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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

19 ELLIOT ZEISEL,)
20 on behalf of himself and all others)
21 similarly situated,)
22)
23 Plaintiff,)
24)
25 v.)
26)
27 DIAMOND FOODS, INC.,)
28 a Delaware corporation,)
Defendant.)

CASE NO.: CV 10-1192-JSW

CLASS ACTION

**NOTICE OF MOTION, PLAINTIFF'S
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT, AND
SUPPORTING MEMORANDUM**

Hearing Date: February 3, 2012
Time: 9:00 a.m.
Courtroom: 11

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MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at the date, time, and location as set forth above, Plaintiff Elliot Zeisel will and hereby does, move the Court for an order granting preliminary approval of the class action settlement as set forth in the parties' Stipulation of Settlement and attached exhibits.¹

For the reasons set forth in the accompanying memoranda of law filed in support of this Motion, Plaintiff moves this Court to preliminarily approve the class action settlement set forth in the accompanying Stipulation of Settlement, to conditionally certify a Class for settlement purposes that is slightly expanded from the Class certified by this Court in its June 7, 2011 Order (Doc. 152) as modified by its October 13, 2011 Order (Doc. 194), to appoint Plaintiff's counsel as Class Counsel for the settlement Class, and to approve the proposed form and manner of giving notice to Class Members of the settlement and advising them of their rights to participate and receive settlement benefits, to exclude themselves, or object.

Plaintiff also moves the Court to enter the following schedule regarding approval of the proposed settlement:

Hearing on Motion for Preliminary Approval of the Settlement	<i>February 3, 2012</i>
Deadline to complete notice ("Notice Date") to settlement class members by mail and publication	<i>May 1, 2012</i>
Deadline for settlement class members to object to ("Objection Date") or opt out ("Opt-Out Date") of the proposed settlement	<i>July 30, 2012</i> [At least 60 days after Notice Date; No less than 25 days prior to Final Approval Hearing]
Deadline for filing of application by Class Counsel for attorney's fees, reimbursement of litigation costs and	<i>July 16, 2012</i> [14 days prior to Objection and Opt-Out Date]

¹ A copy of the Proposed Stipulation of Class Action Settlement (hereinafter, "Stipulation of Settlement" or "Settlement Agreement") is attached hereto as Exhibit A. The six Exhibits to the Stipulation of Settlement are attached hereto as Exhibits A1 - A6.

1	expenses, and incentive payment to Class Representative	
2		
3	Deadline for filing of motion for final approval of proposed settlement	<i>July 16, 2012</i> [14 days prior to Objection and Opt-Out Date]
4		
5	Deadline for filing supplemental papers in support of Final Approval and addressing any objections	<i>August 14, 2012</i> [10 days prior to Final Approval Hearing]
6		
7	Proposed Final Approval Hearing	<i>August 24, 2012</i> [No less than 90 days following order granting preliminary approval of settlement]
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9		
10	Deadline for settlement class members to submit claims forms (“Claim Deadline”)	<i>September 7, 2012</i> [14 days after Final Approval Hearing]
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Plaintiff has calculated the above dates for the schedule in bold italics, using February 17, 2012 as an estimated entry date for the Preliminary Approval Order. If an order is instead entered at a later date, Plaintiff respectfully asks that each of the proposed dates in the above chart be pushed back accordingly. A proposed order has been submitted separately.

At the Final Approval Hearing, the Court will have the opportunity to determine whether to grant final approval to the class action settlement, the settlement class and the requested attorneys’ fees and expenses, as well as to evaluate any objections thereto that may have been filed. *See* Fed. R. Civ. P. 23(e)(2) (directing that class action settlement that purports to bind absent class members may only be entered after hearing held by the court).

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL**SUMMARY OF THE ARGUMENT**

1 On October 13, 2011, a settlement in principle of this class action was reached. The parties'
2 Stipulation of Class Action Settlement ("Stipulation of Settlement") is attached as Exhibit A to
3 Plaintiff's Motion. As detailed below, preliminary approval of this Settlement should be granted.

4 The settlement reached is unquestionably fair—it provides class members with meaningful
5 monetary relief to compensate them for the claims that were pled in the Second Amended Complaint
6 (Doc. 201) ("SAC"). The gravamen of the SAC is that Defendant Diamond Foods, Inc. ("Diamond"
7 or "Defendant") misbranded and mislabeled its packages and website for Diamond of California
8 brand Walnuts products ("Walnuts Products"). The Stipulation of Settlement redresses that
9 complaint by providing that, subject to certain limitations, Diamond will reimburse \$8.25 per
10 package for 3-1b Sam's Club packages and \$3.25 per package for all smaller packages, to class
11 members who submit timely and valid claims forms for their purchases of the Walnuts Products. If
12 Class Members' claims are less than \$2,600,000.00 in total, then the difference between the amount
13 paid to Class Members and \$2,600,000 will be distributed in equivalent food donations to food
14 banks through *cy pres*. Diamond has also agreed not to use the disputed labels in the future and has
15 removed the website statements at issue, thereby providing meaningful injunctive relief to Class
16 Members. In addition, the Stipulation of Settlement requires Diamond to bear the cost of the
17 settlement logistics, including the costs of notice, claims administration, and awarded attorneys' fees
18 and expenses. By any objective standard, the settlement warrants preliminary approval.

19 The notice of the proposed Settlement also fully complies with Fed. R. Civ. P. 23 and due
20 process, as it fully advises Class Members of their rights under the Settlement and is tailored to
21 provide the best notice practicable under the circumstances. *See* Exhibits A3 and A4 (proposed
22 notices) attached to Plaintiff's Motion. Further, the proposed Class for settlement purposes should
23 also be conditionally certified: a national litigation class has already been certified in this case, and,
24 while the proposed settlement Class is slightly expanded, as detailed below, all of the prerequisites
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1 for certification under Federal Rule of Civil Procedure 23 have been satisfied. Thus, certification of
2 the Class is proper.

3 At bottom, the terms of this proposed Settlement are fair, reasonable, and not the subject of
4 any collusion or unfair dealing. Indeed, under the proposed Settlement, Class Members have the
5 opportunity to recover an approximate retail price for the Walnuts Products they purchased and the
6 allegedly unlawful and misleading product labeling has been discontinued. At this *preliminary*
7 stage, approval should be granted. Doing so will allow notice of the proposed Settlement to be sent
8 to the members of the Class and, in turn, will allow the Court to gauge the reaction of the members
9 of the Class to the proposed Settlement.

10 Plaintiff also seeks to set all of the deadlines leading up to that hearing and has submitted a
11 proposed order based upon an assumed date of preliminary approval of no later than February 17,
12 2012. If an order granting preliminary approval is entered later than February 17, 2012, Plaintiff
13 asks that the proposed dates be pushed back accordingly.

14 ARGUMENT

15 **I. FACTUAL BACKGROUND UNDERLYING THE SAC**

16 **A. Nature Of The Action**

17 Diamond is a large food company engaged in processing, marketing and distributing of
18 culinary, in-shell and ingredient nuts and snack products. SAC ¶ 8. In this Action, Plaintiff has
19 sought recovery on behalf of himself and others similarly situated for Diamond's allegedly false and
20 misleading advertising with respect to its Walnuts Products.

21 In short, the fundamental theory of the Action is that Diamond is liable to the Class for its
22 use of unauthorized and unapproved health claims (which require approval from federal authorities)
23 on its Walnuts Products, as well as for the substantially similar statements on its website (which is
24 also considered part of product labeling by the FDA) during the Class Period. SAC ¶¶ 2-3 and SAC
25 Exhibit 4. Plaintiff alleges that Diamond was aware that the FDA had expressly disapproved of any
26 unqualified health claim for walnuts (Diamond had been involved in the preparation of the
27 disapproved petition). Plaintiff further alleges that Diamond thereafter went ahead and used
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1 unapproved health claims in the labeling of its Walnuts Products, (SAC ¶¶ 15-35) which it knew
2 were material to consumers' purchases of its nut products. Diamond has vigorously disputed these
3 contentions, asserting FDA approval was not required for the labels at issue, and that the industry-
4 wide FDA petition for an unqualified health claim had no bearing on the labels at issue. Diamond
5 contends the labeling language was a structure-function claim, not a "health claim" requiring federal
6 approval, and was used only after approval by Diamond's outside regulatory counsel.

7 In February 2010, the FDA sent Diamond a Warning Letter, advising of the FDA's position
8 regarding the labeling violations and stating that Diamond should remedy the violations. SAC ¶¶
9 40-44. The matter became public knowledge after the FDA later posted the Warning Letter on its
10 website. *Id.* ¶ 48.

11 **B. Litigation And Discovery**

12 After learning of Diamond's conduct, Plaintiff filed the instant action on March 22, 2010,
13 alleging that Diamond was liable to Plaintiff and Class Members for its false and misleading
14 advertising, which it used to entice consumers to purchase its Walnuts Products. Plaintiff alleged
15 that Diamond's conduct violated the UCL, FAL, and CLRA, and also constitutes unjust enrichment.
16 Doc. 1, Complaint at ¶¶ 55-91. On June 18, 2010, Plaintiff filed his First Amended Complaint (Doc.
17 15) and on November 11, 2011, Plaintiff filed his Second Amended Complaint (Doc. 201).

18 Diamond formally responded to the Action by filing a motion to dismiss, asserting
19 preemption of Plaintiff's state law claims by the Food Drug and Cosmetic Act, 21 U.S.C. §§ 301, *et*
20 *seq.* See Doc. 9 at 1. During the next year and a half, Plaintiff noticed and took a number of
21 depositions, served at least five sets of requests for production of documents, four sets of
22 interrogatories, and several subpoenas to third parties, which resulted in the production of thousands
23 of pages of documents. Defendant also served (and Plaintiff responded) to requests for production
24 of documents, interrogatories, and requests for admission. Defendant also took the named plaintiff's
25 deposition.

26 The motions practice included the following motions in chronological order: Diamond's
27 motions to dismiss (Docs. 9 and 19), Diamond's motion to compel (Doc. 42), Plaintiff's motion for
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1 class certification (Doc. 75-00), Plaintiff's motion to compel (Doc. 118), and Plaintiff's motion to
2 approve plan and form of notice to the class (Doc. 164). On what proved to be the eve of settlement,
3 Defendant filed a motion for summary judgment (Doc. 186-00) as well as a motion *in limine* to
4 exclude the FDA warning letter from being used at trial (Doc. 181).

5 **C. Class Certification, The Definition Previously Approved, And The Proposed**
6 **Settlement Class Definition**

7 From Plaintiff's perspective, the year and a half of litigation, motions practice, and discovery
8 in the Action resulted in two key outcomes prior to Settlement. The first was that the class was
9 permitted to pursue all six of the asserted claims. *See* Doc. 30 (denying Defendant's motion to
10 dismiss in its entirety). The second was that the Court certified the following class on June 8, 2011
11 (*see* Doc. 152 at 19), as amended on October 13, 2011:

12 All persons in the United States who, for personal or household use, purchased
13 Diamond of California Shelled Walnuts in 6oz, 10oz, 16 oz and 3lb bags from
14 March 22, 2006 through October 13, 2011 ("the Shelled Walnut Products")
15 bearing labels that say "OMEGA ♥ 3...2.5 g per serving" on the front and back of
16 the package, and "The omega-3 in walnuts can help you get the proper balance of
17 fatty acids your body needs form promoting and maintaining heart health" on the
18 back of the package (the "Disputed Labels"). Purchasers who bought Shelled
19 Walnut Products with Disputed Labels for resale not included.

20 Doc. 194 at 1.

21 Should the parties' Stipulation of Settlement be approved by the Court, the class definition as
22 certified by the Court will be modified to constitute a settlement Class that will differ in three
23 respects. Specifically, (1) consistent with discovery produced by Defendant which indicated that the
24 disputed language applied to more than just shelled walnuts, and as consumers were also exposed to
25 substantially similar claims on Defendant's website, the class is expanded to all consumers of
26 Diamond of California brand walnuts for personal or household use during the class period, (2) the
27 end date of the class period is extended until the date of preliminary approval, and (3) the Class
28 excludes Diamond, its employees and representatives, the judges to whom this action has been
assigned, and those individuals who choose to opt-out of this Settlement.

Consequently, the exact proposed settlement Class definition is as follows:

1 all consumers who, for personal or household use, purchased Diamond of
2 California brand walnuts, which include, but are not limited to, Shelled, Halves,
3 Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell Walnuts products
4 in the United States from March 22, 2006 through the date of preliminary
5 approval of settlement. Excluded from the Settlement Class are: (i) all persons
6 who purchased or acquired Diamond of California walnuts for resale; (ii)
7 Diamond and its employees, principals, affiliated entities, legal representatives,
8 successors and assigns; (iii) any person who files a valid, timely Request for
9 Exclusion; and (iv) the Judges to whom this Action is assigned and any members
10 of their immediate families..

11 **D. Settlement Discussions**

12 Following the Court's ruling on Plaintiff's motion for class certification, the parties began
13 settlement discussions, and attended mediation in July 2011. However, the parties' proposals were
14 too far apart at that time, and the mediation failed.

15 After the parties completed fact discovery, and around the time that Defendant filed its
16 motion for summary judgment, the parties resumed settlement discussions. Given the distance
17 between the parties, it was agreed that a mediator was needed, and the parties arranged to return to
18 mediation in October 2011.

