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8 [Additional Counsel Listed on Signature Page]

9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN FRANCISCO DIVISION

12  
 13 IN RE KOREAN RAMEN ANTITRUST  
 14 LITIGATION

Case No. 3:13-cv-04115-WHO

**Indirect Purchaser Plaintiffs’ Notice of  
 Motion and Motion to Approve (1)  
 Incentive Awards to Class  
 Representatives and (2) *Cy Pres*  
 Distribution of Remaining Settlement  
 Funds to Charity; and Memorandum of  
 Points and Authorities in Support  
 Thereof**

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 16  
 17 This Document Relates to:  
 18 ALL INDIRECT PURCHASER ACTIONS

Date: July 10, 2019  
 Time: 2:00  
 Courtroom: 2, 17<sup>th</sup> Floor  
 Judge: Hon. William H. Orrick

21 **NOTICE OF MOTION AND MOTION**

22  
 23 PLEASE TAKE NOTICE THAT on July 10, 2019, at 2:00 p.m., before the Honorable  
 24 William H. Orrick in Courtroom 2 on the 17th Floor, United States District Court for the Northern  
 25 District of California, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, CA  
 26 94102, the Indirect Purchaser Plaintiffs (“the IPPs”) hereby move for an Order approving (a)  
 27 incentive awards to the class representatives to compensate them for the work they undertook on

1 behalf of the class and to recognize their willingness to act as private attorneys general, which serves  
 2 an important public purpose; and (b) distribution of the remaining funds from the settlement between  
 3 the IPPs (on behalf of themselves and the Indirect Settlement Class) and Samyang Foods Co., Ltd. to  
 4 Feeding America, a nationwide food bank. IPPs make this motion based on this notice of motion  
 5 and supporting memorandum of points and authorities, along with the concurrently filed  
 6 Declarations of Briana Crane, Marc G. Reich, and Alan Vasquez, and the Proposed Order.

## 7 MEMORANDUM OF POINTS AND AUTHORITIES

### 8 I. THE SETTLEMENT WITH SAMYANG

9 On September 5, 2013, the first of six class actions were filed by indirect purchasers against  
 10 five Korean ramen manufacturers alleging a conspiracy among the manufacturers to fix the prices of  
 11 ramen. ECF 1. These five manufacturers are Nongshim Company, Ltd. and its U.S. subsidiary,  
 12 Nongshim America, Inc. (collectively “Nongshim”); Ottogi Company, Ltd. and its U.S. subsidiary,  
 13 Ottogi America, Inc. (collectively “Ottogi”); and Samyang Foods Company, Ltd. (“SAMYANG”).  
 14 These five actions were ultimately consolidated with each other and then with related actions brought  
 15 by direct purchasers. ECF 49, 60.

16 During the summer of 2015, the IPPs began settlement discussions with Samyang. (*See*  
 17 Declaration of Robert A. IZARD in Support of Plaintiffs' Motion for Preliminary Approval of  
 18 Settlement (“IZARD Decl.”) ¶ 2 (ECF 201-1)). After exchanging mediation submissions and responses,  
 19 in June 2015, the parties negotiated during an in-person, day-long mediation, and thereafter through  
 20 numerous telephone and written communications. *Id.* On September 8, 2015, the IPPs, on behalf of  
 21 the IPP Settlement Class (the “Class”)<sup>1</sup>, agreed to a settlement with Samyang.  
 22

23  
 24  
 25 <sup>1</sup> The Class was defined as: “[A]ll individuals and entities that indirectly purchased Korean Noodles  
 26 in the United States and its territories, including, without limitation, in the states of California,  
 27 Florida, Massachusetts, Michigan, New York, and Hawaii, from one or more Defendants from May  
 28 1, 2001, through December 31, 2010.” Settlement Agreement ¶ 1(o) (attached to IZARD Decl., ECF  
 2017-1).

