Settlement Administrator with respect to the payment of Taxes.

49. Prior to the Effective Date, no disbursements shall be made out of the Settlement Fund except: (a) upon order of the Court; or (b) as provided in the Settlement. Prior to the Effective Date, the Settlement Administrator may pay from the Settlement Fund Administrative Expenses actually incurred and paid or payable, which shall not exceed \$100,000. After the Effective Date, the Settlement Administrator may pay from the Settlement Fund any additional, unpaid Administrative Expenses. The Settling Defendants and Released Parties are not responsible for, and shall not be liable for, any Administrative Expenses.

50. If the Effective Date does not occur, or if the Settlement is voided, terminated, or cancelled pursuant to the terms of the Settlement, Plaintiff and Class Counsel shall have no obligation to repay any of the Administrative Expenses that have been paid or incurred in accordance with Section 46. Any amounts remaining in the Settlement Fund after payment of Administrative Expenses incurred in accordance with Section 46, including all interest earned

on the Settlement Fund net of any Taxes, shall be returned to Settling Defendants. No other person or entity shall have any further claim whatsoever to such amounts.

51. No person or entity shall have any claim or cause of action against the Plaintiff, Class Counsel, the Settlement Administrator, or any other agent designated by Class Counsel arising from distributions made substantially in accordance with the Settlement, the manner of distribution of the Settlement Fund as approved by the Court, or any order of the Court.

52. The Settling Defendants and Released Parties shall have no responsibility for, interest in, or liability whatsoever with respect to distribution of the Settlement Fund, the payment or withholding of Taxes, the Settlement Administrator, Administrative Expenses, or any losses incurred in connection with the foregoing.

PAYMENT OF SETTLEMENT CHECKS

53. The Settlement Administrator shall mail Benefit Payment checks to Qualified Class Members as their respective liens are resolved, with the Settlement Administrator to pay liens. The checks must be cashed within six (6) months of the date of the mailing (the “Payment Period”). Any Qualified Class Member who does not cash his/her check within the Payment Period forgoes his/her claim to the Benefit Payment. Any proceeds from checks not cashed by the deadline shall become part of the Fund and distributed on a pro-rata basis to Class Members, if practicable, and if not practicable, shall be distributed as a *cy pres* Payment. Because the Settling Parties do not presently expect there to be a material number of uncashed checks (for multiple reasons, including that most Settlement Class Members are represented by counsel and because the Settlement Administrator will make payment options other than checks available to Settlement Class Members), the Settling Parties are not presently designating a *cy*

pres recipient. In the event there are uncashed checks, the Settling Parties will identify a *cy pres* recipient to the Court and move the Court to approve distribution of those funds to said recipient. No funds shall be returned to the Settling Defendants.

54. No deductions for taxes assessed to Claimants will be taken from any Benefit Payment at the time of distribution. Settlement Class Members are responsible for paying all taxes due on such Payments. All Benefit Payments shall be deemed to be paid solely in the year in which payments are actually issued. The Parties do not purport to provide legal advice on tax matters to each other or to Settlement Class Members. To the extent this Agreement, or any of its Exhibits or related materials, is interpreted to contain or constitute advice regarding any U.S. Federal or any state tax issue, such advice is not intended for use by and should not be used by any Person for the purpose of avoiding penalties under the Internal Revenue Code or any state tax laws.

ATTORNEY'S FEES AND CLASS COUNSEL EXPENSES

55. **Attorney's Fees.** Class Counsel and the attorneys for individual Class Members shall be compensated pursuant to the retainer agreements between Plaintiffs, Class Members, and their respective counsel (if any). Defendants acknowledge that various plaintiffs' counsel have contingent fee contracts with their respective individual clients. Defendants take no position regarding any existing contingency fee agreements and Class Counsel's application to the Court, if required, to approve as part of the Settlement the payment of legal fees pursuant to such retainer agreements. Neither the Settling Defendants nor any other Released Party shall have any responsibility for the payment of any Plaintiffs' or Class Members' past or future attorneys' fees

or costs. The Settlement Administrator shall make any Settlement Benefit owed to a Claimant payable in the name of the Claimant or their attorneys for the Claimant's benefit. Any division of a settlement payment between a Claimant and/or their respective counsel is to be determined by such persons and any such division, or any dispute in relation to such division, shall in no way affect the validity of this Agreement, any Release, or any Released Claim. If a Class Member is not represented by counsel and does not have an attorney lien resulting from previous representation relating to the Crumbles, then any Monetary Benefit awarded to said Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement. In effect, Class Counsel is requesting that the Court impute a 1/3 attorney's fee award for any Monetary Benefit paid to Unrepresented Claimants; however, that the value of said fee award be deposited back into the Settlement Fund for the common benefit of all Claimants. Class Counsel submits that the proposed 1/3 reduction represents a fair method of allocating the Settlement Funds to Unrepresented Claimants and treats each Class Member equitably.

RELEASES

56. Upon the entry of a Final Approval Order and without any further action by the Court or by any Party to this Agreement, Class Members (including Plaintiff), and any person claiming rights derivative of any Class Member as their spouse, parent, child, heir, guardian, associate, co-owner, attorney, agent, administrator, trustee, executor, devisee, predecessor, successor, assignee, assign, beneficiary, representative of any kind, shareholder, partner, director, employee, and any other person claiming by, through or on behalf of them, shall be deemed by

operation of law and the Final Judgment to have fully, finally, and forever released, relinquished, waived, discharged and dismissed the Settling Defendants and Released Parties from all Released Claims (including, without limitation, any unknown claims), as well as any claims arising out of, relating to, or in connection with, the prosecution, defense, mediation, arbitration, settlement, disposition, or resolution of the Action, Litigation or the Released Claims.

57. Upon the entry of a Final Approval Order, and without any further action by the Court or any Party to this Agreement, the Settling Defendants agree to release each other, as well as their officers, directors, owners, employees, shareholders, assigns, corporate affiliates, attorneys, and insurers from any and all liability, claims, damages, hold harmless agreements, indemnity obligations, contractual obligations, common law claims, settlements or judgments arising out of or relating to the Action, Litigation, and the Released Claims.

58. Without limiting the foregoing, the Releases specifically extend to any claims, that Class Members do not know or suspect to exist in their favor at the time that the Settlement, and the Releases contained herein, become effective, and Class Members waive any and all provisions, rights, and benefits conferred by any law of any state of the United States, or principle of common law or otherwise, which is similar, comparable, or equivalent to section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

59. Class Members understand and acknowledge the significance of these waivers of California Civil Code section 1542 and any other applicable federal or state statute, case law,

rule, or regulation relating to limitations on releases. In connection with such waivers and relinquishment, Class Members acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Litigation, but that it is their intention to release fully, finally, and forever all Released Claims with respect to the Settling Defendants and Released Parties, and in furtherance of such intention, the release of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

60. Class Members shall be deemed to have agreed that the release set forth herein will be and may be raised as a complete defense to and will preclude any action, arbitration or proceeding based on the Released Claims. The Final Approval Order shall further provide for and effect the release of all actions, causes of action, claims, administrative claims, demands, debts, damages, costs, attorneys' fees, obligations, judgments, expenses, compensation, or liabilities, at law or in equity, whether now known or unknown, suspected or unsuspected, contingent or absolute, whether existing now or arising in the future, whether asserted or that could or might have been asserted, that constitute Released Claims.

61. Certain Class Members have entered into one or more Tolling Agreements regarding the tolling of the statute of limitations applicable to any claim or potential claim or defense relating to their consumption of French Lentil + Leek Crumbles. It is agreed that upon Final Approval, all Tolling Agreements shall be deemed terminated and of no further force or effect, notwithstanding any termination provision contained in any such Tolling Agreement. It is specifically agreed that this Paragraph 61 contained in this Agreement supersedes any

termination provision or process specified in all such Tolling Agreements.

62. Notwithstanding the above, the Court shall retain exclusive jurisdiction over the Settling Parties and the Agreement with respect to the future performance of the terms of the Agreement, and to assure that all payments and other actions required of any of the Parties by the Settlement are properly made or taken.

RESPONSIBILITY FOR LIENS AND AGREEMENT TO INDEMNIFY

63. Class Members represent and warrant that, where necessary, they have obtained or will promptly obtain, the written consent and approval for settlement in connection with, and agree to assume responsibility for, all liens or subrogation rights being asserted by all persons, entities, businesses, firms, corporations or government entities who have given notice of any liens, subrogation claims, or rights to reimbursement, including, but not limited to, attorneys, public health insurers, including Medicare, the Center for Medicare & Medicaid Services, Medicaid, and/or private health insurers relating to medical care provided as a result of or arising in connection with the subject matter of the Litigation, whether past, present or future, known or unknown, by any person, entity, business, firm, corporation or government entity or agency as a result of, or arising in connection with the Released Claims, including, but not limited to, medical expenses paid for or reimbursed by others. Class Members acknowledge that each of them is solely responsible for the payment of any such liens from the proceeds of this settlement and further warrants that all such subrogation and lien payments due and owing will be their sole and exclusive responsibility.

64. Class Members are solely responsible for the payment of any such Medicare, Medicaid, and/or any other conditional lien from the proceeds of this settlement and further

agrees to pay Medicare, Medicaid, and/or any other public payor or private insurer to fully and finally satisfy any liens or interests, including those pursuant to the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b), and implementing regulations, 42 C.F.R. §§ 411.20 et seq., and warrant that all payments due and owing to Medicare, Medicaid, and/or any other payors or insurers are and will be the sole and exclusive responsibility of each Class Member.

65. Class Members will defend, indemnify and hold harmless the Settling Defendants and Released Parties for any and all amounts paid and/or sought by Medicare, Medicaid and/or private insurers from the Settling Defendants or Released Parties, and further agree to ensure that all other procedures required by Medicare, Medicaid, and/or private insurers are followed in order to protect the Settling Defendants and Released Parties from claims for healthcare expense reimbursement.

66. Class Members will defend, indemnify and hold harmless the Settling Defendants and Released Parties from any other claims or liability as a result of or arising in connection with the subject matter of the Litigation, including any subrogation or other claims or liability arising from any claim, demand or cause of action asserted by any other public or private health insurers, medical providers or others for contribution or indemnity, or otherwise in connection with medical care arising in connection with the subject matter of the Litigation.

67. Class Members will defend, indemnify and hold harmless the Settling Defendants and Released Parties from any claims or actions for state or federal income taxes or additions to tax, and any interest or penalty thereon, or claims or liabilities arising from such taxes incurred by or asserted, arising out of Benefits paid to Class Members.

REPRESENTATIONS AND WARRANTIES

68. The Settling Parties each represent, warrant and agree as follows:

69. Each Settling Party has had the opportunity to receive, and has received, independent legal advice from his or her or its attorneys regarding the advisability of making the Settlement, the advisability of executing this Agreement, and the legal and income tax consequences of this Agreement, and fully understands and accepts the terms of this Agreement.

70. The Settling Defendants represent and warrant: (i) that they have the requisite corporate power and authority to execute, deliver, and perform the Agreement and to consummate the transactions contemplated hereby; (ii) that the execution, delivery, and performance of the Agreement and the consummation by them of the actions contemplated herein have been duly authorized by necessary corporate action on the part of the Settling Defendants; and (iii) that the Agreement has been duly and validly executed and delivered by each Settling Defendant and constitutes its legal, valid, and binding obligations.

71. Plaintiff represents and warrants that she is entering into the Agreement on behalf of herself individually and as a proposed Class Representative of her own free will and without the receipt of any consideration other than what is provided in the Agreement or disclosed to, and authorized by, the Court. As Class Representative, she represents and warrants that she has reviewed the terms of the Agreement in consultation with Class Counsel and believes them to be fair and reasonable, and covenants that she will not file an Opt-Out request from the Settlement Class or object to the Agreement.

72. Plaintiff represents and warrants that no portion of any claim, right, demand, action, or cause of action against any of the Settling Defendants or Released Parties that she has

or may have arising out of the Action or pertaining to her claims in this Litigation, including as the Class Representative, and no portion of any recovery or settlement to which she may be entitled, has been assigned, transferred, or conveyed by or for in any manner; and no other person has any legal or equitable interest in the claims, demands, actions, or causes of action referred to in this Agreement.

73. No Party relies or has relied on any statement, representation, omission, inducement, or promise of the other party (or any officer, agent, employee, representative, or attorney for any other party) in executing this Agreement or entering the Settlement provided for herein, except as expressly stated in this Agreement.

MISCELLANEOUS PROVISIONS

74. **Arm's-Length Negotiations.** The determination of the terms and conditions contained herein and the drafting of the provisions of this Agreement have been by mutual understanding after negotiation, with consideration by, and participation of, the Parties hereto and their counsel and under the supervision of, and upon specific recommendations provided by, the Honorable Sarah L. Cave.

75. **Entire Agreement.** This Agreement, together with the Exhibits hereto, constitutes the entire agreement between the Parties with respect to the subject matter of the Settlement and supersedes all prior negotiations, communications, memoranda, and agreements between the Parties (including, but not limited to, the Term Sheet). Neither Plaintiff nor the Settling Defendants is entering into this Agreement in reliance upon any representations, warranties, or inducements other than those expressly contained in this Agreement.

76. **Construing the Agreement.** This Agreement shall not be construed more

strictly against one Party than another merely by virtue of the fact that it may have been initially drafted by counsel for only one of the Parties. It is recognized that this Agreement is the result of arm's-length negotiations between the Parties, and it is acknowledged that all Parties have contributed substantially to the preparation of this Agreement. Accordingly, the doctrine of *contra proferentum* shall not apply in construing this Agreement, nor shall any other such similar doctrine be applicable.

77. **Plaintiff's Authority.** Plaintiff's Counsel and Class Counsel represent and warrant that they are authorized to take all appropriate actions required or permitted to be taken by or on behalf of either Plaintiff or, subsequent to an appropriate Court Order, the Settlement Class, in order to effectuate the terms of this Agreement and are also authorized to enter into appropriate modifications or amendments to this Agreement on behalf of Plaintiff and, subsequent to an appropriate Court Order, the Class Members.

78. **Notices.** All notices to the Parties and their counsel provided for herein shall be sent by email with a hard copy sent by overnight mail to:

(a) If to the Settlement Class Representatives or Class Counsel:

William D. Marler, Esq.
Marler Clark Inc., PS
180 Olympic Dr. SE
Bainbridge Island, WA 98110
Tel: (206) 346-1890
bmarler@marlerclark.com

James R. Peluso, Esq.
Dreyer Boyajian
75 Columbia Street
Albany, NY 12210
Tel: (518) 463-7784
jpeluso@dblawnny.com

Paul V. Nunes, Esq.

Heisman Nunes & Hull LLP
1630 Empire Blvd., Suite 3B
Webster, NY 14580
Tel: (585) 270-6201
PNunes@HNHattorneys.com

Joseph E. O'Connor, Esq.
O'Connor & Partners, PLLC
255 Wall Street
Kingston, NY 12401
Tel: (845) 303-8777
JOConnor@onplaw.com

Jeffrey A. Bowersox, Esq.
Bowersox Law Firm, P.C.
385 1st Street, Suite 215
Lake Oswego, OR 97034
Tel: (503) 452-5858
jeffrey@bowersoxlaw.com

(b) If to Settling Defendants:

Counsel for Smirk's Ltd.
Scott Haworth
Jennifer Bruder
Haworth Barber & Gerstman, LLC
777 Third Avenue, Suite 2104
New York, NY 10017
Tel: (201) 831-1405
scott.haworth@hbandglaw.com
jennifer.bruder@hbandglaw.com

Counsel for Molinos Asociados SAC
Michael P. Collins, Esq.
Bond Schoeneck & King, PLLC
10 Bank Street, Suite 1120
White Plains, NY 10606
Tel: (914) 306-7870
collinm@bsk.com

(c) If to the Settlement Administrator

Edgar C. Gentle III
Gentle Turner & Benson, LLC
P.O. Box 361930
Hoover, AL 35236-1930

Tel: (205) 716-3000
egentle@gtandslaw.com
crumblesettlement@gtandslaw.com

79. **Modification, Court Approval, Extensions.** This Agreement is not subject to modification without the written consent of the Settling Parties and approval of the Court; provided, however, that, after entry of the Final Approval Order, the Settling Parties may by agreement effect such modification of this Agreement and its implementing documents (including all exhibits hereto) without notice to or approval by the Court if such changes are consistent in all material respects with the Court's Final Approval Order or do not limit the rights of Settlement Class Members. The Settling Parties also reserve the right, subject to the Court's approval, to make any reasonable extensions of time that might be necessary to carry out any of the provisions of this Agreement.

80. **Termination of Agreement.** The Settling Defendants and the Plaintiff each have the right to terminate this Settlement if: (i) the Class Action Hold Back Amount exceeds ten (10) percent of the Qualified Settlement Fund and that Settling Parties cannot, in good faith, reach agreement on a Class Action Hold Back Amount exceeding ten (10) percent of the Fund; (ii) the Court, or any appellate court(s), rejects, modifies or denies approval of any portion of this Agreement or the proposed settlement that the terminating party in its (or their) sole judgment and discretion believes is material; or (iii) the Court, or any appellate court(s), does not enter or completely affirm, or alters or expands, any portion of the Final Approval Order, or any of the Court's findings of fact or conclusions of law, that the terminating party in its (or their) sole judgment and discretion believes is material. The terminating party must exercise the option to withdraw from and terminate this Agreement, as provided in this paragraph no later

than twenty (20) days after receiving notice of the event described in this paragraph. If the Agreement is terminated, then the Agreement, its terms, and its exhibits shall be null and void and shall have no force or effect, no party shall be bound by any of its terms (except for the terms of this Paragraph) and the Agreement shall not be admissible in any further or different proceedings.

81. **Evidentiary Preclusion.** Whether or not the Settlement, as embodied in this Agreement, is approved by the Court, and whether or not this Settlement is consummated, the fact and terms and of this Settlement, including the exhibits annexed hereto, the Settlement embodied within it, all negotiations, discussions, drafts, and proceedings in connection with this Settlement, and any act performed, or document signed in connection therewith:

(a) Shall not be offered or received against the Settling Defendants or Released Parties, Plaintiff or the other Class Members as evidence of, or be deemed to be evidence of, any presumption, concession or admission by any of the Settling Defendants or Released Parties or by Plaintiff or the other Class Members with respect to the truth of any fact alleged by Plaintiff or the validity, or lack thereof, of any claim that has been or could have been asserted in the Action or Litigation, or the deficiency of any defense that has been or could have been asserted in the Action or Litigation, or of any liability, fault or wrongdoing of the Settling Defendants or Released Parties;

(b) Shall not be offered or received against the Settling Defendants or Released Parties as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any Settling Defendants, or against Plaintiff or any of the other Class Members as

evidence of any infirmity in the claims of Plaintiff and the other Class Members;

(c) Shall not be offered or received against the Settling Defendants or Released Parties, Plaintiff or the other Class Members as evidence of a presumption, concession, or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the foregoing parties, in any arbitration proceeding or other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of this Settlement; provided, however, that if the Settlement is approved by the Court, the Settling Defendants and Released Parties may refer to this Settlement to effectuate the protection from liability granted them hereunder or in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar, reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(d) Shall not be construed against the Settling Defendants, Released Parties, Settling Defendants' Counsel, or Plaintiff or the other Class Members or Class Counsel as an admission or concession that the consideration to be paid hereunder represents the amount which could be or would have been recovered after trial; and

(e) Shall not be construed as or received in evidence as an admission, concession or presumption against Plaintiff or the other Class Members or any of them that any of their claims are without merit or that damages recoverable under the Complaint would not exceed the benefits available to them in this Settlement.

82. **Exhibits.** All of the Exhibits hereto are incorporated herein by reference as if set forth herein verbatim, and the terms of all attachments are expressly made a part of this

Agreement. In the event of any variance between the terms of this Agreement and any of the Exhibits hereto, the terms of this Agreement shall control and supersede the Exhibit(s).

83. **Waiver.** The waiver by any Settling Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior or subsequent to, or contemporaneous with, this Agreement.

84. **Tax Consequences.** No opinions concerning the tax consequences of the proposed personal injury settlement to individual claimants or class members is given or will be given by the Settling Defendants, Plaintiff, attorneys for individual Class Members, or Class Counsel, nor are any representations in this regard made by virtue of this Agreement. Each Class Member's (including their counsel's) tax obligations, if any, and the determination thereof, are the sole responsibility of the Class Member, and the tax consequences, if any, may vary depending on the particular circumstances of each individual Class Member.

85. **Media Communications.** Except as required by the Settling Parties or in accordance with applicable law, rule, or regulation (e.g., securities law, rules, or regulations), or any other exception expressly provided herein, to avoid contradictory, incomplete, false or confusing information about the Settlement, the Parties, Class Members and their Counsel agree that if they intend to make any written press releases, disclosures on their websites, or statements to the media or on social media about or that reference the terms of the Settlement or the Litigation, unless such releases or statements are identical to statements contained in this Agreement or the Exhibits, such releases or statements must be approved in writing by all of the other Parties in advance and, where desired by any other Party, made jointly. Any Party may respond to inquiries initiated by the media, and in doing so may decline to comment, but

otherwise shall only refer the inquiring entity to the Class Notice, a statement approved by the other Party, or other truthful statements already in the public domain. Nothing provided herein shall prevent the Parties or Class Members from communicating with immediate family members, accountants, investors, or lenders about the Settlement or the Litigation without prior approval.

86. **Protective Orders.** All orders, settlement agreements and designations regarding the confidentiality of documents and information (“Protective Orders”) remain in effect, and all Parties, Class Members and their counsel remain bound to comply with the Protective Orders, including the provisions to certify the destruction of “Confidential” documents.

87. **Binding on Successors.** This Agreement shall be binding upon the heirs, executors, administrators, successors, and assigns of the Plaintiff, Settlement Class Members, and Settling Defendants.

88. **Cooperation in Effecting Settlement.** The Parties and their counsel agree to recommend approval of this Settlement Agreement to the Court and to undertake their commercially reasonable efforts in good faith, including all steps and efforts contemplated by this Settlement Agreement and any other steps and efforts that may be necessary or appropriate to secure prompt Final Settlement Approval and otherwise carry out the terms of this Settlement Agreement. The Parties and their counsel agree to prepare and execute any additional documents that may reasonably be necessary to effectuate the terms of this Agreement. The Parties shall cooperate with the Settlement Administrator to the extent reasonably necessary to assist and facilitate the Settlement Administrator in carrying out its duties and responsibilities.

89. **Obligation to Conclude Settlement.** The obligation, although not the ability, of the Parties to conclude the proposed settlement is and will be contingent upon each of the following:

- (a) Execution of this Agreement by the Parties;
- (b) Entry by the Court of Preliminary Approval of the Settlement;
- (c) Entry by the Order of Final Approval of the Settlement, in substantial compliance with the order submitted to the Court, which the time to appeal has expired or which has remained unmodified after any appeal(s); and
- (d) Any other conditions stated in this Agreement.

90. **Governing Law.** This Agreement and any ancillary agreements shall be governed by, and interpreted according to, the law of the State of New York.

91. **Forum for Enforcement of Settlement.** Any action to enforce this Agreement shall be commenced and maintained only in the United States District Court for the Southern District of New York. If any Settlement Class Member hereafter sues or commences an arbitration against the Settling Defendants for the purpose of enforcing any claims that are released under this Agreement, this Agreement shall be and constitute a complete defense thereto.

92. **Attorneys' Fees.** Notwithstanding any of the provisions herein, if any Party finds it necessary to institute legal proceedings to enforce another Party's obligation under this Agreement, the prevailing Party in any such action shall be entitled to recover its reasonable and necessary attorneys' fees and costs.

93. **Parties Bound.** This Agreement shall be binding upon and inure to the benefit

of the Plaintiff, all Potential Settlement Class Members, Class Counsel, the Settling Defendants, and the respective heirs, successors and assigns of each of the foregoing.

94. **Authorization of Signatories.** The undersigned counsel for Plaintiff represents that (i) they are Qualified to enter into this Agreement on behalf of the Plaintiff and prospective Class Representative, and (ii) they are seeking to protect the interests of the entire Settlement Class. The undersigned counsel for the Settling Defendants represent that they are Qualified to enter into this Agreement on behalf of the Settling Defendants.

95. **Agreement Executable in Counterparts.** This Agreement may be executed in counterparts, and, when so executed, shall constitute a binding original; each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Electronic signatures or signatures sent by email shall be deemed original signatures and shall be binding.

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed, by their duly authorized attorneys, as for the date stated above:

FOR PLAINTIFFS: MARLER CLARK, INC. P.S.



Name: William D. Marler

Dated: October 7, 2024

FOR PLAINTIFFS: BOWERSOX LAW FIRM, P.C.



Name: Jeffrey Bowersox

Dated: October 7, 2024

FOR PLAINTIFFS: DREYER BOYAJIAN LLP



Name: James R. Peluso

Dated: October 7, 2024

FOR PLAINTIFFS: HEISMAN NUNES & HULL LLP



Name: Paul Nunes

Dated: October 7, 2024

FOR PLAINTIFFS: O'CONNOR & PARTNERS, LLP



Name: Joseph E. O'Connor

Dated: October 7, 2024

FOR SMIRK'S LTD.: HAWORTH BARBER & GERSTMAN, LLC



Name: Scott Haworth

Dated: October 7, 2024

FOR MOLINOS: BOND SCHOENECK & KING, PLLC



Name: Michael Collins

Dated: October 7, 2024

4873-6909-4630, v. 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BREEANNE BUCKLEY PENI, individually
and on behalf of all others similarly situated,

Plaintiff,

v.

DAILY HARVEST, INC. and SECOND BITE
FOODS, INC. d/b/a “STONE GATE FOODS”,
SMIRK’S LTD., and MOLINOS ASOCIADOS
SAC,

Defendants.

[PROPOSED] THIRD AMENDED
CLASS ACTION COMPLAINT

Civil Case No. 1:22-cv-05443-DLC

JURY TRIAL DEMANDED

Plaintiff, by and through her undersigned attorneys, as and for her class action complaint, alleges as follows.

I. INTRODUCTION

1. Plaintiff brings this action against defendants for personal injuries arising out of an outbreak of gastrointestinal illness related to a certain food product containing tara flour that was manufactured, produced, prepared, packaged, marketed, sold and/or distributed by defendants, namely known as “French Lentil + Leek Crumbles” under the brand name Daily Harvest.

II. JURISDICTION

2. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) because this is a class action involving more than 450 putative class members, some of whom are citizens of states diverse from defendants, and the amount in controversy exceeds \$5,000,000, exclusive of costs and interest.

3. This Court has personal jurisdiction over defendants because defendants maintain their principal place of business in this district, regularly and systematically transacted business in this district, contracted to supply goods or services in this district, the wrongful conduct complained of in this complaint occurred in this district, and/or defendants committed tortious acts outside of this district that caused injury to persons, including plaintiff, within this district.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because plaintiff and one or more defendants reside in this district, a substantial part of the events or omissions giving rise to the complaint occurred in this district, and defendants are subject to personal jurisdiction in this district.