19 On July 25, 2011 the parties met with a JAMS mediator, Hon. Charles A. Legge (retired) for
20 a full day of mediation. However, the parties were unable to agree upon the broad parameters of a
21 settlement in principle. Over the following nearly three months, parties continued active litigation
22 and after the close of merits discovery resumed their negotiation. Ultimately, the parties attended a
23 second mediation session before a different mediator, David A. Rotman of Gregorio, Haldeman,
24 Piazza & Rotman. During that mediation, they negotiated the key remaining terms of the Stipulation
25 of Settlement, culminating in the written agreement presently before the Court.

26 The parties have diligently worked on the Settlement which was the product of months of
27 hard fought arms-length negotiation. Plaintiff believes the terms of the Settlement are incredibly
28 favorable to the Class, providing substantial remuneration (*i.e.*, \$8.25 per 3 lb Sam's Club package
and \$3.25 per each smaller package). Further, Class members may claim up to three 3-pound bags
of Walnut Products or up to five bags of any other Walnut Products with a sworn attestation of
purchase and claim up to twenty-four bags with the submission of adequate proofs of purchase. If

1 the Class claims less than \$2,600,000 of purchases, the difference between what has been claimed
2 and \$2,600,000 will be provided as charitable donations to food banks as *cy pres*. In addition to the
3 monetary compensation, the Settlement also provides for injunctive relief to the Class as Diamond
4 agrees in the future not to use the disputed labels and agrees it has removed the website statements at
5 issue. Diamond must also bear the cost of the settlement logistics, including the costs of notice,
6 claims administration, and awarded attorneys' fees and expenses.

7 As demonstrated in detail below, the Notice Plan contemplated by the terms of the
8 Stipulation of Settlement provides for both publication notice and direct mail notice where possible,
9 and is the best notice practicable under the circumstances comports both with Fed. R. Civ. P. 23
10 and due process.

11 Plaintiff now respectfully requests that a Class for settlement purposes be provisionally
12 certified and the Settlement and plan of notice be preliminarily approved.

13 **II. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED**

14 **A. The Settlement Class Satisfies The Class Certification Elements of Rule 23**

15 **1. The Class Has Previously Been Certified**

16 Just six months ago, in June 2011, the Court ruled that the class sought to be certified in the
17 Action met all requirements of Rule 23 of the Federal Rules of Civil Procedure. To satisfy Fed. R.
18 Civ. P. 23(a), a plaintiff must establish: numerosity, commonality, typicality, and fair and adequate
19 protection of the class by the class representative and counsel. To satisfy Fed. R. Civ. P. 23(b), a
20 plaintiff must prove one or more of: risk of substantial prejudice from separate actions,
21 declaratory relief is appropriate for the class as a whole, or the predominance of common questions
22 of law or fact that make the class action procedure superior to any other available means of
23 adjudication. The Court must undertake a rigorous analysis to determine if class certification is
24 appropriate. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir. 2005).

25 In its class certification order of June 7, 2011, the Court ruled that the requirements of Rule
26 23(a) and (b)(3) were met, and that the litigation class would be certified. Doc. 152 at 1-19.
27 Although Diamond had opposed certification, Diamond did not appeal that decision, and Mr. Zeisel

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1 respectfully submits that -- based upon the record made for the class certification motion, and the
2 Court's order granting certification -- there is no question that the class was properly certified.

3 **2. The Settlement Class Is Not Substantially Different From The Certified**
4 **Class**

5 When a class has been properly certified by Court order, and the proposed settlement class is
6 not materially different from the certified class, then the settlement class should be presumptively
7 valid under Rule 23. *Cf. In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal.
8 2007) (district court certifying a settlement class based on same analysis as prior certification of
9 "identical" class). That is exactly the situation here, and indeed it is typical. *See, e.g., Satchell v.*
10 *Federal Express Corp.*, 2007 WL 1114010, *3 (N.D. Cal. 2007) (certifying settlement class, and
11 noting typical changes to class definition as earlier certified).

12 As already noted above, there are only three, relatively minor differences between the
13 litigation class definition as certified by the Court under Rule 23(a) and (b)(3), and the settlement
14 Class as defined in the Stipulation of Settlement for which approval is now sought under those same
15 Rules.

16 The first difference is that the numerosity of the class is increased, as the Class is expanded
17 to cover all consumers who purchased the Walnuts Products, in reflection of discovery indicating
18 that Diamond used the labeling at issue on non-Shelled Walnuts and as Diamond also made
19 substantially similar statements through its website. While the size of the Class is somewhat
20 increased, the gravamen of the claims remains the same, and it remains the case that Class Members
21 have the same claims based upon Diamond's unitary course of conduct and substantially similar,
22 allegedly unlawful and misleading health claims. Thus, while the class is expanded so that all
23 consumers who have been harmed by Defendant's uniform practice may obtain settlement relief and
24 resolution of their claims, the nature of the Class has not been changed in any substantive respect.

25 The second difference is that the end-date of the Class Period has shifted back from October
26 2011, until the date of preliminary approval. This addition of a couple of months will add to the size
27 of the class, but, as compared to the five plus years of the class period, this increase is insignificant.

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1 The third difference is that Diamond, its employees, and representatives, the judges assigned to this
2 case and their immediate families, and those individuals who choose to opt-out, are excluded from
3 the class. These exclusions are typical in any class action settlement, and will involve tiny numbers
4 of people compared to the overall settlement Class. In short, this difference is not material either.

5 **3. Summary**

6 For preliminary approval, the settlement Class must satisfy the class certification elements of
7 Rule 23. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-621 (1997). The settlement
8 Class here is not materially different than the class as previously and rigorously certified by the
9 Court. Consequently, the first requirement for preliminary approval of an appropriate settlement
10 class under Rule 23(a) and (b)(3) is easily met here.

11 **B. The Substantive Terms Of The Settlement Are Fair, And Should Be Granted 12 Preliminary Approval**

13 **1. The Proposed Settlement Is Within The Range Of Possible Approval As 14 Fair, Reasonable, And Adequate**

15 Preliminary approval should also be granted to the Settlement because its terms are fair and
16 reasonable. Ultimately, the decision as to whether to grant preliminary approval to a settlement of a
17 class action is a matter left to the discretion of the trial court. *See Castro v. Zenith Acquisition*
18 *Corp.*, 2007 WL 81905, *1 (N.D. Cal. Jan. 9, 2007). In exercising that discretion, however, the
19 Court should bear in mind that “there is an overriding public interest in settling and quieting
20 litigation,” and this is “particularly true in class action suits.” *Van Bronkhorst v. Safeco Corp.*, 529
21 F.2d 943, 950 (9th Cir. 1976). Recognizing that a settlement represents an exercise of judgment by
22 the negotiating parties, *see Torrasi v. Tucson Elec. Power*, 8 F.3d 1370, 1375-1376 (9th Cir. 1993),
23 the Ninth Circuit has held that “the court’s intrusion upon what is otherwise a private consensual
24 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
25 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
26 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
27 reasonable and adequate to all concerned.” *Officers for Justice v. Civil Service Comm’n*, 688 F.2d
28 615, 625 (9th Cir. 1982).

1 The general standard by which courts are guided when deciding whether to grant preliminary
2 approval to a class action settlement is whether the proposed settlement falls within the range of
3 what could be “fair, adequate, and reasonable,” so that notice may be given to the proposed class,
4 and a hearing for final approval may be scheduled. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276
5 (9th Cir. 1992); *see also Gattreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (If the court finds
6 that the proposed settlement is “within the range of possible approval” and that notice should be
7 given, “the next step is the fairness hearing.”).

8 This proposed Settlement assuredly satisfies the foregoing criteria. The terms of the
9 Stipulation of Settlement provide Class Members with meaningful relief that addresses the precise
10 legal injury that was alleged in the SAC. Unlike notorious class settlements that release class
11 member claims for mere pennies on the dollar, here the recovery offered is real and substantial. In
12 addition to the injunctive relief secured by the Settlement, each qualifying Class Member is entitled
13 to receive \$8.25 per 3 lb Sam’s Club package and \$3.25 per each smaller package. Exhibit A
14 (Stipulation of Settlement) at Section III(C)(2)(a). Class members may claim up to three 3-pound
15 bags of Walnut Products or up to five bags of any other Walnut Products with a sworn attestation of
16 purchase and claim up to twenty-four bags with the submission of adequate proofs of purchase. *Id.*
17 at Section III(C)(2)(a,b). The amounts payable to Class members under this settlement exceed the
18 wholesale price of the Walnut Products and reasonably approximate the maximum amount Class
19 Members could have recovered at trial. By any measure, the settlement terms are fair and
20 reasonable.

21 The Settlement terms are also fair and reasonable when also considered in light of the
22 uncertain prospects and risks faced by Plaintiff and the putative class. Defendant vigorously denied
23 liability (and still does). Defendant voiced its intention to vigorously contest not only the ultimate
24 liability and claim for damages, but also filed a motion for summary judgment (which is currently
25 pending). Although Plaintiff remained confident of the merits of his case, the results were not
26 predictable with any degree of certainty. In addition, even if judgment were entered against it,
27 Diamond could still appeal. Such an appeal to the Ninth Circuit would likely take years to resolve,
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1 such that, even if successful, it would mean that ultimate relief to the Class would likely be years
2 down the road.

3 **2. The Settlement Was A Product Of Adversarial Arms'-Length Negotiation**

4 The discussions and negotiations leading up to the Settlement were conducted in vigorous,
5 adversarial, and arms-length fashion, which serves as an added indicia of the fairness of the
6 Settlement.

7 Here, it is undeniable that the settlement negotiations were non-collusive and adversarial in
8 nature. Before engaging in any settlement talks, the parties litigated multiple motions, including
9 Defendant's motion to dismiss and Plaintiff's motion for class certification. Further, the parties' first
10 attempt at mediation in July 2011 entirely failed, and the parties pressed forward with completion of
11 fact discovery before agreeing to return to mediation. Thus, it was only in October 2011, after more
12 than a year and a half of litigation, that an agreement in principle to settle was reached.

13 Moreover, the Stipulation of Settlement was reached at a time when uncertainties lay ahead
14 for each party. Specifically, Defendant's motion for summary judgment had just been filed, the
15 outcome of which, like any other adversarial motion in litigation, was uncertain. If the motion were
16 granted, then, subject to any appeal, Defendant's exposure would decrease, potentially completely.
17 On the other hand, even if the motion were denied, Plaintiff faced the prospect of arduous
18 preparations for a trial on the merits, which could go either way, and contentious hearings on the
19 admissibility of expert testimony critical to Plaintiff's case. Thus, the chronology of the
20 proceedings made it particularly reasonable for the parties to explore a settlement at the time that
21 they did, if doing so could be done on a fair and reasonable basis.

22 **3. The Proposed Settlement Is Recommended By Class Counsel**

23 The recommendations of class counsel are entitled to a presumption of reasonableness. *Boyd*
24 *v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D.Cal. 1979). Here, class counsel, and with the well-
25 informed support of Mr. Zeisel, believe strongly that the proposed settlement offers broad and
26 valuable relief to the Class, and that the Settlement is certainly in its best interest.

1 **4. Summary**

2 The factors to consider in determining the fairness of a proposed settlement must be analyzed
3 in the context of the settlement as a whole. *Staton v. Boeing*, 327 F.3d 938, 959, 961 (9th Cir. 2003).
4 Here, all pertinent factors indicate that this Settlement is “within the range” of being fair, reasonable,
5 and adequate. *See, e.g., In re Tableware Antitrust Litig.*, 484 F.Supp. 2d at 1079-80; *Ross v. Trex*
6 *Co., Inc.*, 2009 WL 2365865, *3 (N.D. Cal. July 30, 2009). Because the proposed settlement
7 amounts to a reasonable means of resolving this litigation, and because the risks and expenses
8 inherent in continuing to litigate this matter are significant and uncertain, this proposed Settlement
9 should be preliminarily approved.

10 **C. The Notice Plan Should Be Approved.**

11 Rule 23 and due process concerns call for notice to be provided to absent Class Members in
12 order to inform them of the proposed settlement, and grant them the opportunity to opt-out or object.
13 *See* Fed. R. Civ. P. 23(c)(2). The notice and means of disseminating it must be the “best notice
14 practicable” under the circumstances. *See Mullane v. Central Hanover Trust*, 339 U.S. 306, 314-
15 315, 317 (1950). That test is clearly satisfied by the notice agreed upon in the Stipulation of
16 Settlement.

17 Specifically, the parties have agreed to provide notice pursuant to the notice plan that has
18 already been approved by this Court for the litigation class. *See* Doc. 194 at 2. The parties propose
19 to disseminate notice through the following methods: (1) publication of the Short Form Notice in a
20 national newspaper,² in two national periodicals (*i.e., Cooking Light* and *Bon Appétit*) and *via*
21 newswire release for absent Class Members whose names and addresses cannot be determined; (2)
22 mailing the Long Form Notice for Class Members whose names and addresses and/or email
23 addresses are known; (3) posting the Long Form Notice on a settlement website provided by the
24 class action claims administrator; and (4) providing a toll-free telephone number that Class Members
25 can also call to obtain the notices. *See* Exhibit A (Stipulation of Settlement at Section V(2)), Exhibit

26 _____
27 ² The parties have also agreed to publish the Short Form Notice in USA Today on two occasions
28 instead of one as this Court previously approved.