1 From Plaintiffs' perspective, the Samyang Settlement was not an end in itself; rather, it was a  
2 step towards a more complete recovery for the IPP class for the overcharges they paid for Korean  
3 Ramen Noodles during the period in which the alleged price-fixing conspiracy took place. The  
4 Samyang Settlement furthered this goal in two ways. First, Samyang was required to cooperate with  
5 Plaintiffs and provide witnesses to confirm testimony that Samyang had provided to the Korean Fair  
6 Trade Commission, through both deposition testimony and at trial. Second, Samyang was required  
7 to pay IPPs \$500,000, which would be used, first, to contribute towards the expenses of the ongoing  
8 litigation, and second, to be included with any funds Plaintiffs obtained in the litigation from the  
9 remaining Defendants. The \$500,000 settlement was never sufficient, without additional funds from  
10 the other Defendants, for distribution in a case involving hundreds of millions of dollars in  
11 commerce. *In re Linerboard Antitrust Litig.* 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003)(Courts  
12 generally approve so-called "ice-breaker" settlements such as this one, because of their many  
13 benefits to the class.).

14 The Court approved the Settlement on August 22, 2016. ECF 398. No class members  
15 requested exclusion from the Class or objected to the settlement. *Id.* ¶ 9. *Id.* Half of the Samyang  
16 Settlement fund (after payment of notice and administration costs) was used to reimburse expenses  
17 that Plaintiffs incurred in prosecuting the lawsuit against the Non-Settling Defendants. These  
18 expenses were disclosed to the Class in the Notice (ECF 328 at 22, 25, 29 of 30) ("[Class Counsel]  
19 intend to ask the Court to permit them to use up to 50% of the Settlement Fund remaining after the  
20 payment of notice and administration costs<sup>2</sup> to reimburse past and future expenses incurred in  
21 prosecuting the lawsuit against the Non-Settling Defendants.") and approved by the Court in its Order  
22 granting final approval. ECF 398 at 3-4 ("Counsel for the Indirect Purchaser Plaintiffs are entitled  
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26 <sup>2</sup> As part of the negotiated settlement with Samyang, the DPPs agreed to share the cost of notice with  
27 IPPS.

1 to the payment of \$216,673 as partial reimbursement of costs incurred in the prosecution of this  
2 litigation.”).<sup>3</sup>

3 The IPPs continued to press their claims zealously against the Defendants for over two years,  
4 which included taking over one hundred depositions, successfully moving for class certification,  
5 defeating Defendants’ motions for summary judgment, and taking the case to a jury trial. However,  
6 the jury returned a verdict for the remaining Defendants in December 2018.

7 Now that the action is over, IPPs request approval of incentive awards for the class  
8 representatives for their dedication and services to the Class. And, because there are insufficient  
9 funds in the Settlement Fund to provide notice, process claims, and mail checks (regardless whether  
10 incentive awards are approved), IPPs seek the Court’s permission to make a *cy pres* distribution of  
11 the remaining funds to Feeding America, a nationwide hunger-relief organization. As of the date of  
12 this motion, the Settlement Fund comprised \$216,673. *See* Declaration of Alan Vasquez submitted in  
13 support of this motion (“Vasquez Decl.”) ¶5.

14 **II. DISCUSSION**

15 **A. INCENTIVE AWARDS SHOULD BE APPROVED**

16 **1. Legal standard**

17 “Incentive awards are fairly typical in class action cases.” *Rodriguez v. W. Publg. Corp.*, 563  
18 F.3d 948, 958 (9th Cir. 2009); *accord In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934,  
19 943 (9th Cir. 2015) (“[I]ncentive awards that are intended to compensate class representatives for  
20 work undertaken on behalf of a class ‘are fairly typical in class action cases.’”). “Such awards are  
21 discretionary and are intended to compensate class representatives for work done on behalf of the  
22 class, to make up for financial or reputational risk undertaken in bringing the action and, sometimes,  
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25 <sup>3</sup> “This amount will reduce amounts already incurred by Plaintiffs in paying expert fees, fees  
26 incurred to maintain a database to house and review documents produced, translation fees, and travel  
27 expenses, and deposition costs incurred in the prosecution of this litigation.” Decl. of Alan R. Plutzik  
¶ 7, ECF 383-1.