III. PARTIES

5. Plaintiff Breeanne Buckley Peni is an individual residing in Dutchess County, State of New York.

6. Defendant Daily Harvest, Inc. (“Daily Harvest”) is corporation organized and existing under the laws of the State of Delaware with a principal place of business in this District, and registered with the New York State Department State as having a principal executive office located at 37 West 20th Street, Suite 1101, New York, NY 100111.

7. Defendant Second Bite Foods, Inc. d/b/a Stone Gate Foods (“Stone Gate Foods”) is a corporation existing under the laws of the State of Minnesota with a principal place of business located at 5365 Shore Trail NE, Prior Lake, Minnesota 55372.

8. Defendant Smirk’s Ltd. (“Smirk’s”) is a limited liability company formed under the laws of the State of Colorado with its principal place of business located at 17601 US Highway 34, Fort Morgan, CO 80701.

9. Defendant Molinos Asociados SAC (“Molinos”) is a Peruvian company owned by Herbert Telge, with a principal place of business located at Calle 2 Mz.N Lt.4 Las Vertientes, Villa El Salvador, Lima, Peru.

IV. FACTUAL BACKGROUND

A. Defendant Daily Harvest

10. Defendant Daily Harvest operates as a direct-to-customer food brand in the United States.

11. Daily Harvest markets its food as being organic, clean, healthy, easy to prepare, and ready in minutes, while staying earth friendly.¹

12. Defendant Daily Harvest advertises that it provides a “Chef-crafted meal delivery that starts with good, clean food! Built on fruits + vegetables. Farm-froze to lock in nutrients and flavor.”²

13. Daily Harvest’s website advertises its products and services to consumers as “A Better Food System,” “From Seed to Plate” and that “We Got You.”³

14. Defendant Daily Harvest states that its food products are grown in organic soil that is bio-diverse, resulting in healthier soil, more nutrient-dense foods, and less carbon in the atmosphere.⁴

¹ Daily Harvest, *What We Eat and How its Grown Matters*, <https://www.daily-harvest.com/about> (last accessed June 27, 2022).

² Google search result for “Daily Harvest,” https://www.google.com/search?q=daily+harvest&rlz=1C1GCEA_enUS972US972&oq=daily+harvest&aqs=chrome.0.69i59j46i131i199i433i465i512j69i59l2j0i3j0i131i433j0i131i433i512j0i433i512j0i3j0i433i512.2640j1j15&sourceid=chrome&ie=UTF-8 (last accessed June 27, 2022).

³ *Id.*

⁴ Daily Harvest, *What We Eat and How its Grown Matters*, <https://www.daily-harvest.com/about> (last accessed June 27, 2022).

15. Daily Harvest markets its products as being chef-crafted food built on sustainably sourced fruits and vegetables that are grown using organic agriculture and chemical free practices, and made without sources of dairy, gluten, gums, fillers, or any type of artificial product.⁵

16. Daily Harvest states that it works with farmers directly to ensure the most sustainable and healthy products for their customers and to help transition farmed land from conventional to organic with increased biodiversity.⁶

17. Defendant Daily Harvest represents on its website that “[w]e freeze our ingredients at peak ripeness, typically within 24 hours of harvest, to lock in flavor and nutrients, reduce food waste, and eradicate the need for additives or harmful preservative.”⁷

B. Defendant Stone Gate Foods

18. Defendant Stone Gate Foods, according to its website, is a “specialty food manufacturer” that has served “retail, food service and private label companies throughout the country for the last 44 years.”⁸

19. Stone Gate Foods’ website states that: “Specializing in frozen foods, our proven expertise in specialty food development and manufacturing has made us the go-to co-packaging facility and private label manufacturer for top brands throughout the United States.”⁹

20. Stone Gate Foods advertises that its “40,000 square-foot flexible manufacturing facility specializes in the production of a wide variety of both ready-to-eat and ready-to-cook frozen food products for Private Label and Contract Manufacturing.”¹⁰

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See <https://stonegate-foods.com/> (last accessed August 15, 2022).

⁹ *Id.*

¹⁰ *Id.*

21. Defendant Stone Gate Foods represents on its website that “WE MAKE SAFETY A PRIORITY.”¹¹

22. Stone Gate states that “All of our products are developed by professional chefs and are carefully crafted using the very best ingredients. From homestyle to bistro, barbecue to bar food, food brands trust Stone Gate Foods to create extraordinary products of the highest quality.”¹²

C. Defendant Smirk’s

23. Defendant Smirk’s owns and operates a specialty product supply shop, and at all times relevant, supplied tara flour to Defendant Second Bite for use in manufacturing the French Lentil + Leek Crumbles product that was identified as the source of the subject outbreak and was the cause of Plaintiff’s illness and injuries.

24. Smirk’s unlawfully imported the tara flour, sourced from Molinos Asociados, into the United States.

D. Defendant Molinos Asociados

25. Defendant Molinos was a processor and distributor of tara products. Molinos manufactured and distributed the subject tara flour, which was the source of the subject outbreak, to Defendant Smirk’s at its principal place of business in Fort Morgan, Colorado.

E. Daily Harvest French Lentil + Leek Crumbles

26. At the end of April 2022, defendant Daily Harvest introduced a new plant-based protein line of foods intended to be a substitute for ground meat, of which one of the new products was “French Lentil + Leek Crumbles.”¹³

¹¹ *Id.*

¹² See <https://stonegate-foods.com/brands/> (last accessed August 15, 2022).

¹³ Dani Blum, *Daily Harvest Recalls Lentil and Leek Crumbles After Consumers Fall Ill*, THE NEW YORK TIMES (June 24, 2022) available at: <https://www.nytimes.com/2022/06/24/well/eat/daily-harvest-recalls-meat-substitute.html>.

27. Defendant Stone Gate Foods manufactured and/or produced the food product known as “French Lentil + Leek Crumbles” that was sold and distributed by Daily Harvest.

28. Upon information and belief, the ingredients of the French Lentil + Leek Crumbles included lentil, butternut squash, hemp seed, quinoa, cremini and tara flour.

29. On or about June 19, 2022, defendant Daily Harvest stated on its website that the company had received reports of French Lentil + Leek Crumbles causing gastrointestinal issues.¹⁴

30. The French Lentil + Leek Crumbles is a frozen product packaged in a 12oz white pouch with the words “Daily Harvest” at the top, a large “CRUMBLES” immediately below the top and the words “French Lentil + Leek” in bold, as shown below:



Figure 1

¹⁴ Daily Harvest, <https://www.daily-harvest.com/content/french-lentil-leek-crumbles-advisory#> (last accessed June 27, 2022).

31. Daily Harvest told customers “to dispose of the product and not eat it.”¹⁵

32. On June 23, 2022, defendant Daily Harvest announced that it was recalling its French Lentil + Leek Crumbles due to consumer reports of gastrointestinal illness.

33. According to defendant Daily Harvest, all lot codes of the French Lentil + Leek Crumbles are affected by the recall.

34. Defendant updated its website to include the following statement:

Published June 23, 2022 at 6:10PM ET

Daily Harvest has voluntarily recalled all French Lentil + Leek Crumbles due to consumer reports of gastrointestinal illness and potential liver function issues.

From April 28 to June 17, 2022, approximately 28,000 units of the recalled product were distributed to consumers in the continental United States through online sales and direct delivery, as well as through retail sales at the Daily Harvest store in Chicago, IL and a “pop-up” store in Los Angeles, CA. Samples were also provided to a small number of consumers. Daily Harvest directly notified by email those consumers who were shipped the affected product, and other consumers for whom the company had contact information, and consumers were issued a credit for the recalled product.

Consumers who may still have the recalled product in their freezers should immediately dispose of it.

French Lentil + Leek Crumbles is a frozen product packaged in a 12oz white pouch with the words “Daily Harvest” at the top, a large “CRUMBLES” immediately below the top and the words “French Lentil + Leek” in bold, as shown below. All lot codes of the French Lentil + Leek Crumbles are affected. No other Daily Harvest products are affected or part of this recall.

To date, the company has received approximately 470 reports of illness or adverse reactions. Consumer safety is our highest priority, and we have taken immediate steps to stop production and distribution of the product and conduct a root cause investigation, which is ongoing.

This recall is being made in cooperation with the U.S. Food and Drug Administration. Consumers who have questions or would like to report adverse reactions should contact Daily Harvest by email at crumbles-recall@daily-harvest.com or by visiting <https://www.daily-harvest.com/content/french-lentil->

¹⁵ *Id.*

leek-crumbles-advisory# or by calling 1-888-302-0305 9am – 9pm Eastern Time, 7 days a week.¹⁶

35. On July 19, 2022, Daily Harvest announced that it had identified the ingredient “tara flour” as the cause of the gastrointestinal illness outbreak.

36. Daily Harvest’s website update as of July 19, 2022, stated in bold typeface:

At this time, we have identified tara flour as the cause of the issue. Our extensive investigation has involved many experts analyzing data from all sources. We have only used this ingredient in French Lentil + Leek Crumbles and we are no longer sourcing from this producer who does not provide any ingredients for our 140+ other items. This was the first and only time we’ve used tara flour, which has been available and used in the North American market as a plant-based source of protein prior to our use. Our investigation team will continue working with the FDA, the tara flour producer and others to help determine what specifically made people sick.¹⁷

F. Plaintiff’s Injury

37. At all relevant times, plaintiff Breeanne Buckley Peni purchased and consumed French Lentil + Leek Crumbles that were prepared, marketed, sold and distributed by defendant Daily Harvest.

38. Plaintiff first subscribed to defendant Daily Harvest’s meal delivery products in or about May 2022.

39. In May 2022, plaintiff made an online purchase of the French Lentil + Leek Crumbles from Daily Harvest.

40. Said food product was delivered to plaintiff on or about May 24, 2022.

41. Plaintiff last consumed the French Lentil + Leek Crumbles on or about June 10, 2022.

¹⁶ Daily Harvest, <https://www.daily-harvest.com/content/french-lentil-leek-crumbles-advisory#>.

¹⁷ Daily Harvest, <https://www.daily-harvest.com/content/french-lentil-leek-crumbles-advisory#>.

42. After consuming “French Lentil + Leek Crumbles” plaintiff became violently ill with gastrointestinal illness and was hospitalized.

43. Plaintiff’s initial symptoms included fever, nausea, extreme abdominal pain, chills and joint pain.

44. On or about June 12, 2022, plaintiff was hospitalized.

45. As a result of her illness from consuming French Lentil + Leek Crumbles made with tara flour, plaintiff suffered gastrointestinal injury that required surgery to remove her gallbladder.

46. Plaintiff remained hospitalized until being discharged on or about June 17, 2022.

47. As a direct and proximate result of the foregoing, plaintiff suffered general and special, incidental, and consequential damages which shall be fully proven at the time of trial, including, but not limited to both past and future damages for: bodily injury, pain and suffering, loss of enjoyment of life, risk of future injury, medical and medical related expenses, travel and lodging related expenses, lost wages, emotional distress and other ordinary, incidental and consequential damages as would be anticipated to arise under the circumstances.

V. CLASS ALLEGATIONS

48. Plaintiff repeats and realleges the paragraphs above as if fully set forth herein.

49. Plaintiff brings this action on behalf of herself and under Fed. R. Civ. P. 23 (a), (b)(1), (b)(2) and (b)(3) as representative of a class of persons who are asserting claims for personal injuries against defendants caused by the recall of contaminated French Lentil + Leek Crumbles.

50. Plaintiff proposes a Nationwide Class defined as follows:

All persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles (“the Product” or “the Crumbles”) and directly suffered personal injuries caused by the consumption of the Crumbles, and all persons

in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles.

51. Excluded from the Classes are defendants, their officers, directors, current employees, subsidiaries, corporate affiliates, successors or assigns and the judicial officers assigned to this case and their immediate family members.

52. Plaintiff reserves the right to modify or amend the Class definitions, as appropriate, during the course of this litigation.

53. The exact number of members of the class, as identified above, is not known to plaintiff, but upon information and belief, exceeds 450 persons and is sufficiently numerous such that joinder of individual members herein is impracticable.

54. Upon information and belief, the putative class members are readily identifiable through records in the possession of defendants that identify their online subscription-based customers who purchased and were delivered the subject food products.

55. Certification of plaintiff's claims for class-wide treatment is appropriate because plaintiff can prove the elements of her claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

56. The members of the putative class are mutually and commonly aggrieved and the relief sought is common to the entire class and, if granted, would commonly benefit the entire class.

57. There are numerous questions of law and fact common to plaintiff and the class, including:

- a. Whether defendants sold the French Lentil + Leek Crumbles products containing tara flour that were unreasonably dangerous, defective, adulterated, and not safe or fit for human use and consumption;
- b. Whether defendants failed to adequately warn plaintiff and the class of dangers that accompanied the use and consumption of the French Lentil + Leek Crumbles products containing tara flour;
- c. When defendants knew or should have known of an outbreak of gastrointestinal illness caused by the French Lentil + Leek Crumbles and whether defendants failed to timely notify plaintiff and the class of said danger;
- d. Whether defendants failed to exercise reasonable care in the preparation, marketing, sale and distribution of the French Lentil + Leek Crumbles products containing tara flour;
- e. Whether defendants failed to adequately monitor the safety and sanitary conditions of their food products, facilities and services;
- f. Whether defendants failed to apply reasonable policies and procedures so as to ensure the safety and sanitary conditions of the French Lentil + Leek Crumbles containing tara flour products sold to the public, including plaintiff;
- g. Whether defendants failed to prevent gastrointestinal injury to persons who consumed the French Lentil + Leek Crumbles products;
- h. Whether defendants failed to properly train their agents, servants and employees how to ensure the safety of their food products; and
- i. Whether defendants violated applicable laws, rules, and regulations including, but not limited to, sections 199-a and 200 of the NYS Agriculture and Markets

Law and section 331 of the Federal Food, Drug and Cosmetics Act, 21 U.S.C., § 301 et seq.

58. Common questions of fact and law predominate over any questions affecting only individual members of the class, including but not limited to the alleged acts and omissions and breach of defendants' legal duties set forth herein.

59. Plaintiff's claims herein are typical of the claims of the class, in that the claims of all members of the class, including plaintiff, depend on a showing of the acts and omissions of defendant giving rise to the right of plaintiff to the relief sought.

60. Plaintiff will fairly and adequately protect the interests of the respective class members in that plaintiff has such a plain, direct, and adequate interest in the outcome of the controversy to assure the adequacy of the presentation of the issues involved herein. Plaintiff has no interest which is adverse to any interest of the class members.

61. Plaintiff has retained competent counsel with substantial experience litigating class claims in both state and federal court, including the successful class certification of claims for personal injury arising out of water and foodborne outbreaks of gastrointestinal illness.

62. Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the class and have the financial resources to do so. Neither plaintiff nor her counsel have interests adverse to the class.

63. Class action treatment is superior to other available methods for the fair and efficient adjudication of the controversy.

64. Class treatment will permit a large number of similarly situated individuals to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of evidence, testimony and effort. Class treatment will further avoid the risk of

inconsistent rulings and judgments on common issues of fact and law that individual actions would endanger.

65. Absent class certification, individual litigation of the claims would be unreasonably expensive in light of the probable recoverable damages, burdensome upon the court, and would waste resources otherwise available to compensate the class.

66. Absent class certification, the claims of any infant class members may be untimely.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION (Strict Liability)

67. Plaintiff repeats and realleges the paragraphs above as if fully set forth herein.

68. Defendants received monetary benefit from the sale of their food products.

69. Defendants had a duty to provide the aforesaid food products in such condition that they would be reasonably safe for consumption and to warn plaintiff of any dangers which could accompany such use.

70. At all relevant times, the food manufactured, produced, prepared, packaged, marketed, sold and distributed by defendants was unreasonably dangerous, defective, and not safe and fit for its intended use and purpose by plaintiff.

71. Defendants failed to warn plaintiff of dangers which could accompany the consumption of food that they manufactured, produced, prepared, packaged, marketed, sold and distributed.

72. Upon information and belief, defendants had actual and/or constructive knowledge of the nature and the condition of the safety of the food products, facilities and services that they provided and/or should have had such knowledge in the exercise of reasonable care.

73. Defendants are strictly liable to plaintiff for placing said food products into the

stream of commerce for consumption by members of the public, including plaintiff.

74. As a direct and proximate result of the foregoing, plaintiff suffered personal injuries and seeks general, special, incidental, and consequential damages in an amount to be determined at the time of trial.

**SECOND CAUSE OF ACTION
(Breach of Express and Implied Warranties)**

75. Plaintiff repeats and realleges the paragraphs above as if fully set forth herein.

76. At all relevant times that defendants manufactured, produced, prepared, packaged, marketed, sold and distributed their food products, said defendants expressly and implicitly represented and warranted that such food products were reasonably safe, wholesome, merchantable, and fit for the intended and ordinary use by consumers, including plaintiff.

77. Defendants' representations and warranties were directed at purchasers and consumers of its food products, including plaintiff, who were intended beneficiaries of same.

78. The representation and warranties of defendants with respect to the food consumed by plaintiff were breached in that said food sold to plaintiff was not safe or fit for human use, and was not of merchantable quality, and in fact was otherwise dangerous and unsafe, all in violation of defendant's express statements and implied warranties of merchantability.

79. As a direct and proximate result of the foregoing, plaintiff suffered personal injuries and seeks general and special, incidental, and consequential damages in an amount to be determined at the time of trial.

**THIRD CAUSE OF ACTION
(Negligence)**

80. Plaintiff repeats and realleges the paragraphs above as if fully set forth herein

81. Defendants owed a duty to the plaintiff to use reasonable care in connection with

the preparation, marketing, sale and distribution of their food products.

82. Defendants had a duty to ensure that the food prepared, marketed, sold and distributed to plaintiff was safe for its intended use, and in a sanitary condition.

83. Defendants owed a duty to comply with all applicable state and federal laws and regulations governing the preparation, marketing, sale and distribution of its food products, including but not limited to New York State Agriculture and Markets Law §§ 199-a, 200, and the Federal Food, Drug and Cosmetics Act, 21 U.S.C., § 301 et seq., which prohibit the sale of food that is unsafe for consumption by the public.

84. Defendants breached their duties owed to plaintiff.

85. The food manufactured, produced, prepared, packaged, marketed, sold and distributed by defendants that was consumed by plaintiff was unsafe, adulterated and unfit for human consumption.

86. Defendants committed the following acts and omissions of negligence:

- a. Defendants failed to exercise reasonable care in the preparation, marketing, sale and distribution of their food products;
- b. Defendants failed to adequately monitor the safety of their food products, facilities and services;
- c. Defendants failed to apply reasonable policies and procedures so as to ensure the safety of the food they sold to the public, including plaintiff;
- d. Defendants failed to provide proper warnings and safeguards to persons who purchased and consumed their food products, including plaintiff;
- e. Defendants failed to prevent the adulteration of food and prevent gastrointestinal injury to persons who consumed their food products, including

plaintiff;

- f. Defendants failed to properly train their agents, servants and employees how to ensure the safety of the food they sold to the public, including plaintiff; and
- g. Defendants violated applicable laws, rules, and regulations including, but not limited to, sections 199-a and 200 of the NYS Agriculture and Markets Law and section 331 of the Federal Food, Drug and Cosmetics Act, 21 U.S.C., § 301 et seq.

87. Defendants' breach of their duty in violation of the aforementioned statutory laws and regulations constitutes negligence *per se*.

88. As a direct and proximate result of defendants' negligence and negligence *per se*, plaintiff was injured, and said injury was foreseeable.

89. As a direct and proximate result of the foregoing, plaintiff suffered personal injuries and seeks general and special, incidental, and consequential damages in an amount to be determined at the time of trial.

VII. DEMAND FOR TRIAL BY JURY

Plaintiff demands a jury trial on all issues so triable.

VIII. PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against defendants as follows:

- A. Certifying this action as a class action;
- B. Appointing the named plaintiff as class representative;
- C. Appointing the undersigned counsel as class counsel;
- D. Awarding compensatory and special damages, together with pre and post judgment interest, in an amount to be determined at trial;

- E. Granting declaratory relief adjudicating the parties' legal rights and obligations;
- F. For the costs, disbursement, and reasonable attorneys' fees of this action; and
- G. For such other and further relief as this Court deems just and proper.

Dated:

Respectfully,

James R. Peluso (Bar Roll # JP2875)
DREYER BOYAJIAN LLP
75 Columbia Street
Albany, New York 12210
Telephone: (518) 463-7784
jpeluso@dblawnny.com

Joseph E. O'Connor (Bar Roll # JO5185)
O'CONNOR & PARTNERS, PLLC
255 Wall Street, Kingston, NY 12401
Telephone: (845) 303-8777
joconnor@onplaw.com

William D. Marler
MARLER CLARK, INC. P.S.
1012 First Avenue, Fifth Floor
Seattle, WA 98104
Telephone: (206) 346-1888
bmarler@marlerclark.com

Paul V. Nunes (Bar Roll # PN2853)
HEISMAN NUNES & HULL LLP
1603 Empire Blvd., Suite 3B
Webster, NY 14580-2182
Telephone: (585) 270-6922
pnunes@nhhattorneys.com

Jeffrey A. Bowersox
BOWERSOX LAW FIRM, P.C.
385 1st Street, Suite 215
Lake Oswego, OR 97034
Telephone: (503) 452-5858
jeffrey@bowersoxlaw.com

Counsel for Plaintiff and the Proposed Class

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BREEANNE BUCKLEY PENI, Individually
and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

DAILY HARVEST, INC., SECOND BITE
FOODS, INC., d/b/a “STONE GATE
FOODS”, SMIRK’S LTD., AND
MOLINOS ASOCIADOS SAC,

Defendants.

Civil Action No. 22-cv-05443

**[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL OF
SETTLEMENT**

WHEREAS, the above-entitled action is pending before this Court (the “Action”);

WHEREAS, Plaintiff Breeanne Buckley Peni (“Plaintiff” or “Named Plaintiff”), on behalf of herself and the Settlement Class Members; (2) Defendant Smirk’s Ltd. (“Smirk’s”); and (3) Defendant Molinos Asociados SAC (“Molinos”) (Smirk’s and Molinos being the “Settling Defendants” and together with Plaintiff, the “Settling Parties” or “Parties”) have reached a proposed settlement and compromise of the disputes between them in the above action as set forth in the Class Action Settlement Agreement (the “Settlement Agreement,” and the settlement contemplated thereby, the “Settlement”);

WHEREAS, the Parties have applied to the Court for preliminary approval of the Settlement;

AND NOW, the Court, having read and considered the Settlement Agreement and accompanying documents, as well as the Motion for Preliminary Approval of Class Action Settlement and supporting papers, and all capitalized terms used herein having the meaning defined in the Settlement, IT IS HEREBY ORDERED AS FOLLOWS:

1. Settlement Terms. The Court, for purposes of this Order, adopts all defined terms as set forth in the Settlement Agreement.

2. Jurisdiction. The Court has jurisdiction over the subject matter of the action and over all parties to the action, including all members of the Settlement Class.

3. Preliminary Approval of Proposed Settlement Agreement. Subject to further consideration by the Court at the time of the Final Approval Hearing, the Court preliminarily approves the Settlement as fair, reasonable, and adequate to the Settlement Class, as falling within the range of possible final approval, and as meriting submission to the Settlement Class for its consideration. The Court also finds the Settlement Agreement: (a) is the result of serious, informed, non-collusive, arms-length negotiations, involving experienced counsel familiar with the legal and factual issues of this case and guided in part by the Parties' mediations with United States Magistrate Judge Sarah L. Cave and NAM Mediator retired Judge Peter B. Skelos, and (b) appears to meet all applicable requirements of law, including, at least for purposes of a class action settlement, Fed. R. Civ. P. 23. Therefore, the Court grants preliminary approval of the Settlement.

4. Class Certification for Settlement Purposes Only. For purposes of the Settlement only, the Court conditionally certifies the Settlement Class, as described below:

All persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles and directly suffered personal injuries caused by consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles.

Excluded from the Settlement Class are: (1) the presiding judges in the Actions; (2) any member of those judges' immediate families; (3) the Settling Defendants; (4) any of the Settling Defendant's subsidiaries, parents, corporate affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; (5) counsel for the Parties; and (6) any persons who timely opt-out of the Settlement Class.

5. The Court preliminarily finds for purposes of considering this Settlement that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the Named Plaintiff are typical of the claims of the Settlement Class she seeks to represent; (d) the Plaintiff will fairly and adequately represent the interests of the Settlement Class; (e) the questions of law and fact common to the Settlement Class predominate over any questions affecting only individual members of the Settlement Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. Amendment of Complaint. Pursuant to the terms of the Settlement Agreement, the Court grants the Settling Parties leave to file Plaintiff's Third Amended Complaint.

7. Class Representatives. The Court orders that Breeanne Buckley Peni be appointed as the Representative Plaintiff.

8. Class Counsel. The Court also orders that Marler Clark, Inc. PS, Dreyer Boyajian LLP, O'Connor & Partners, PLLC, Heisman Nunes & Hull LLP, and Bowersox Law Firm, P.C. be appointed Class Counsel. The Court preliminarily finds that the Representative Plaintiff and Class Counsel fairly and adequately represent and protect the interests of the absent Settlement Class Members in accordance with Fed. R. Civ. P. 23.

9. Settlement Notice. The Court finds that the Settlement as set forth in the Settlement Agreement falls within the range of reasonableness and warrants providing notice of such Settlement to the members of the Settlement Class and accordingly, the Court, pursuant to Fed. R. Civ. P. 23(c) and (e), preliminarily approves the Settlement upon the terms and conditions set forth in the Settlement Agreement. The Court approves, as to form and content, the notice and claim form substantially in the form attached to the Settlement Agreement.

10. The Court finds that the Parties' plan for providing notice to the Settlement Class (the "Settlement Notice") described in the Settlement Agreement constitutes the best notice practicable under the circumstances and constitutes due and sufficient notice to the Settlement Class of the terms of the Settlement Agreement and the Final Approval Hearing and complies fully

with the requirements of the Federal Rules of Civil Procedure, the United States Constitution, and any other applicable law. The Court directs that the Settlement Notice Date should occur no later than 20 business days from the date of this Order, or [_____].

11. The Court further finds that the Settlement Notice adequately informs members of the Settlement Class of their right to exclude themselves from the Settlement Class so as not to be bound by the terms of the Settlement Agreement. Any member of the Class who desires to be excluded from the Settlement Class, and therefore not bound by the terms of the Settlement Agreement, must submit a timely and valid written Request for Exclusion pursuant to the instructions set forth in the Settlement Notice.

12. Settlement Administrator. The Court appoints Edgar Gentle of Gentle Turner & Benson, LLC, P.O. Box 361930, Hoover, AL 35236-1930 as the Settlement Administrator. Edgar Gentle shall be required to perform all duties of the Settlement Administrator as set forth in the Settlement Agreement and this Order. The Settlement Administrator shall post the Settlement Notice on the Settlement Website.