1 A3 (Long form notice), Exhibit A4 (Short form notice), and Exhibit A6 (Settlement Notice Program)
 2 attached to Plaintiff's Motion. The Court has already concluded that this "method of notice is the
 3 best notice practicable under the circumstances." Doc. 194 at 2.

4 In addition, the proposed forms of notice also comply with due process requirements and
 5 Rule 23. While they are not the exact same notices previously approved by the Court (as those did
 6 not mention the Settlement), the proposed Short Form Notice and Long Form Notice were developed
 7 from those previously-approved forms. See Exhibits A3 (Long form notice) and A4 (Short form
 8 notice) to Plaintiff's Motion. Moreover, the language that has been added is consistent with the
 9 guidance and sample language recommended by the Federal Judicial Center (www.fjc.gov). The
 10 proposed notices inform absent class members as to the terms of the Settlement, their right to avail
 11 themselves of the settlement, opt-out, or object. See Exhibits A3 and A4 to Plaintiff's Motion.

12 As such, the proposed form of notice and its plan of dissemination should be approved.

13 CONCLUSION

14 For all the foregoing reasons, the Plaintiff's Unopposed Motion for Preliminary Approval of
 15 Settlement should be GRANTED.

16 Dated: December 30, 2011

17 By: s/Joseph N. Kravec, Jr.
 Joseph N. Kravec, Jr.

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 19 Wyatt Lison, Esquire
 Maureen Davidson-Welling, Esquire
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ATTORNEYS FOR PLAINTIFF

**EXHIBIT A
TO MOTION FOR
PRELIMINARY APPROVAL**

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ATTORNEYS FOR DEFENDANT
DIAMOND FOODS, INC.

ATTORNEYS FOR PLAINTIFF
ELLIOT ZEISEL AND THE CLASS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELLIOT ZEISEL, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

DIAMOND FOODS, INC., a
Delaware corporation,

Defendant.

Case No. CV 10-01192-JSW (EDL)

SETTLEMENT AGREEMENT

Hon. Jeffrey White
Courtroom: 11

1 The undersigned parties (collectively, the “Parties,” and each separately a “Party”) to the
2 above-captioned action (the “Action”), by and through their attorneys, have entered into the
3 following Stipulation of Class Action Settlement (the “Agreement”), subject to the approval of this
4 Court.

5 **I. RECITALS**

6 This Agreement, including its attached Exhibits, is entered into by and among Plaintiff Elliot
7 Zeisel (“Plaintiff”), on behalf of himself and on behalf of each of the Settlement Class Members, and
8 Diamond Foods, Inc. (“Diamond”). Capitalized terms used herein are defined in Section II herein or
9 indicated in parentheses elsewhere in the Agreement. Subject to Court approval as required by
10 applicable Federal Rules of Civil Procedure, and as provided herein, the Parties hereby stipulate and
11 agree that, in consideration for the promises and covenants set forth in the Agreement and upon the
12 entry by the Court of a Final Judgment and Order Approving Settlement and the occurrence of the
13 Effective Date, the Action shall be settled and compromised upon the terms and conditions
14 contained herein.

15 WHEREAS, Diamond is a food company engaged in processing, marketing and distributing
16 culinary, in-shell and ingredient nuts under the Diamond of California brand name;

17 WHEREAS, on or about March 22, 2010, Plaintiff filed a putative class action in the United
18 States District Court of the Northern District of California, entitled *Elliot Zeisel v. Diamond Foods,*
19 *Inc.*, Case No. CV 10 1192 JSW (EDL).

20 WHEREAS, on September 3, 2010, the Court denied Defendant’s motion to dismiss.

21 WHEREAS, on June 7, 2011, the Court granted Plaintiff’s motion for class certification.

22 WHEREAS on September 30, 2011, Diamond filed its motion for summary judgment
23 scheduled for hearing on November 4, 2011.

24 WHEREAS on July 25, 2011, Plaintiff and Diamond participated in a full-day mediation of
25 before the Hon. Charles A. Legge (Ret.) and on October 13, 2011 participated in a second full day
26 mediation before David Rotman, Esq., of Gregario, Haldeman, Piazza & Rotman. After the
27 mediation sessions, the Parties reached a settlement in principle that is now fully memorialized in
28 this Agreement.

1 WHEREAS, on November 8, 2011, pursuant to Stipulation, Plaintiff amended his complaint
2 to, *inter alia*, seek to certify a class consisting of all consumers who, for personal or household use,
3 purchased Diamond of California walnuts, which include, but are not limited to, Shelled, Halves,
4 Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell Walnuts products in the United States
5 from March 22, 2006 through the date of preliminary approval of settlement.

6 WHEREAS, Plaintiff is a member of the Settlement Class alleged in the Action.

7 WHEREAS, Plaintiff and the Settlement Class are represented by the Law Offices of Janet
8 Linder Spielberg, the Braun Law Group, P.C. and Stember Feinstein Doyle & Payne, LLC. (“Co-
9 Lead Counsel”).

10 WHEREAS, Co-Lead Counsel have conducted a thorough investigation into the facts and
11 law relating to the Action and have analyzed and evaluated the merits of the parties’ contentions.
12 Co-Lead Counsel have also evaluated the risks, delay and difficulties involved in establishing
13 liability, and in the event of liability, a right to recovery in excess of that offered by this settlement
14 and the likelihood that the Action could be further protracted and expensive. Co-Lead Counsel are
15 satisfied that the terms and conditions of this Agreement are fair, reasonable, adequate and equitable,
16 and that a settlement of the Action is in the best interests of the Settlement Class.

17 WHEREAS, Diamond denies any and all wrongdoing of any kind whatsoever, and denies
18 any liability to the Plaintiff or to the Settlement Class. In no event shall this Agreement, or any party
19 thereof, be construed or deemed to be evidence of an admission or a concession on the part of
20 Diamond of any fault or wrongdoing of any kind, nor an admission or concession of liability of any
21 kind, whether for damages or equitable or declaratory relief or any other form of legal remedy, or a
22 concession of any infirmity in any of the defenses that have been asserted or could have been or
23 could be asserted in the Action. Diamond, however, considers it desirable that all claims against it
24 be settled on the terms hereinafter set forth in order to avoid further expense, inconvenience, and
25 delay, to dispose of the protracted Action and to put to rest all controversy concerning all claims
26 which have been asserted in the Action. Therefore, for settlement purposes only, Diamond, while
27 continuing to deny any and all allegations of liability, has agreed to settle and terminate the Action
28 against it as set forth herein.

1 WHEREAS, it is the intention and desire of Plaintiff and Diamond to compromise, resolve,
2 dismiss and release all allegations and claims for damages or other relief, except for personal injury
3 or non-economic losses, concerning Walnut Products that have been or could have been brought
4 against Diamond or its Released Parties, or any of them, in the Action and in any action filed,
5 litigation pending or claim pursued by any Person or entity who is a member of the Settlement Class,
6 related to the Labeling, sale, marketing or advertising of the Walnut Products.

7 NOW, THEREFORE, the Agreement is entered into by and among the Parties, by and
8 through their respective counsel and representatives, and the Parties agree that: (a) upon approval of
9 the Court after the hearing(s) provided for in the Agreement, the Action and all Released Claims
10 shall be settled and compromised as between Plaintiff and the Settlement Class on the one hand, and
11 Defendant on the other hand; and (b) upon Court approval of the Agreement, the [Proposed] Final
12 Judgment and [Proposed] Order Approving Settlement, substantially in the form attached as Exhibit
13 1 hereto, shall be entered dismissing the Action with prejudice and releasing all Released Claims, as
14 defined herein, against Diamond and all Released Parties, all on the following terms and conditions:

15 **II. DEFINITIONS**

16 As used in the Agreement and the Exhibits hereto, in addition to any definitions elsewhere in
17 the Agreement, the following terms shall have the meanings set forth herein:

- 18 1. “Action” means *Elliot Zeisel v. Diamond Foods, Inc.*, Case No. CV 10-1192 JSW
19 (EDL) (N.D. Cal.).
- 20 2. “Agreement” means this Settlement Agreement (including all Exhibits attached
21 hereto).
- 22 3. “Award” means the monetary relief obtained by Settlement Class Members pursuant
23 to Section III.C.2. of this Agreement.
- 24 4. “Attorneys’ Fees and Expenses” means such funds as may be awarded by the Court to
25 Co-Lead Counsel based on the stipulation described herein to compensate them and all other
26 Plaintiff’s Counsel in this Action for their fees and expenses in connection therewith, as described
27 more particularly in Section VIII of this Agreement.
- 28

1 5. “Authorized Claimant” means member of the Settlement Class who timely submits a
2 valid Claim Form in accordance with the terms of this Agreement.

3 6. “Claim” means a request for relief pursuant to Sections III.C.2. and IV. of this
4 Agreement submitted by a Settlement Class Member on a Claim Form filed with the Claims
5 Administrator in accordance with the terms of this Agreement.

6 7. “Claim Form” means the form to be used by Settlement Class Members for filing
7 Claims with the Claims Administrator. The proposed Claim Form is subject to Court approval and
8 attached hereto as Exhibit 2.

9 8. “Claims Administration Expenses” means the expenses incurred by the Claims
10 Administrator in administering the Notice Program and processing all Claims made by Settlement
11 Class Members.

12 9. “Claims Administrator” means Kurtzman Carson Consultants LLC, 2335 Alaska
13 Avenue, El Segundo, CA 90245.

14 10. “Claims Deadline” means the date by which all Claim Forms must be postmarked or
15 received by the Claims Administrator to be considered timely. The Claims Deadline shall be clearly
16 set forth in the Court Orders granting preliminary and final approval of the Settlement, the Notices,
17 on the Claims Administrator’s dedicated website, and the front page of the Claim Form, and shall be
18 fourteen (14) days following the Final Approval Hearing.

19 11. “Class Notice” or “Notice” means the forms of notice to be disseminated to
20 Settlement Class Members informing them about the Settlement. Copies of each of the proposed
21 Notices are attached respectively in the form of Exhibits 3 and 4.

22 12. “Class Representative” means plaintiff Elliot Zeisel.

23 13. “Complaint” means the Second Amended Complaint filed in this Action by Plaintiff
24 on November 8, 2011.

25 14. “Court” means the United States District Court for the Northern District of California,
26 the Honorable Jeffrey S. White presiding.

27
28

1 15. “Defendant” means Diamond Foods, Inc., and includes, without limitation all related
2 entities including but not limited to parents, subsidiaries, agents, employees and assigns,
3 predecessors, successors and affiliates.

4 16. “Disputed Labels” shall mean labels that say “OMEGA.3 ♥ 2.5 g per serving”
5 together with “The Omega.3 in walnuts can help you get the proper balance of fatty acids your body
6 needs for promoting and maintaining heart health.”

7 17. “Effective Date” means either: (a) the date thirty-five (35) days after the entry of the
8 Final Judgment and Order Approving Settlement, if no timely motions for reconsideration and/or no
9 appeals or other efforts to obtain review have been filed; or (b) in the event that an appeal or other
10 effort to obtain review has been initiated, the date thirty-five (35) days after such appeal or other
11 review has been finally concluded and is no longer subject to review, whether by appeal, petitions
12 for rehearing, petitions for rehearing en banc, petitions for writ of certiorari, or otherwise.

13 18. “Final Approval Hearing” means the hearing to be conducted by the Court on such
14 date as the Court may order to determine of the fairness, adequacy and reasonableness of the
15 Settlement in accordance with applicable jurisprudence. The Parties shall request the Court set the
16 Final Approval Hearing for May 25, 2012, but in no event shall the Final Approval Hearing be
17 earlier than 60 days after the Notice Date or 90 days after Preliminary Approval.

18 19. “Final Judgment and Order Approving Settlement” means the Final Judgment and
19 Order Approving Settlement to be entered by the Court, substantially in the form of Exhibit 1 and
20 conforming to Section IX. herein, approving the Settlement, as fair, adequate and reasonable,
21 confirming the certification of the Settlement Class for purposes of the Settlement only, and issuing
22 such other findings and determinations as the Court and/or the Parties deem necessary and
23 appropriate to implement the Settlement.

24 20. “Labeling” means the display of written, printed or graphic matter upon the
25 packaging of Walnut Products, as well as written, printed or graphic matter designed for use in the
26 distribution or sale of Walnut Products, including information found on Diamond’s website
27 supplementing, describing, explaining and/or promoting Walnut Products.
28

1 21. “Motion for Preliminary Approval of Settlement” means the motion, to be filed by
2 Plaintiff, for Preliminary Approval of this Agreement and includes all supporting papers.

3 22. “Notice Expenses” means the reasonable costs and expenses incurred in connection
4 with preparing, printing, disseminating, posting, internet hosting and publishing the Class Notice,
5 and all other aspects of administering the Notice Program.

6 23. “Notice Date” means the last date, set by the Court, on which notice is published in a
7 magazine or newspaper pursuant to the Notice Program described in Section V. below. The Notice
8 Date shall be no later than 90 days after the Court enters an order granting Preliminary Approval of
9 this Settlement or such other date as the Court may order.

10 24. “Opt Out Date” means the date, to be set by the Court, by which a Request For
11 Exclusion must be filed with the Claims Administrator in order for a Settlement Class Member to be
12 excluded from the Settlement Class.