1 to recognize their willingness to act as a private attorney general.” *Id.* at 958-59. “Awards are  
2 generally sought after a settlement or verdict has been achieved.” *Id.* at 959.

3 “In evaluating a request for a service award for a class representative, courts consider all  
4 “relevant factors including the actions the plaintiff has taken to protect the interests of the class, the  
5 degree to which the class has benefited from those actions, . . . the amount of time and effort the  
6 plaintiff expended in pursuing the litigation ... and reasonable fears of workplace retaliation.”  
7 *Alvarez v. Farmers Ins. Exch.*, 2017 WL 2214585, at \*1 (N.D. Cal. Jan. 18, 2017) (*quoting Staton v.*  
8 *Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)).

9 Incentive awards should be approved here because all class representatives made substantial  
10 contributions to this case. Declaration of Marc G. Reich In Support of Motion to Approve Incentive  
11 Awards to Class Representatives (“Reich Decl), ¶3. All were kept abreast of the progress of this  
12 action through the pleading stage, class certification, summary judgment, and trial. *Id.* ¶ 2. Class  
13 representative searched for hard-copy and electronic documents in response to Defendants’ discovery  
14 requests. *Id.* Many took the time to prepare for deposition and to be deposed. And Joyce Beamer  
15 and Ji Choi travelled to San Francisco from Michigan and New York, respectively, to prepare for and  
16 testify at trial. These efforts, performed on behalf of the class without expectation of compensation,  
17 should be rewarded.

18 IPPs ask that awards be granted in three levels. First, IPPs request awards in the amount of  
19 \$2,000 for representatives Karen Heiferman, Nicholas Halloran, Cynthia Skinner, Jill Bonnington  
20 and Stephen Fenerjian, who served diligently but, “for reasons of hardship, unavailability or illness,  
21 were not able to submit themselves to a deposition in California.” ECF No. 379. Second, IPPs  
22 request that awards in the amount of \$6,000 be granted to Kendal Martin, Anthony An, Eleanor  
23 Pelobello, Kenny Kang, Christina Nguyen, Thu-Thuy Nguyen, Yim Ha Noble, and Charles Chung  
24 who prepared for and sat for depositions. Finally, Plaintiffs request that the Court award incentive  
25 awards in the amount of \$10,000 for representatives Joyce Beamer and Ji Choi, who sat for  
26 deposition and also took time out of their busy schedules to prepare for, travel to, and attend trial  
27 where they were both subjected to questioning by attorneys for Nongshim and Ottogi. *See In re TFT-*

1 LCD (*Flat Panel*) *Antitrust Litig.*, M 07-1827 SI, 2013 WL 149692, at \*2 (N.D. Cal. Jan. 14, 2013)  
 2 (“award[ing] a higher [\$15,000] incentive award to the four class representatives who testified at trial  
 3 in recognition of their substantial contributions to this case”); *Gallucci v. Boiron, Inc.*, No.  
 4 11CV2039 JAH NLS, 2012 WL 5359485, at \*10 (S.D. Cal. Oct. 31, 2012), *aff’d sub nom. Gallucci*  
 5 *v. Gonzales*, 603 F. App’x 533 (9th Cir. 2015) (affirming larger incentive award for lead plaintiff  
 6 who contributed a greater amount of time and effort).

7 Because, as explained below, distributing funds to Class members is impractical, regardless  
 8 whether the Court approves incentive awards, the incentive awards will not have any effect on the  
 9 amount each Class member will recover and thus do not create a conflict of interests between the  
 10 Class and the class representatives.