13. Exclusion from the Settlement Class. Class Members who wish to opt out of and be excluded from the Settlement must follow the directions in the Class Notice and submit a Request for Exclusion to the Settlement Administrator, postmarked no later than the Opt-Out Deadline, which is 35 days after the Notice Date. The Request for Exclusion must be personally completed and submitted by the Class Member or his or her attorney. One person may not opt someone else out, and so-called “mass” or “class” opt-outs shall not be permitted or recognized. The Settlement Administrator shall periodically notify Class Counsel and Settling Defendants’ counsel of any Requests for Exclusion.

14. All Class Members who submit a timely, valid Request from Exclusion will be excluded from the Class and will not be bound by the terms of the Settlement Agreement, will not be bound by the release of any claims pursuant to the Settlement Agreement or any judgment, and will not be entitled to object to the Settlement Agreement or appear at the Final Approval Hearing. All Class Members who do not submit a timely, valid Request for Exclusion will be bound by the

Settlement Agreement and the Judgment, including the release of any claims pursuant to the Settlement Agreement.

15. Hold Back Amount. The Settlement Administrator shall provide a full and complete list of Opt-Out requests (“Opt-Out List”) to the Settling Defendants’ Counsel and to Class Counsel by [_____] [within five (5) business days after the Opt-Out Deadline]. Smirk’s shall use the Opt-Out List to determine the amount, if any, that it will hold back from payment into the Qualified Settlement Fund after entry of the Order for Final Approval to cover its reasonable material exposure relative to the potential litigation or claims by the Opt-Outs (the “Class Action Hold Back Amount”). Smirk’s must identify the Class Action Hold Back Amount to the Settlement Administrator and Plaintiff’s Class Counsel by [_____] [fourteen (14) days after the Opt-Out List deadline].

16. In the event that the Settling Defendants determine that the Class Action Hold Back Amount should exceed ten (10) percent of the Total Settlement Fund Value, and if Plaintiff and Class Counsel do not agree that the amount is reasonable, then the Parties shall engage in good faith negotiations, employing the assistance of retired Judge Peter B. Skelos, if needed, to reach agreement on any Class Action Hold Back Amount exceeding ten (10) percent of the Total Settlement Fund Value. The Objection Deadline and other deadlines addressed within this Order shall be extended during the period of such good faith negotiations and the Settlement Administrator shall post this information about the extension of deadlines on the Settlement Website. If necessary, based on an extended period of negotiations—which the Parties shall work in good faith to avoid—the Settling Parties shall inform the Court of the need to postpone the Final Approval Hearing, and the Settlement Administrator shall post to the Settlement Website information about any adjourned date for that hearing.

17. Objections to the Settlement. Any objection to the Settlement must be in writing, postmarked on or before the Objection Deadline, which is 75 days from the Notice Date, unless extended due to Settling Defendants’ Class Action Hold Back Determination, herein Sections 14 and 15, and sent to the Settlement Administrator at the address set forth in the Class Notice. Any

objection regarding or related to the Settlement must contain (i) a caption or title that clearly identifies the Action and that the document is an objection, (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney if represented, (iii) information sufficient to establish the person's standing as a Settlement Class Member, (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection, (v) identification of the case name, case number, and court for any prior class action lawsuit in which the objector and the objector's attorney (if applicable) has objected to a proposed class action settlement in any court in the United States in the previous five (5) years, the general nature of such prior objection(s), and the outcome of said prior objection(s), (vi) the objector's signature, and (vii) the signature of the objector's counsel, if any. Upon Court order, the Parties will have the right to obtain document discovery from and take depositions of any Objecting Class Member on topics relevant to the Objection.

18. If a Class Member submits both an Opt-Out Form and Objection, the Settlement Administrator will contact the Class Member to confirm the Class Member's wishes. In the event of non-response or doubt, such person will be deemed to have opted out of the Settlement, and thus to be ineligible to object. Any objecting Class Member who has not been opted out of the settlement will be bound by the terms of the Settlement Agreement if the Agreement becomes final according to its terms.

19. Objecting Class Members may appear at the Final Approval Hearing and be heard. If an objecting Class Member chooses to appear at the Final Approval Hearing, a notice of intention to appear must be filed with the Court or postmarked no later than the Objection Deadline.

20. Any Settlement Class Member who does not make a valid written objection as set forth by the Settlement shall be deemed to have waived such objection and forever shall be foreclosed from making any objection to the fairness or adequacy of or from seeking review by any means, including an appeal, of the following: the Settlement, the Settlement Agreement, the payment of attorneys' fees and costs, service award, or the Final Approval Order and Judgment.

21. Submission of Claims. To receive a Settlement Benefit, a Settlement Class Member must follow the directions in the Settlement Notice and file a claim with the Settlement Administrator by the Claims Deadline, which is 75 days after the Notice Date, unless extended due to Settling Defendants' Class Action Hold Back Determination, herein Sections 14 and 15. Settlement Class Members who do not submit a valid claim will not receive a Monetary Benefit and will be bound by the Settlement.

22. Appeal. If any Claimant whose Claim has been rejected in whole or in part desires to contest such rejection, the Claimant must, within twenty (20) days, serve upon the Settlement Administrator a notice and statement of reasons indicating the Claimant's grounds for contesting the rejection along with any supporting documentation. The Settlement Administrator shall within twenty (20) days notify the Claimant of the Settlement Administrator's determination on the appeal.

23. A Claimant who disagrees with the appeal ruling of the Settlement Administrator may appeal to the Court within fourteen (14) days of the Settlement Administrator's appeal determination by submitting a written statement to the Court at Attn: Hon. Judge Denise Cote, Case No. 1:22-cv-05443-DLC, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, outlining the Claimant's position and why the Claimant believes the Settlement Administrator has erred. The appeals process shall not result in any modification of substantive eligibility criteria. The Court shall issue a determination on the appeal in writing, which shall be served on the Claimant (and the Claimant's counsel, where applicable) and the Settlement Administrator. Decisions of the Court are final and binding.

24. Schedule of Events. The following events shall take place as indicated in the chart below:

Event	Date
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Deadline for Settlement Website to go live	The Settlement Administrator shall activate the Settlement Website for public accessibility no earlier and no later than the Notice Date.
Deadline to commence Settlement Notice (“Notice Date”)	Within 20 business days after entry of the Preliminary Approval Order.
Deadline for Opt-Out Requests to be postmarked	35 calendar days following the Notice Date
Deadline for Objections to be postmarked	75 calendar days following the Notice Date, unless extended due to Settling Defendants’ Hold Back Determination, herein Sections 14 and 15
Deadline for Settlement Administrator to provide the Opt-Out List	5 business days following the Opt-Out Deadline
Deadline for Settling Defendants to Identify Hold Back Amount	14 calendar days following receipt of Opt-Out List
Deadline for Claim Forms to be postmarked or submitted online	75 calendar days following the Notice Date, unless extended due to Settling Defendants’ Hold Back Determination, herein Sections 14 and 15
Deadline for Plaintiff to file motion for final approval of class action settlement	14 days prior to Final Approval Hearing
Deadline for Parties to file all papers in response to any timely and valid Objections	15 business days prior to Final Approval Hearing
Final Approval Hearing	143 calendar days after preliminary approval of class action settlement

25. The Court notes that the various deadlines set forth above have been set because of the potential need for a Class Action Hold Back Amount. The Court is requiring any Settlement Class Members who wish to opt out of the Settlement to do so within 35 days of the Notice Date. The deadline for Settlement Class Members to file Claim Forms and/or to object to the settlement, by contrast, will not fall until after the Class Action Hold Back Amount (if any) has been determined and after notice of the Class Action Hold Back Amount has been communicated on the Settlement Website.

26. Authority to Extend. The Court may, for good cause, extend any of the deadlines set forth in this Order, or adjourn the Final Approval Hearing, without further notice to the Settlement Class Members other than posting on the Settlement Website.

27. If, for any reason, the Settlement Notice Date does not or cannot commence at the time specified above, the Parties will confer in good faith and recommend a corresponding extension of the Claims Deadline to the Court.

28. Notice to Appropriate Federal and State Officials. Settling Defendants shall, within ten (10) business days of having filed their motion for preliminary approval, prepare and provide the notices required by the Class Action Fairness Act of 2005, Pub. L. 109-2 (2005), including, but not limited to, the notices to the United States Department of Justice and to the Attorneys General of all states in which Settlement Class Members reside, as specified in 28 U.S.C. § 1715. Class Counsel shall cooperate in the drafting of such notices and shall provide Settling Defendants with any and all information in their possession necessary for the preparation of these notices.

29. Preliminary Injunction. Plaintiff, Settlement Class Members, and any other person, representative, or entity acting on behalf of any Settlement Class Members are, until the Final Approval Hearing, barred and enjoined from (a) filing, commencing, prosecuting, maintaining, or intervening in (as members of a class or otherwise) any claim, lawsuit, arbitration, administrative, regulatory, or other proceeding arising out of the Released Claims against any of the Released Parties; and (b) organizing or soliciting the participation of any Settlement Class Members into a separate class for purposes of pursuing as a purported class action (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action) any claim, lawsuit, or other proceeding arising out of the Released Claims against any of the Released Parties. The Court finds that issuance of this preliminary injunction is necessary and appropriate in aid of the Court's jurisdiction over the action and to protect and effectuate the Court's review of the Settlement.

30. Final Approval Hearing. The Court shall conduct a Final Approval Hearing to determine final approval of the Agreement on a date no earlier than 143 days after the Preliminary Approval Order. At the Final Approval Hearing, the Court shall address whether the proposed Settlement should be finally approved as fair, reasonable and adequate, including the approval of

any attorney's fees or expenses, and whether the Final Approval Order and Judgment should be entered.

31. In the Event of Non-Approval. In the event that the proposed Settlement is not approved by the Court, the Effective Date does not occur, or the Settlement Agreement becomes null and void pursuant to its terms, this Order and all orders entered in connection therewith shall become null and void, shall be of no further force and effect, and shall not be used or referred to for any purposes whatsoever in this civil action or in any other case or controversy; in such event the Settlement and all negotiations and proceedings directly related thereto shall be deemed to be without prejudice to the rights of any and all of the Parties, who shall be restored to their respective positions as of the date and time immediately preceding the execution of the Settlement.

32. Stay of Proceedings. All Settlement Class Members are, until the Final Approval Hearing, enjoined from commencing or continuing any action or proceeding in any court or tribunal asserting any claims encompassed by the Settlement Agreement, unless the Settlement Class Member timely files a valid Request for Exclusion as defined in the Settlement Agreement. All discovery deadlines in related cases remain in effect.

33. No Admission of Liability. By entering this Order, the Court does not make any determination as to the merits of this case. Preliminary approval of the Settlement Agreement is not a finding or admission of liability by Settling Defendants. Furthermore, the Settlement Agreement and any and all negotiations, documents, and discussions associated with it will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation, or principle of common law or equity, or of any liability or wrongdoing by the Settling Defendants, or the truth of any of the claims. Evidence relating to the Settlement Agreement will not be discoverable or used, directly or indirectly, in any way, whether in this Action or in any other action or proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the terms and conditions of the Agreement, this Order, the Final Approval Order, and the Judgment.

34. Retention of Jurisdiction. The Court retains jurisdiction over this Action to consider all further matters arising out of or connected with the Settlement Agreement and the settlement described therein.

IT IS SO ORDERED.

Dated: _____

The Honorable Denise Cote
United States District Judge

**ATTENTION ALL PERSON IN THE UNITED STATES WHO
PURCHASED, RECEIVED, OR CONSUMED DAILY HARVEST FRENCH
LENTIL + LEEK CRUMBLES IN 2022**

This notice may affect your rights. Please read it carefully.

A court has authorized this notice. This is not a solicitation from a lawyer.

- This notice concerns a class action lawsuit titled *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc., et al.*, Case No. 1:22-cv-05443, pending in the United States District Court for the Southern District of New York. You previously received a notice about this case when two of the defendants—Daily Harvest, Inc., and Stone Gate Foods, Inc.—agreed to a settlement (the “DH/SGF Settlement”). You are now receiving a second notice because the remaining defendants, Smirk’s Ltd. and Molinos Asociados SAC (the “Settling Defendants”), now also have agreed to a settlement that will increase the amount of money available to pay eligible claims.
- **IF YOU HAVE ALREADY FILED A CLAIM TO RECEIVE BENEFITS FROM THE DH/SGF SETTLEMENT, AND WISH TO PARTICIPATE IN THIS SETTLEMENT TOO, YOU DO NOT NEED TO TAKE ANY FURTHER ACTION. THE CLAIM FORM YOU HAVE ALREADY FILED WILL APPLY TO BOTH SETTLEMENTS AND, AS EXPLAINED BELOW, YOU WILL NOW RECEIVE A LARGER MONETARY AWARD. HOWEVER, PLEASE NOTE THAT THE PAYMENTS FROM EACH SETTLEMENT MAY NOT BE MADE AT THE SAME TIME, AS THEY ARE COMING FROM TWO SEPARATE QUALIFIED SETTLEMENT FUNDS (QSFs) AND ARE SUBJECT TO DIFFERENT TIMELINES.**
- This class action Settlement (“the Settlement”) by the Settling Defendants, just like the prior DH/SGF Settlement, pertains to personal injuries experienced by people who consumed Daily Harvest French Lentil + Leek Crumbles (“Crumbles”), which contained the ingredient tara flour, at any time in the year 2022. The lawsuit settlement affects all

Questions? Visit www.SMcrumblessettlement.com or call (877) 229-1937.

persons in the United States (including its territories) who purchased, received, or consumed Crumbles and directly suffered personal injuries caused by consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of Crumbles (the "Class").

- The Settling Defendants deny any wrongdoing. They contend that they complied with the law in all respects and at all times.
- To settle the case, Settling Defendants have agreed to pay \$7,671,000 to settle claims submitted by members of the Class, as well as for expenses necessary to administer the settlement. This amount may be reduced depending upon the number of people who opt out of the settlement, as explained further below. The Settlement Administrator's total costs for class notice and class administration and any expenses incurred therefrom shall not exceed \$1,000,000 for both this Settlement and the DH/SGF Settlement unless the Court orders otherwise.
- The lawyers who brought this lawsuit ("Class Counsel") will not ask the Court to award them attorneys' fees from this settlement amount. If Class Members who file claims for relief in the settlement are represented by counsel, any payment of fees will be paid to that counsel by the Class Member pursuant to that Class Member's agreement with his or her counsel. However, if a Class Member is not represented by counsel and does not have an attorney lien resulting from previous representation relating to the Crumbles, then any Monetary Benefit awarded to said Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement, so that unrepresented people do not receive more than those who have been represented.
- Your legal rights are affected whether or not you act. Read this notice carefully.

This Notice summarizes the proposed Settlement. For the precise terms and conditions of the Settlement, please see the Settlement Agreement, available at www.SMcrumblesettlement.com (the "Settlement Website"), or contact the Settlement Administrator at P.O. Box 361930, Hoover, AL 35236 or by telephone at (877) 229-1937.

YOUR RIGHTS AND OPTIONS IN THIS SETTLEMENT		DEADLINE
Submit Claim Form	The only way to get a cash payment, is if you qualify. If you already have submitted a Claim Form in the DH/SGF Settlement, you do not need to submit another Claim Form to receive benefits from this settlement.	*[75 days after this Notice]
Exclude Yourself From the Class	You will not get any benefits under this Settlement. This is the only option that allows you to be part of any other lawsuit or proceeding in arbitration against the Settling Defendants about the legal claims in this case. If you previously excluded yourself from the DH/SGF Settlement Class, you must submit a separate request to exclude yourself from this Settlement.	*[35 days after this Notice]
Object to the Settlement	Tell the Court about why you don't like the Settlement. (If you exclude yourself from the Settlement, you cannot also object to it.)	[75 days after this Notice]
Go to a Hearing On [_____]	If you timely submitted a written objection, you may ask to speak in Court about the Settlement.	[143 days after preliminary approval of class action settlement]
Do Nothing	Get no benefits (unless you have already submitted a claim form in the DH/SGF Settlement). Give up rights to be part of any other lawsuit against the Settling Defendants about the legal claims in this case.	
* The Deadline to Submit a Claim Form and the Objection Deadline may be extended without further direct notice to you. All such changes will to the deadlines will be posted to the Settlement Website at www.SMcrumblesettlement.com . Please continue to check the Settlement Website for updates.		

- These rights and options—**and deadlines to exercise them**—are explained in this notice.
- **Final Approval Hearing:** On [_____], the Court will hold a hearing to determine: (1) whether the Settlement should be approved as fair, reasonable, and adequate, and should receive final approval; and (2) whether Class Counsel's application for expenses incurred by Class Counsel should be granted. The hearing will be held in the

Questions? Visit www.SMcrumblesettlement.com or call (877) 229-1937.

United States District Court for the Southern District of New York, before the Honorable Denise Cote, [_____], in Courtroom 18B, 500 Pearl Street, New York, New York, 10007, or such other judge assigned by the Court. This hearing date may change without further direct notice to you. Consult the Settlement Website at www.SMcrumblesettlement.com, or the Court docket in this case available through Public Access to Court Electronic Records (“PACER”) (<http://www.pacer.gov>), for updated information on the hearing date and time.

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1. Why Did I Get This Settlement Notice?

If you received this Settlement Notice, records show that in 2022, you may have purchased, received, or consumed French Lentil + Leek Crumbles (“Crumbles”), a product manufactured by Second Bite Foods, Inc. d/b/a “Stone Gate Foods” and distributed and sold by Daily Harvest, Inc. This product contained the food ingredient tara flour, which was imported by Smirk’s, who sourced it from Molinos Asociados. It has been alleged in court that if consumption of the Crumbles caused personal injuries, the tara flour ingredient was the cause. Smirk’s and Molinos Asociados are the “Settling Defendants.” A court authorized this Notice because you have the right to know about the proposed Settlement and your options before the Court decides whether to approve the Settlement. If the Court approves the Settlement after any objections, and if that approval is upheld on appeal (if any), a Settlement Administrator appointed by the Court will make payments that the Settlement allows.

Questions? Visit www.SMcrumblesettlement.com or call (877) 229-1937.

The Honorable Denise Cote, District Judge of the Southern District of New York, is in charge of this case, which is called *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc., et al.* The case number is 1:22-cv-05443. The person who filed this Lawsuit is called the Plaintiff. This Notice explains the Lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get these benefits.

2. How Do I Know If I Am Affected By The Settlement?

If you are an individual in the United States who purchased, received, or consumed Crumbles and directly suffered personal injuries caused by consumption of Crumbles, and/or an individual in the United States who suffered monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles, you are a member of the Class. Specifically excluded from the Class are (i) any Governmental Entity; (ii) subsidiaries, divisions, corporate affiliates, owners, officers, current employees, and directors of the Settling Defendants; (iii) any assigned judges and members of their staffs and immediate families; and (iv) Class Counsel.

If the Settlement does not become effective (for example, because it is not finally approved, or the approval is reversed on appeal), then this litigation will continue.

3. What Is The Lawsuit About?

Numerous lawsuits against the Settling Defendants were brought pertaining to Crumbles, beginning in or about June 2022. One such lawsuit was brought by Plaintiff, who alleged that her consumption of Crumbles caused personal injuries and related monetary damages. Settling Defendants deny any wrongdoing. They contend that they complied with the law in all respects and at all times. The Court has not decided that the Settling Defendants did anything wrong and the settlement does not mean that the Settling Defendants violated the law.

This lawsuit is a class action. A class action is a lawsuit in which the claims and rights of many people are decided in a single court proceeding. One or more people — sometimes called “class representatives” — sue on behalf of people who may have similar claims. All the people who may have similar claims form a “class” and are “class members.” A settlement in a class action — if approved by the Court as fair, reasonable, and adequate — resolves the claims for all class members.

This Settlement is the *second* and final settlement in the Daily Harvest Crumbles litigation. The DH/SGF Settlement, which was for \$22,999,000 and which the Court preliminarily approved on May 22, 2024, would resolve class members' claims against Daily Harvest, Inc., and Stone Gate Foods, Inc. This new Settlement resolves the claims against remaining defendants Smirk's Ltd. and Molinos Asociados SAC. If you already submitted a claim for benefits in the first settlement, this second settlement, if approved, will increase the amount of money you will receive.

4. Why Is This Case Being Settled?

Both sides agreed to the settlement to avoid the cost and risk of further litigation. The settlement does not mean that any law was broken. Settling Defendants deny all the legal claims in this case. Plaintiff and the lawyers representing her think the settlement is best for all Class Members.

5. What If I'm Still Not Sure If I'm Included In the Settlement?

If you are not sure whether you are included in the Class, call (877) 229-1937 or go to www.SMcrumblesettlement.com.

6. What Can I Get In The Settlement?

Class Members will be eligible to file a claim for personal injury damages and/or monetary damages. The Settlement Administrator will evaluate each claim based on materials submitted and grade each claim according to an agreed formula called the "Allocation Matrix." That Allocation Matrix was provided to the Court as part of the Settlement Agreement and you can read it on the Settlement Website: www.SMcrumblesettlement.com.

The amount of the payment will depend upon the "Category" into which a Class Member's personal injury or monetary damages fall. If you did not suffer personal injuries directly, but you suffered monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles, you are considered a Category 1A. If you directly suffered personal injuries related to your consumption of the Crumbles, but you did not receive medical treatment for these injuries, you are considered a Category 1B. If you directly suffered personal injuries related to your consumption of the Crumbles, and you received medical treatment for these injuries, but were not hospitalized, you are considered a Category 2. If you directly suffered personal injuries related to your consumption of the Crumbles, received medical treatment for these injuries, and were hospitalized for these injuries, you are considered a Category 3. If you directly suffered personal injuries related to your consumption of the Crumbles, and you underwent a cholecystectomy (gallbladder removal surgery) related to these injuries, you are considered a Category 4.

The table below sets forth the estimated expected payments to claimants in each Category. Please note that if you already submitted a claim for benefits in the DH/SGF Settlement, the amounts below are *in addition to* those you will receive if you qualify for benefits from the DH/SGF Settlement:

Category #	Estimated Award in the DH/SGF Settlement	Estimated Award in this Settlement	Estimated Total Award
1A	\$500	\$165	\$665
1B	\$1,000	\$335	\$1,335

Questions? Visit www.SMcrumblesettlement.com or call (877) 229-1937.

2	\$15,000	\$5,000	\$20,000
3	\$30,000	\$10,000	\$40,000
4	\$130,000	\$43,330	\$173,330

Importantly, the \$7,671,000 amount of the Settlement Fund may be reduced depending upon the number of people who opt out of the settlement and the category such people would have occupied had they not opted out. Promptly after the deadline for class members to opt-out, which falls on [_____], the parties will negotiate the amount of what the Settlement Agreement calls the “Hold Back Amount.” This is the amount that will be removed from the \$7,671,000 settlement amount to allow the parties to continue to litigate the claims of those who have opted out. The Hold Back Amount will be posted to the Settlement Website, www.SMcrumblesettlement.com, by [_____]. This date has been set intentionally so that class members will be aware of the actual amount of the settlement fund before they file their claims or object to the settlement.

If the Hold Back Amount is no more than ten percent of the \$7,671,000 settlement fund, the Settling Defendants can set that amount without negotiations. If the Settling Defendants believe the Hold Back Amount must be more than ten percent of the fund, negotiations may be required and the parties may need the assistance of a third-party neutral with those negotiations. Delays in setting the Hold Back Amount may cause the Court to extend the deadlines for Class Members to file claim forms or to object to the settlement. Any changed deadlines will be posted to the Settlement Website, www.SMcrumblesettlement.com. Please check the website regularly.

The above projections also assume that approximately \$2,825,000 will be set aside to pay any Category 2, 3, or 4 shortfalls, if any, at the Settlement Administrator’s discretion, including enhancing awards for claimants with verified causally related injuries that are considered grave or extraordinary (the “extraordinary damages fund”). It is projected that Category 1 Claimants (this includes Category 1A and Category 1B) will be paid a total of \$166,000 (approximately [_____] Claimants out of [_____] Class Members). It is projected that Category 2 Claimants will be paid a total of \$1,445,000 (approximately [_____] Claimants out of [_____] Class Members). It is projected that Category 3 Claimants will be paid a total of \$1,860,000 (approximately [_____] Claimants out of [_____] Class Members). It is projected that Category 4 Claimants will be paid a total of \$1,400,000 (approximately [_____] Claimants out of [_____] Class Members). The predetermined benefits – \$165 each for Category 1A Claimants, \$335 each for Category 1B Claimants, \$5,000 each for Category 2 Claimants, \$10,000 each for Category 3 Claimants, \$43,330 each for Category 4 Claimants – may proportionally increase or decrease depending upon the response from Class Members. The Settlement Administrator shall determine the Monetary Benefit awarded to each Qualified Class Member pursuant to the Settlement Program and Allocation Matrix. If you disagree with your Monetary Benefit award determination you may file an appeal with the Settlement Administrator. After receiving the Settlement Administrator’s

appeal determination, if you still disagree with your Monetary Benefit award determination, you may file an appeal with the Court. The Court's decision will be final and binding.

If you did not file a claim in the DH/SGF Settlement by the deadline, you can still submit a claim for this Settlement. However, you will only be eligible to receive funds from this Settlement, not from both settlements. The only exception is for claimants who were unable to file a claim in the DH/SGF Settlement due to a valid reason; their eligibility will be assessed on a case-by-case basis by the Settlement Administrator.

If you have already filed a claim in the DH/SGF Settlement, you will not need to submit a new claim form to receive benefits from this Settlement. The new funds will be added to your existing claim's determined benefits. Due to the separate timelines and processes for each settlement, it is not guaranteed that both payments will be made at the same time. Payments for this Settlement and the DH/SGF Settlement come from two separate Qualified Settlement Funds (QSFs). As such, it is likely that the payment from this Settlement will be made in addition to, but not at the same time as, the DH/SGF payment.

Additionally:

- Claimants in this Settlement may apply for the extraordinary damages fund, even if they did not file a claim in the DH/SGF Settlement.
- If you did not opt out of the DH/SGF Settlement, you can still choose to opt out of this Settlement if you wish.
- If you did not object to the DH/SGF Settlement, you can still choose to object to this Settlement if you wish. However, only those who do not opt out of the Settlement are eligible to submit an objection.

More information regarding how the Settlement Administrator will grade claims and your right to appeal your determination, can be found in the Allocation Matrix, Exhibit F, available on the Settlement Website at www.SMcrumblessettlement.com.

After the Settlement becomes "final", payments will be sent to Qualified Class Members who send in valid Claim Forms on time (*i.e.*, no later than the Claim Form Deadline) that the Settlement Administrator has determined satisfy the Eligibility Requirements of the Settlement. If the Court approves the Settlement after a hearing on [_____], there may be appeals. Resolving these appeals can take time. Please be patient.

7. How Do I Participate In The Settlement?

If you are eligible to receive monetary benefits, submit a Claim Form and related documentation to the Settlement Administrator by either (1) submitting a Claim Form at the Settlement Website, or (2) submitting a Claim Form by mail. The Claim Form can be found at www.SMcrumblessettlement.com. If you need a paper copy of the Claim Form to be sent to you, call (877) 229-1937. If you already have an attorney representing you in this case, please contact them before the Claim Form Deadline regarding filing your claim.