13 25. “Objection Date” means the date by which Settlement Class Members must file
14 objections, if any, to the Settlement in accordance with Section VI.1. herein.

15 26. “Plaintiff” means plaintiff Elliot Zeisel.

16 27. “Plaintiff’s Counsel” includes all attorneys representing Plaintiff or any Settlement
17 Class Member.

18 28. “Preliminary Approval” means the order to be entered by the Court, substantially in
19 the form of Exhibit 5 and conforming to Sections III.A. and III.B. herein, conditionally certifying the
20 Settlement Class, preliminarily approving the Settlement, setting the date of the Final Approval
21 Hearing, appointing Co-Lead Counsel as Plaintiffs’ Counsel for the Settlement Class, approving the
22 Notice Program, Class Notice, and Claim Form, and setting dates for the Claims Deadline, Opt Out
23 and Objection Date, and Notice Date.

24 29. “Proof of Purchase” means the Diamond of California Walnut Product packaging or
25 documentation from a third-party commercial source reasonably establishing the fact and date of
26 purchase during the Class Period in the United States of a Diamond of California Walnut Product.
27 Packaging shall constitute Proof of Purchase only if it establishes that the Disputed Label was on the
28 product claimed by the Class Member.

1 30. “Released Claim” means any individual, class, representative, group or collective
2 claim, liability, right, demand, suit, matter, obligation, damage, loss, action or cause of action, of
3 every kind and description that a Releasing Party has or may have, including assigned claims,
4 whether known or Unknown, asserted or un-asserted, latent or patent, that is, has been, could
5 reasonably have been or in the future might reasonably be asserted under any body of law by the
6 Releasing Party either in a court or any other judicial or other forum, regardless of legal theory or
7 relief claimed, and regardless of the type of relief or amount of damages claimed, against any of the
8 Released Parties arising from, or in any way relating to Labeling, sales, marketing, or advertising,
9 regardless of medium, of any Diamond Walnut Products, including but not limited to any claim that
10 the product Labeling is false or misleading. For purposes of this Agreement, the term “Unknown
11 Claim” means any all Released Claims that any member of the Settlement Class, or anyone acting on
12 behalf of or in their interest, does not know or suspect to exist against any of the Released Parties
13 which, if known, might have affected his or her decision regarding the settlement of this Action.
14 Notwithstanding the provisions of this paragraph or of any other paragraph in this Agreement, this
15 Agreement shall not be deemed to release any individual, class, representative, group or collective
16 claim, liability, right, demand, suit, matter, obligation, damage, loss, action or cause of action, of
17 every kind and description that a Releasing Party has or may have for a personal injury or non-
18 economic loss.

19 31. “Released Party” means Diamond and any entity that manufactured, tested, inspected,
20 audited, certified, purchased, distributed, licensed, transported, marketed, advertised, donated,
21 promoted, sold or offered for sale at wholesale or retail any Walnut Products, or any contributed to
22 any Labeling, advertising packaging, ingredient or component thereof, including all of their
23 respective predecessors, successors, assigns, parents, subsidiaries, divisions, departments, and
24 affiliates, and any and all of their past, present and future officers, directors, employees, stock-
25 holders, partners, agents, servants, successors, attorneys, insurers, representatives, licensees,
26 licensors, customers, subrogees and assigns. It is expressly understood that, to the extent a Released
27 Party is not a Party to the Agreement, all such Released Parties are intended third party beneficiaries
28 of the Agreement.

1 32. “Releasing Party” means each Plaintiff, Plaintiffs’ Counsel, and each Settlement
2 Class Member and any Person claiming by or through each Settlement Class Member, including but
3 not limited to, spouses, children, wards, heirs, devisees, legatees, invitees, employees, associates,
4 co-owners, attorneys, agents, administrators, predecessors, successors, assignees, representatives of
5 any kind, shareholders, partners, directors, or affiliates.

6 33. “Request For Exclusion” means the written communication that must be filed with
7 the Claims Administrator and postmarked on or before the Opt Out and Objection Date by a
8 Settlement Class Member who wishes to be excluded from the Settlement Class.

9 34. “Residual Restitution” means the amount calculated by subtracting from \$2,600,000
10 the total Restitution paid to Settlement Class Members in satisfaction of validly submitted Claims.

11 35. “Restitution” means the total compensation paid to Settlement Class Members in
12 satisfaction of validly submitted Claims.

13 36. “Settlement” means the terms and conditions of this Agreement.

14 37. “Settlement Class” and “Settlement Class Member(s)” each means all consumers
15 who, for personal or household use, purchased Diamond of California brand walnuts, which include,
16 but are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell
17 Walnuts products in the United States from March 22, 2006 through the date of preliminary approval
18 of settlement. Excluded from the Settlement Class are: (i) all persons who purchased or acquired
19 Diamond of California walnuts for resale; (ii) Diamond and its employees, principals, affiliated
20 entities, legal representatives, successors and assigns; (iii) any person who files a valid, timely
21 Request for Exclusion; and (iv) the Judges to whom this Action is assigned and any members of
22 their immediate families.

23 38. “Settlement Class Period” means March 22, 2006 through the date of Preliminary
24 Approval.

25 39. “Settlement Consideration” means the consideration exchanged by and between
26 Diamond and the Settlement Class, as set forth in this Agreement.

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28

1 40. “Walnut Product” means Diamond of California brand walnuts, which include, but
2 are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell
3 Walnuts.

4 **III. TERMS AND CONDITIONS**

5 **A. CONDITIONAL CLASS CERTIFICATION FOR SETTLEMENT** 6 **PURPOSES ONLY**

7 1. This Agreement is for settlement purposes only, and neither the fact of, nor any
8 provision contained in this Agreement or its Exhibits, nor any action taken hereunder, shall
9 constitute, be construed as, or be admissible in evidence as an admission of: (a) the validity of any
10 claim or allegation by Plaintiff, or of any defense asserted by Defendant, in the Action or any other
11 action or proceeding; or (b) any wrongdoing, fault, violation of law, or liability of any kind on the
12 part of any Party, Released Party, Settlement Class Member or their respective counsel.

13 2. By stipulation, Plaintiff amended his complaint bringing it on behalf of himself and a
14 class of all consumers who, for personal or household use, purchased Diamond of California brand
15 walnuts, which include, but are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut
16 Topping, and In-the-Shell Walnuts products in the United States from March 22, 2006 through the
17 date of preliminary approval of settlement. The Class sought to be certified by Plaintiff through his
18 Second Amended Complaint shall be certified for settlement purposes only, and exclude: (i) all
19 persons who purchased or acquired Walnut Products for resale; (ii) Defendant and its employees,
20 principals, affiliated entities, legal representatives, successors and assigns; (iii) any person who files
21 a valid, timely Request for Exclusion; and (iv) the Judges to whom this Action is assigned and any
22 members of their immediate families.

23 3. Subject to Court approval and for settlement purposes only, Plaintiff Elliot Zeisel is
24 appointed Class Representative of the Settlement Class and Janet Lindner Spielberg of the Law
25 Offices of Janet Lindner Spielberg, Michael D. Braun, of the Braun Law Group, P.C., and Joseph N.
26 Kravec, Jr., of Stember Feinstein Doyle & Payne, LLC are appointed Co-Lead Counsel for the
27 Settlement Class.
28

1 4. If this Agreement fails to receive Court approval or otherwise fails to be
2 consummated, then nothing in this Agreement or other papers or proceedings related to the
3 Settlement shall be used as evidence or argument by any Party concerning whether the Action as
4 pled in the Complaint may properly be maintained as a class action, whether the Settlement Class is
5 ascertainable, or whether Co-Lead Counsel or Plaintiff can adequately represent the Settlement Class
6 members under applicable law.

7 **B. REQUIRED EVENTS AND COOPERATION BY THE PARTIES**

8 1. Preliminary Approval: The Parties and their respective counsel agree that Plaintiff
9 shall seek Preliminary and Final Approval of the Settlement as described herein. As soon as
10 reasonably practicable after execution of the Agreement, Plaintiff shall submit a Motion for
11 Preliminary Approval, this Agreement, including all Exhibits, and shall seek an order of Preliminary
12 Approval from the Court, substantially in the form of Exhibit 5 hereto, which, by its terms shall:

13 a. Determine preliminarily that this Agreement and the Settlement set forth
14 herein fall within the range of reasonableness meriting possible final approval and dissemination of
15 Notice to the Settlement Class;

16 b. Determine preliminarily that the Class Representative is a member of the
17 Settlement Class and that, for purposes of the Settlement, satisfies the requirements of typicality, and
18 that he adequately represents the interests of the Settlement Class Members, and appoint him as the
19 representative of the Settlement Class;

20 c. Determine preliminarily that the Settlement Class meets all applicable
21 requirements of Fed. R. Civ. P. 23 ("Rule 23"), and conditionally certify the Settlement Class for
22 purposes of the Agreement under Rule 23 for settlement purposes only;

23 d. Appoint Co-Lead Counsel as Settlement Class Counsel pursuant to Rule
24 23(g).

25 e. Schedule the Final Approval Hearing to: (i) determine finally whether the
26 Settlement Class satisfies the applicable requirements of Rule 23 and should be finally certified for
27 settlement purposes only; (ii) review objections, if any, regarding the Agreement; (iii) consider the
28 fairness, reasonableness and adequacy of the Settlement; (iv) consider Co-Lead Counsel's

1 application for an award of attorneys' fees and reimbursement of expenses consistent with the
2 stipulation of the parties set forth herein; (v) determine the validity of Requests for Exclusion and
3 exclude from the Settlement Class those Persons who validly and timely opt out; and (vi) consider
4 whether the Court shall issue the Final Judgment and Order Approving Settlement approving the
5 Settlement and dismissing the Action with prejudice;

6 f. Set a briefing schedule for the Final Approval Hearing;

7 g. Approve the proposed Class Notice and Notice Program;

8 h. Approve the designation of the Claims Administrator;

9 i. Direct Diamond, the Claims Administrator, or their designee(s) to cause the
10 Class Notice to be disseminated in the manner set forth in the Notice Program on or before the
11 Notice Date;

12 j. Determine that the Class Notice and the Notice Program: (i) meets the
13 requirements of Rule 23(c)(3) and due process; (ii) is the best practicable notice under the
14 circumstances; (iii) is reasonably calculated, under the circumstances, to apprise Settlement Class
15 Members of the pendency of the Action and their right to object to the proposed Settlement or opt
16 out of the Settlement Class; and (iv) is reasonable and constitutes due, adequate and sufficient notice
17 to all those entitled to receive notice.

18 k. Require each Settlement Class Member who wishes to opt out of the
19 Settlement Class to submit a timely written Request for Exclusion, on or before the Opt Out and
20 Objection Date, as specified in Section VI.2. herein;

21 l. Rule that any Settlement Class Member who does not submit a timely written
22 Request for Exclusion will be bound by all proceedings, orders and judgments in the Action;

23 m. Require any Settlement Class Member who wishes to object to the fairness,
24 reasonableness or adequacy of the Agreement or to the award of attorneys' fees, costs and expenses,
25 to deliver to Co-Lead Counsel and Diamond's Counsel and to file with the Court, by the Opt Out
26 and Objection Date, a statement of his or her membership in the Class including all of the
27 information required by the Claim Form in paragraph IV.2.a of this Agreement, a statement of his or
28 her objection, as well as the specific reason, if any, for each objection, including any legal support

1 the Settlement Class Member wishes to bring to the Court's attention and any evidence the
2 Settlement Class Member wishes to introduce in support of his or her objection, and to state whether
3 the Settlement Class Member and/or his or her counsel wishes to make an appearance at the Final
4 Approval Hearing, or be forever barred from separately objecting; and

5 n. Require that any Settlement Class Member who wishes to submit a Claim
6 pursuant to Sections III.C.2 and/or IV herein submit such Claim in writing on or before the Claims
7 Deadline in the manner set forth in Section IV herein, or forever be barred from submitting a Claim
8 under this Agreement.

9 2. Cooperation: The Parties acknowledge that each intends to implement the Settlement.
10 The Parties shall, in good faith, cooperate and assist with and undertake all reasonable actions and
11 steps in order to accomplish all required events on the schedule set by the Court, and shall use
12 reasonable efforts to implement all terms and conditions of the Agreement.

13 **C. SETTLEMENT CONSIDERATION**

14 1. Use of Disputed Labels

15 Diamond agrees that the Disputed Labels are no longer being used and will not be used on
16 Walnut Products in the future. Diamond further agrees that it has removed the "Live Well" section
17 from its website and removed from the rest of the website the claims cited by the FDA in its
18 February 22, 2010 letter. Diamond further agrees that it has removed from its website all
19 unqualified health claims, if any, that state eating Walnut Products will lower cholesterol, protect
20 against heart disease and stroke, prevent certain types of cancer, prevent arthritis or other
21 inflammatory diseases, or fight depression and other mental illnesses. Except for the limitations
22 agreed to in this paragraph, Diamond reserves the right to use the FDA-approved qualified health
23 claim for walnuts, any language or symbols developed by or in conjunction with the American Heart
24 Association ("AHA") and any truthful and not misleading statements regarding the health benefits of
25 its Walnut Products which Diamond, in its sole discretion, determines comply with relevant state
26 and federal statutes and regulations.