11 **B. A *CY PRES* DISTRIBUTION OF THE REMAINDER SHOULD BE**  
 12 **APPROVED**

13 While “a court’s goal in distributing class action damages is to get as much of the money to  
 14 the class members in as simple a manner as possible,” this goal may be unattainable “when the class  
 15 members are so numerous and the individual claims are so small that individualized distributions are,  
 16 as a practical matter, impossible.” NEWBERG ON CLASS ACTIONS § 12:26 (5th ed.). Here, even if  
 17 incentive awards are not approved, the amount in the Settlement Fund is insufficient to pay the costs  
 18 associated with (a) providing notice, (b) processing claim forms, and (c) processing checks. Because  
 19 the funds are effectively “non-distributable,” IPPs move for approval of a *cy pres* award of the  
 20 balance of the Settlement Fund to a non-profit organization that distributes food nationwide to needy  
 21 recipients and disaster victims.

22 **1. Distributing the remaining funds would be burdensome and costly**

23 “*Cy pres* payments are permissible when funds are ‘non-distributable’ or ‘where the proof of  
 24 individual claims would be burdensome or distribution of damages costly.’” *O’Connor v. Uber*  
 25 *Techs., Inc.*, 13-CV-03826-EMC, 2019 WL 1437101, at \*13 (N.D. Cal. Mar. 29, 2019) (quoting  
 26 *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)). A *cy pres* distribution “is most useful  
 27 when individual stakes are small, and the administrative costs of . . . distributions to class members

1 might exceed the amount that ends up in class members' pockets.” *Holtzman v. Turza*, 728 F.3d 682,  
2 689 (7th Cir. 2013).

3 Here, there are insufficient funds to distribute the funds to class members. As of the date of  
4 this motion, \$216,673 remain in the Fund. *See Vasquez Dec’l.*, ¶5. Moreover, the names and  
5 addresses of class members are not known. Therefore, notice would have to be given so that Class  
6 members could identify themselves and request a distribution of a portion of the proceeds. *Id.* at ¶ 7.  
7 Thereafter, distributing the funds to class members would require processing the claims forms, and  
8 processing the checks. *Id.*

9 Although the exact amount of such an undertaking can only be estimated, the cost of  
10 providing notice to the Class in 2016 provides a useful comparison. The 2016 notice included  
11 publication in newspapers, text link search advertising, banner advertising and a targeted media  
12 campaign on selected websites. *Id.* at ¶ 8. In 2016, the cost of providing notice in this manner was  
13 \$179,535. *Id.* Therefore, the cost to notify the Class now that they need to submit claim forms  
14 would be at least \$179,535. *Id.* Thus, giving notice alone, would consume nearly 80% of the fund —  
15 regardless of the number of claimants who ultimately submit claim forms — ***meaning only \$37,138***  
16 ***would remain to process claim forms and send checks to claimants*** (this assumes no incentive  
17 awards for class representatives are approved). *Id.*

18 Second, after providing notice, the claims administrator would need to process the claim  
19 forms submitted by Class members and send checks to the recipients. *Id.* at ¶ 9. The cost of  
20 performing these functions would depend on the number of claim forms that were processed and  
21 checks that were issued, but the cost of processing, issuing and mailing checks likely would exceed  
22 \$1.00 per claimant. *Id.* Accordingly, assuming the cost was \$1.00 (a low estimate), if only 40,000  
23 claims are filed, it would cost approximately \$40,000 to process claim forms, issue checks, and mail  
24 them to claimants—more than the amount remaining to distribute after notice. *Id.* As the Court is  
25 aware from the trial testimony, the case involved products that were, individually, fairly inexpensive,  
26 but the volume of commerce over the Class Period was hundreds of millions of dollars. It is safe to  
27 assume that the IPP class numbers in the tens of millions.

1 In light of the foregoing, it would be impractical to attempt to distribute this small fund to  
2 Samyang class members. *Id.* at ¶ 10.