Questions? Visit www.SMcrumblessettlement.com or call (877) 229-1937.

You must complete and submit the Claim Form, including all required documentation and signatures, no later than [] (75 days after the date of this Notice, unless extended), to the Settlement Administrator online at the Settlement Website, or by mail (postmarked no later than []) to P.O. Box 361930, Hoover, AL 35236.

The Deadline to Submit a Claim Form may be extended without further direct notice to you. Consult the Settlement Website at www.SMcrumblesettlement.com. Please continue to check the Settlement Website for updates.

More information regarding how to participate in the Settlement is available on the Settlement Website at www.SMcrumblesettlement.com.

8. How Do I Opt-Out Of The Settlement?

If you want to keep the right to assert claims about the issues in this case against Settling Defendants Smirk's Ltd. and/or and Molinos Asociados SAC then you must take steps to get out of the Settlement. This is called excluding yourself, or Opting-Out, of the Settlement Class.

If you want to Opt-Out of the Settlement Class, you must submit your request for exclusion by either (1) submitting an exclusion form at the Settlement Website, or (2) submitting by mail a written request for exclusion. If you Opt-Out of the Settlement Class, you will not be allowed to object to this Settlement or submit a Claim Form. If you validly Opt-Out of the Settlement Class, but later decide you would like to participate in the Settlement, you may still participate in the Settlement by filing a Claim Form (see Section 7 for instructions) and withdrawing your opt-out election before [], the date of the Final Approval Hearing.

You must complete and submit an exclusion form no later than [] (35 days after this Notice), sent by mail (postmarked no later than []) to Smirk's-Molinos Settlement, P.O. Box 361930, Hoover, AL 35236.

More information regarding how to Opt-Out of the Settlement is available on the Settlement Website at www.SMcrumblesettlement.com.

9. Do I Have a Lawyer in the Case?

The Court has designated Marler Clark, Inc. PS, Dreyer Boyajian LLP, O'Connor & Partners, PLLC, Heisman Nunes & Hull LLP, and Bowersox Law Firm, P.C. to represent you as "Class Counsel." You will not be charged for these lawyers. If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense. You may already have engaged counsel to represent you in connection with claims pertaining to consumption of Crumbles, in which case you should consult with that counsel. Class Counsel will not ask the Court to award them attorneys' fees to be deducted from the settlement fund; any such payments will be paid by the recipients of settlement funds to their counsel pursuant to the terms of each person's attorney retainer agreement. However, if any Class Member states in a claim form that he or she is not represented by counsel, and if that person does not have an attorney lien resulting from previous representation relating to Crumbles, then any Monetary Benefit awarded to said

Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement. This is to ensure that those who are and are not represented by counsel receive approximately the same amounts (after any attorneys' fees) for their injuries.

A copy of Class Counsel's motion for reimbursement of Attorneys' Expenses incurred by Class Counsel to provide this Settlement Notice is available on the Settlement Website: www.SMcrumblesettlement.com.

10. What Am I Giving Up In Exchange for the Settlement?

If you are a Class Member and the Settlement is ultimately approved, you will be legally bound by all orders and judgments of the Court, and you will also be legally bound to the releases in the Settlement. This means that in exchange for being a Class Member and being eligible for the benefits in the Settlement, you will not be able to sue, continue to sue, or be part of any other lawsuit against Settling Defendants and/or any of the Released Parties that involves the same legal claims as those resolved through this Settlement. The definition of "Released Claims" is provided in Paragraph 1.36 of the Settlement Agreement and is further detailed in Sections 56 through 60, as copied below:

1.36 **"Released Claims,"** as set forth fully in Sections 56 through 60, means any and all suits, claims, controversies, previously assigned claims by Stone Gate and Daily Harvest, rights, agreements, promises, debts, liabilities, accounts, reckonings, demands, judgments, obligations, covenants, contracts, or causes of action of every nature, character, and description, in law or in equity, (including, but not limited to, any claims for damages, interest, attorneys' fees, expert or consulting fees, and any other costs, expenses or liability whatsoever), whether based on federal, state, local, statutory, or common law or any other law, rule or regulation, whether known or unknown, fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, whether class or individual in nature, including both known claims and unknown claims, that (1) have been asserted in the Action by Plaintiff or in the Litigation by any Settlement Class Member against the Settling Defendants, or (2) could have been asserted in any forum by the Plaintiff or the Settlement Class Members against any of the Settling Defendants or Released Parties, which in any way arise out of, are related to, or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Action, including, but not limited to, claims for personal or monetary injuries (including loss of consortium) related to any person's purchase or consumption of Crumbles. Notwithstanding the foregoing, "Released Claims" does not include claims relating to the enforcement of the Settlement or its terms.

56. Upon the entry of a Final Approval Order and without any further action by the Court or by any Party to this Agreement, Class Members (including Plaintiff), and any person claiming rights derivative of any Class Member as their spouse, parent, child, heir, guardian, associate, co-owner, attorney, agent, administrator, trustee, executor, devisee, predecessor, successor, assignee, assign, beneficiary, representative of any kind, shareholder, partner, director, employee, and any other person claiming by, through or on behalf of them, shall be deemed by operation of law and the Final Judgment to have fully, finally, and forever released, relinquished,

waived, discharged and dismissed the Settling Defendants and Released Parties from all Released Claims (including, without limitation, any unknown claims), as well as any claims arising out of, relating to, or in connection with, the prosecution, defense, mediation, arbitration, settlement, disposition, or resolution of the Action, Litigation or the Released Claims.

57. Upon the entry of a Final Approval Order, and without any further action by the Court or any Party to this Agreement, the Settling Defendants agree to release each other, as well as their officers, directors, owners, employees, shareholders, assigns, corporate affiliates, attorneys, and insurers from any and all liability, claims, damages, hold harmless agreements, indemnity obligations, contractual obligations, common law claims, settlements or judgments arising out of or relating to the Action, Litigation, and the Released Claims.

58. Without limiting the foregoing, the Releases specifically extend to any claims, that Class Members do not know or suspect to exist in their favor at the time that the Settlement, and the Releases contained herein, become effective, and Class Members waive any and all provisions, rights, and benefits conferred by any law of any state of the United States, or principle of common law or otherwise, which is similar, comparable, or equivalent to section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

59. Class Members understand and acknowledge the significance of these waivers of California Civil Code section 1542 and any other applicable federal or state statute, case law, rule, or regulation relating to limitations on releases. In connection with such waivers and relinquishment, Class Members acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Litigation, but that it is their intention to release fully, finally, and forever all Released Claims with respect to the Settling Defendants and Released Parties, and in furtherance of such intention, the release of the Released Claims will be and remain in effect notwithstanding the discovery or existence of any such additional or different facts.

60. Class Members shall be deemed to have agreed that the release set forth herein will be and may be raised as a complete defense to and will preclude any action, arbitration or proceeding based on the Released Claims. The Final Approval Order shall further provide for and effect the release of all actions, causes of action, claims, administrative claims, demands, debts, damages, costs, attorneys' fees, obligations, judgments, expenses, compensation, or liabilities, at law or in equity, whether now known or unknown, suspected or unsuspected, contingent or absolute, whether existing now or arising in the future, whether asserted or that could or might have been asserted, that constitute Released Claims.

The full text of the Settlement Agreement, which includes all of the provisions about settled claims and releases, is available on the website: www.SMcrumblesettlement.com.

11. How Do I Tell the Court I Don't Like the Proposed Settlement?

To object to the Settlement, you or your attorney must send a written objection to the Court and to the Settlement Administrator showing the basis for your objections. To be effective, an Objection must be in writing and include: (a) a reference to this case name, number, and court, *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc. et al.*, Case No. 1:22-cv-05443-DLC (S.D.N.Y.); (b) your name, address, telephone number, and, if available, email address, and, if you are represented by counsel, your counsel's name, address, telephone number, and email; (c) a written statement of all grounds for the Objection, accompanied by any legal support for such Objection; (d) a statement of whether you intend to appear at the Final Approval Hearing, either with or without counsel; (e) a statement of facts that establish your membership in the Class, including all information required by the Claim Form; (f) a detailed list of all other objections submitted by you, or your counsel, to any class action settlement in any court in the United States in the previous five (5) years; and (g) your signature, even if the objection is submitted through counsel, and if you are represented by counsel, the signature of your attorney. If you or your counsel have not objected to any other class action settlement in any court in the United States in the previous five (5) years, you must affirmatively state that fact in the written materials provided in connection with the Objection to this Settlement. This information is material to the Court's consideration of your Objection; failure to include this information and documentation shall be grounds for striking and/or overruling the Objection, even if the Objection is otherwise timely submitted to the Settlement Administrator. You must send copies of all documents you file with the Court to the Clerk of Court, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007.

Any objection must be postmarked on or before the Objection Deadline and sent to the Settlement Administrator at P.O. Box 361930, Hoover, AL 35236. The Objection Deadline may be extended without further direct notice to you. Consult the Settlement Website at www.SMcrumblesettlement.com. Please continue to check the Settlement Website for updates.

You can also ask the Court to disapprove the requested Attorneys' Expenses incurred by Class Counsel to provide this Settlement Notice. The granting by the Court of reimbursement of expenses incurred by Class Counsel for Class Notice is not a necessary term of the Settlement, and it is not a condition of approval of the Settlement by the Court. No Party may cancel or terminate the Settlement based on this Court's or any appellate court's ruling with respect to such expense reimbursement and no order or proceeding relating to any expense reimbursement, or any appeal from any such order, shall not operate to terminate or cancel this Settlement.

You may also appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for paying that attorney. If you want to raise an objection to the Settlement at the Final Approval Hearing, you must submit that objection in writing, by the Objection Deadline, which is [_____], unless extended, to

the Clerk of Court, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, postmarked or filed via the Court's electronic filing system (ECF).

If you fail to comply with these requirements or fail to submit your Objection and statement of intention to appear by the deadline [_____], unless extended, you may be deemed to have waived all objections and may not be entitled to speak at the Final Approval Hearing on [_____].

You do not need to appear at the Final Approval Hearing to have your objections considered or take any other action to indicate your approval of the Settlement Agreement.

More information regarding how to Object to the Settlement, including extensions to the Objection Deadline, are available on the Settlement Website at www.SMcrumblesettlement.com.

12. What Is the Difference Between Objecting and Opting Out?

Objecting is telling the Court that you don't like something about the Settlement. You can object only if you stay in the Class. If you stay in the Class, you will be legally bound by all orders and judgments of the Court, and you won't be able to assert claims against the Settling Defendants in any forum that are deemed released by the Settlement. Opting out is telling the Court that you don't want to be part of the Class. If you opt out, you have no basis to object because the case no longer affects you. You cannot both opt out of and object to the Settlement. If a person attempts to do both, the Court will treat the submission as an opt-out. **Note that, in this case, the deadline to opt out falls much earlier than the deadline to object. This is because the parties must know the number of people who have opted out before setting the Hold Back Amount.**

13. When Will The Court Decide If The Settlement Is Approved?

The Court will hold a hearing on [_____] to determine whether to approve the Settlement. The hearing will be held in the United States District Court for the Southern District of New York, before the Honorable Denise Cote, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, in Courtroom 18B, or such other judge assigned by the Court.

The hearing is open to the public. This hearing date may change without further notice to you. Consult the Settlement Website at www.SMcrumblesettlement.com or the Court docket in this case available through the Public Access to Court Electronic Records ("PACER") (<http://pacer.gov>), for updated information on the hearing date and time.

14. How Do I Get More Information?

You can inspect many of the Court documents connected with this case on the Settlement Website: www.SMcrumblesettlement.com. Other papers filed in this lawsuit are available by accessing the Court docket in this case available through PACER (<http://pacer.gov>).

You can contact the Settlement Administrator at P.O. Box 361930, Hoover, AL 35236 or by telephone at (877) 229-1937.

You can also obtain additional information by contacting Class Counsel:

William D. Marler, Esq.
Marler Clark Inc., PS
180 Olympic Drive S.E.
Bainbridge Island, WA 98110
Tel: (206) 346-1890
bmarler@marlerclark.com

James R. Peluso, Esq.
Dreyer Boyajian
75 Columbia Street
Albany, NY 12210
Tel: (518) 463-7784
jpeluso@dblawny.com

Paul V. Nunes, Esq.
Heisman Nunes & Hull LLP
1630 Empire Blvd., Suite 3B
Webster, NY 14580
Tel: (585) 270-6201
PNunes@HNHattorneys.com

Joseph E. O'Connor, Esq.
O'Connor & Partners, PLLC
255 Wall Street
Kingston, NY 12401
Tel: (845) 303-8777
JOConnor@onplaw.com

Jeffrey A. Bowersox, Esq.
Bowersox Law Firm, P.C.
385 1st Street, Suite 215
Lake Oswego, OR 97034
Tel: (503) 452-5858
jeffrey@bowersoxlaw.com

Please do not address any questions about the Settlement or Litigation to the Clerk of Court or the Judge.

Questions? Visit www.SMcrumblesettlement.com or call (877) 229-1937.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

BREEANNE BUCKLEY PENI, Individually
and on Behalf of All Others Similarly
Situated,

Plaintiff,

v.

DAILY HARVEST, INC., SECOND BITE
FOODS, INC., d/b/a “STONE GATE
FOODS”, SMIRK’S LTD., AND MOLINOS
ASOCIADOS

Defendants.

Civil Action No. 22-cv-05443

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff’s Motion for Final Approval of Class Action Settlement came on for hearing before this Court on [_____], with Class Counsel Marler Clark, Inc. PS, Dreyer Boyajian LLP, O’Connor & Partners, PLLC, Heisman Nunes & Hull LLP, and Bowersox Law Firm, P.C. (“Class Counsel”) appearing on behalf of Breeanne Buckley Peni (“Class Representative” or “Plaintiff”), Haworth Barber & Gerstman LLC appearing on behalf of Smirk’s Ltd. (“Smirk’s”), and Bond Schoeneck & King PLLC, appearing on behalf of Molinos Asociados, (“Molinos”; together with Smirk’s, the “Settling Defendants”) (collectively, the “Settling Parties” or “Parties”).

WHEREAS, on June 27, 2022, plaintiff Breeanne Buckley Peni filed a Class Action Complaint alleging Strict Liability, Breach of Warranty, and Negligence against Daily Harvest, Inc., in the Southern District of New York in a case styled *Breeanne Buckley Peni, individually and on behalf of all others similarly situated, v. Daily Harvest, Inc., et al.* Case No. 1:22-cv-05443.

WHEREAS, around this same time, a number of Related Actions were filed against the Settling Defendants. Those filed in federal court were transferred to the District Court for the Southern District of New York and assigned to the Court. Those filed in New York State Supreme

Court have been consolidated for discovery purposes and remain in that Court; and since that time, they have been following the directives of the Hon. Denise Cote of the Southern District of New York in these proceedings.

WHEREAS, on April 28, 2023, the District Court for the Southern District of New York entered a Coordination Order for all Related Actions in the Daily Harvest Litigation.

WHEREAS, the Parties have submitted their Motion for Preliminary of Class Action Settlement and supporting documents (“Settlement”), which this Court preliminarily approved on [_____] (“Preliminary Approval Order”).

WHEREAS, the Preliminary Approval Order established an Opt-Out deadline of [_____] and Claims Deadline and Objections Deadline of [_____].

WHEREAS, in accordance with the Preliminary Approval Order, Class Members have been given notice of the terms of the Settlement and the opportunity to object to or exclude themselves from its provisions.

WHEREAS, having received and considered the Settlement, all papers filed in connection therewith, including Plaintiff’s Motion for Final Approval of Class Action Settlement, and the evidence and argument received by the Court at the hearing before it entered the Preliminary Approval Order and at the final approval hearing on [_____], the Court HEREBY ORDERS and MAKES DETERMINATIONS as follows:

1. Incorporation of Other Documents. The Class Action Settlement Agreement, including its exhibits, and the definitions of words and terms contained therein are incorporated by reference in this Order. The terms of this Court’s Preliminary Approval Order are also incorporated by reference in this Order.

2. Jurisdiction. This Court has jurisdiction over the subject matter of this Action and over the Parties, including all members of the following Settlement Class certified for settlement purposes in this Court's Preliminary Approval Order pursuant to Fed. R. Civ. P. 23(b)(3):

All persons in the United States (including its territories) who purchased, received, or consumed French Lentil + Leek Crumbles and directly suffered personal injuries caused by consumption of the Crumbles, and all persons in the United States (including its territories) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of the Crumbles.

Excluded from the Settlement Class are: (1) the presiding judges in the Actions; (2) any member of those judges' immediate families; (3) the Settling Defendants; (4) any of the Settling Defendant's subsidiaries, parents, affiliates, and officers, directors, current employees, legal representatives, heirs, successors, or assigns; (5) counsel for the Parties; and (6) any persons who timely opt-out of the Settlement Class.

3. Class Certification. The Court finds and determines that the Settlement Class, as defined in the Settlement Agreement and above, meets all of the legal requirements for class certification for settlement purposes under Fed. R. Civ. P. 23(a) and (b)(3), and it is hereby ordered that the Class is certified for settlement purposes.

4. Pursuant to the Settlement Agreement, and for settlement purposes only, the Court finds as to the Settlement Class with respect to all aspects of the Settlement Agreement that the prerequisites for a class action under Fed. R. Civ. P. 23(a) and (b)(3) have been satisfied in that:

- a. The Settlement Class is so numerous that joinder of all members is impracticable;
- b. There are questions of law or fact common to the Settlement Class;
- c. The claims of the Class Representative are typical of the claims of the Settlement Class;
- d. The Class Representative had fairly and adequately protected the interests of the Settlement Class and is, therefore, appointed as Class Representative;

- e. Marler Clark, Inc. PS, Dreyer Boyajian LLP, O'Connor & Partners, PLLC, Heisman Nunes & Hull LLP, and Bowersox Law Firm, P.C. have fairly and adequately protected the interests of the Settlement Class and are qualified to represent the Settlement Class and are, therefore, appointed as Class Counsel;
- f. The questions of law and fact common to the Settlement Class predominate over the questions affecting only individual members; and
- g. A class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

5. Adequate Representation. The Court orders that Class Representative Breeanne Buckley Peni appointed as Representative Plaintiff be appointed as the Class Representative. The Court also orders that Marler Clark, Inc. PS, Dreyer Boyajian LLP, O'Connor & Partners, PLLC, Heisman Nunes & Hull LLP, and Bowersox Law Firm, P.C. be appointed Class Counsel. The Class Representative and Class Counsel have fairly and adequately represented and protected the interests of the absent Settlement Class Members, both with respect to litigation of the Action and for purposes of negotiating, entering into, and implementing the Settlement. Class Counsel and the Settlement Class Representatives have satisfied the requirements of Rules 23(a)(4) and 23(g) of the Federal Rules of Civil Procedure.

6. Arms-Length Negotiations. The Court finds that the proposed Settlement is fair, reasonable, and adequate based on the value of the Settlement, and the relative risks and benefits of further litigation. The Settlement was arrived at after sufficient investigation and discovery and was based on arms-length negotiations, including two mediations.

7. Class Notice. The notice provisions of the Class Action Fairness Act, 28 U.S.C. § 1715, have been satisfied. The Court finds that the approved Notice Plan has been satisfactorily and substantially implemented.

8. The Court finds that distribution of the Notice in the manner set forth in the Settlement Agreement constituted the best notice practicable under the circumstances, and

constituted valid, due, and sufficient notice to all members of the Class. The Court finds that such notice complies with the requirements of Fed. R. Civ. P. 23, the Constitution of the United States, and any other applicable laws. The Notice informed the Settlement Class of: (1) the terms of the Settlement; (2) their right to submit objections, if any, and to appear in person or by counsel at the final approval hearing and to be heard regarding approval of the Settlement; (3) their right to request exclusion from the Class and the Settlement; and (4) the location and date set for the final approval hearing. Adequate periods of time were provided by each of these procedures.

9. The Court finds and determines that the notice procedure carried out by the Settlement Administrator afforded adequate protections to Class Members and provides the basis for the Court to make an informed decision regarding approval of the Settlement based on the responses of Class Members. The Court finds and determines that the Notice has satisfied the requirements of law and due process.

10. Final Settlement Approval. The Court hereby finally approves the Settlement and finds that the terms constituted, in all respects, a fair, reasonable, and adequate settlement as to all Settlement Class Members in accordance with Fed. R. Civ. P. 23 and direct consummation pursuant to its terms and conditions.

11. The Court finds that the Settlement Agreement provides substantial and meaningful monetary benefits and other consideration to the Settlement Class as follows: Settling Defendants agreed to provide cash benefits with a gross potential payout value of \$7,671,000 (seven million, six hundred and seventy-one thousand dollars) in the aggregate. \$[] of the cash benefit was held back by the Settling Defendants, pursuant to the terms of the Settlement Agreement, based on the amount the Settling Defendants reserved for the claims of Class Members who opted out of the Settlement. The balance of the Class Action Hold Back Amount shall be deposited into the Settlement Fund after the Settling Defendants litigate to conclusion or otherwise resolve the claims of those who have opted out of the Settlement, or by December 31, 2026, whichever is later.

12. The Court finds that the settlement treats Settlement Class Members equitably relative to one another, and that the Settlement Benefits to be paid to each Settlement Class Member as provided for by the Settlement are fair and reasonable.

13. The manner of distribution of the Settlement Fund as described in the Settlement and in the Class Notice is hereby approved, subject to modification by further order of this Court, which may, at the discretion of the Court, be entered without further notice to the Settlement Class. Any order or proceedings relating to the manner of distribution of the Settlement Fund, so long as they are not materially inconsistent with this Final Judgment, shall not operate to terminate or cancel the Settlement or affect the finality of this Final Judgment approving the Settlement.

14. Attorneys' Fees. Neither Class Counsel nor any other attorney representing a Settlement Class Member or an individual who opts out shall be entitled to an award of attorney's fees directly from the Settlement Fund or the Settling Defendants. Neither the Settling Defendants nor any other Released Party shall have any responsibility for the payment of any Plaintiffs' or Class Members' past or future attorneys' fees or costs. Class Counsel and the attorneys for individual Class Members shall be compensated pursuant to the respective retainer agreements between Plaintiffs, Class Members, and their respective counsel (if any). The Settlement Administrator shall make any Settlement Benefit owed to a Claimant payable in the name of the Claimant and/or their attorneys for the Claimant's benefit (if any). Any division of a settlement payment between a Claimant and/or their respective counsel is to be determined by such persons and any such division, or any dispute in relation to such division, shall in no way affect the validity of this Agreement, any Release, or any Released Claim.

15. If a Class Member is not represented by counsel and does not have an attorney lien resulting from previous representation relating to the Litigation, then any Monetary Benefit awarded to said Unrepresented Claimant shall be reduced by one-third (1/3) under the terms of the Settlement Agreement. The Court finds that Plaintiff and the Class Counsel's application to impute a 1/3 attorney's fee award for any Monetary Benefit paid to Unrepresented Claimants and

to deposit the value of said fee award back into the Settlement Fund for the common benefit of all Claimants, is fair and reasonable and treats each Class Member equitably in the allocation of the Settlement Funds.

16. Dismissal. This Action is hereby DISMISSED WITH PREJUDICE, on the merits, by Plaintiffs and all members of the Settlement Class as against Settling Defendants on the terms and conditions set forth in the Settlement Agreement without costs to any party, except as expressly provided for in the Settlement Agreement.

17. Release. Upon the Effective Date as defined in the Settlement Agreement, the Plaintiff and each and every one of the Settlement Class Members unconditionally, fully, and finally releases and forever discharges the Released Parties from the Released Claims. In addition, any rights of the Class Representative afforded under Section 1542 of the California Civil Code and any other similar, comparable, or equivalent laws, are terminated.

18. Injunction Against Released Claims. Each and every Settlement Class Member, and any person actually or purportedly acting on behalf of any Settlement Class Member(s), is hereby permanently barred and enjoined from commencing, instituting, continuing, pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without limitation, in any individual, class or putative class, representative or other action or proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum, against the Released Parties. This permanent bar and injunction is necessary to protect and effectuate the Settlement Agreement, this Final Order of Dismissal, and this Court's authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and to protect its judgments.

19. No Admission of Liability. The Settlement Agreement and any and all negotiations, documents, and discussions associated with it will not be deemed or construed to be an admission or evidence of any violation of any statute, law, rule, regulation, or principle of common law or equity, or of any liability or wrongdoing by Settling Defendants, or the truth of any of the claims. Evidence relating to the Agreement will not be discoverable or admissible, directly or indirectly, in any way, whether in this Action or in any other action or proceeding, except for purposes of

demonstrating, describing, implementing, or enforcing the terms and conditions of the Agreement, the Preliminary Approval Order, or this Order.

20. Findings for Purposes of Settlement Only. The findings and rulings in this Order are made for the purposes of settlement only and may not be cited or otherwise used to support any other action except as provided in the Settlement Agreement.

21. Effect of Termination or Reversal. If for any reason the Settlement terminates or Final Approval is reversed or vacated, the Settlement and all proceedings in connection with the Settlement will be without prejudice to the right of Settling Defendants or the Class Representative to assert any right or position that could have been asserted if the Agreement had never been reached or proposed to the Court, except insofar as the Agreement expressly provides to the contrary. In such an event, the certification of the Settlement Classes will be deemed vacated. The certification of the Settlement Classes for settlement purposes will not be considered as a factor in connection with any subsequent class certification issues.

22. Settlement as Defense. In the event that any provision of the Settlement or this Final Order of Dismissal is asserted by a Settling Defendant as a defense in whole or in part to any claim, or otherwise asserted (including, without limitation, as a basis for a stay) in any other suit, action, or proceeding brought by a Settlement Class Member or any person actually or purportedly acting on behalf of any Settlement Class Member(s), that suit, action or other proceeding shall be immediately stayed and enjoined until this Court or the court or tribunal in which the claim is pending has determined any issues related to such defense or assertion. Solely for purposes of such suit, action, or other proceeding, to the fullest extent they may effectively do so under applicable law, the Parties irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court, or that the Court is, in any way, an improper venue or an inconvenient forum. These provisions are necessary to protect the Settlement Agreement, this Order and this Court's authority to effectuate the Settlement and are ordered in aid of this Court's jurisdiction and to protect its judgment.

23. Retention of Jurisdiction. Without affecting the finality of this Final Judgment in any way, the Court retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, distribution of funds, and enforcement of the Settlement.

24. Upon the Court's receipt of and satisfaction with Class Counsel's Notice of Completion of Duties and accompanying declarations, the Court shall discharge Class Counsel's and the Settlement Administrator's duties and declare this matter closed, unless otherwise ordered by the Court.

25. Nothing in this Order shall preclude any action to enforce the Parties' obligations pursuant to the Settlement Agreement or pursuant to this Order.

26. The Parties and the Settlement Administrator will comply with all obligations under the Settlement Agreement until the Settlement is fully and finally administered.