1 2. Monetary Relief for Settlement Class Members

2 In addition to all other Settlement Consideration set forth in this Agreement, Settlement Class
3 Members who timely file Claims by the Claims Deadline and who provide all required proof or
4 documentation and comply with all other conditions and requirements specified herein shall have the
5 right to obtain relief, as detailed below.

6 a. **WITHOUT PROOF OF PURCHASE REQUIRED**

- 7 i. Three (3) pound Bags of Diamond of California walnuts purchased at
8 Sam's Club

9 Settlement Class Members who, in accordance with the terms of this Agreement, submit a
10 Claim Form for up to and including three (3) 3-pound bags of Diamond of California walnuts
11 purchased at Sam's Club between March 22, 2006 and the date of Preliminary Approval shall be
12 entitled, as of the Effective Date, to a check in the amount of eight dollars and twenty five cents
13 (\$8.25) per bag of Walnut Products claimed. Claimant must also provide a Sam's Club membership
14 number on the claim form to be eligible as the 3-pound bags were only sold at Sam's Club.

- 15 ii. All Other Walnut Products

16 Settlement Class Members who, in accordance with the terms of this Agreement,
17 submit a Claim Form for up to and including five (5) bags of any Diamond of California Walnut
18 Product (other than 3 pound bags of Diamond of California Walnuts purchased at Sam's Club)
19 purchased between March 22, 2006 and the date of Preliminary Approval shall be entitled, as of the
20 Effective Date, to a check in the amount of three dollars and twenty five cents (\$3.25) per bag of
21 Walnut Products claimed.

22 b. **WITH PROOF OF PURCHASE REQUIRED**

23 Settlement Class Members who submit Claims in accordance with the terms of this
24 Agreement and, on the Claim Form, claim more than three (3) 3-pound bags of Sam's Club Walnut
25 Products or more than five (5) bags of any other Walnut Product must provide Proof of Purchase of
26 all bags claimed that exceed three (3) 3-pound bags of Sam's Club Walnut Products or more than
27 five (5) bags of any other Walnut Product. Diamond shall have the right, but not the obligation, to
28 inspect submitted Proofs of Purchase and evaluate their adequacy and trustworthiness.

1 The maximum number of Walnut Products for which any Settlement Class Member may
2 claim with proof of purchase is twenty-four (24).

3 c. Class Members may submit their completed and signed (either by hand or
4 electronically) Claim Forms to the Claims Administrator by mail or online, postmarked or submitted
5 online on or before the Claim Deadline. Claims submitted for more than three (3) 3-pound bags of
6 Diamond of California walnuts or five (5) bags of any other Diamond of California Walnut Product
7 shall include Proof of Purchase and the Claim Form shall conspicuously notify Settlement Class
8 Members that failure to include Proof of Purchase for such Claims may result in the Claim being
9 rejected for bags in excess of three (3) 3-pound bags of walnuts or five (5) bags of any other Walnut
10 Product, and that submission of false or fraudulent claims may result in the Claim being rejected in
11 its entirety or for bags in excess of three (3) 3-pound bags of walnuts or five (5) bags of any other
12 Walnut Product. Submission of multiple Claim Forms from the same household will be subject to
13 audit by the Claims Administrator for validity.

14 d. All checks issued to Settlement Class Members under this Agreement shall
15 issue within 35 days of the Effective Date and state that they must be cashed within 120 days from
16 the date issued or they will become void. The amount of any checks that are not cashed within 120
17 days from the date issued or that are returned to the Claims Administrator as undeliverable after
18 mailing to the Settlement Class Member at the address provided by the Settlement Class Member on
19 the Claim Form, will cease to be the property of those Settlement Class Members, and shall be added
20 to the Residual Restitution. The Claims Administrator shall provide Defense Counsel and Co-Lead
21 Counsel with an identification of the checks returned as undeliverable or not cashed within 120 days
22 of the date issued and of the amounts of those checks to be added to the Residual Restitution.

23 e. **RESIDUAL RESTITUTION**

24 Once all proper Class Member Claims are paid, any residual restitution will be considered *cy*
25 *pres* which Diamond will donate to non-interested, national, geographically diverse, third party food
26 bank(s) in the form of food products. Diamond will provide food products whose retail value totals
27 the Residual Restitution at times of Diamond's choosing within eighteen (18) months following the
28

1 Effective Date. The donations shall be spread out throughout the year rather than at one time in
2 order to facilitate the food banks' ability to meet needs throughout the year.

3 Upon request of Co-Lead Counsel, Diamond will provide Co-Lead Counsel with updates
4 informing Co-Lead Counsel of the status and progress of the donations referenced in this paragraph.
5 In addition, Diamond shall submit a declaration to the Court sufficiently detailing the donations that
6 have been made and how those donations met or exceeded the Residual Restitution.

7 **IV. CLAIM DEADLINES, CLAIM FORMS, AND ADMINISTRATION**

8 1. The Claim Deadline shall be fourteen (14) days following the Final Approval
9 Hearing. All Claims must be submitted with a Claim Form and received by the Claims
10 Administrator or postmarked by the Claims Deadline. The Claims Deadline shall be clearly set forth
11 in the Settlement Class Notice, the websites of the Claims Administrator and of Co-Lead Counsel
12 and on the Claim Form. Settlement Class Members who do not timely submit a completed Claim
13 Form shall not be eligible for an Award.

14 2. Claim Forms must be signed by the Class Member by hand or electronically under
15 penalty of perjury. Claim Forms will be made available by mail and for downloading from the
16 Settlement Website maintained by the Claims Administrator and, at Co-Lead Counsel's sole cost and
17 discretion, may be made available on the websites of Co-Lead Counsel. Such Claim Form shall be
18 approved by the Court and substantially in the form attached hereto as Exhibit 2 and must include
19 the following information and/or affirmations:

- 20 a. The following information relating to purchase:
- 21 i. Settlement Class Member name, address and telephone number
- 22 ii. Identification of the quantity and type of bags of Diamond of
23 California Walnut Products for which the Claim is made;
- 24 iii. Affirmation that the Walnut Products were purchased in the United
25 States during the Settlement Class Period for personal or household use;

26 3. The Parties agree that the Claims Administrator shall be approved by the Court, shall
27 be an agent of the Court, and shall be subject to the Court's supervision and direction as
28 circumstances may require. The Claims Administrator will administer the Notice Program and

1 Claims process, and oversee the distribution of Awards to Settlement Class Members in accordance
2 with the terms of the Settlement and orders of the Court. Diamond will pay all costs of the Claims
3 Administrator, Notice Program and related website, and Claims process, whether or not the
4 Settlement is finally approved.

5 4. The Claims Administrator shall administer the monetary relief for Settlement Class
6 Members provided by the Agreement by resolving Claims in a cost effective and timely manner
7 consistent with the terms of this Agreement and the orders of the Court. The Claims Administrator
8 shall maintain records of all Claims submitted until at least 180 days after the last of the Claims
9 payment checks to Settlement Class Members is issued and such records will be made available
10 upon request to Co-Lead Counsel and Diamond's Counsel. Upon request by counsel for Diamond or
11 Co-Lead Counsel, the Claims Administrator shall provide reports totaling: number of Claims
12 submitted; number of bags claimed; number of Claims for more than three (3) 3-pound bags walnuts
13 and more than five (5) bags of all other Walnut Products; number of bags claimed in each Claim for
14 more three (3) 3-pound bags of walnuts and more than five (5) bags of all other Walnut Products,
15 and such other information as reasonably required for Diamond or Co-Lead Counsel to exercise the
16 rights under this Agreement. Claim Forms and supporting documentation will be kept confidential
17 by the Claims Administrator and will be provided only to the Court upon request and to Co-Lead
18 Counsel and Counsel for Diamond to the extent necessary to resolve issues relating to this
19 Agreement. The Claims Administrator also shall provide such reports and such other information to
20 the Court as it may require.

21 5. Adequate and customary procedures and standards will be used by the Claims
22 Administrator to prevent the payment of fraudulent claims and to pay only legitimate claims. The
23 Claims Administrator shall make all determinations concerning the eligibility and amount of
24 payment for submitted claims, and mail notice of rejection to Settlement Class Members whose
25 claims have been rejected in whole or in part. In the event a Settlement Class Member disagrees
26 with the determination, the Settlement Member may send a letter to the Claims Administrator
27 requesting reconsideration of the rejection of the claim and the Claims Administrator agrees to
28 reconsider such determination, which includes consultation with Class Counsel and Diamond. The

1 Parties shall meet and confer regarding resolution of those Claims and, if unable to agree, shall
2 submit those Claims to the Court for determination. The Claims Administrator shall send payment
3 to eligible Settlement Class Members or, as applicable, a letter explaining the rejection of the claim,
4 within 35 days after the Effective Date. As to any Claims being determined by the Court pursuant to
5 this paragraph, the Claims Administrator shall send payment or a letter explaining the Court's
6 rejection of the claim, within 35 days of the Court's determination.

7 6. The Claims Administrator shall cause a website to be created containing Claims
8 information and relevant documents, including but not limited to, all applicable deadlines, the Class
9 Notice, a downloadable Claim Form, orders of the Court pertaining to the Settlement, this
10 Agreement, a toll-free telephone number and addresses to contact the Claims Administrator by e-
11 mail and U.S. mail. Diamond shall pay the cost of creating and maintaining this website. The
12 website shall be rendered inactive after the Claims Deadline and the time to terminate this
13 Agreement have passed. The Parties shall use reasonable efforts to agree on all information and
14 documents to be posted on this website.

15 7. The Claims Administrator shall cause a toll free telephone number to be created for
16 Settlement Class Members to receive information about the Settlement. The parties shall agree upon
17 a set of frequently asked questions and answers to be used by the Claims Administrator when
18 answering Settlement Class Members' questions. The parties shall also create a protocol for the
19 Claims Administrator to refer Settlement Class Member calls to Co-Lead Counsel.

20 **V. NOTICE TO THE SETTLEMENT CLASS**

21 1. No later than 90 days after the entry by the Court of an order granting Preliminary
22 Approval or such other date as the Court may order, the Claims Administrator shall cause the Class
23 Notice to be disseminated to potential Settlement Class Members as provided herein ("Notice
24 Date"). The Parties acknowledge and agree, as the Court has previously ordered, that notice by a
25 combination of national publication, including those previously approved by this Court in its
26 October 13, 2011 Order, and direct mail/e-mail is the best means under the circumstances of this
27 case to effect notice to the class and that the Notice Program outlined in Exhibit 6 comports with the
28 requirements of due process. The Parties also acknowledge and agree that the Notice Program

1 encompasses at least the publication plan set for the in the Court's Order re Notice dated October 13,
2 2011.

3 2. Notice Program.

4 a. Long-form Notice: The Class Notice shall be in substantially the form of
5 Exhibit 3, attached hereto and shall be posted on the website created by the Claims Administrator.

6 At a minimum, the Class Notice shall include:

- 7 i. a short, plain statement of the background of the Action and the
8 proposed Settlement;
- 9 ii. describe the proposed Settlement relief as set forth in this Agreement;
- 10 iii. inform Settlement Class Members that, if they do not exclude
11 themselves from the Settlement Class, they may be eligible to receive relief;
- 12 iv. describe the procedures for participating in the Settlement including all
13 applicable deadlines and advise Settlement Class Members of their rights, including their right to file
14 a Claim to receive an Award under the Settlement, to opt out of same, or object thereto;
- 15 v. explain the scope of the Release, and the impact of the proposed
16 Settlement on any existing litigation, arbitration or other proceeding;
- 17 vi. state that any Award to Settlement Class Members under the
18 Settlement is contingent on the Court's final approval of the proposed Settlement;
- 19 vii. the identity of class counsel and the amount sought in attorneys' fees
20 and costs;
- 21 viii. explain that neither Counsel for the Parties, nor the Claims
22 Administrator may advise on the tax consequences of participating or not participating in the
23 Settlement;
- 24 ix. explain the procedures for opting out of the Settlement including the
25 applicable deadline for opting out as well as the consequences of opting out, and specifying that so-
26 called "mass" or "class" opt outs shall not be allowed; and
- 27 x. explain the procedures for objecting to the Settlement including
28 applicable deadlines.

1 b. Short-form Notice: The Claims Administrator shall cause to be published in
2 accordance with the terms set forth below, a short form of the Class Notice. The short form shall be
3 in substantially the form attached hereto as Exhibit 4 and shall at a minimum, include the web
4 address of the Settlement website and a telephone number for the Claims Administrator, the class
5 definition, a brief description of relief available to the Settlement Class Members and the right to
6 object and/or opt-out of the Class.

7 c. Direct Mail Notice: The Claims Administrator shall mail the Long-form
8 Notice to those Settlement Class Members for whom Class Counsel or Diamond can provide either a
9 U.S. postal address or an e-mail address.

10 d. Publication: The Short-form Notice shall be published in accordance with the
11 Notice Plan set forth in Exhibit 6 no later than 90 days from an Order preliminarily approving the
12 Settlement and Notice Program or such other date as the Court may order.

13 e. The Claims Administrator shall provide the Court with documentation
14 showing and an affidavit attesting that Notice was disseminated pursuant to the Notice Program.