3 **2. The balance remaining in the Fund should be distributed to Feeding**  
4 **America**

5 “The *cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a  
6 class action settlement fund to the ‘next best’ class of beneficiaries.” *Nachshin*, 663 F.3d at 1036.  
7 Accordingly, the Court must consider whether the proposed *cy pres* recipient is appropriate. *Id.* at  
8 1034. In so doing, the Court considers two factors:

9 (1) the objectives of the underlying statute; and

10 (2) the interests of the silent class members, including their geographic diversity. *Id.* at 1039.

11 Here, IPPs believe the best candidate for the remaining Funds is Feeding America, the largest  
12 hunger relief organization in the United States. Declaration of Briana Crane of Feeding America In  
13 Support of Motion to Approve *Cy Pres* Distribution (“Crane Dec’l”), ¶ 3. The organization is  
14 comprised of a national network of more than 200 food banks and food-rescue programs that  
15 distribute donated food through 60,000 charitable agencies to hungry Americans. *Id.* Last year, it  
16 helped provide 4 billion meals to an estimated 46 million Americans. *Id.* at ¶ 5.

17 The demands placed upon Feeding America are weighty. 40 million Americans now live in  
18 hunger or on the edge of hunger – what the government calls “food insecure.” *Id.* at ¶ 4. In addition,  
19 Feeding America readies itself and responds quickly to disasters nationwide. In 2017, Feeding  
20 America’s network delivered more than 100 million pounds of food, water, and supplies to  
21 communities devastated by some of the worst hurricanes on record. *Id.* at ¶ 8. Its member food  
22 banks are still providing much needed relief to victims of the Camp fire in California which occurred  
23 during the *Korean Ramen Noodles* trial. *Id.*

24 Moreover, Feeding America is an excellent steward of the contributions it receives to fulfill  
25 its mission. In both the 2017 and the 2018 editions of Forbes magazine, Feeding America was given  
26 a charitable commitment rating of 99%, meaning that 99% of all product and money donations that  
27



1 Feeding America receives go directly towards feeding hungry people rather than to administration or  
2 fundraising. *Id.* at ¶ 9.

3 Finally, Feeding America is an appropriate recipient under the law. The subject matter of this  
4 lawsuit is an overcharge for Ramen, a relatively low-cost meal. Of course, consumers eat Ramen for  
5 a variety of reasons: taste, convenience, and cost. However, Ramen is a frequent choice for  
6 consumers with budgetary constraints looking for a low-cost meal. Small increases in the price of a  
7 food product, as alleged here, have the greatest affect on those who are “food insecure” and who may  
8 have to make a choice between paying a utility bill, for example, or purchasing food. This is  
9 precisely the constituency that Feeding America serves.

10 In short, Feeding America is an extremely worthy, and appropriate, *cy pres* recipient.

11 **3. The Class has been notified of the possibility of a cy pres award**

12 The Class has already been notified that the IPPs might seek to a *cy pres* distribution of the  
13 remaining funds. In the section of the long-form Notice entitled, in response to the question “How  
14 will the funds from the Settlement be distributed?,” the Notice states, in relevant part, “No  
15 determination has been made at this time about whether funds will be distributed to the Indirect  
16 Settlement Class or whether the funds will be distributed *cy pres*. That decision will be made at a  
17 later date and subject to the Court’s approval.” ECF 328 at 22 of 30.

18 As explained above, in response to this Notice, no class members requested exclusion from  
19 the Class, filed objections to the Settlement, or appeared at the hearing to object. ECF 398 ¶¶ 9, 13.

20 **III. CONCLUSION**

21 For the reasons set forth above, the IPP Plaintiffs respectfully request that the Court grant  
22 their motion.

23  
24 Date: June 3, 2019

25 \_\_\_\_\_  
26 /s/  
27 Daniel E. Birkhaeuser (State Bar No. 136646)

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