27. The Parties shall bear their own costs and attorneys' fees except as otherwise provided by the Settlement Agreement and this Court.

28. Entry of Judgment. This Order shall constitute a final judgment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: _____

The Honorable Denise Cote
United States District Judge

EXHIBIT “E”

EXHIBIT “E”

CONFIDENTIAL

Proposed Smirk's-Molinos Settlement

c/o Ed Gentle, Settlement Administrator

501 Riverchase Parkway East, Suite 100

Hoover, AL 35244

(800) 345-0837 Toll Free | (205) 716-3000 Telephone

(205) 716-2364 Facsimile

**CLAIM FORM
FOR PROPOSED SMIRK'S-MOLINOS SETTLEMENT**

1. CLAIMANT IDENTIFICATION

Name: _____

Date of Birth: _____

Social Security No: _____

Address: _____

City: _____ State: _____ Zip: _____ County: _____

If you have filed a lawsuit, arbitration, or other proceeding involving consumption of Daily Harvest's Lentil + Leek Crumbles (the "Crumbles"), state the case name, venue, and docket number: _____

If you are filing this claim as a legal representative for the Claimant state your name here, followed by the basis of your authority (e.g., Power of Attorney, Parent or Legal Guardian, Conservator):

If you are represented by legal counsel in connection with consumption of Crumbles, state the name, address, telephone number, and email address of that counsel:

2. EXPOSURE

Date(s) on which Claimant purchased the *French Lentil + Leek Crumbles* ("Crumbles"), if applicable:

Date(s) on which claimant ate the Crumbles, if applicable: _____

Does claimant possess a proof of purchase for the Crumbles? YES NO

Did claimant pay for the Crumbles with a credit/debit card? YES NO

Did someone else pay for the Crumbles with a credit/debit card? YES NO

If someone else paid for the Crumbles, identify that person: _____

3. ILLNESS

Did Claimant experience an injury? Yes No

Date of symptom onset: _____

Which, if any, of the following did claimant experience after eating the Crumbles?									
Itching	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Fatigue	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Nausea	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Jaundice	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Vomiting	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Dark Urine	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Diarrhea	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Loss of appetite	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Constipation	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Stomach cramps	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Fever/Chills	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Light colored stool	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Pain	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No	Abnormal liver function by lab testing	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No
Muscle/body aches	<input type="checkbox"/>	Yes	<input type="checkbox"/>	No					

Did Claimant experience any other symptoms? If so, please describe them:

Was Claimant treated by a doctor? Yes No

Was Claimant treated in the Emergency Room? Yes No
If so, number of ER visits: _____

Was Claimant admitted to the hospital? Yes No
If so, how many nights in the hospital: _____

Did Claimant undergo any diagnostic or medical procedures? Yes No
If so, please list: _____

Did Claimant undergo a cholecystectomy? Yes No

Date Claimant's symptoms resolved: _____

If Claimant's symptoms have not resolved, please describe any ongoing symptoms and medical care:

4. CATEGORY DESIGNATION

In this section, please check the category that applies to your Claim

- Category 1A:** Claimant did not mark any illnesses in Section 3, and only suffered consequential monetary damages arising from or related to another person's alleged personal injuries arising from the consumption of the Crumbles.
- Category 1B:** Claimant did not receive medical treatment for personal injury illnesses marked in Section 3.
- Category 2:** Claimant received medical treatment for illnesses marked in Section 3, but was not hospitalized.
- Category 3:** Claimant received medical treatment for illnesses marked in Section 3, and was hospitalized. (Emergency Room visits are not considered hospitalizations. Claimant must have been admitted to the hospital to qualify for this Category).
- Category 4:** Claimant received medical treatment for illnesses marked in Section 3, including hospitalization related to a cholecystectomy.

If you received medical treatment for your injuries and would like to be considered for an enhancement of your monetary benefits, please identify any special medical circumstances of your illness that should be considered in evaluating the claim: (Please note, that only Claimants who can show they received medical treatment for illnesses in Categories 2, 3, or 4 above, are eligible for an enhancement consideration.)

5. MEDICAL PROVIDERS
(If Claimant checked Category 1, skip to Section 6)

Please list all medical providers that claimant received related medical treatment from.

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____

Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____
Charges: _____

Provider Name: _____

Address: _____

Dates of Treatment: _____
Charges: _____

6. MEDICAL EXPENSES

Total medical expenses claimed: \$_____ (Please attach medical bills to support)

7. RETAINED EXPERT OR TREATING PROVIDER REPORT? Yes No

If so, please attach report(s).

I declare under penalty of perjury of the laws of the State of _____ that the information provided in this Proof of Claim Form and the attachments hereto is true and correct to the best of my knowledge.

Claimant or Representative Signature

SUBMITTED ON _____, 2024 _____
Counsel for Claimant

REQUIRED DOCUMENTATION

Please tab and attach:

1. All medical records, including laboratory reports, of claimant relating in any way to the illness or any special medical circumstances of claimant's illness described in Section 4, and (optional) chronology of medical care.
2. All medical bills, liens, receipts and notices of payment due related to the illness.
3. Proof of purchase for *Crumbles* (i.e. receipt, credit card, or bank statement).
4. Evidence related to any special circumstances claimed.
5. Report of retained expert(s) or treating healthcare provider(s) regarding claimant's illness.

Exhibit E.1

MEDICAL INSURANCE BENEFITS QUESTIONNAIRE

**PLEASE MAKE SURE THAT YOU
COMPLETE & RETURN
ALL PAGES OF THIS FORM, INCLUDING
COPIES OF INSURANCE CARDS AND
ADDITIONAL PAGES, IF NEEDED.**

**MISSING OR ILLEGIBLE INFORMATION
AND/OR PAGES WILL DELAY THE
PROCESSING OF YOUR CLAIM.**

MEDICAL INSURANCE BENEFITS QUESTIONNAIRE

GENTLE, TURNER & BENSON, LLC
501 RIVERCHASE PARKWAY EAST, SUITE 100
HOOVER, ALABAMA 35244

TOLL FREE (800) 345-0837 • LOCAL (205) 716-3000 • FAX (205) 716-2364
OUR FILE NO. 6890-2

I. PERSONAL INFORMATION FOR THE INJURED PARTY— If you are completing this form on behalf of an injured party (as parent, guardian, representative, POA, GAL, etc.), **complete this entire form using information for the INJURED PARTY and attach a copy of the documentation designating you as such.**

Full LEGAL Name of INJURED PARTY: _____
 (First) (M.I.) (Last)

Current Address or Address at Time of Death: _____

City: _____ State: _____ Zip: _____

Date of Birth: _____ Full SSN: _____ Telephone: (____) _____
 mm/dd/year (Required)

Email Address: _____ Gender: M F

Is the injured party deceased? YES NO If "Yes", date of death: _____

II. SETTLEMENT INJURY INFORMATION (if unsure, please get this information from your attorney)

For the purpose of this questionnaire, the term "injury" refers to the event that qualified the injured party for the potential settlement.

Date of 1st ingestion of Daily Harvest (can be approximate): _____

Onset date of injury symptoms/illness allegedly caused by the Crumbles: _____

CITY, STATE AND COUNTY where injury occurred: _____
 CITY STATE COUNTY

III. GOVERNMENT MEDICAL INSURANCE INFORMATION

MEDICARE: *Federally sponsored* medical insurance benefits for most people aged 65 years or older or who have been on social security disability for more than 24 consecutive months

From the date of the injury to present day, did the injured party become eligible for **MEDICARE** parts A &/or B benefits? (please answer regarding eligibility to receive original Medicare benefits even if the injured party has a Medicare replacement plan in effect) YES NO

If 'Yes', on what date did the injured party become eligible for Medicare? _____

Please list the injured party's Medicare number (HICN or MBI): _____

*******PLEASE ATTACH A COPY OF THE RED, WHITE & BLUE MEDICARE CARD*******

MEDICAID: *State sponsored, needs-based* medical insurance benefits. The injured party may have applied for this insurance coverage through a state or county office. Please note: The insurance received through this application process may not be called “Medicaid”, but it is considered Medicaid for the purposes of this settlement.

State Medicaid agencies sometimes will provide your medical insurance through a **Managed Care Organization/Plan (“MCO”)**. MCOs are still considered Medicaid plans. Examples of common Medicaid MCOs are Wellcare, Molina, United Healthcare, Amerigroup, MercyCare, AETNA Better Health, etc., but there are many Medicaid MCO plans and they are not limited to the previous examples. Your insurance card may provide information as to whether your plan is a Medicaid MCO.

From the date of the injury to present day, did the injured party become eligible for *MEDICAID* medical insurance benefits, including MCOs, in any state? YES NO

If ‘Yes’, please list all states through which the injured party received Medicaid medical insurance since the settlement injury and any corresponding MCO(s) for each state:

State 1. _____ MCO(s), if any: _____

State 2. _____ MCO(s), if any: _____

State 3. _____ MCO(s), if any: _____

State 4. _____ MCO(s), if any: _____

State 5. _____ MCO(s), if any: _____

*******PLEASE ATTACH A COPY OF MEDICAID AND/OR MCO CARDS*******

TRICARE (formerly known as CHAMPUS) or US Family Health Plan: Medical insurance through the U.S. Armed Forces

From the date of your injury to present day, did the injured party receive medical insurance through his/her own service or a family member’s service in any branch of the U.S. Armed Forces? YES NO

If ‘Yes’, please answer the following questions:

1. Is the injured party the Sponsor or a Dependent? (circle one) **SPONSOR** **DEPENDENT**

2. If a dependent, list the **Sponsor’s** Name and ID number:

_____ Sponsor Full Name _____ Sponsor ID Number

3. In what branch of the Armed Forces did the sponsor serve? Please check the branch in which the sponsor most recently served:

Army Army National Guard Army Reserves Navy

Naval Reserves Marines Marine Reserves Air Force

Air National Guard U.S. Coast Guard US Public Health Services

VETERANS ADMINISTRATION MEDICAL BENEFITS:

1. From the date of the injury to present day, did the injured party become eligible to receive ANY medical treatment (not just service connected treatment) from a Veterans Administration (“VA”) hospital or any other VA medical facility? YES NO

If ‘Yes’, please list the names and locations (city and state) of all VA treatment facilities from which the inured party received ANY medical treatment, even if the medical treatment is not related to this case and even if he/she did not seek medical treatment at a VA facility for settlement related injuries. (attach additional pages, if needed):

- 1. _____
Facility Name _____ City, State _____
- 2. _____
Facility Name _____ City, State _____
- 3. _____
Facility Name _____ City, State _____
- 4. _____
Facility Name _____ City, State _____

2. From the date of the injury to present day, did the injured party become eligible to receive CHAMPVA coverage (VA coverage for dependents of disabled or deceased Veterans)? YES NO

If ‘Yes’, please list the names and locations (city and state) of all VA treatment facilities from which the injured party received ANY medical treatment, even if the medical treatment is not related to this case (attach additional pages, if needed):

- 1. _____
Facility Name _____ City, State _____
- 2. _____
Facility Name _____ City, State _____
- 3. _____
Facility Name _____ City, State _____
- 4. _____
Facility Name _____ City, State _____

INDIAN HEALTH SERVICE:

From the date of the injury to present day, has the injured party been eligible to receive medical care from Indian Health Service? YES NO

If ‘Yes’, please list the IHS facility from which you received settlement-related medical care and the address and phone number of the facility:

IV. PRIVATE MEDICAL INSURANCE INFORMATION

PRIVATE MEDICAL INSURANCE: Medical insurance received through the injured party’s or a family member’s employment or an individual medical insurance plan purchased directly from a medical insurance company or through the insurance marketplace. Private health insurance also includes any Medicare Parts C &/or D plans, ANY Medicare Advantage or Medicare supplement plans, and prescription only plans.

Did the injured party have private medical insurance at the time of or at any time since the injury?

YES **NO**

If ‘Yes’, list ALL private medical insurance coverage the injured party had from the date of the injury to present day:

1. Insurance company name: _____

Member, plan, contract, etc. ID #: _____ Group #: _____

Insurer’s Member Services phone #: (may be found on the back of the insurance card): _____

Is this a Medicare Advantage or Medicare supplement plan? YES NO

2. Insurance company name: _____

Member, plan, contract, etc. ID #: _____ Group #: _____

Insurer’s Member Services phone #: (may be found on the back of the insurance card): _____

Is this a Medicare Advantage or Medicare supplement plan? YES NO

3. Insurance company name: _____

Member, plan, contract, etc. ID #: _____ Group #: _____

Insurer’s Member Services phone #: (may be found on the back of the insurance card): _____

Is this a Medicare Advantage or Medicare supplement plan? YES NO

4. Insurance company name: _____

Member, plan, contract, etc. ID #: _____ Group #: _____

Insurer’s Member Services phone #: (may be found on the back of the insurance card): _____

Is this a Medicare Advantage or Medicare supplement plan? YES NO

*******PLEASE ATTACH A COPY OF THE FRONT & BACK OF THE INSURANCE CARD(S)*******

PRIVATE MEDICAL INSURANCE, CONT.

5. Insurance company name: _____

Member, plan, contract, etc. ID #: _____ Group #: _____

Insurer's Member Services phone #: (may be found on the back of the insurance card): _____

Is this a Medicare Advantage or Medicare supplement plan? YES NO

*******PLEASE ATTACH A COPY OF THE FRONT & BACK OF THE INSURANCE CARD(S)*******

If the injured party had additional private medical insurers since the date of injury that you have not listed in 1-5 above or in any previous sections of this questionnaire, please attach additional page(s) with information for any additional medical insurers the injured party had since the injury date AND provide a copy of the front and back of the insurance card(s) for those insurers.

V. PRE-SETTLEMENT FUNDING LOANS/ADVANCES

Did the injured party obtain any pre-settlement funding loans (loans from lenders such as Fast Trak, Cartiga, etc.)* or loans from his/her attorney*? YES NO

If 'Yes', provide each lender name, lender contact phone number, account/contract number, loan amount, and current amount due, including interest, if known:

*by requesting this information, we are not ensuring or guaranteeing repayment of any loans. If settlement funds are available, we will pay these obligations from the injured party's settlement funds, net of attorney fees, case expenses and medical liens at a repayment rate per the terms of the loan agreement with the lender.

VI. BANKRUPTCY

Has the injured party ever declared Bankruptcy? YES NO

If 'Yes', provide: Filing date(s): _____ Discharge date(s): _____

Is the bankruptcy case still active? YES NO

PLEASE READ

Please make sure to provide complete and accurate information and answer ALL questions in this questionnaire. Failure to do so will result in a delay to final resolution of the injured party's case. Please note: unanswered questions cannot be considered as a 'No'. Answer all questions, even if they do not apply to the injured party. You are responsible for providing complete and accurate information for any and all medical insurers that the injured party had since the date of injury.

VII. RELEASE AND SIGNATURE

By signing below, you agree to the release of any of the information given above, including the injured party’s name, address, social security number, and date of birth to the private and/or governmental agencies referenced in Parts III, IV, V and VI above. It is your responsibility to notify us if any of the benefit information changes or needs to be supplemented. You also understand that if you provide false, incorrect or inaccurate information or omit information, whether intentionally or unintentionally, the injured party will bear any and all financial responsibility arising from such misinformation. **The undersigned hereby swears under penalty of perjury that all of the information provided herein is true and accurate.:**

Date: _____ / _____ / _____

**Injured Party Signature or Personal Representative Signature
if Injured Party is a minor, deceased or incapacitated**

If you are signing as a Personal Representative for the injured party, please complete the following:

List your relationship to the Injured Party: _____

Representative Name: _____
(First) (M.I.) (Last)

Current Mailing Address: _____

City: _____ State: _____ Zip: _____

Telephone: (____) _____ Email Address: _____

****If you have signed this document as a Personal Representative, you must attach documents designating you as such (Power of Attorney, Letters Testamentary, Guardianship documentation, etc.)****

Exhibit E.2

HIPAA RELEASE FORM

AUTHORIZATION TO DISCLOSE HEALTH INFORMATION

Claimant Name: _____ **Date:** _____

Date of Birth: _____ **Soc. Sec. No.** _____

1. The following individuals or organizations are authorized to disclose my health records to the parties specified below in section #4:

(Note: Please list the names of your medical care providers and your health insurance providers that may have records relevant to the resolution of your Personal Injury Claim. If you are unsure of the exact legal name of your medical providers and health insurance providers, you can leave this blank, and we will complete it for you with the understanding that you authorize all relevant parties):

2. The type and amount of information to be used or discloses is as follows:

The entire record, including but not limited to: any and all medical records, problem lists, medication lists, lists of allergies, immunization records, history and physicals, discharge summaries, laboratory results, x-ray and imaging reports, medical images of any kind, video tapes, photographs, consultation reports, correspondence, itemized invoices and billing information, and information pertaining to Medicaid or Medicare eligibility and all payments made by those agencies, for the following dates:

Dates of Services From: _____ To: _____

(Note: List the date range for which the medical providers and insurance companies above may have records relevant to the resolution of your Personal Injury Claim. If you are unsure of the exact dates, then leave this blank, and we will complete this section for you with the understanding that you authorize all relevant date ranges).

3. I understand that the information in my health records may include information relating to sexually transmitted disease, acquired immunodeficiency syndrome (AIDS), or human immunodeficiency virus

(HIV). It may also include information about behavioral or mental health services, as well as treatment for alcohol and drug abuse.

- 4. The health information may be disclosed to and used by the following individual and/or organization:

GENTLE, TURNER & BENSON, LLC
501 Riverchase Parkway East, Suite 100
Hoover, Alabama 35244
(p) 205-716-3000 (f) 205-716-2364

- 5. I understand I have the right to revoke this authorization at any time. I understand if I revoke this authorization, I must do so in writing and present my written revocation to the health information management department. I understand the revocation will not apply to information that has already been released in response to this authorization. I understand the revocation will not apply to my insurance company when the law provides my insurer with the right to contest a claim under my policy. Unless otherwise revoked, this authorization will expire 5 years after the date that I sign it.

- 6. I understand that authorizing the disclosure of this health information is voluntary. I can refuse to sign this authorization and forego a recovery under Daily Harvest Settlement Class Action Settlement. I understand that no organization may condition treatment, payment, enrollment, or eligibility for benefits on my signing of this authorization. I understand I may inspect or copy the information to be used or disclosed, as provided in CFR 1634.524. I understand any disclosure of information carries with it the potential for an unauthorized re-disclosure and the information may not be protected by federal confidentiality rules or HIPAA. If I have questions about disclosure of my health information, I can contact the parties listed above in section #4.

Patient or Legal Representative

Date

Relationship to Patient (If signed by Legal Representative)

Exhibit E.3

MEDICARE PROOF OF REPRESENTATION

Sign below if you, the Medicare beneficiary, want to inform the Centers for Medicare & Medicaid Services (CMS) that you have given another individual the authority to represent you and act on your behalf with respect to your claim for liability insurance, no-fault insurance, or workers' compensation, including releasing identifiable health information or resolving any potential recovery claim that Medicare may have if there is a settlement, judgment, award, or other payment. Your representative must also sign that he/she has agreed to represent you.

Type of Medicare Beneficiary Representative (Check one below and then print the requested information):

() Individual other than an Attorney: Name: Edgar C. Gentle, III, Esq. and Katherine H. Benson, Esq.
(X) Attorney* Relationship to Medicare Beneficiary: Lien/Settlement Administrator
() Guardian* Firm or Company Name: Gentle, Turner & Benson, LLC
() Conservator* Address: 501 Riverchase Parkway East, Suite 100
() Power of Attorney* Hoover, AL 35244
Telephone: (p) 205-716-3000 (f) 205-716-2364

Medicare Beneficiary Information and Signature/Date: **For this document, the injured party is the Beneficiary. Provide information for the injured party only. This does NOT mean a spouse or other heir/representative:**

Please complete numbers 1-4 below only:

- 1. Beneficiary's Name
Please print exactly as shown on your Medicare card: _____

- 2. Beneficiary's Medicare Number (number on your Medicare card): _____

- 3. Date of Illness/Injury for which the beneficiary has filed a liability insurance, no-fault insurance or workers' compensation claim: _____
(if you are unsure of the exact date of injury as listed on the complaint or demand, please leave this blank and we will complete it for you.)

- 4. Beneficiary Signature: _____ Date Signed: _____

****Due to the recent nationwide change in the Medicare number system, please provide a copy of the front of your Medicare card. Failure to provide your current Medicare number could result in a delay in processing your case.****

For Lien Administrator's Use Only – DO NOT WRITE OR SIGN BELOW THIS LINE:

Representative Signature/Date:

Representative's Signature: _____ Date signed: _____

Our File No.: _____

Confidential Class Action Settlement with Smirk's and Molinos Asociados Proposed Allocation Model

In exchange for their release, Smirk's Ltd. and Molinos Asociados SAC ("the Settling Defendants") have agreed to contribute to the payment of claims for the injured parties. Specifically, Citizens Insurance Company of America, The Hanover Insurance Company, and The Hanover Insurance Group (together, the "Settling Insurers") will contribute \$7,671,000 to the Settlement Fund on behalf of Smirk's. The Settling Insurers will also contribute an additional \$25,000 on Smirk's behalf for the Settlement Notice. Molinos (which is uninsured) will contribute \$25,000 specifically for the Settlement Notice.

It is agreed that Smirk's will withhold a portion of its total contribution to the Settlement Fund for a specified period of time to cover its reasonable material exposure relative to the potential litigation or claims from Opt-Outs (the "Class Action Hold Back Amount"). Any remaining funds from this hold back will be distributed pro rata to members of the Class Action no later than December 31, 2026.

It is also agreed that Smirk's and its insurers will hold back \$753,712.16 for claims already made against the Citizens/Hanover policies (the "Claims Hold Back Amount"). Within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover shall provide the plaintiff with a written statement of the amounts paid, along with reference claim numbers used in the resolution of the unrelated pending claims against Smirk's, once all such claims are resolved. If any of the \$753,712.16 is not paid on those other claims, within thirty (30) days of Hanover's closing of all claims related to the Claims Hold Back Amount, Hanover will pay the remainder of the unpaid amount to the Qualified Settlement Fund and it will then be distributed to the members of the Class Action on a pro rata basis.

Under this proposal, a court-appointed Settlement Administrator will oversee the distribution of the settlement funds. The Settlement Fund will be divided into several categories (outlined below) to ensure that: (a) every claimant can reliably count on a base level of compensation with potential enhancements; and (b) the Settlement Administrator has a significant amount of money to award enhancements to claimants at his discretion. Under this proposal, a claimant is

eligible to receive awards from the multiple categories listed below, as well as an enhancement from the Settlement Administrator.

The Settlement Administrator's fees and expenses, including costs for Notice and Class Administration, will be paid from the Settlement Fund, with up to \$500,000 allocated for this Settlement, on top of the \$500,000 previously allocated for the Daily Harvest-Stone Gate Settlement. Any remaining funds will be distributed to claimants on a pro rata basis.

Claimants who have already submitted a claim form, along with supporting documentation, in the Daily Harvest-Stone Gate Settlement and wish to participate in this settlement too do not need to take any further action. The claim form they previously filed will apply to both settlements.

Claimants to the Smirk's-Molinos Settlement may apply to the extraordinary damages fund (Category 5) even if they did not file a claim in the Daily Harvest settlement. However, claimants who did not participate in the Daily Harvest-Stone Gate settlement will only be eligible to recover at an approximate 30% rate in the Smirk's-Molinos settlement. The sole exception is for claimants who were unable to file a claim in Daily Harvest-Stone Gate Settlement, with eligibility reviewed on a case-by-case basis.

Categories

Category 1: \$166,000

1A: This category will be used to compensate equally those claimants on a prorated bases (not to exceed \$165 each) who suffered consequential monetary damages arising from or related to another person's personal injuries arising from consumption of French Leek and Lentil Crumbles with tara in 2022.

1B: This category will be used to compensate equally those claimants on a prorated basis (not to exceed \$335 each) whose personal injury illness is verified to be causally related to the consumption of French Leek and Lentil Crumbles with tara in 2022 but did not receive medical treatment. Any unused amount will be utilized in Category 5.

Category 2: \$1,445,000

This category will be used to compensate equally the approximately 289 claimants whose personal injury illness is verified to be causally related to the consumption of French Leek and Lentil Crumbles with tara in 2022 and who received medical treatment but were not hospitalized (estimated to be \$5,000 gross each). In addition, these claimants would be eligible for a Settlement Administrator enhancement as provided in Category 5. Any unused amount will be utilized in Category 5.

Category 3: \$1,860,000

This category will be used to compensate equally the approximately 186 claimants whose personal injury illness is verified to be causally related to the consumption of French Leek and Lentil Crumbles with tara in 2022 and were hospitalized (estimated to be \$10,000 gross each). To qualify for this category, the claimant must have been admitted to a hospital. ER visits do not qualify. In addition, these claimants would be eligible for a Settlement Administrator enhancement as provided in Category 5, including, but not limited to an enhancement for the number of days of hospitalization. Any unused amount will be utilized in Category 5.

Category 4: \$1,400,000

This category will be used to compensate equally the approximately 42 cholecystectomy claimants whose personal injury illness is verified to be causally related to the consumption of French Leek and Lentil Crumbles with tara in 2022 (estimated to be \$33,330 gross each). In addition, these claimants would receive a Category 3 award (for a total award of \$43,330 gross) and would be eligible for a Settlement Administrator enhancement, including, but not limited to an enhancement for the number of days of hospitalization. Any unused amount will be utilized in Category 5.

Category 5: \$2,825,000

This is the Settlement Administrator's discretionary category. This category will be used to pay any category 2, 3 or 4 shortfalls, if any. Based on the evidence

submitted, he may use his discretion to create objective criteria to allocate enhancement awards to any claimant whose injury is verified to be causally related to the consumption of French Leek and Lentil Crumbles with Tara in 2022. It is agreed that the following are factors, among others, that merit consideration for enhancement, but do not require enhancement for any given claim (listed in no order of priority or gravity):

- Proof of consumption and documentation of an injury
- Any causally related invasive procedure, e.g., ERCP (endoscopic retrograde cholangiopancreatogram) or liver biopsy
- Number of days of hospitalization
- Any causally related complication of hospitalization that extended care needs post-hospitalization, e.g., wound infection, severe disruption of GI function
- Chronic physical or mental symptoms causally related to illness documented by MD or DO
- Causally related miscarriage documented by MD or DO and related damage
- Other documented factors
- To correct errors or omissions in scoring the above categories

There will be no awards for punitive damages or loss of consortium.

The estimated amounts per claim in categories 2 to 4 are the best estimates available based upon the anticipated number of claims. If there are materially more claims than expected, then the awards in categories 2 through 4 will be ratably reduced.

All claimants agree to present claims to the Settlement Administrator using a universal submission form that may be supplemented by claimants' counsel.

Following the assessment of enhancement awards by the Settlement Administrator, claimants' counsel shall have 20 days to appeal to the Settlement Administrator for increased awards to specific clients.