15 **VI. OBJECTIONS AND REQUESTS FOR EXCLUSION**

16 1. Objections

17 Any Settlement Class Member who intends to object to the fairness of the Settlement must
18 do so no later than 25 days before the Final Approval Hearing (Objection Date). In order to object,
19 the Settlement Class Member must file with the Court, and provide a copy to Co-Lead Counsel and
20 Diamond's Counsel a document that includes the following: (a) the name, address, telephone
21 number and e-mail address of the Person objecting and, if represented by counsel, of his/her counsel;
22 (b) specifically and in writing, all objections; (c) whether he/she intends to appear at the Final
23 Approval Hearing, either with or without counsel; and (d) a statement of his membership in the
24 Class including all of the information required by the Claim Form. Any Settlement Class Member
25 who fails to file and serve timely a written objection and notice of his or her intent to appear at the
26 Final Approval Hearing pursuant to this Section shall not be permitted to object to the approval of
27 the Settlement at the Final Approval Hearing and shall be foreclosed from seeking any review of the
28

1 Settlement or the terms of the Agreement by appeal or other means, unless given special permission
2 by the Court.

3 2. Requests for Exclusion

4 a. Any member of the class may request to be excluded (or “opt out”) from the
5 Settlement Class. A Settlement Class Member who wishes to opt out of the Settlement Class must do
6 so no later than 25 before the Final Approval Hearing (Opt-out Date). In order to opt out, a
7 Settlement Class Member must complete and mail to the Claims Administrator a Request For
8 Exclusion that is post-marked no later than the Opt Out and Objection Date. The Request for
9 Exclusion must be personally signed by the Settlement Class Member requesting exclusion and
10 contain a statement that indicates a desire to be excluded from the Settlement Class. So-called
11 “mass” or “class” opt-outs shall not be allowed.

12 b. Except for those Settlement Class Members who timely and properly file a
13 Request for Exclusion, all other Settlement Class Members will be deemed to be Settlement Class
14 Members for all purposes under the Agreement, and upon the Effective Date, will be bound by its
15 terms, regardless of whether they file a Claim or receive any monetary relief.

16 c. Any Settlement Class Member who properly requests to be excluded from the
17 Settlement Class shall not: (a) be bound by any orders or judgments entered in the Action relating to
18 the Settlement; (b) be entitled to relief under, or be affected by, the Agreement; (c) gain any rights
19 by virtue of the Agreement; or (d) be entitled to object to any aspect of the Settlement.

20 d. The Claims Administrator shall provide Co-Lead Counsel and Diamond’s
21 Counsel with a final list of any timely Requests For Exclusion received by the Claims Administrator
22 within five (5) business days after the Opt Out and Objection Date.

23 **VII. RELEASES**

24 The Agreement shall be the sole and exclusive remedy for any and all Released Claims of all
25 Releasing Parties against all Released Parties. No Released Party shall be subject to liability or
26 expense of any kind to any Releasing Party with respect to any Released Claim. Upon entry of the
27 Final Judgment and Order Approving Settlement, each and every Releasing Party shall be
28

1 permanently barred and enjoined from initiating, asserting and/or prosecuting any Released Claim
2 against any Released Party in any court or any forum.

3 1. Upon entry of the Final Judgment and Order Approving Settlement each Releasing
4 Party shall be deemed to have released and forever discharged each Released Party of and from any
5 and all liability for any and all Released Claims.

6 2. The members of the Settlement Class acknowledge that they may hereafter discover
7 facts in addition to or different from those that they now know or believe to be true concerning the
8 subject matter of this release, but nevertheless fully, finally and forever settle and release and all
9 Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent,
10 which now exist, may hereafter exist, or heretofore have existed based upon actions, conduct, events
11 or transaction occurring on or before the date of this Agreement, without regard to subsequent
12 discovery or the existence of such different or additional facts concerning each of the Released
13 Parties. Notwithstanding the above, the release does not include claims for personal injury or other
14 non-economic losses related to the use of Diamond Walnut Products.

15 3. With respect to any and all Released Claims, and upon entry of the Final Judgment
16 and Order Approving Settlement without further action, for good and valuable consideration,
17 Plaintiff, on behalf of himself and the Settlement Class and as the representative of the Settlement
18 Class, shall expressly, and Releasing Parties shall be deemed to have, and by operation of the Final
19 Judgment and Order Approving Settlement shall, to the fullest extent permitted by law, fully, finally,
20 and forever expressly waived and relinquished with respect to the Released Claims, any and all
21 provisions, rights, and benefits of Section 1542 of the California Civil Code and any and all similar
22 provisions, rights, and benefits conferred by any law of any state or territory of the United States or
23 principle of common law that is similar, comparable, or equivalent to Section 1542 of the California
24 Civil Code, which provides:

25 **“A general release does not extend to claims which the creditor does**
26 **not know or suspect to exist in his or her favor at the time of executing**
27 **the release, which if known by him or her must have materially**
28 **affected his or her settlement with the debtor.”**

1 4. Additional Mutual Releases

2 a. On and after the Effective Date, each of the Released Parties shall be deemed
3 to have fully, finally, and forever released, relinquished and discharged each and all of the Plaintiffs
4 and Settlement Class Members, and their respective present and former parents, subsidiaries,
5 divisions, and affiliates, the present and former partners, employees, officers and directors of each of
6 them, the present and former attorneys, accountants, experts, consultants, insurers, and agents of
7 each of them, each of the foregoing solely in their capacity as such, and the predecessors, successors,
8 heirs, and assigns of each, from all claims of every nature and description, known and unknown,
9 relating to the initiation, assertion, prosecution, non-prosecution, settlement, and/or resolution of the
10 Action or the Released Claims.

11 b. On and after the Effective Date, each of the Releasing Parties shall be deemed
12 to have fully, finally, and forever released, relinquished and discharged the Released Parties, its
13 present and former parents, subsidiaries, divisions, affiliates, partners, employees, officers and
14 directors, attorneys, accountants, experts, consultants, insurers, agents, predecessors, successors,
15 heirs, and assigns, from all claims of every nature and description, including Unknown claims,
16 relating to the defense, settlement and/or resolution of the Action or the Released Claims.

17 c. Except as to the rights and obligations provided for under this Agreement,
18 Defendant and its attorneys and all of their respective past, present and future predecessors,
19 successors, assigns, devisees, relatives, heirs, legatees, and agents, including their respective past,
20 present and future predecessors, successors, assigns, devisees, relatives, heirs, legatees, and agents,
21 hereby release and forever discharge the Plaintiff and his attorneys from any and all charges,
22 complaints, claims, debts, liabilities, demands, obligations, costs, expenses, actions and causes of
23 action of every nature, character, and description, whether known or unknown, asserted or un-
24 asserted, suspected or unsuspected, fixed or contingent, which Defendant may now have, own or
25 hold or which Defendant at any time may have, own, or hold, against the Plaintiff, his attorneys by
26 reason of any matter, cause or thing whatsoever occurred, done, omitted or suffered from the
27 beginning of time to the date of this Agreement.

28

1 5. The Parties agree that the Court shall retain exclusive and continuing jurisdiction over
2 the Parties, Settlement Class Members, and the Claims Administrator to interpret and enforce the
3 terms, conditions, and obligations under the Agreement.

4 **VIII. COUNSEL FEES AND COSTS AND PLAINTIFF INCENTIVE AWARD**

5 1. Co-Lead Counsel agree to make, and Diamond agrees not to oppose, an application
6 for the award of Attorneys' Fees and Expenses in this Action in the amount of \$850,000 total. Co-
7 Lead Counsel shall not request any additional fees or costs above this amount. Diamond agrees not
8 to oppose an application by Co-Lead Counsel for an incentive award of up to \$5,000 for Plaintiff to
9 be paid from the Attorneys' Fees and Expenses awarded to Plaintiff's Counsel in this Action. If the
10 Court approves the motion, such fees and expenses will be paid by Diamond within thirty (30) days
11 after the Effective Date. If the Court reduces the amount of fees and expenses, Diamond shall pay
12 the reduced amount within thirty (30) days after the Effective Date. In no event shall Diamond pay
13 more than \$850,000 for Co-Lead Counsel's fees and expenses, which includes the \$5,000 for
14 Plaintiff's incentive award. If an appeal is taken by any party of the Court's fee award, Diamond's
15 obligation to pay any fee award shall be suspended pending final resolution of such appeal.
16 Diamond agrees it will not appeal an award of Co-Lead Counsel's fees and expenses (including the
17 \$5,000 for Plaintiff's incentive award) that in the aggregate does not exceed \$850,000.

18 2. Co-Lead Counsel, in their sole discretion, shall allocate and distribute this award of
19 Attorneys' Fees and Expenses among Plaintiff's Counsel. Upon payment of the fees ordered by the
20 Court as set forth above, Diamond's obligations regarding fees and expenses shall be fully and
21 forever discharged and no Plaintiff, Settlement Class Member or Plaintiff's Counsel shall be entitled
22 to seek or recover any further payment of fees or expenses from Diamond. Co-Lead Counsel agree
23 to indemnify and hold harmless Diamond and its Released Parties from any and all claims for
24 payment of attorneys' fees and/or expenses to Plaintiff's Counsel other than as set forth in paragraph
25 1 above, except that Co-Lead Counsel shall not be responsible to indemnify and hold harmless
26 Diamond and its Released Parties for any attorneys' fees and/or expenses claimed by or awarded to
27 counsel for any objector to the Settlement.

28

1 **IX. FINAL JUDGMENT AND ORDER APPROVING SETTLEMENT**

2 1. This Agreement is subject to and conditioned upon the issuance by the Court of the
3 Final Judgment and Order Approving Settlement that finally certifies the Settlement Class for the
4 purposes of settlement only, grants final approval of the Settlement, and provides the relief specified
5 herein, which relief shall be subject to the terms and conditions of the Agreement and the Parties'
6 performance of their continuing rights and obligations hereunder. Such Final Judgment and Order
7 Approving Settlement shall be in substantially the form attached hereto as Exhibit 1 and shall:

8 a. Confirm the final certification, for settlement purposes only, of the Settlement
9 Class;

10 b. Confirm the compliance of the Settlement Class with all requirements of Rule
11 23, including confirmation of the adequacy of the representation of the Class Representative as
12 representative of the Settlement Class;

13 c. Confirm that the Notice Program complied in all respects with the
14 requirements of due process and Rule 23 by providing due, adequate, and sufficient notice to the
15 Settlement Class;

16 d. Determine that the Agreement is entered into in good faith, is reasonable, fair
17 and adequate, and is in the best interest of the Settlement Class;

18 e. Dismiss the Action with prejudice as to the Released Parties and without cost;

19 f. Release each Released Party from the Released Claims that any Releasing
20 Party has, had, or may have in the future, against each Released Party and provide that the Covenant
21 Not To Sue has been given by each Settlement Class Member in favor of each Released Party and
22 that all Settlement Class Members are bound thereby;

23 g. Bar and enjoin all Releasing Parties from asserting against any Released Party
24 any Released Claim and bar and enjoin all Settlement Class Members from initiating or pursuing any
25 claim or action barred by the Releases herein;

26 h. Release each Releasing Party and Settlement Class Member, and their
27 respective present and former parents, subsidiaries, divisions and affiliates, the present and former
28 partners, employees, officers and directors of each of them, the present and former attorneys,

1 accountants, experts, consultants and insurers, and agents of each of them, each of the foregoing
2 solely in their capacity as such, and the predecessors, successors, heirs and assigns of each of them,
3 from all claims of every nature and description, known and unknown, that any Released Party has
4 had, or may in the future have relating to the initiation, assertion, prosecution, non-prosecution,
5 settlement and/or resolution of the Action or the Released Claims, and bar and enjoin all Released
6 Parties from asserting the same;

7 i. Release each Defendant and their respective present and former parents,
8 subsidiaries, divisions and affiliates, the present and former partners, employees, officers, and
9 directors of each of them, the present and former attorneys, accountants, experts, consultants,
10 insurers and agents of them, and the predecessors, successors, heirs and assigns of each of them from
11 all claims of every nature and description, known and unknown, that any Releasing Party has, had or
12 may in the future have relating to the defense, settlement and/or resolution of the Action or the
13 Released Claims, and bar and enjoin all Releasing Parties from asserting the same;

14 j. Retain the Court's continuing and exclusive jurisdiction over the Parties to the
15 Agreement, including all Settlement Class Members, to construe and enforce the Agreement in
16 accordance with its terms for the mutual benefit of the Parties.

17 **X. REPRESENTATIONS AND WARRANTIES**

18 1. Diamond represents and warrants: (a) that it has the requisite corporate power and
19 authority to execute, deliver and perform the Agreement and to consummate the transactions
20 contemplated hereby; (b) that the execution, delivery and performance of the Agreement and the
21 consummation by it of the actions contemplated herein have been duly authorized by necessary
22 corporate action on the part of Diamond; and (c) that the Agreement has been duly and validly
23 executed and delivered by Diamond and constitutes its legal, valid and binding obligation.

24 2. Plaintiff represents and warrants that he is entering into the Agreement on behalf of
25 himself individually and as representative of the Settlement Class Members and the Releasing
26 Parties, of his own free will and without the receipt of any consideration other than what is provided
27 in the Agreement or disclosed to, and authorized by, the Court. Plaintiff represents and warrants that
28 he has reviewed the terms of the Settlement in consultation with Co-Lead Counsel and believes them

1 to be fair and reasonable, and covenants that he will not file a Request for Exclusion from the
2 Settlement Class or object to the Settlement. Co-Lead Counsel represents and warrants that they are
3 fully authorized to execute the Agreement on behalf of the Plaintiff, individually and as
4 representative of the Settlement Class Members and Releasing Parties.

5 3. The Parties warrant and represent that no promise, inducement or consideration for
6 the Settlement has been made, except those set forth herein. No consideration, amount or sum paid,
7 accredited, offered or expended by Diamond in its performance of this Agreement and the
8 Settlement constitutes a fine, penalty, punitive damages or other form of assessment for any claim
9 against it.

10 **XI. NO ADMISSIONS; NO USE**

11 The Agreement and every stipulation and term contained in it is conditioned upon final
12 approval of the Court and is made for settlement purposes only. Whether or not consummated, this
13 Agreement shall not be: (a) construed as, offered in evidence as, received in evidence as, and/or
14 deemed to be, evidence of a presumption, concession or an admission by Plaintiff, Defendant, any
15 Settlement Class Member or Releasing or Released Party, of the truth of any fact alleged or the
16 validity of any claim or defense that has been, could have been, or in the future might be asserted in
17 any litigation or the deficiency of any claim or defense that has been, could have been, or in the
18 future might be asserted in any litigation, or of any liability, fault, wrongdoing or otherwise of such
19 Party; or (b) construed as, offered in evidence as, received in evidence as, and/or deemed to be,
20 evidence of a presumption, concession or an admission of any liability, fault or wrongdoing, or in
21 any way referred to for any other reason, by Plaintiff, Defendant, any Releasing Party or Released
22 Party in the Action or in any other civil, criminal or administrative action or proceeding other than
23 such proceedings as may be necessary to effectuate the provisions of the Agreement.

24 **XII. TERMINATION OF THIS AGREEMENT**

25 1. Either Party may terminate this Agreement by providing written notice to the other
26 Party within ten (10) days of the occurrence of any of the following:

27 a. The Court does not ultimately enter an order granting Preliminary Approval
28 Order conforming in all material respects to Sections III.A. and III.B. herein and Exhibit 5 hereof;

1 b. The Court does not conditionally and finally certify the Settlement Class as
2 defined herein or the Court's order certifying the Settlement Class is reversed, vacated, or modified
3 in any material respect by another court; or

4 c. The Court does not ultimately enter a Final Judgment and Order Approving
5 Settlement conforming in all material respects to Section IX. herein and Exhibit 1, or if entered, such
6 Final Judgment and Order Approving Settlement is reversed, vacated, or modified in any material
7 respect by another court.

8 2. In the event of termination, the terminating Party shall cause the Claims
9 Administrator to post information regarding the termination on the website established for the
10 Settlement.

11 3. It is expressly agreed that neither the failure of the Court to award Attorneys' Fees
12 and Expenses to Co-Lead Counsel, nor the amount of such Attorney's Fees and Expenses or
13 Incentive Awards that may be finally determined and awarded, shall provide a basis for termination
14 of this Agreement.

15 4. Defendant may unilaterally withdraw from and terminate this Agreement up to fifteen
16 (15) days before the Final Approval Hearing if any of the following events occur.

17 a. Any state attorney general, or any federal or state agency, regulator, or
18 authority institutes a proceeding against any of the Released Parties arising out of or otherwise
19 related to the Release and any of the terms or conditions of this Agreement;

20 b. Any state attorney general, or any federal or state agency, regulator, or
21 authority: (a) objects either to any aspect or term of the Agreement; or (b) requires any modification
22 to the Agreement, including, without limitation, or expansion of the scope of the contemplated relief
23 that Defendant in its sole discretion deems reasonably material; and/or

24 c. More than 300 Settlement Class Members have submitted valid and timely
25 Requests for Exclusion.

26 d. Claims submitted total more than \$2,600,000.

27 If Defendant elects to cancel the Agreement, this Agreement and all related documents exchanged or
28 signed by the Parties or submitted to the Court shall be null and void and shall have no effect

1 whatsoever upon this Action or its adjudication. The Parties shall promptly notify the Court of
2 Defendant's election and shall ask the court to issue a case scheduling order setting the case for
3 discovery, prompt determination of class certification issues and trial. In the event of termination
4 under this paragraph 4, Defendant shall also cause the Claims Administrator to post information
5 regarding the termination on the website established for the Settlement.

6 5. In the event that this Agreement terminates for any reason, all Parties shall be
7 restored to their respective positions as of immediately prior to the date of execution of this
8 Agreement. Upon termination, Sections III.A.1, III.A.4., IV.3., XI., XII.2., XII.3., XIII.2, XIII.4.,
9 and XIII.5. herein shall survive and be binding on the Parties, but this Agreement shall otherwise be
10 null and void.

11 **XIII. MISCELLANEOUS PROVISIONS**

12 1. Entire Agreement: The Agreement, including all Exhibits hereto, shall constitute the
13 entire Agreement among the Parties with regard to the Settlement and shall supersede any previous
14 agreements, representations, communications and understandings among the Parties with respect to
15 the subject matter of the Settlement. The Agreement may not be changed, modified, or amended
16 except in a writing signed by all Parties and, if required, approved by the Court. The Parties
17 contemplate that certain of the Exhibits to the Agreement relating to Class Notice may be modified
18 by subsequent agreement of Diamond and Co-Lead Counsel or by the Court prior to dissemination
19 to the Settlement Class.

20 2. Governing Law: The Agreement shall be construed under and governed by the laws
21 of the State of California, applied without regard to laws applicable to choice of law.

22 3. Execution in Counterparts: The Agreement may be executed by the Parties in one or
23 more counterparts, each of which shall be deemed an original but all of which together shall
24 constitute one and the same instrument. Facsimile signatures or signatures sent by e-mail shall be
25 treated as original signatures and shall be binding.

26 4. Notices: Any notice, instruction, application for Court approval or application for
27 Court orders sought in connection with the Settlement and the Agreement or other document to be
28 given by any Party to any other Party shall be in writing and delivered personally, by UPS, Federal

1 Express or similar service next business day delivery, or sent by registered or certified mail, postage
2 prepaid, if to Diamond to the attention of Diamond's Counsel, and if to Settlement Class Members to
3 the attention of Co-Lead Counsel on their behalf.

4 All notices to the Parties or counsel required by the Agreement shall be made in writing and
5 communicated as set forth above to the following addresses:

6 a. If to Plaintiff's or Co-Lead Counsel:

7 Joseph N. Kravec, Jr., Esq.
8 STEMBER FEINSTEIN DOYLE & PAYNE, LLC
9 429 Forbes Avenue 17th Floor
10 Pittsburgh, PA 15219
11 Telephone: (412) 281-8400
12 Facsimile: (412) 281-1007

13 b. If to Diamond or Diamond's Counsel:

14 Amanda L. Groves, Esq.
15 WINSTON & STRAWN LLP
16 101 California Street
17 San Francisco, CA 94111-5802
18 Telephone: (415) 591-1000
19 Facsimile: (415) 591-1400

20 5. Publicity: Defendant, Plaintiff, the class representatives, and Co-Lead Counsel shall
21 not cause any aspect of the Litigation or the terms of this Settlement Agreement not available in the
22 public record to be reported to the media or news reporting services. Any statement to the media or
23 news reporting services shall be limited to what is available in the public record. Neither Party shall
24 disparage the other. Notwithstanding these obligations, Defendant may make such disclosures
25 regarding the Litigation and terms of this Settlement as it deems necessary in its filings with the
26 Securities and Exchange Commission, to its auditors, submissions to the FDA, or as otherwise
27 required by state or federal law.

28 6. Good Faith: The Parties agree that they will act in good faith and will not engage in
any conduct that will or may frustrate the purpose of this Agreement, including but not limited to,
soliciting or otherwise encouraging, directly or indirectly, class members to request exclusion from
the class, object to the Settlement or appeal the final judgment. The Parties further agree, subject to
Court approval, to reasonable extensions of time to carry out any of the provisions of the Agreement.

1 7. Protective Orders: All orders, agreements and designations regarding the
2 confidentiality of documents and information (“Protective Orders”) remain in effect, and all Parties
3 and counsel remain bound to comply with the Protective Orders except as modified herein. Within
4 thirty (30) days of the Effective Date, the Parties will certify in writing that they have used their best
5 efforts to destroy or return to the producing party all documents and information produced in the
6 Actions that were designated as “Confidential” or “Attorneys' Eyes Only” pursuant to the Protective
7 Order, previously entered in the Action, including documents produced by the Parties and third
8 parties and deposition transcripts designated pursuant to the Protective Order. Notwithstanding this
9 provision, Co-Lead Counsel are counsel for Diamond are entitled to retain an archival copy of all
10 pleadings, motion papers, legal memoranda, correspondence or attorney work product, even if such
11 materials contain Protected Material. Any such archival copies that contain or constitute Protected
12 Material remain subject to the Protective Order as set forth therein.

13 8. Binding on Successors: The Agreement shall be binding upon, and inure to the
14 benefit of, the heirs, successors, assigns, executors and legal representatives of the Parties to the
15 Agreement and all Defendants and Released Parties.

16 9. Arms Length Negotiations: The determination of the terms and conditions contained
17 herein of and the drafting of the provisions of this Agreement has been by mutual understanding
18 after negotiation, with consideration by, and participation of, the Parties hereto and their counsel.
19 This Agreement shall not be construed against any Party on the basis that the Party was the drafter or
20 participated in the drafting.

21 10. Waiver: The waiver by one Party of any provision or breach of the Agreement shall
22 not be deemed a waiver of any other provision or breach of the Agreement.

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

25 12. Exhibits: All Exhibits to this Agreement are material and integral parts hereof, and
26 are incorporated by reference as if fully rewritten herein.

27 13. Taxes: No opinion concerning the tax consequences of the Settlement to any
28 Settlement Class Member is given or will be given by Diamond, Diamond’s Counsel, Co-Lead

1 Counsel, or Plaintiff's Counsel; nor is any Party or their counsel providing any representation or
2 guarantee respecting the tax consequences of the Settlement as to any Settlement Class Member.
3 The Class Notice will direct Settlement Class Members to consult their own tax advisors regarding
4 the tax consequences of the Settlement and any tax reporting obligations with respect thereto. Each
5 Settlement Class Member is responsible for his/her tax reporting and other obligations respecting the
6 Settlement, if any.

7 14. Modification in Writing Only: This Agreement and any and all parts of it, may be
8 amended, modified, changed or waived only by an express instrument in writing and signed by the
9 Parties. The Parties recognize and agree that all modifications are subject to Court approval.

10 15. Integration: This Agreement represents the entire understanding and agreement
11 among the Parties and supersedes all prior proposals, negotiations, agreements, and understandings
12 related to the subject matter of this Agreement. The Parties acknowledge, stipulate and agree that no
13 covenant, obligation, condition, representation, warranty, inducement, negotiation or undertaking
14 concerning any part or all of the subject matter of this Agreement has been made or relied upon
15 except as set forth expressly herein.

16 16. Agreement Constitutes A Complete Defense: To the extent permitted by law this
17 Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an
18 injunction against, any action, suit, or other proceeding that may be instituted, prosecuted or
19 attempted in breach of or contrary to this Agreement.

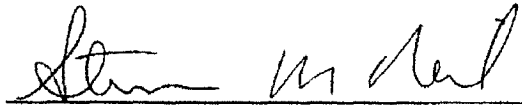
20 IN WITNESS WHEREOF, each of the Parties hereto has caused the Agreement to be
21 executed on its behalf by its duly authorized counsel of record, all as of the day set forth below.

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Stipulated and agreed to this 30th day of December, 2011.

Dated: 12/30/11


DIAMOND FOODS, INC., Defendant

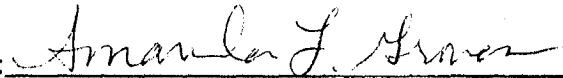
By: Steven M. Neil

(Print Name)

VP, Chief Financial / Administrative
(Title) *ff*

WINSTON & STRAWN, LLP

Dated: Dec 30, 2011

By: 
Attorneys for Defendant
DIAMOND FOODS, INC.

ADDITIONAL SIGNATURES ON NEXT PAGE

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SIGNATURES CONTINUED FROM PREVIOUS PAGE

BRAUN LAW GROUP

Dated: 12-30-11

By: 
Michael D. Braun, Esquire
Attorneys for Plaintiff
ELLIOT ZEISEL

STEMBER FEINSTEIN DOYLE & PAYNE, LLC

Dated: _____

By: _____
Joseph N. Kravec, Jr., Esquire
Attorneys for Plaintiff
ELLIOT ZEISEL

LAW OFFICES OF JANET LINDNER SPIELBERG

Dated: _____

By: _____
Janet Lindner Spielberg, Esquire
Attorneys for Plaintiff
ELLIOT ZEISEL

1 SIGNATURES CONTINUED FROM PREVIOUS PAGE

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BRAUN LAW GROUP

Dated: _____

By: _____

Michael D. Braun, Esquire
Attorneys for Plaintiff
ELLIOT ZEISEL

STEMBER FEINSTEIN DOYLE & PAYNE, LLC

Dated: 12/29/11

By:  _____

Joseph N. Kravec, Jr., Esquire
Attorneys for Plaintiff
ELLIOT ZEISEL

LAW OFFICES OF JANET LINDNER SPIELBERG

Dated: 12/29/11

By:  _____

Janet Lindner Spielberg, Esquire
Attorneys for Plaintiff
ELLIOT ZEISEL

**EXHIBIT A-1
TO MOTION FOR
PRELIMINARY APPROVAL**

(EXHIBIT 1 TO SETTLEMENT AGREEMENT)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELLIOT ZEISEL, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

DIAMOND FOODS, INC., a Delaware
corporation,

Defendant.