A Claimant who disagrees with the appeal ruling of the Settlement Administrator may appeal to the Court within 14 days of the Settlement Administrator's appeal determination by submitting a written statement to the

Court at Attn: Hon. Judge Denise Cote, Case No. 1:22-cv-05443-DLC, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007, outlining the Claimant's position and why the Claimant believes the Settlement Administrator has erred.

The appeals process shall not result in any modification of substantive eligibility criteria. The Court shall issue a determination on the appeal in writing, which shall be served on the Claimant (and the Claimant's counsel, where applicable) and the Settlement Administrator. Decisions of the Court are final and binding.

EXHIBIT “G”

EXHIBIT “G”

EXHIBIT G-1



DREYER·BOYAJIAN
ATTORNEYS AT LAW

75 Columbia Street
Albany, New York 12210
T: (518) 463-7784
F: (518) 463-4039

General Civil and Criminal Litigation in all Federal and State Courts and Agencies; Negligence, Product Liability, Corporate, Commercial, Municipal, Construction, Real Estate, Environmental, Civil Rights, Class Action/Complex Litigation, Qui Tam/False Claims, White Collar Criminal Defense, Professional Liability

MEMBERS OF FIRM



WILLIAM J. DREYER, admitted to bar: 1969, New York; 1970; U.S. Supreme Court, 1994; U.S. Court of Appeals, Second Circuit, 1974; U.S. District Courts: Northern District of New York, 1974; Southern District of New York, 2005; Eastern District of New York; District of Vermont, 2015; District of Connecticut; U.S. Tax Court, 1984; U.S. Court of Appeals for the Armed Forces, 1970. Education: Bowdoin College (A.B., 1966); New York Law School (J.D., 1969). Capt., JAGC, U.S. Army, 1969-1973. Chief Assistant U.S. Attorney, Northern District of New York, 1974-1980. Member: CJA Committee; CJA Advisory Committee, U.S. Court of Appeals, Second Circuit; Northern District of New York Bankruptcy Judge Merit Selection Panel, 1985-1987, 1994-1995; Federal Public Defender's Association, Northern District of New York; Federal Court Bar Association, Northern District of New York (President & Trustee); Federal Bar Council; New York State Bar Association (Speaker: Federal and State Practice Seminars, 1985-1996; Executive Committee: Commercial and Federal Litigation Section); Albany County Bar Association; Albany Law School American Inns of Court, 1987-1991. Honors: The Best Lawyers in America, 1st ed. - present; Martindale-Hubbell: AV[®] Preeminent rating; Super Lawyers: Super Lawyers 2007-2023, Top 50 Upstate New York 2009, 2011-2018, 2020-21; Top 25 Hudson Valley 2007-2023; Judge Duane Award, Northern District of New York Federal Bar Association; Lifetime Advocate Award, New York State Trial Lawyers Association; New York State Bar Association Attorney Professionalism Award 2018.

CONCENTRATIONS: Federal Civil and Federal Criminal Practice.



DONALD W. BOYAJIAN, admitted to bar: 1982, New York; U.S. Supreme Court; U.S. Court of Appeals, Second Circuit; U.S. District Courts: Northern District of New York; Western District of New York. Education: Union College (B.A., 1978, cum laude); Franklin Pierce Law Center (J.D., 1981). Assistant Editor, Annual Survey of New Hampshire Law Journal, 1981. Confidential Law Assistant, New York State Supreme Court, Appellate Division, Third Department, 1981-1982. Town Attorney, Town of Waterford, New York, 1985-present. Assistant District Attorney, Saratoga County, 1987-1988. Independent Counsel, New York State Senate Ethics Committee, 1986-1988. Member: Federal Court Bar Association, Northern District of New York (Vice President & Trustee); American Bar Association; American Association for Justice; New York State Bar Association (Speaker: Basic Civil Practice and Practical Skills Seminars 1992-1994; Guide for the Up-To-Date Litigator - Wrongful Death, 2001; Member: Municipal Law Section; Continuing Legal Education Committee); New York State Trial Lawyers Association (President: Capital Region Affiliate; Speaker: Continuing Legal Education, Decisions, Discovery, Ethics, Labor Law); New York State Academy of Trial Lawyers; Albany County Bar Association; Saratoga County Bar Association; Armenian Bar Association. Pro Bono: Board to Fund Equal Justice, Legal Aid Society of Northeastern New York; Leukemia and Lymphoma Society Man/Woman of the Year Award Recipient 2010; Northeast Council on Occupational Safety and Health. Honors: Martindale-Hubbell: AV[®] Preeminent rating; Super Lawyers: Super Lawyers 2007-2023, Top 50 Upstate New York 2007-2009, 2011-2015, 2018, Top 25 Hudson Valley 2007-2018, 2021-2023; National Trial Lawyers Top 100.

CONCENTRATIONS: Serious Personal Injury Litigation of Automobile Negligence, Medical Malpractice, Defective Products and Environmental/Toxic Torts; Mass Torts; Class Actions; Municipal Liability and Civil Rights; Commercial/Consumer Fraud; Whistleblower/False Claims.



JAMES R. PELUSO, admitted to bar: 2001, New York; Massachusetts, 2017; U.S. Supreme Court, 2008; U.S. Court of Appeals, Second Circuit, 2006; U.S. District Courts: Northern District of New York, 2001; Southern District of New York, 2005; District of Vermont, 2015. Education: Siena College (B.B.A., 1997, magna cum laude); Albany Law School of Union University (J.D., 2000). Executive Editor for Symposia & Member, Albany Law Review, 1998-2000; Executive President, Student Bar Association, Albany Law School, 1999-2000. Member: Federal Bar Association, Northern District of New York; New York State Bar Association; New York State Trial Lawyers Association; New York State Academy of Trial Lawyers; Albany County Bar Association; Italian American Bar Association. Honors: Martindale-Hubbell, AV[®] Preeminent rating; Super Lawyers: Super Lawyers 2019-2023, Super Lawyers Rising Stars 2013-2015; National Trial Lawyers Top 100.

CONCENTRATIONS: Class Actions; Mass Torts; Personal Injury; Defective Products; Consumer Fraud; Environmental Law; Business Counseling; Commercial Litigation; Insurance Coverage; Municipal Law.



JOHN J. DOWD, admitted to bar: 1998, New York; U.S. Districts Courts: Northern District of New York, 1998; Southern District of New York, 2002. Education: Boston College (B.A., 1994, cum laude); Albany Law School of Union University (J.D., 1997). Assistant Attorney General, New York State Attorney General’s Office – Litigation Bureau, 1997-1998. Partner/Associate, Couch White LLP, 1999-2009. Member: Associated General Contractors of New York State, LLC; Eastern Contractors Association; Northeastern Subcontractors Association; Saratoga Builders Association, Inc.; New York State Bar Association; American Bar

Association (Forum on Construction Industry, 2000-2009; Saratoga County Bar Association; Super Lawyers: Super Lawyers 2022-2023.

CONCENTRATIONS: Construction Law & Litigation; Commercial and General Litigation; Corporate Law; Property Law; Real Property Tax Litigation; Municipal Litigation; Zoning and Land Use; Real Estate.



LAUREN SANG-HEE OWENS: admitted to bar: 2012, New York; Massachusetts, 2011; U.S. Court of Appeals, Second Circuit, 2014; U.S. District Courts: Northern District of New York, 2012; Western District of New York, 2012; District of Massachusetts, 2012. Education: State University of New York, University at Albany (B.A., 2007, summa cum laude); Albany Law School of Union University (J.D., 2011). Executive Director, Moot Court Board, Albany Law School. National Order of Barristers, Albany Law School Chapter. Member: Federal Bar Association, Northern District of New York; New York State Bar Association; New York

State Trial Lawyers Association; New York State Academy of Trial Lawyers; Albany County Bar Association. Pro Bono: Board of Advisors, YMCA Guilderland. Honors: Super Lawyers: Super Lawyers 2023, Super Lawyers Rising Stars 2016-2021.

CONCENTRATIONS: Personal Injury; False Claims/Qui Tam/Whistleblower Litigation; Health Care Fraud; Criminal Defense; White Collar Defense; Professional Liability.



STACY MIX, admitted to bar: 2017, New York. District Court: Northern District of New York, 2021; Education: State University of New York, University at New Paltz (B.A., 2013, summa cum laude); Albany Law School of Union University (J.D., 2016, summa cum laude). Albany Law Review, Associate Editor. Assistant District Attorney, Nassau County District Attorney’s Office (2016-2020). Member: New York State Bar Association, New York State Academy of Trial Lawyers. Super Lawyers: Super Lawyers Rising Stars 2023.

CONCENTRATIONS: Civil Litigation and Appeals; Personal Injury; Criminal Defense.

REPRESENTATIVE CLASS ACTIONS AND COMPLEX LITIGATION

- *Abrams v. General Electric*, N.D.N.Y. 95-CV-1734. Successfully prosecuted a class action on behalf of former employees alleging age discrimination against General Electric Company, resulting in a settlement favorable to the class.
- *Arroyo v. State*, Ct. NYS Court of Claims, No.111361. Successfully certified and settled a class action in the New York State Court of Claims against the State of New York on behalf of thousands of persons injured by the 2005 Seneca Lake Spraypark Cryptosporidium outbreak. Dreyer Boyajian was appointed Co-Class Counsel in the case, which was the largest reported outbreak of cryptosporidium in New York State and second largest reported outbreak in U.S. recreational water history.
- *Baker v. SF HWP Management LLC et al*, NYS Sup. Ct. Washington County, No. 50564. Successfully certified and settled a class action involving a norovirus outbreak at the Six Flags Great Escape Indoor Lodge and Waterpark, Lake George, New York, in March 2008. Dreyer Boyajian LLP was appointed Co-Class Counsel in the case, which was one of the largest norovirus outbreaks in New York State history.
- *Bellotti v. Smiley Brothers Inc.*, NYS Sup. Ct. Ulster County, Index No. 14-522. Served as Class Counsel in a class action certified and settled on behalf of hundreds of persons injured in the 2014 norovirus outbreak at the Mohonk Mountain House in New Paltz, NY.
- *Brown v. City of Oneonta, et al*, N.D.N.Y. 93-CV-349; 98-CV-9375. Successfully defended the City of Oneonta in a federal civil rights class action alleging Fourth Amendment and Equal Protection claims based upon racial discrimination.
- *Bruce v. County of Rensselaer, et al*, N.D.N.Y. 02-CV-0847. Participated in the defense and settlement of a civil rights class action claim alleging an unconstitutional strip search policy by law enforcement officials.
- *Cavalieri v. General Electric Company, et al*, N.D.N.Y., 06-CV-315. Served as local counsel in the defense of an ERISA class action lawsuit against General Electric Company.
- *Dunn v. Washington County Fair, Inc., et al*, NYS Sup. Ct. Saratoga County, 99-3235. Appointed Lead Class Counsel in the successful settlement of a class action involving the E. coli O157:H7 outbreak at the New York State Washington County Fair in August 2000, which at the time was considered to be the largest waterborne E. coli outbreak in the nation's history.

- *Ford et al v. Rensselaer Polytechnic Institute*, N.D.N.Y. 1:20-CV-470. Served as Class Counsel in successful class settlement of lawsuit against RPI seeking reimbursement of tuition and fees related to closure of campus in Troy, New York during COVID-19 pandemic.
- *George, et al. v. General Motors Corporation and Alcoa, Inc.*, N.D.N.Y., 05-CV-1482. Prosecuted and settled a mass toxic tort action against General Motors and Alcoa on behalf of hundreds of individuals claiming personal injuries caused by exposure to PCBs from consumption of fish in the St. Lawrence River.
- *Kelly et. al. v. Community Bank, N.A.*, N.D.N.Y. 8:19-cv-00919. Served as local counsel in the prosecution and class settlement of a consumer class action alleging deceptive and unfair collection of bank overdraft fees.
- *Morrissey v. Nextel Partners, Inc.*, NYS Sup. Ct. Albany County, Index No. 3194-06. Successfully certified and settled a class action alleging deceptive business practices on behalf of thousands of cell phone customers. Dreyer Boyajian LLP served as Class Counsel.
- *Saratoga County Water Authority v. General Electric Company*, N.D.N.Y. 1:11-cv-006. Successfully prosecuted and settled a lawsuit on behalf of the Saratoga County Water Authority against General Electric Company for the PCB contamination of its public water supply on the Hudson River serving tens of thousands of water users.
- *Village of Stillwater et al v. General Electric Company*, N.D.N.Y. 09-CV-228. Successfully prosecuted and settled a lawsuit on behalf of several Hudson River towns and villages against General Electric Company for the PCB contamination of their wellfields and Hudson River water supplies.

EXHIBIT G-2



1012 First Avenue, Fifth Floor
Seattle, WA 98104
T: (206) 346-1888
F: (206) 346-1898

Marler Clark is a national food safety law firm that has been representing victims of foodborne illness since 1993. Marler Clark has become the most prominent foodborne illness law firm in America and a major force in food policy in the U.S. and around the world. [Over the last 30 years, Marler Clark, The Food Safety Law Firm](#), has represented thousands of individuals in claims against food companies whose contaminated products have caused life altering injury and even death.

In 1993, Marler Clark attorneys represented Brianne Kiner, the most seriously injured survivor of the historic Jack in the Box [E. coli O157:H7](#) outbreak, in her landmark \$15.6 million settlement with the company. The 2011 book, [Poisoned: The True Story of the Deadly E. coli Outbreak that Changed the Way Americans Eat](#), by best-selling author Jeff Benedict, chronicles the Jack in the Box outbreak and the rise of Marler Clark as a law firm specializing in foodborne illness litigation. In 2023, the book, ["Poisoned"](#), gained national attention and was produced as a documentary on [Netflix](#), called *Poisoned: The Dirty Truth About Your Food*. Bill Marler is featured in this film as one of the experts in foodborne illness cases, speaking about the failure of our food system in the United States. This film has been nominated for the Tribeca Film Festival and the Best Science Documentary of 2023.

For the last 30 years, Marler Clark has represented victims of every large foodborne illness outbreak in the United States and has consulted on cases in Europe, Asia and Africa. Marler Clark has filed lawsuits against such companies as Cargill, Chili's,

Chi-Chi's, Chipotle, ConAgra, Dole, Excel, Golden Corral, KFC, McDonald's, Odwalla, Peanut Corporation of America, Sheetz, Sizzler, Supervalu, Taco Bell and Wendy's.

Among the most notable cases litigated by Marler Clark, is that of nineteen-year-old dancer Stephanie Smith, who was sickened by an E. coli-contaminated hamburger that left her brain-damaged and paralyzed. In another noteworthy case, Linda Rivera, a fifty-seven-year-old mother of six from Nevada, was hospitalized for over 2 years after she was stricken with what her doctor described as "the most severe multi-organ [bowel, kidney, brain, lung, gall bladder, and pancreas] case of E. coli mediated [HUS](#) I have seen in my extensive experience."

[New York Times](#) reporter Michael Moss won a Pulitzer Prize for his coverage of Smith's case, which was settled by Cargill in 2010 for an amount "to care for her throughout her life." Linda's story hit the front page of the [Washington Post](#) and became Senate Majority Leader Harry Reid's touchstone for successfully moving forward the Food Safety Modernization Act in 2010.

More Than a Food Safety Law Firm

Marler Clark advocated for a safer food supply, petitioning the United States Department of Agriculture to better regulate pathogenic E. coli, working with nonprofit food safety and foodborne illness victims' organizations, and helping spur the passage of the 2010-2011 FDA Food Safety Modernization Act. This work has led to invitations to address local, national, and international gatherings on food safety, including testimony before the U.S. House of Representatives Committee on Energy and Commerce.

The Marler Clark attorneys travel widely and frequently to speak to food industry groups, fair associations, and public health groups about the litigation of claims resulting from outbreaks of pathogenic bacteria and viruses and the issues surrounding it. Marler Clark gives frequent donations for the promotion of improved food safety and has established numerous collegiate science scholarships across the nation.

The attorneys at Marler Clark write on topics related to foodborne illness. Marler Clark is the publisher of the online news site, [Food Safety News](#) and award-winning blog, www.marlerblog.com, which is widely read by the food safety and legal communities. Lawyers at Marler Clark are frequent media guests on food safety

issues and have been profiled in numerous publications, including the [BBC News](#), ABC News, [New York Times](#), The New Yorker, and The Wall Street Journal (see below).

In February 2023, Bill Marler, Marler Clark's managing partner, was listed in [Quality Assurance Magazine](#) as one of 16 people who have shaped the last 30 years of food safety. In 2010, Marler was awarded the NSF Food Safety Leadership Award for Education and, in 2008, he earned the Outstanding Lawyer Award by the King County Bar Association. He also received the Public Justice Award from the Washington State Trial Lawyers Association in 2008.

PUBLICATIONS

2011 – [Separating the Chaff From the Wheat: The Reality of Proving a Foodborne Illness Case](#). White Paper June

2010 – [Lawyers, Microbiologists, and Safe Food](#) Microbiologist Magazine, Vol 11, No 2, June

2009 – [Legal Issues for Food Safety: What Every Food Professional Should Know](#) Food Safety and Quality Magazine, Volume 5, Issue 3 September

2009 – [Serving Up Trouble](#) American Association of Justice Trial Magazine, Vol 45, No 2 February 2007 – [Food Safety and the CEO](#):(PDF) Keys to Bottom Line Success Food Safety Magazine, October/November.

2005 – [Food Claims and Litigation](#) (PDF) Food Safety In-sight Newsletter by Environ Health Associates, Inc, February

2005 – [Separating the Chaff from the Wheat: How to Determine the Strength of a Foodborne Illness Claim](#) (PDF) Paper presented at Defense Research Institute meeting on Food Liability

2005 – [How to Keep Your Focus on Food Safety](#) Food Safety Magazine, June-July.

2004 – [How to Document a Food Poisoning Case](#) (co-authored with David Babcock) Trial Magazine, November

PROFILES

2023 – [Food safety attorney Bill Marler is still in business – and show business](#), The Seattle Times, Sandi Doughton, December 2023

2023 – [The Seattle Times, Seattle food-safety attorney Bill Marler does not eat these foods – do you?](#), The Seattle Times, Sandi Doughton, February 2023

2023 – [Association of Food and Drug Officials – 16 People Who Have Shaped the Last 30 Years of Food Safety](#), Quality Assurance Magazine, Steve Mandernach, Jan/Feb 2023

2023 – [30 years after the deadly E. coli outbreak, a Seattle attorney still fights for food safety](#), The Seattle Times, Sandi Doughton, February 2023

2011/2022 – Poisoned: [The True Story of the Deadly E. Coli Outbreak That Changed the Way Americans Eat](#), By Jeff Benedict

2022 – [3 key rules to follow when eating at restaurants, according to a lawyer who represents food poisoning victims](#), Insider, Andrea Michelson, April 2022

2022 – [The Food Safety Imperative: Talking With Attorney Bill Marler](#), IFT, Jane M. Caldwell February 2022

2020 – [A teenage runaway tries his hand at migrant work and becomes one of the most powerful food safety lawyers in the world / William Marler, Owner and Managing Partner, Marler Clark, LLP](#). The Good Story – When It Mattered Podcast Ep. 49 — Chitra Ragavan June 2020

2020 – [Law360: Bill Marler and COVID-19](#) , Jill Coffey May 29

2020 – [An Exclusive Conversation with Foodborne Illness Attorney Bill Marler QA Magazine](#), Lisa Lupo, March/April

2020 – [He helped make burgers safer, Now he is fighting food poisoning again](#), Washington Post, January 19

2018 – [Getting to Know Bill Marler](#) – Stop Foodborne Illness, March 2018

- 2018 – [Bill Marler: 25 Years of Food Safety](#), Food Safety Magazine, May 8
- 2018 – [Bill Marler reflects on the case that launched his career in food safety](#), SeattleU Lawyer, Claudine Benmar, April 18
- 2018 – [A Safer Food Supply](#), Trial Magazine, Kate Halloran, April 1
- 2017 – [Seattle Litigator Bill Marler Follows the Food Chain](#) Bloomberg News Cases and Controversies Podcast, Steven Sellers, December 18
- 2017 – [Meet The Attorney Behind The Biggest Food Safety Cases](#) KNKX, Gabriel Spitzer & Kevin Kniestedt, September 30
- 2017 – [This Food Poisoning Expert Revealed The 6 Things He Refuses To Eat](#)HealthyWay, R.J.Wilson, May 18
- 2016 – [How one Attorney Is Trying to Make Food Safer](#) Civil Beat News, Rui Kaneya, August 22
- 2016 – [This genius lawyer is our best hope against deadly food poisoning](#) Mother Jones, Kiera Butler, May 20
- 2016 – [7 Things We Learned About Food Safety Oversight From A Foodborne Illness](#)Expert Consumerist, Ashlee Kieler, February 2
- 2015 – [Profile in Obsession: Bill Marler](#), Naomi Tomky, March 24
- 2015 – [The New Yorker – A Bug in the System](#) The New Yorker, Wil S. Hylton, February 2
- 2014 – [Q&A: Food Safety Lawyer Bill Marler on What Not to Eat](#) The National Law Journal, Jenna Greene, November 3
- 2012 – [Bill Marler, Attorney, Blogger, and Food Safety Advocate, Talks Turkey \(Or Spinach, Rather\)](#) Miami New Times, Ily Goyanes, November 2
- 2012 – [Profiles in Public Health Law: Interview with William “Bill” Marler](#) CDC Public Health Law News, July

2012 – [Food Safety Lawyer Bill Marler On Sprouts, Raw Milk, and Why “Local” Isn’t Always Safer](#) Blisstree.com, Hanna Brooks Olsen, March 5

2011 – [Listeria outbreak draws Seattle lawyer to battle](#) Associated Press, Shannon Dininny, October 9

2011 – [Food-Borne Illness Attorney: Top Foods to Avoid](#) ABC News, Neal Karlinsky, September 29

2011 – [How to Keep Food Free of Salmonella: Lawsuits](#) The Atlantic, Barry Estabrook, August 31

2011 – [More Stomach-Churning Facts about the E. Coli Outbreak](#) New York Times, Mark Bittman, June 8

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2011 – [Good Food Hero: Bill Marler, Food Safety Attorney](#) Good Food World, Gail Nickel-Kailing, May 23

2011- [Poisoned: The True Story of the Deadly E. coli Outbreak that Changed the Way Americans Eat](#) Inspire Books, Jeff Benedict, May 15

2011 – [New Book Chronicles Islander Marler’s Work](#) Bainbridge Island Review, Connie Mears, May 13

2010 – [Food Safety Lawyer Puts His Money Where Your Mouth Is](#) AOL News, Andrew Schneider, September 29

2009 – [Bill Marler: Taking on E.coli, BigAg, Raw Milk, Conspiracy Theorists, and the USDA](#) Simple, Good, and Tasty, Shai Danielson, December 16

2009 – [Food Safety Lawyer’s Wish: Put Me Out of Business](#) Seattle Times, Maureen O’Hagan, November 23

2009 – [WSU Discourse on Food Safety, Courtesy Seattle Lawyer](#) Kitsap Sun, Tristan Baurick, August 29

- 2009 – [Calling for Real Food Safety Reform: Bill Marler for FSIS](#) Civil Eats, David Murphy, June 24
- 2009 – [When Food Sickens, He Heads for Courthouse](#) Minneapolis Star-Tribune, Matt McKinney, June 24
- 2009 – [Bill Marler, The Food-Safety Litigator](#) Culinate, Miriam Wolf, April
- 2009 – [Food Fight: Bill Marler's Beef](#) (PDF) Washington Law & Politics, David Volk, May
- 2009 – [Candidate for Top FSIS Job talks E. coli Testing, Irradiation, Education](#) The Meating Place, Ann Bagel Storck, February 6
- 2009 – [Five Minutes with Bill Marler, Well Known Lawyer, Food Safety Activist](#) Cattle Network, Chuck Jolley, February 5
- 2009 – [Outspoken Food Safety Attorney Wants In](#) The Washington Post, Ed O'Keefe, January 27
- 2008 – [E. Coli Lawyer Is Busier Than Ever](#) Associated Press, February 4
- 2007 – [Legally Speaking: The Food Poisoning Lawyer](#) The Southeast Texas Record, John G. Browning, November 20
- 2007 – [The Nation's Leading Food-borne Illness Attorney Tells All](#) Washington State Magazine, Hannelore Sudermann, August
- 2007 – [Food Fight](#) Portland Oregonian, Alex Pulaski, March
- 2006 – [How a Tiny Law Firm Made Hay Out of Tainted Spinach](#) The Wall Street Journal, Heather Won Tesoriero and Peter Lattman, September 27
- 2001 – [THE INSIDE STORY: How 11 School kids Got \\$4.75 Million in E. coli Lawsuit](#) MeatingPlace.com, Bryan Salvage, March 7
- 2001 – [Hammer Time: Preparation Pays When Disputes Escalate to Lawsuits](#) Meat & Poultry Magazine, David Hendee

2001 – [For Seattle Attorney, A Bacterium Brings Riches—and Enemies](#) The Wall Street Journal, Rachel Zimmerman

2001 – [The Bug That Ate The Burger](#) Los Angeles Times, Emily Green, June

1999 – [Courting Publicity, Attorney Makes Safe Food His Business](#) Seattle Post, Maggie Leung, September 7

START DATE	END DATE	CASE	COURT
2003	2004	Lucca v. Delops, Inc., d/b/a D'Angelo's Sandwich Shops > Engaged by Defendant's Counsel	Bristol County, MA
2005	2006	Foster v. Friendly Ice Cream Corporation	Middlesex County, MA
2005	2009	In Re: Chi-Chi's, Inc.	Bankr. D. DE
2006	2016	Springer v. State of New York (Seneca Lake Spray Park)	Court of Claims, NY
2007	2009	Baker v. Lvovskiy d/b/a Quiznos Subshop	Suffolk County, MA
2007	2009	Johnson v. Houlihan's Restaurants, Inc.	Kane County, IL
2009	2011	Patterson v. JKLM, Inc. d/b/a McDonalds	Rock Island County, IL
2012	2013	Prescott v. GMRI, Inc. d/b/a The Olive Garden Italian Restaurant	Cumberland County, NC
2012	2014	Johnson v. RPH Management, Inc. d/b/a McDonald's Restaurant	Tuscaloosa County, AL
2014	2015	Cagler v. Papa John's USA, Inc.	W.D. NC
2016	2017	Werkmeister v. Hardee's Restaurants, LLC	Spartanburg County, SC
2016	2017	Hubbs v. Red Robin International, Inc.	Greene County, MO
2016	2017	Williams v. Williamsbridge Restaurant Inc. d/b/a New Hawaii Sea Restaurant	Bronx County, NY
2016	2018	Petersen v. Costco Wholesale Co., Inc., Townsend Farms, Inc., et al [Initial Notice Only]	C.D. CA
2018	2021	Cuehlo v HNK, Sato v Genki Sushi USA	1st Cir., HI
2018	2020	Welch v. Jascor, Inc., d/b/a McDonald's Restaurant	Seneca County, NY
2019	2020	Lajqi v. Bar Taco Port Chester, LLC	Westchester County, NY

EXHIBIT G-3

BOWERSOX
LAW FIRM P.C.

385 1st St., Suite 215
Lake Oswego, OR 97034
T: (503) 452-5858
F: (503) 345-6893



Jeffrey Alan Bowersox exclusively representing plaintiffs as a trial lawyer since 1981. Admitted to the Oregon State Bar and United States District Court for the District of Oregon 1981; Ninth Circuit Court of Appeals 1987; General Admission US District for the Northern District of Illinois 2023. Member American Association for Justice ("AAJ") since 1981. Past Chair of AAJ Section on Toxic, Environmental and Pharmaceutical Torts.

Representative Mass Tort Case Involvement:

Medical Device Cases:

Court appointed to serve on Plaintiffs' Steering Committee: Rejuvenate and ABG II Hip Implant Products Liability Litigation, MDL 2441 (MN)
Court appointed to serve on Plaintiffs' Steering Committee: IN RE: Abbott Laboratories, et al. Preterm Infant Nutrition Products Liability Litigation, MDL 3026 (IL)
Court appointed to serve on Plaintiffs' Steering Committee: IN RE: Bair Hugger Forced Air Warming Devices Products Liability Litigation, MDL 2666 (MN)
IN RE: Stryker LFIT V40 Femoral Head Products Liability Litigation, MDL 2768
IN RE: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation, MDL 2197 (OHN)
IN RE: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation, MDL 2244 (TXN)
IN RE: Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation, MDL 2329 (GAN)
IN RE: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation, MDL 2775 (MD) (Oregon filed case pending transfer to MDL)
IN RE: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Products Liability Litigation, MDL 2570 (INS)
IN RE: Philips Recalled CPAP, BI Level PAP, and Mechanical Ventilator Products Liability Litigation, MDL 3014
IN RE: Guidant Corp. Implantable Defibrillators Products Liability Litigation, MDL 05- 1708
IN RE: Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation, MDL 08-1905 (MN)
IN RE: Zimmer Durom Hip Cup Products Liability Litigation, MDL 2158
IN RE: Kugel Mesh Hernia Patch Products Liability Litigation, MDL 1842 (RI)
IN RE: American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation, MDL 2325 (WVS)

IN RE: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation, MDL 2326 (WVS)

IN RE: C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation, MDL 2187 (WVS)

IN RE: Ethicon, Inc., Pelvic Repair System Products Liability Litigation, MDL 2327 (WVS)

Pharmaceutical Cases:

IN RE: Actos (Pioglitazone) Products Liability Litigation, MDL 2299 (LAW)

IN RE: Avandia Marketing, Sales Practices and Products Liability Litigation, MDL 1871 (PAE)

IN RE: Bextra and Celebrex Marketing, Sales Practices and Products Liability Litigation, MDL 1699 (CAN)

IN RE: Fosamax Products Liability Litigation, MDL 1789 (NYS)

IN RE: Levaquin Products Liability Litigation, MDL 1943 (MN)

IN RE: NuvaRing Products Liability Litigation, MDL 1964 (MOE)

IN RE: Ortho Evra Products Liability Litigation, MDL 1742 (OHN)

IN RE: Vioxx Marketing, Sales Practices and Products Liability Litigation, MDL 1657 (LAE)

IN RE: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation, MDL 2100 (ILS)

IN RE: Accutane (Isotretinoin) Products Liability Litigation, MDL 1626 (NJ)

IN RE: Taxotere (Docetaxel) Products Liability Litigation, MDL 2740 (LAED)

Representative Sample of Individual Complex Litigation Cases:

- *Yeatts v. Polygon Northwest Company*, 360 Or 170, 379 P.3d 445 (Or. 2016) (*Yeatts I*)
- *Yeatts v. Polygon Northwest Company*, 313 Or. App. 220, 496 P.3d 1060 (Or. App. 2021)
- 369 Or. 338 (Or. 2022) (*Yeatts II*) (Trial and Appellate Counsel – worksite guardrail failure; catastrophic brain injury)
- *Dominguez v. Rodriguez, et al.*, Multnomah County Circuit Court No. 16-cv-16260 (Trial Counsel – view obstruction collision; wrongful death)
- *Bates, et al. v. Union Oil Company of California*, 944 F.2d 647 (1991) (Trial Counsel – Noncompetitive pricing; fraud)
- *Anderson v. Makita USA, Inc., et al.*, Multnomah County Circuit Court No. 0304-03354 (Trial Counsel – product liability failure to warn; severe facial injury)
- *Huntoon v. R.A. Reed Productions, Inc.*, Multnomah County Circuit Court (Trial Counsel – stage collapse; musician career-ending injury)
- *Willemsen v. Invacare Corporation, et al.*, Oregon Supreme Court, 352 Or. 191, 282 P.3d 867 (Or., 2012) (Trial and Appellate Counsel – product liability with international jurisdictional dispute; wrongful death)
- *China Terminal v. Willemsen*, 133 S.Ct. 984, 184 L.Ed.2d 762, 81 USLW 3249, 81 USLW 3406, 81 USLW 3409 (2013)
- *Jack Ensley, PR of the Estate of Benjamin M. Ensley v. Strato-Lift, Inc, a.k.a. Strato Lift & Boom, Inc.* 3:00-cv-00269-HU, 116 F.Supp.2d 1175 (D. Or. 2000) 134 F.Supp.2d 1191 (D. Or. 2001) (Trial Counsel – product liability; workplace wrongful death)
- *Ronald Bates v. James E. John Construction Co., Inc., et al.*, Multnomah County Circuit Court No. 21CV47340 (Trial Counsel - worksite injury)
- *Elliot Betteridge v. Terex Corporation, et al.*, Multnomah County Circuit Court Case No. 20CV13077 (Worksite Injury)

- *April Upchurch Fredrickson v. Echo Rental Company, et al.*, United States District Court of Idaho Case No. 2:21-cv-440-DCN (Trial Counsel - mid-air airplane crash; wrongful death)
- *Alix Fredrickson v. Echo Rental Company, et al.*, United States District Court of Idaho Case No. 2:21-cv-442-REP (Trial Counsel - mid-air airplane crash; wrongful death) (United States District Court of Idaho Consolidated Case No. 2:21-cv-272-BLW)
- *Nancy Doty, Inc., PR of the Estate of Renee Radziwon-Chapman v. Wildcat Haven Holdings, I LLC, et al.*, Clackamas County Circuit Court No. CV15060002 (Trial Counsel and Appellate Counsel –cougar mauling; workplace death)
- *Nancy Doty, Inc. v. Wildcat Haven, Inc.*, 297 Or App 95, 439 P.3d 1018 (Or. App. 2019) (Trial Counsel and Appellate Counsel –cougar mauling; workplace death)
- *Adrian Godinez-Orozco v. Fred Meyer*, Multnomah County Circuit Court No.120302752 (Trial Counsel – Negligence; child blinded in one eye by product display)
- *Journey Bailey v. Oregon School Activities Association*, Multnomah County Circuit Court No. 120405235 (Trial Counsel – High school football player brain injury)
- *Meza, by and through Conservator v. Old Castle Trucking, et al.*, Clark County Superior Court No. 05-2-03468-1 (Trial Court Counsel – truck collision; infant’s brain injury)
- *Stover, by and through Conservator v. Ford Motor Co. et al.*, Multnomah County Circuit Court No. 0506-6110 (Trial Court Counsel – auto defect; toddler’s brain injury)
- *Estate of Johnston v. Jersey & Associates Excavating, Inc.*, et al., Multnomah County Circuit Court No. 0701-01083 (Trial Court Counsel – product liability; wrongful death)
- *Blake, by and through Conservator v. Housing Authority of Portland, et al.*, Multnomah County Court (Trial Court Counsel – product liability; infant’s burn injuries)
- *Burgoyne, by and through Conservator v. Hennessy Industries, Inc., et al.*, Multnomah County Circuit Court No. 0906-08910 (Trial Court Counsel – product liability; catastrophic brain injury)
- *State of Oregon v. Shemelewski*, Deschutes County Circuit Court (Privately retained Trial Counsel – defense of Felony Kidnapping)

Professional Associations and Memberships:

Member of the Oregon Trial Lawyers Association ("OTLA"). Former member of OTLA Board of Governors. Former OTLA Education Committee. Member of Oregon State Bar. Former member of Executive Committee of the Products Liability Section of the Oregon State Bar and last Chair of the Oregon State Bar Products Liability Section. Former member Executive Committee of the Oregon Chapter of the Federal Bar Association. Member of Multnomah Bar Association. Former member of Multnomah Bar Association Court Liaison Committee.

Regional Honors and Awards:

Super Lawyer – “Mass Torts and Class Actions – Plaintiffs” 2006, 2011- 2022
Best Lawyers – “Mass Tort Litigation/Class Actions – Plaintiffs” 2018 – 2024
Best Lawyers - “Lawyer of the Year” Mass Tort Litigation/Class Actions – Plaintiffs 2020
U.S. News Best Law Firms - “Mass Tort Litigation/Class Actions – Plaintiffs” 2019 – 2024
"Oregon Super Lawyers" in the areas of Mass Torts/Class Actions.

Invited member of Melvin M. Belli Society. Supporting member Natioual Civil Justice Institute. Guardian member of Public Justice. Member of Academy of Truck Accident Attorneys.

EXHIBIT G-4



**1630 Empire Blvd.
Suite 3B
Webster NY 14580-2182
585-270-6922**

Paul V. Nunes

Work History: Partner, Heisman Nunes & Hull LLP (Rochester NY), 2019-Present; partner, Underberg & Kessler LLP (Rochester NY), 1985-2019; Associate, Thacher Proffitt & Wood (New York City NY), 1980-1985; Senior Law Clerk, Associate Justice Emmett J. Schnepp, Appellate Division Fourth Dept (Rochester NY), 1977-1980); Clerk, United States Attorney's Office Northern District of New York (Syracuse NY), 1976.

Education: Syracuse University College of Law (Syracuse NY), JD 1977; College of the Holy Cross (Worcester, MA), BA, 1974; University of Durham (Durham, England), 1972-1973.

Practice Areas:

Personal Injury: toxic torts, food-borne illness, motor vehicle accidents and construction site accidents.

Business Torts: misappropriation of trade secrets, unfair competition, non-compete agreements, Copyright and Trademarks.

General Civil Litigation: trust and estates, partnership law/corporate governance, land use, municipal liability, contracts, etc.

Professional Ratings: preeminent A/V Rating - Martindale-Hubbell; Best Lawyers - 2009 - 2023 (14 years running); New York Super Lawyer - 2007 - 2023 (16 years running); AVVO Rating - 10/10 (superb).

Certified Mediator: Federal Court, Western District of New York.

Paul V. Nunes, Heisman Nunes & Hull, LLP
1630 Empire Blvd., Ste 3B, Webster NY 14580
pnunes@HNHAttorneys.com
www.HNHAttorneys.com



Notable Cases

Personal Injury (Plaintiff)

Plutonium “X-Files” (representing family whose matriarch had been injected with plutonium without consent by US government in secret post-war experiment)

Seneca “Spray Park” class action (representing thousands of victims- many of them children- exposed to cryptosporidium at New York State-run water park)

Golden Ponds “Clostridium perfringens” poisoning (representing victims of food-born illness following Thanksgiving Day meal served at restaurant)

Brook Lea Country Club “Salmonella” Outbreak (representing over 100 victims of food-born illness following meals served at the club)

Peter Pan (representing victims injured by exposure to salmonella-contaminated peanut butter)

Personal Injury (Defense)

Asbestos litigation (defending distributor of insulation products against thousands of claims of alleged toxic exposure)

Eastern Alloys aka Zinc litigation (defending manufacturer of zinc alloy against claims that exposure activated or aggravated asymptomatic MS)

Fire Department MVA (defending fire department whose own volunteer collided with a fellow first responder while volunteer drove through river of smoke)

Caterpillar Wrongful Death Action (defending construction company by establishing products liability against Caterpillar for defective design of its asphalt roller)

Business, Banking and Trust & Estates

“Fast Ferry” (protecting Australian Government interests following collapse of ownership of US-Canada commuter ferry)

Sills Estate (defending national bank against alleged claims of breach of fiduciary duty)

McPherson Trust (defending bank as trustee against alleged claims of mismanagement of charitable remainder uni-trust)

WDX "Arbitron" litigation (representing black-owned radio station challenging media company's alleged discriminatory methodology in measuring regional listenership)

"Geneseo" Farm (challenging will procured by undue influence)

Intellectual Property

Arbor Mist trademark litigation (representing international wine manufacture in alleged trademark infringement action)

Fashion Bug trademark litigation (representing local clothing boutique in alleged trademark infringement action)

Neo Sci trade-secret and copyright infringement litigation (representing departing executives who formed company to compete with former employers)

Chesterfield Kings (representing internationally known rock band in action to collect royalty fees for its copyrighted works)

"Anonymous" photographer (representing photographer in claim against UK graphic artist for copyright infringement)

Joseph E. O'Connor

Kingston, NY | 845-303-8777 | JOConnor@onplaw.com

EDUCATION

Brown University, Providence, RI B.A.	<i>Graduated 1992</i>
St John's University of Law, Jamaica, NY J. D.	<i>Graduated 1997</i>

BIOGRAPHY



Joseph has been practicing law for over twenty years and is currently the managing partner of the firm. He is a lifelong resident of the Hudson Valley and relies on his connections to the community to best serve his clients. Joseph graduated from Brown University in 1993 and played both division one football and golf for the Brown Bears. He graduated from St. John's University School of Law in 1997. Joseph dedicates a majority of his time to representing seriously and catastrophically injured individuals harmed by construction, motor vehicle, motorcycle, and bicycle accidents, as well as those harmed by defective products.

Joseph is admitted to practice law in the State of New York, as well as the U.S. District Courts for the Northern, Southern, and Eastern Districts of New York. He has been admitted pro hac vice in New Jersey, Utah, and Texas.

Joseph is on the Board of Directors for the New York State Academy of Trial Lawyers. He regularly presents Continuing Legal Education lectures, statewide and nationally. Joseph is a member of the American Association for Justice, the New York State Judicial Screening Committee, the American Bar Association, the Ulster County Bar Association, and the Academy of Truck Accident Attorneys.

Joseph has continuously been named as one of the top 25 lawyers of the Hudson Valley and Upstate New York by Super Lawyers for 2015 through 2021. He carries a Martindale-Hubbell A.V. Preeminent rating, as well as a perfect 10 rating with AVVO. Many of his cases have been featured on television, including the Today Show and Anderson 360. The Wall Street Journal, The New York Times, and the New York Journal have all featured cases he litigated.

AREAS OF PRACTICE

- Personal Injury
- Medical Malpractice
- Construction Accidents
- Labor Law
- Traumatic Brain Injuries
- Motor Vehicle Accidents
- Motorcycle Accidents
- Criminal Law

100% of Practice Devoted to Litigation

BAR ADMISSIONS

New York
U.S District Court Northern District of New York
U.S. District Court Southern District of New York
U.S. District Court Northern District of New York

Joseph E. O'Connor

Kingston, NY | 845-303-8777 | JOConnor@onplaw.com

VERDICTS & SETTLEMENTS

(Parties Remain Confidential)

- \$16,000,000.00 Settlement for a Hudson Valley accident.
- \$7,770,000.00 Settlement for a construction worker for injuries he sustained at the workplace.
- \$7,000,000.00 Settlement for injured infant.
- \$6,000,000.00 Settlement for injuries that resulted from a defective car.
- \$5,900,000.00 Settlement for a construction worker for injuries he sustained at the workplace.
- \$5,900,000.00 Settlement for a construction worker for injuries he sustained at the workplace.
- \$5,000,000.00 Settlement for injuries sustained in a motorcycle accident.
- \$4,900,00.00 Settlement for product liability resulting in severe burns.
- \$2,917,000.04 Settlement for injuries sustained in a motor vehicle accident
- \$2,655,000.00 Settlement for injuries sustained in a motor vehicle accident.
- \$2,500,000.00 Settlement for injuries sustained in a motorcycle accident.
- \$2,250,000.00 Settlement for injured pedestrian.
- \$2,050,000.00 Settlement for injured bicyclist.
- \$2,000,000.00 Personal injury claim settled for a Hudson Valley plaintiff.
- \$2,000,000.00 Settlement for injured bicyclist.
- \$1,900,000.00 Settlement for an injury sustained at a construction site.
- \$1,900,000.00 Settlement for injuries sustained in a motor vehicle accident.
- \$1,675,000.00 Settlement for injuries sustained in a motor vehicle accident.
- \$1,600,000.00 Settlement for a wrongful death bicycle accident.
- \$1,500,000.00 Settlement for an injured motorcyclist.
- \$1,065,000.00 Settlement for drug rehab assault.
- \$1,250,000.00 Settlement for clergy abuse
- \$1,050,000.00 Settlement for claims of negligent operation of a motor vehicle and dangerous automotive products.

IN THE NEWS

NYDailyNews.com – [*N.Y. middle schoolers stripped, forced to simulate sex in football hazing ritual, legal papers say*](#)

DailyFreeman.com – [*Kingston High School attack: Notice of claim filed on behalf of injured student, mother*](#)

ShawangunkJournal.com – [*Civil Lawsuit Filed Against Samaritan Daytop Village*](#)

TimesUnion.com – [*Widow of driver killed in Troy collision files negligence suit*](#)

AboutLawsuits.com – [*Daily Harvest Class Action Lawsuit Filed Over Gastrointestinal Illnesses*](#)

TimesUnion.com – [*Widow of driver killed in Troy collision files negligence suit*](#)

DailyFreeman.com – [*Samaritan Daytop Village in Ellenville sued by former resident who alleges employee raped her*](#)

InvestorsObserver.com – [*Lynch Carpenter Investigates Claims in Nuance Communications Data Breach*](#)

DailyFreeman.com – [*Two Kingston High School Students die in crash on Route 28 in Shandaken*](#)

RecordOnline.com – [*Monica Goods case: Indictment of NY trooper again raises questions over police narrative*](#)

TimesUnion.com – [*2 killed crossing Route 9W in Marlborough*](#)

HudsonValleyOne.com – [*More than a year after bike wreck, Gaby O'Shea urges motorists to share the road*](#)

Joseph E. O'Connor

Kingston, NY | 845-303-8777 | JOConnor@onplaw.com

PROFESSIONAL ASSOCIATIONS & MEMBERSHIPS

American Association of Justice, Washington, DC <i>Member</i>	<i>2006 – Present</i>
Ulster County Defense Bar, Kingston, NY <i>Member</i>	<i>1999 – Present</i>
New York State Academy of Trial Lawyers, Albany, NY <i>Member</i> <i>Board Member</i>	<i>1999 – Present</i>
American Bar Association, New York, NY <i>Member</i>	<i>1998 – Present</i>
Ulster County Bar Association, Kingston, NY <i>Member</i>	<i>1997 – Present</i>
New York Bar Association, Albany, NY <i>Member</i>	<i>1997 – Present</i>

EXHIBIT “H”

EXHIBIT “H”

Bellotti v. Smiley Brothers Inc.,
2014 WL 10962079 (Sup. Ct. Ulster County December 15, 2014)

2014 WL 10962079 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Ulster County

Louis BELLOTTI and Anna Marie Bellotti, individually and on
behalf of themselves and all others similarly situated, Plaintiffs,

v.

SMILEY BROTHERS, INC. d/b/a Mohonk Mountain House, Defendant.

No. 14-0522.
December 15, 2014.

Decision/Order

Dreyer Boyajian, LLP, 75 Columbia Street, Albany, NY 12210, Plaintiffs.

Ryan Smith & Carbine, PC, 511 Glen Street, Glens Falls, NY 12801, Defendant.

[Richard Mott](#), Judge.

*1 R.J.I. No. 55-14-1108

Richard Mott, J.S.C.

Mott, J.

Plaintiffs Louis Bellotti and Anna Marie Bellotti (Plaintiffs) move, pursuant to CPLR Article 9, for an order (1) certifying this as a class action, (2) approving the proposed class definition, (3) appointing plaintiffs as class representatives, and (4) appointing Dreyer Boyajian LLP as class counsel. Defendant Smiley Brothers, Inc. d/b/a Mohonk Mountain House oppose.

Background

Plaintiffs allege that in January, 2014, there was an outbreak of gastrointestinal illness at Mohonk Mountain House. Plaintiffs allege that they and hundreds of others were epidemiologically linked to the outbreak caused by a norovirus (or “Norwalk virus”), that the incubation period for a norovirus is typically between 24 and 60 hours, but may range from 10 to 72 hours, and that norovirus is very contagious and transmitted primarily by fecally contaminated food or water, person-to-person contact, and/or touching infected surfaces and objects.

Plaintiffs seek to act as class representatives on behalf of “all persons who experienced gastrointestinal illness within 72 hours after departure from visiting the Mohonk Mountain House in New Paltz, New York between January and February, 2014 or who experienced gastrointestinal illness within 72 hours after exposure to a person who visited Mohonk Mountain House between January and February 2014.”

Defendant argues that class certification should be denied. Defendant asserts that Plaintiffs have failed to make an evidentiary showing that they meet the requirements of [CPLR § 901](#) and that the proposed class definition is so overbroad as to compel denial of certification. Further, Defendant argues that there is no proof of the number of potential class members and that

Plaintiffs have failed to demonstrate that questions of law or fact common to the class predominate over questions affecting only individuals. They assert that Plaintiffs are not representative of any class. Defendants also argue that the representative parties will not fairly and adequately protect the class's interests and that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy.

In reply, Plaintiffs have submitted various documents, previously submitted to Defendant, including the Ulster County Department of Health "Investigation Summary Illness Investigation - Mohonk Mountain House."

Discussion

The proponent of class certification bears the burden of establishing the following statutory criteria enumerated by CPLR § 901(a): (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interest of the class, and (5) a class action is superior to other available methods for fair and efficient adjudication of the controversy. Each requirement is an essential prerequisite to class action certification and whether each factor has been established rests within the sound discretion of the trial court. *Leichtung v. Tower Air, Inc.*, 269 A.D.2d 363, 364 (2d Dept. 2000), *Mix v. Wal-Mart Stores*, 57 AD.3d 1044,1045 (3d Dept. 2008).

*2 The Court must also consider 1) the interest of members of the class in individually controlling the prosecution or defense of separate actions, 2) the impracticability or inefficiency of prosecuting or defending separate actions, 3) the extent and nature of any litigation concerning the controversy already commenced, 4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum, and 5) the difficulties likely to be encountered in the management of a class action. CPLR § 902.

"CPLR Article 9 ... is to be liberally construed." *Beller v. William Penn Life Ins. Co. Of N.Y.*, 37 A.D.3d 747, 748 (2d Dept. 2007). See, *Wilder v. May Department Stores Co.*, 23 A.D.2d 646, 649 (2d Dept. 2005), *Englade v. Harper Collins Publr., Inc.*, 289 A.D.2d 159, 159-160 (1st Dept. 2001). "[A]ny error, if there is to be one, should be in favor of allowing the class action." *Lauerv. New York Tel. Co.*, 231 A.D.2d 126,130 (3d Dept. 1997). Further, "such determination 'is not immutable and [t]he Trial Judge has discretion to sever certain issues ... to divide the class into subclasses ... to decertify the class ... and to make any appropriate order dealing with procedural matters concerning the conduct of the litigation." *Id.* Accord, *Hurrell-Haring v. State*, 81 A.D.3d 69, 72 (3d Dept. 2011).

With regard to the subclass of "all persons who experienced gastrointestinal illness within 72 hours after departure from visiting the Mohonk Mountain House in New Paltz, New York between January and February, 2014," Plaintiffs have clearly satisfied the requirements of CPLR § 901 for class certification. The Ulster County Department of Health reports and documents establish that there were more than 150 confirmed cases of gastrointestinal illness among guests who visited the facility during the survey period and that there were 114 confirmed staff illnesses. The class is so numerous that joinder of all members is impracticable.

Further, there are questions of law and fact common to each member of the subclass as to whether Defendant breached its duties to the class. The class is mutually aggrieved and the relief sought is common to the class and would benefit it. These questions of fact, including whether Defendant exercised reasonable care in the operation and maintenance of its facilities and adequately monitored sanitary conditions are common to the class. Similarly, the claims of the proposed class representatives are typical of the claims of the class. All of the claims allegedly arise from the same norovirus outbreak at Defendant's premises. Finally, the representative parties will fairly and adequately protect the interest of the class. They have a direct and sufficient interest in the outcome of the case and to assure the adequacy of the presentation of the issues, and their attorneys have substantial experience in complex, multi-party and class action litigation.

Moreover, the subclass meets all of the requirements of [CPLR § 902](#). The prosecution of separate actions against Defendant is impracticable and inefficient. The interest in class members in individually controlling the prosecution of separate actions is slight. It is by far preferable for there to be a single action to resolve the claims than individual ones.

With respect to the subclass of “all persons who experienced gastrointestinal illness within 72 hours after exposure to a person who visited Mohonk Mountain House between January and February 2014,” i.e. secondary exposure, Plaintiffs' have thus far failed to carry their burden. Plaintiffs have failed to demonstrate that the subclass is numerous. While family members who must care for sick spouses and children may theoretically be exposed to norovirus, documents submitted in support of the motion fail to identify any such person(s) or to demonstrate that any such cases exist. Plaintiffs may wish to supplement their arguments with respect to the proposed secondary exposure class.

*3 Accordingly, the motion for class certification as to the subclass of “all persons who experienced gastrointestinal illness within 72 hours after departure from visiting the Mohonk Mountain House in New Paltz, New York between January and February, 2014” is hereby granted, and the motion for class certification as to the subclass of “all persons who experienced gastrointestinal illness within 72 hours after exposure to a person who visited Mohonk Mountain House between January and February 2014” is denied without prejudice to Plaintiffs' demonstrating that the proposed subclass complies with the requirements of [CPLR § 901](#).

The parties are directed to confer and to stipulate, if possible, as to how notice, pursuant to [CPLR § 904](#), may be given to the members of the certified class. If the parties are unable so to stipulate, they should notify the Court of same and submit written proposals to the Court concerning how notice shall be given on or before December 19, 2014.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Plaintiffs' counsel, who is required to comply with the provisions of [CPLR § 2220](#) with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York

November 20, 2014

ENTER

<<signature>>

RICHARD MOTT, J.S.C.

Matter of Arroyo v State,
12 Misc. 3d 1197(A), 824 N.Y.S.2d 767 (Ct. Cl. 2006)

824 N.Y.S.2d 767, 2006 N.Y. Slip Op. 51606(U)



Unreported Disposition

12 Misc.3d 1197(A), 824 N.Y.S.2d 767 (Table), 2006 WL 2390619 (N.Y.Ct.Cl.), 2006 N.Y. Slip Op. 51606(U)

This opinion is uncorrected and will not be published in the printed Official Reports.

*1 In the Matter of the Claim of Phyllis Arroyo and John Arroyo, Individually and as Parents and Natural Guardians (“P/N/G”) of Alex Arroyo, et al., On Behalf of Themselves and All Other Persons Similarly Situated, Claimants,

v.

The State of New York, Defendant.

Timothy Springer and Jacqueline Springer, Individually and on behalf of their infant children, Adam Springer, Kelly Springer and Rachel Springer, Claimants,

v.

The State of New York, Defendant.

111362

Ct Cl

Decided on June 29, 2006

CITE TITLE AS: Matter of Arroyo v State of New York

ABSTRACT

Actions

Class Actions

Arroyo, Matter of, v State of New York, 2006 NY Slip Op 51606(U). Actions—Class Actions. [Civil Practice Law and Rules—§ 901](#) (a) (Prerequisites to class action; common questions of law or fact). (Ct Cl, June 29, 2006, Midey, J.)

APPEARANCES OF COUNSEL

For Claimants:

DREYER BOYAJIAN, LLP

BY: Donald W. Boyajian, Esq.,

Of Counsel. (Claim No. 111362)

UNDERBERG & KESSLER, LLP

BY: Paul V. Nunes, Esq.,
Of Counsel. (Claim No. 111361)

MARLER CLARK, LLP, PS

BY: Bruce T. Clark, Esq.,

Of Counsel.

For Defendant: HON. ELIOT SPITZER

Attorney General

BY: Ed J. Thompson, Esq.,

Assistant Attorney General

Of Counsel.

OPINION OF THE COURT

Nicholas V. Midey, J.

In these two motions, claimants seek an order certifying each action as a class action pursuant to Article 9 of the CPLR. In addition, in Motion No. M-71063 claimants seek an order consolidating their claim (Claim No. 111362) with Claim No. 111361 pursuant to [CPLR § 602\(a\)](#). Upon request of all parties, oral argument of these motions was scheduled and heard jointly, at which time counsel for the claimants in Claim No. 111361 joined in the request for consolidation of these two claims. Therefore, since identical relief is sought in each motion, these motions will be considered together.

In addition to the oral argument, the Court has also read and reviewed the following papers in connection with these motions:

Notice of Motion (M-71063)1

Attorney Affidavit, with Exhibits A-E (M-71063)2

Memorandum of Law in Support of Consolidation and Class Certification, with Exhibit (M-71063)3

Notice of Motion (M-71115)4

Attorney Affidavit, with Claim attached (M-71115)5

Memorandum of Law in Support of Motion seeking Class Certification (M-71115)6

Affirmation in Opposition (M-71063/M-71115)7

Memorandum of Law in Opposition (M-71063/M-71115)8

Reply Affidavit, with Exhibits A-I (M-71063)9

824 N.Y.S.2d 767, 2006 N.Y. Slip Op. 51606(U)

Reply Memorandum of Law (M-71063)10

Claimants' Reply Memorandum of Law (M-71115)11

Correspondence dated March 30, 2006 (M-71063/
M-71115)12

These two claims are based upon events which occurred during the summer of 2005 at Seneca Lake State Park in Geneva, New York. The State of New York is the owner and operator *2 of this park, and during 2005 it operated and promoted a "Spraypark" as one of the park's main attractions. This Spraypark, which first opened in 2002, consists of over 100 water jets that spontaneously spray water over a hardtop surface.

In August, 2005, the Spraypark was closed by the State Department of Health, after a finding that the Spraypark water was contaminated with cryptosporidium, a highly contagious waterborne parasite. Exposure to this parasite may cause cryptosporidiosis, with symptoms of abdominal cramping, diarrhea, nausea, vomiting, dehydration, fatigue, fever, and loss of appetite.

Following the actions taken by the Department of Health, the two above captioned claims were served upon the Attorney General and filed with the Clerk of the Court of Claims, each alleging that numerous claimants had been exposed to the cryptosporidium parasite and that they suffered the effects of cryptosporidiosis. Each claim indicated that class action certification would be sought pursuant to CPLR Article 9.¹

Each claim is based upon allegations of negligence, essentially alleging that the State failed to adequately maintain or monitor the sanitary conditions of the Spraypark water, and as a result allowed the water to become contaminated with the cryptosporidium parasite.²

As mentioned above, claimants now seek to consolidate these two actions and, after consolidation, also request that their consolidated claim be certified as a class action.

Pursuant to CPLR § 602, claims may be consolidated when the actions involve a common question of law or fact. In this particular matter, each claim is based upon the contamination of the water at the Spraypark, a confirmed fact, and the claimants in each claim seek damages based upon their direct or indirect exposure to the cryptosporidium parasite contained in this water. As a result, this Court anticipates that liability of

the State, if any, will be predicated upon identical principles of law. Under these circumstances, the Court finds that it is certainly appropriate for these two claims to be consolidated pursuant to CPLR § 602, a determination which was not strenuously opposed by the State.

Based on this conclusion, the Court will next address claimants' request that this consolidated action be certified as a class action under CPLR Article 9, a request that is vigorously contested by the State.

Although rare, the provisions of CPLR Article 9 have been held applicable to claims pending in this Court (see *Bertoldi v State of New York*, 164 Misc 2d 581), and class action lawsuits have been recognized in the Court of Claims (*Brown v State of New York*, 250 AD2d 314; *St. Paul Fire and Marine Ins. Co. v State of New York*, 99 Misc 2d 140).

The more complicated issue, however, is to determine which potential claimants may be eligible for inclusion in the class. Specifically, it is necessary to reconcile the strict jurisdictional *3 pleading requirements of *Court of Claims Act § 11* with the provisions of CPLR Article 9 pertaining to class actions.

In *Bertoldi (supra)*, former Judge Weisberg concluded that the provisions of CPLR Article 9 superseded the pleading requirements of the Court of Claims Act. However, in *Brown (supra)*, former Judge Hanifin concluded that any party included in a class action in the Court of Claims must also satisfy the jurisdictional pleading requirements of *Court of Claims Act § 11(a)* (*Brown v State of New York*, Ct Cl, August 21, 1997 [Claim No. 86979, Motion No. M-55344] [unreported decision]).

Since Judge Hanifin's decision in *Brown*, two of my esteemed and learned colleagues have addressed the issue of class eligibility, and both have agreed with Judge Hanifin that a person must be a named claimant in a filed claim in order to be included as a member of a certified class in the Court of Claims (*Partridge v State of New York*, Claim No. 90710, Motion Nos. M-58210, CM-58893, dated May 31, 2000, Patti, J., [UID No.2000-013-002];³ *Woolley v State of New York*, Claim No. 103781, Motion Nos. M-63263, M-63409, dated July 2, 2001, Collins, J., [UID No.2001-015-160])⁴.

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This Court agrees with the logic of Judge Hanifin, reinforced by the decisions of Judge Patti and Judge Collins. Since the State conditioned its waiver of immunity upon compliance with Court of Claims Act Article 2, cases, including numerous appellate cases, have uniformly held that such compliance must be strictly construed. As Judge Hanifin stated in *Brown*, “if the legislature intended the filing and service requirements of the Court of Claims Act to apply to all actions except class actions, it presumably would have said so.” (*Brown v State of New York, supra*). This Court therefore finds that to be included in any class action lawsuit, a claimant must first satisfy the filing and service requirements of the Court of Claims Act.

As set forth in the motion papers, at least 663 individuals have been named as claimants, or have served a notice of intention to file a claim, in the Springer and Arroyo claims.⁵ Based on the foregoing, it is this Court's determination that the potential class, at this point in time, must be limited to these claimants.

As noted by this Court in a related Decision and Order (*Springer v State of New York, Ct Cl, November 17, 2005, Midey, J., Claim No. 111361, Motion Nos. M-70742, CM-70755, [UID #2005-009-053]*), however, this potential class, if certified, may be expanded under certain *4 conditions. In that Decision and Order, this Court noted that the vast majority of potential claimants in this claim will in all likelihood be infants. Pursuant to [Court of Claims Act § 10\(5\)](#), the claim of an infant is tolled until the disability is removed, and it may then be presented within two years thereafter. Additionally, any potential adult claimant who has not yet joined in either the Springer or Arroyo claims may apply for late claim relief under [Court of Claims Act § 10\(6\)](#). Such late claim relief may be granted in the discretion of the Court, and as this Court stated in its prior Decision and Order, the State would have a difficult time in successfully arguing against such relief under these circumstances. Therefore, even though potential eligibility for inclusion in the proposed class has been limited herein, the Court anticipates that there may be additions to the class at a later date.

The Court must now therefore consider whether a class should be certified under the facts and circumstances as presented herein.

[CPLR § 901\(a\)](#) sets forth the prerequisites for bringing a claim as a class action:

One or more members of a class may sue or be sued as representative parties on behalf of all if:

the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

the claims or defenses of the representative parties are typical of the claim or defenses of the class;

the representative parties will fairly and adequately protect the interests of the class; and

a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In evaluating whether these criteria have been met and whether certification is warranted, and pursuant to [CPLR § 902](#), the Court must take into account, among other relevant factors:

The interest of members of the class in individually controlling the prosecution or defense of separate actions;

The impracticability or inefficiency of prosecuting or defending separate actions; *5

The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;


The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

The difficulties likely to be encountered in the management of a class action.



Although each of the five criteria set forth in [CPLR § 901\(a\)](#) must be satisfied, these requirements should be construed liberally and in favor of certification ([Lauer v New York Telephone Co., 231 AD2d 126, 130](#)). Qualification for class action status is a determination vested in the sound discretion of the Court ([Matter of Froehlich v Toia, 71 AD2d 824; Small v Lorillard Tobacco Co., 94 NY2d 43, 52](#)).

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Numerosity

There is no mechanical test to determine whether a putative class is so numerous that it makes joinder impracticable ( [Friar v Vanguard Holding Corp.](#), 78 AD2d 83). In this particular case, however, and as previously stated, more than 600 individuals have been listed as potential claimants in the Springer and Arroyo claims which, in this Court's opinion, easily satisfies the numerosity requirement.

Commonality

As previously discussed herein with respect to the issue of consolidation, common questions of fact and law predominate. Even though the defendant contends that individual claimants may have suffered different amounts of damage, a variation in damage amounts among members of the class is insufficient to defeat certification ( [Weinberg v Hertz Corp.](#), 116 AD2d 1;  [Godwin Realty Assocs. v CATV Enters.](#), 275 AD2d 269).

Typicality

To satisfy this requirement, a class representative must satisfy the Court that he or she possesses the same interests as other members of the putative class. In this case, the claims of the proposed class representatives (Springer and Arroyo) allege that they suffered a cryptosporidium infection as a result of exposure to that parasite after attending that Spraypark. The Court finds that these claims are typical of the proposed class, since they arise from the same event or course of conduct which forms the basis of the claims of other class members, and liability is based upon the same allegations of negligence against the State.

Adequacy of Representation


In this particular matter, the Court finds that the proposed class representatives, Phyllis and John Arroyo, and Timothy and Jacqueline Springer, in their respective individual capacities as well as on behalf of their infant child or children, would provide fair and adequate representation to the other members of the class. *6

Furthermore, it has been proposed in this motion that three law firms will act as co-counsel in this claim. The Court has reviewed the qualifications of each firm ⁶, and finds that

they are competent counsel, all with substantial experience in either food-borne or waterborne illness claims,


and all with extensive experience in class action litigation. The Court finds that these three law firms, with their expertise, will diligently represent the interests of the class.

Superiority

The Court is aware that many of the individual claims may be reasonably modest, and the ability to proceed as a class action will be the most cost effective procedure for many of the individual claimants. Furthermore, it would be an incredible waste of manpower for the Attorney General to defend each of the over 600 potential claims on an individual basis, and similarly it would certainly be a waste of judicial resources to handle each of these claims individually. Therefore, after consideration of the factors set forth in  [CPLR § 902](#), the Court finds that certification of these claims as a class action is the superior method to resolve the claims set forth herein.

Accordingly, for all of the reasons set forth above, claimants' motions for class certification pursuant to CPLR Article 9 are granted.

The Court notes that in their application, claimants had proposed that the class, if certified, be defined to include subclasses of claimants, based upon the extent of damages allegedly suffered by a particular claimant, and claimants also suggested that such subclasses be further divided into subclasses of adults and infants. Claimants have indicated, however, that upon certification, they anticipate that a class definition may be mutually agreed upon by the parties, including categories of subclasses.

Additionally, and subsequent to oral argument, claimants submitted a proposed "Notice of Class Action" (see Attachment to Item 12), with such notice including notification to potential members (infants and potential applicants for late claim relief under  [Court of Claims Act § 10\[6\]](#)) who have not yet appeared in this action.

Since counsel for the claimants anticipate that the parties may be able to reach agreement on these issues (class definition, subclasses, and notice to potential class members), this Court will not specifically address these matters herein, but will provide the parties an opportunity to resolve such issues by stipulation. This Court, therefore, intends to conference this

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claim in the immediate future to address these matters and any other pre-trial issues, as well as to implement a time frame for the completion of discovery.

Accordingly, based upon the foregoing, it is

ORDERED, that claimants' motion to consolidate Claim No. 111361 and Claim No. 111362 pursuant to CPLR § 602 is hereby GRANTED, and the consolidated claim shall hereafter be captioned "TIMOTHY SPRINGER and JACQUELINE SPRINGER, Individually and on behalf of *7 their Infant Children, ADAM SPRINGER, KELLY SPRINGER and RACHEL SPRINGER, and PHYLLIS ARROYO and JOHN ARROYO, Individually and on behalf of their Children, ALEX ARROYO, CHEYENNE ARROYO, and MCKENZIE ARROYO, and all other persons similarly situated (claimants) v THE STATE OF NEW YORK (defendant), and this consolidated claim shall be designated as Claim No. 111361; and it is further

ORDERED, that the Chief Clerk of the Court is hereby directed to transfer the file contents of Claim No. 111362 to Claim No. 111361; and it is further

ORDERED, that claimants' motions for certification of this consolidated claim are hereby GRANTED, with the class consisting of those individuals who have either been named as claimants or who have served a notice of intention to file a claim in connection with either the Arroyo claim (Claim No. 111362) or the Springer claim (Claim No. 111361); and it is further

ORDERED, that a conference will be conducted by the Court as soon as reasonably practicable to address the issues of class definition, including possible subclasses, the proper form of the "Notice of Class Action", and other discovery matters.

Syracuse, New York

June 29, 2006


NICHOLAS V. MIDEY JR.


Judge of the Court of Claims

FOOTNOTES

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Footnotes

- 1 The Court is aware of one other claim based upon the cryptosporidium outbreak at the Spraypark, to wit: Dey v State of New York & Ano., Claim No. 111576. This claim has also been assigned to this Court pursuant to the Individual Assignment System for the Court of Claims (§ 206.3 of the Uniform Rules for the Court of Claims). There is no indication in the Dey claim that class action certification is desired.
- 2 The Arroyo claim (Claim No. 111362) also contains causes of action based upon strict liability and breach of warranty (express and implied).
- 3 Unpublished decisions and selected orders of the Court of Claims are available via the Internet at <http://www.nyscourtofclaims.state.ny.us/decisions>.
- 4 Although recognizing the availability of class action relief in the Court of Claims, and after considering the issue of class eligibility, Judge Collins determined that a class action was not appropriate in Woolley.
- 5 Pursuant to  Court of Claims Act § 10(3), in claims based upon allegations of negligence or unintentional torts, a notice of intention, if served upon the Attorney General within 90 days of accrual, extends a claimant's right to serve and file a claim to two years from the date of accrual. Therefore, any potential member of the

proposed class who has served a notice of intention has established, at this point in time, compliance with the strict jurisdictional requirements of  § 11 and may be included in the class, if certified.

- 6 In a prior Decision and Order, and after reviewing their qualifications, this Court had previously approved the application of William Marler, Esq., and Bruce T. Clark, Esq., to appear *pro hac vice* with Underberg & Kessler, LLP, in connection with the Springer claim (Claim No. 111361) (see Decision and Order to Motion No. M-71017, dated January 12, 2006 (UID #2006-009-001]).

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Baker et al v. SF HWP Management LLC et al,
(Sup. Ct. Washington County June 8, 2009)

COPY

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

LEONARD BAKER, ALICIA FOGARTY, ALEXIA FOGARTY a minor by her mother and Natural Guardian ALICA FOGARTY, LINDSAY B. HUNZIKER and JOSHUA BERNER, individually and as Parents and Natural Guardians of OLIVIA BERNER, on behalf of themselves and all other similarly situated,

DECISION AND ORDER

Plaintiffs

Index No. 50564

RJI No.

-against-

SF HWP MANAGEMENT, LLC, HWP DEVELOPMENT, LLC, SIX FLAGS, INC. d/b/a SIX FLAGS GREAT ESCAPE LODGE and INDOOR WATERPARK, SIX FLAGS THEME PARKS, INC. d/b/a SIX FLAGS GREAT ESCAPE LODGE and INDOOR WATERPARK, and JOHN DOE INC. 1-10.

Defendants

APPEARANCES:

Degraff, Foy & Kunz, LLP (James D. DiPasquale, Esq., of counsel) and Dreyer Boyajian, LLP (James R. Peluso, Esq., of counsel), Attorneys for plaintiffs

Napierski, Vandeburgh & Napierski, LLP (Mark J. Dolan, Esq., of counsel), Attorneys for Defendants

PRESENT: KROGMANN, J.

Plaintiffs herein move this Court for class action certification pursuant to Civil Practice Law and Rules 901 and 902. Preliminarily, the Court notes that since the making of the motion in August of 2008, the two outstanding cases were consolidated by order of Mr. Justice Egan dated December 5, 2008 to carry the above-cited caption.

The controversy arises out of an outbreak of gastrointestinal illness by numerous persons who

were guests or patrons of Six Flags Great Escape Lodge and Indoor Waterpark (the "Lodge") in or around mid-March, 2008. The Lodge is a 200 room suite hotel, having a ballroom, indoor water park and four separate dining facilities. Apparently, the New York State Department of Health ("DOH") investigated the outbreak and determined that it was caused by an outbreak of "norovirus". Transmission occurs person to person through fecal contamination of food or water. The underlying complaints allege the named plaintiffs were patrons of the Lodge who used the water park and consumed food during the referenced period in March of 2008. The moving affirmation suggests that there may be upwards of 600 affected persons according to information obtained from the DOH.

The two actions now consolidated were filed in April and May of 2008. The causes of action enumerated include: negligence, gross negligence, negligence per se, strict liability, breach of implied and express warranties.

The moving papers, of course, attempt to satisfy the five "Prerequisites to a class action" set out at CPLR 901(a).

Initially, the Court's attention is drawn to the five factors set out at CPLR 902, which are described as "among the matters" a court shall consider as to whether the action "[may] proceed as a class action". The second of those is "the impracticality or inefficiency of prosecuting or defending separate actions". It is virtually conceded that no particular plaintiff's damages alone, could support the amount of discovery that will likely be needed to determine the cause of the viral outbreak and "prove up" that cause to support one or more of the causes of action against the defendants here. The cramping and intestinal sickness, causing pain, discomfort and missed work, has not been shown to cause serious personal injury of the type that would individually support the intensive discovery and proof hurdles which are here apparent to the Court. As to 902(1), there is no reason for any one

potential plaintiff to want or need to control the prosecution of separate actions, nor are there any serious difficulties apparent in the management of a class action (matter number 5).¹ The Court, then will proceed to review the five prerequisites of CPLR 901(a):

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

As to CPLR 901(a)(1), the Court observes that the numerosity of potential members is met. The reply affidavit of James R. Peluso attaches documents subpoenaed from the DOH records, including “Six Flag Great Escape Lodge and Waterpark GI Illness Outbreak” daily summaries for March 28, 2008 and April 2, 2008. The former counts 469 persons reporting gastrointestinal illness and the later 507 persons, with a total of 610 calls being received at the DOH call center, apparently

¹ The United States Supreme Court has noted that the class action mechanism helps overcome the problem that small potential recoveries do not preclude incentive to vindicate wrongs suffered on an individual basis (See Anchem Products v. Windsor, 521 US 591; Deposit Guaranty v. Roper, 445 US 326).

through its toll free number. The attachments do not indicate how many of that number are cases which are “confirmed” cases which include a “lab confirmed infection of any agent that could cause GI illness”. Presumably, updated DOH records would reveal the confirmed cases.² Such number indeed makes joinder impractical and yet it is not so large as to be unmanageable.

As to CPLR 901(a)(2), there are clearly questions of law or fact which are common to the class. The individual issues (the slightly varying degrees of illness - and thus damage) do not predominate over the question of how the virus originated and was spread to patrons and visitors to the Lodge and thereafter whether the defendants are liable therefore upon one of the theories pleaded. Small v. Lorillard, 94 NY2d 43. On this point, defendants argue “[p]laintiffs have failed to come forward with any evidence from a medical or health professional that implicates the Lodge as the origin of the norovirus outbreak that suggests the Lodge’s activities contributed to the spread of the infection...” The referenced attachments show in some detail the methodology used by the DOH in collecting data. True, none of the attachments set forth a conclusion based upon evidence that places the blame for the virus outbreak on the Lodge, but the Court does not read the statute as requiring proof positive of liability. As in Simon v. Cunard Line Ltd., 75 AD2d 283 at 288, “To the extent that inquiry into the merits of a claim is appropriate before certification of a class, the inquiry is to determine whether on the surface there appears to be a cause of action for relief which is neither spurious nor sham”.

² The Court recognizes that defendants have urged the Court not to consider evidentiary attachments in a movants’ reply affidavit. In the norm, such would be good judicial practice so as to prevent the respondents from being “ambushed” with evidence that should have been more properly placed in the moving papers and properly considered by those opposing the motion. Here, the motion papers must be filed within sixty days after the date responsive pleadings are due. Such time does not allow for the orderly accumulation of evidence, especially where the sought after information is with a state agency. The Court is considering the attachments to the reply affidavit in the interests of justice and because if they were contained within the original papers they would be just as self-serving as they now are.

As to CPLR 901(a)(3) and (4), it appears clear that the claims of the representative parties are typical of the claims of the class. Typicality is important, because, if there are, for instance, extreme levels of differences in damages with the class, the intensity of the prosecution may not do justice to each class member. Here, although the duration of the illness/distress caused by the virus may differ slightly, there does not appear to be any seriously injured members of the class. If there is such a member, they could certainly opt out of class representation. Here, Leonard Baker became violently ill with vomiting and diarrhea and was unable to work for several days all after attending an end-of-year wrestling banquet at the Lodge. Alica and Alexia Fogarty attended a “family camp weekend” for diabetics at the Lodge where they consumed food and beverage and used the amenities. They both allegedly became violently ill with repeated bouts of vomiting, diarrhea, headache and fever. Plaintiffs Lindsay Hunziker, Joshua Berner and Olivia Berner were allegedly overnight guests at the Lodge on March 16 and 17, 2008. In addition, they used the waterpark and dining facilities. Those plaintiffs allegedly suffered repeated bouts of abdominal pain, diarrhea, headache and fever. Lindsay Hunziker required emergency room treatment and lost four days of unpaid work due to her illness. There is nothing to indicate that these plaintiffs are not representative of the class. The Court takes comfort in concluding that they are.

Upon consideration of CPLR 901(a)(5), a class action upon the circumstances presented, is a fair and efficient method for adjudication of the controversy. As mentioned above, the likelihood that each injured class member would be able to obtain justice, on an individual basis is low. Because of this, class certification is obviously opposed by defendants. Much of the opposition is directed to insufficient “proof” of wrongdoing on the part of the Lodge. The Court agrees that liability has not been shown, and the burden to do so remains with the plaintiffs. (See Rallis v. City

of New York, 3 AD3d 525)

Defendants propose the decisions in Catalano v. Heraeus Kulzer, 305 AD2d 356 and Geiger v. American Tobacco, 277 AD2d 420 as militating against the “commonality” requirement. Both decisions determined that the issue of causality must be solved on a case-by-case basis and therefore they predominated over the common issues. Catalano was a breach of warranty case dealing with dental restorations and Geiger dealt with individual issues of addiction and causation in a tobacco case. In Gordon v. Ford Motor, 260 AD2d 164, certification was denied in a breach of implied warranty of merchantability case where the court found that each member would have to show that their vehicle was not fit for its ordinary purposes.

In the instant matter, at least as to the negligence related claims, if plaintiffs can prove that the cause of the norovirus “contamination” was because defendants breached a duty of care, the issues of the various plaintiffs’ patronization of the Lodge and experiencing and reporting a gastrointestinal illness in the relevant time period would not predominate because the latter could be characterized as statistical in nature.

The Court acknowledges that if the source of norovirus contamination can be proved to have been in the food service portion of the Lodge’s business, the success of a breach of warranty claim may involve inquiry that is somewhat more than statistical. The Court does not see that the existence of such cause of action should interrupt class certification when the success of the plaintiffs on their liability claim, if at all, will likely be due to proof of a negligence-related cause of action.

Defendants also contend, as an argument against class certification, that the proposed class description is improper. The Court agrees that the proposed description is not proper, but since CPLR 903 suggests that the order permitting a class action is to “describe the class”, an improperly

proposed class does not mean that a class designation may not be given. (Compare Alix v. Wal-Mart Stores, Inc., 57 AD3d 1044 [3rd Dept 2008].)

Here, the Court will not approve a class description which includes persons who may have suffered a gastrointestinal illness after being in contact with someone who patronized the Lodge but were not, themselves a patron of the Lodge. Not only does the inclusion of such other persons beg the potential appearance of an undisclosed number of additional persons whose contacts with Lodge guests may be open to doubt, the Court harbors serious doubt that the “duty” required to proceed with any negligence related cause of action extends to such “remote” persons. The Court also takes this opportunity to note that the norovirus which allegedly was at the root of the illness suffered by the complaining Lodge patrons is transmitted “through the fecal-oral route or through contaminated food or water”. To suggest that persons who contracted gastrointestinal illness after coming into contact with persons who were guests or patrons of the Lodge should be part of the class would only suggest or even require that there be a separate “fecal-oral” food/water contamination event having no connection with the Lodge. The Peluso reply affidavit attaches a copy of a Six Flags Outbreak Questionnaire which was apparently sent to persons staying at the Lodge for some portion of March, 2008. It suggests “both ill and well attendees should complete the questionnaire”.


The Court will approve the certification of a class of persons as class action plaintiffs whose members were persons who patronized any of the facilities of the named defendants in the month of March, 2008 who experienced gastrointestinal illness while at such facility or within 72 hours after departure from such facilities and who reported to (or responded to inquiries from) the New York State Department of Health relating to such illness.

Within fifteen (15) days hereof, plaintiffs’ counsel shall propose, upon notice to opposing

counsel, the content of a notice of commencement of class action and the method by which the notice is to be given to class members. The notice shall also provide a method for potential members to choose to be excluded from the class.

The within constitutes the decision and order of this Court.

Dated: *JUNE 8, 2009*



David B. Krogmann
Justice of the Supreme Court

THE COURT IS FILING THE ORIGINAL DECISION AND ORDER TOGETHER WITH THE ORIGINAL PAPERS IN THE APPROPRIATE COUNTY CLERK'S OFFICE. ATTORNEY FOR PLAINTIFF IS TO COMPLY WITH CPLR 2220.