Case No. 3:10-cv-01192 JSW (EDL)

Honorable Jeffrey S. White

FINAL ORDER AND JUDGMENT

Date Complaint Filed: March 22, 2010

1 Based upon the submissions of the Parties,

2 IT IS ORDERED, ADJUDGED AND DECREED:

3 1. This Final Order and Judgment incorporates herein and makes a part hereof (i) the
4 Stipulation of Settlement, dated 12-30-11 (a copy of which, without exhibits, is appended
5 hereto as Exhibit (1)); and (ii) Exhibit A (Short Form Notice), Exhibit B (Long Form Notice),
6 Exhibit C (Claim Form), Exhibit D ([Proposed] Order Re Preliminary Approval), and Exhibit E
7 ([Proposed]Final Order and Judgment), all of which are exhibits to the Stipulation of Settlement.
8 The Parties are hereby authorized to agree to and adopt such amendments to, and modifications and
9 expansions of, the Stipulation of Settlement and all exhibits thereto (the "Stipulation of Settlement")
10 as (a) shall be consistent in all material respects with the Final Order and Judgment entered by the
11 Court, and (b) do not limit the rights of Class Members; otherwise, such amendments, modifications,
12 and expansions shall only be after notice to and approval of the Court. Defined terms in this Final
13 Order and Judgment shall have the same meanings as in theStipulation of Settlement.

14 2. The Court finds that, for purposes of settlement only, the requirements of Rule 23 of
15 the Federal Rules of Civil Procedure are met by the Class. Joinder of all Class Members in a single
16 proceeding would be impracticable, if not impossible, because of their numbers and dispersion.
17 Common issues exist among Class Members and predominate over questions affecting only
18 individual Class Claims regarding whether Diamond Foods, Inc. misbranded or mislabeled its
19 Walnut products by making false and misleading statements on package labels and the company's
20 website relating to the health benefits of walnut consumption. Plaintiffs' claims are typical of those
21 of the Class, in that (i) the interests of the Plaintiff are consistent with those of the Class; (ii) there
22 are no apparent conflicts between or among the named Plaintiff and the Class; (iii) the Plaintiff has
23 been and is capable of continuing to be an active participant in both the prosecution of, and the
24 negotiations to settle, the Action; and (iv) the Plaintiff and the Class are represented by qualified,
25 reputable counsel who are experienced in preparing and prosecuting class actions, including those
26 involving the sort of practices alleged in the Complaint. Finally, a class settlement is superior to
27 other available methods for a fair resolution of the controversy.

1 3. The Court hereby finally certifies, for settlement purposes only, the following
2 settlement class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure: all consumers
3 who, for personal or household use, purchased Diamond of California brand walnuts, which include,
4 but are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell
5 Walnuts products in the United States from March 22, 2006 through the [date of preliminary
6 approval of settlement]. Excluded from the Class are: (i) all persons who purchased or acquired
7 Diamond of California walnuts for resale; (ii) Diamond and its employees, principals, affiliated
8 entities, legal representatives, successors and assigns; (iii) any person who files a valid, timely
9 Request for Exclusion; and (iv) the Judges to whom this Action is assigned and any members of
10 their immediate families (the "Class"). The Class Period shall mean the period commencing March
11 22, 2006 through the [date of preliminary approval of settlement]. A list of those persons who have
12 excluded themselves from the Class, and who are therefore not bound by this Final Order and
13 Judgment, is attached as Exhibit -- to the Affidavit of _____, filed on
14 _____, 2012 [Docket No. ___] and is incorporated herein and made a part hereof.

15 4. The Court makes the following findings on notice to the Class:

16 a) The Court finds that the distribution of the Short Form Notice and the Long
17 Form Notice, the establishment of a 1-800 toll-free telephone number, and creation of the
18 Internet site, all as provided for in the Stipulation of Settlement and Order Granting
19 Preliminary Approval of Class Action Settlement of _____, ____ (the
20 "Preliminary Approval Order"), (i) constituted the best practicable notice under the
21 circumstances to Class Members, (ii) constituted notice that was reasonably calculated, under
22 the circumstances, to apprise Class Members of the pendency of the Action, their right to
23 object or to exclude themselves from the proposed Settlement, and their right to appear at the
24 Final Approval Hearing, (iii) was reasonable and constituted due, adequate, and sufficient
25 notice to all persons entitled to be provided with notice, and (iv) complied fully with the
26 requirements of the United States Constitution and the Rules of the Court.

27 b) The Court finds that the notice materials and the notice methodology set forth
28 in the Stipulation of Settlement, the Preliminary Approval Order, and this Final Order and

1 Judgment (i) constitute the most effective and practicable notice of the Final Order and
2 Judgment, the relief available to Class Members pursuant to the Final Order and Judgment,
3 and applicable time periods; (ii) constitute due, adequate, and sufficient notice for all other
4 purposes to all Class Members; and (iii) comply fully with the requirements of the United
5 States Constitution and the Rules of this Court.

6 5. The Plaintiff Elliot Zeisel (hereinafter the "Plaintiff"), as representative of the Class,
7 and Class Counsel have adequately represented the Class for purposes of entering and implementing
8 the Settlement.

9 6. The terms and provisions of the Stipulation of Settlement, including all exhibits
10 thereto, have been entered into in good faith and are hereby fully and finally approved as fair,
11 reasonable, and adequate as to, and in the best interests of, each of the Parties and the Class
12 Members. The Court has considered and denied all objections filed in this Action. Accordingly, the
13 Court hereby directs that the Settlement shall be effected in accordance with the terms of the
14 Stipulation of Settlement (all of which terms and definitions are adopted and incorporated herein by
15 reference).

16 7. With this final approval of the Settlement, it is hereby ordered that the Releases,
17 which are set forth in Section VII of the Stipulation of Settlement, are expressly incorporated herein
18 in all respects and are effective as of the date of this Final Order and Judgment; and the Released
19 Parties (as that term is defined in Section II of the Stipulation of Settlement) are forever discharged
20 from any claims or liabilities arising from, or in any way relating to the Released Claims (as that
21 term is defined in Section II of the Stipulation of Settlement).

22 8. The terms of the Stipulation of Settlement and of this Final Order and Judgment,
23 including all exhibits hereto, shall be forever binding on, and shall have *res judicata* and preclusive
24 effect in, all pending and future lawsuits maintained by the Plaintiff and all other Class Members
25 who did not timely exclude themselves from the Class, as well as their heirs, executors and
26 administrators, successors, and assigns.

27 9. This Action (and any and all claims asserted herein at any time) is dismissed in its
28 entirety, on the merits, with prejudice and without leave to amend, with each party to bear his/her/its

1 own costs and attorneys' fees (except as otherwise expressly provided herein), and all Class
2 Members who did not timely and properly execute and submit a Request for Exclusion shall be
3 forever barred and permanently enjoined from starting, continuing, or participating in, litigating, or
4 receiving any benefits or relief from any other lawsuit, arbitration, or administrative or regulatory
5 proceeding or order based on or relating to the claims, facts, or circumstances in this Action and/or
6 the Released Claims except claims relating to the enforcement of the Settlement of the Action.

7 10. The Defendant is ordered to implement the terms and conditions of the Stipulation of
8 Settlement, including payment to all Class Members who have not excluded themselves from this
9 Settlement and who submit a timely, valid Claim pursuant to the Stipulation.

10 11. Class Counsel is hereby awarded attorneys' fees and reimbursements of their
11 expenses in the amount of \$_____ to be paid by Defendant to
12 STEMBER FEINSTEIN DOYLE & PAYNE, LLC, 429 Forbes Avenue, Allegheny Building, 17th
13 Floor, Pittsburgh, Pennsylvania 15219, LAW OFFICES OF JANET LINDNER SPIELBERG, 12400
14 Wilshire Boulevard, #400, Los Angeles, California 90025, and BRAUN LAW GROUP, 10680 West
15 Pico Boulevard, Suite 280, Los Angeles, California 90064. Such fees are to be paid by Defendant
16 within thirty (30) days of the Effective Date (as defined in the Stipulation of Settlement).

17 12. The Court finds and determines that an incentive award of \$_____ is
18 due and payable to Plaintiff Elliot Zeisel for his services and efforts in the representation of the
19 Class, which shall be payable by Defendant and deducted from the amount approved by paragraph
20 11 of this Final Order and Judgment within thirty (30) days of the Effective Date (as defined in the
21 Stipulation of Settlement).

22 13. Neither the Stipulation of Settlement nor this Final Order and Judgment (nor any
23 document referred to herein or any action taken to carry out this Final Order and Judgment) is, may
24 be construed as, or may be used as an admission or concession by or against Defendant of the
25 validity of any claim or any actual or potential fault, wrongdoing, or liability whatsoever. Entering
26 into or carrying out the Stipulation of Settlement (including the exhibits thereto), and any
27 negotiations or proceedings related thereto, shall not in any event be construed as, or deemed to be
28 evidence of, an admission or concession with regard to the denials and defenses by Defendant, and

1 shall not be offered or received in evidence in any action or proceeding against any party hereto in
2 any court, administrative agency, or other tribunal for any purpose whatsoever, other than as
3 evidence of the settlement or to enforce the provisions of this Final Order and Judgment and the
4 Stipulation of Settlement, provided however, this Final Order and Judgment and the Stipulation of
5 Settlement (including the exhibits thereto) may be filed in any action against Defendant to support a
6 defense of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction,
7 or any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

8 14. The Court has personal jurisdiction over the Parties and the Class Members, and it
9 has subject matter jurisdiction to approve the Stipulation of Settlement, including all exhibits thereto,
10 and enter this Final Order and Judgment. Without in any way affecting the finality of this Final
11 Order and Judgment, this Court hereby retains jurisdiction as to all matters relating to administration,
12 consummation, enforcement, and interpretation of the Stipulation of Settlement and of this Final
13 Order and Judgment, and for any other necessary purpose.

14 LET JUDGMENT BE ENTERED ACCORDINGLY:

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17 JEFFREY S. WHITE
18 UNITED STATES DISTRICT JUDGE

19 Dated: _____, 2012.
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**EXHIBIT A-2
TO MOTION FOR
PRELIMINARY APPROVAL**

(EXHIBIT 2 TO SETTLEMENT AGREEMENT)

CLAIM FORM
Page 1

Claims Administrator

Zeisel v. Diamond Foods, Inc.,
Northern District of California
Civil Action No. 3:10-cv-1192-JSW

Toll Free: (888) _____

www. _____ .com

FOR YOUR CLAIM TO BE TIMELY AND VALID, YOU MUST COMPLETE, SIGN AND RETURN THIS FORM, WHICH MUST BE POSTMARKED OR SUBMITTED ONLINE NO LATER THAN _____, 2011.

FAILURE TO SUBMIT YOUR COMPLETED CLAIM FORM BY THIS DEADLINE OR TO PROVIDE THE REQUIRED INFORMATION REQUESTED BELOW MAY RESULT IN THE REJECTION OF YOUR CLAIM.

PLEASE SUBMIT YOUR COMPLETED FORM ONLINE AT WWW.---.COM OR MAIL IT TO:

[ADD ADDRESS]

1) Print Your Name:

2) E-mail:

3) Street Address:

City, State and Zip Code:

4) Phone Number: ()

5) **LIST ALL DIAMOND WALNUT PURCHASES (excluding 3lbs. bags):** Please state the number of bags of Diamond of California brand walnuts (excluding 3lbs. bags) that you purchased between March 22, 2006 and _____, 2011 in the United States for your personal or household use.

Bags Purchased: 1 2 3 4 5 Other:

6) **LIST 3LBS. BAG PURCHASES FROM SAM'S CLUB ONLY:** Please state the number of 3 pound bags of Diamond of California brand walnuts that you purchased at Sam's Club between March 22, 2006 and _____, 2011 in the United States for your personal or household use.

1 2 3 Other:

CLAIM FORM
Page 2

Sam's Club Membership No: _____

Your Claim for 3lbs bags of Diamond of California walnuts purchased from Sam's Club will be rejected if you fail to include your Sam's Club Membership number. A Sam's Club Membership number is not required for any other size bag claimed.

7) If you are claiming more than three (3) of the 3lbs pound bags acquired at Sam's Club or more than five (5) bags of any other Diamond Walnut product, you must attach proof(s) of purchase, such as a receipt or bag label. **Failure to include Proof of Purchase for Claims in excess of three bags of the 3lbs bags from Sam's Club or five bags of any other walnut product or submission of false or fraudulent claims may result in the Claim being rejected in its entirety.**

I declare under penalty of perjury under the laws of the United States of America that between March 22, 2006 and _____, 2011 I purchased in the United States for my personal or household use the number of bags of Diamond walnuts as stated above.

Dated: _____

Signature of Claimant

QUESTIONS? CALL _____ OR VISIT www._____.com

**EXHIBIT A-3
TO MOTION FOR
PRELIMINARY APPROVAL**

(EXHIBIT 3 TO SETTLEMENT AGREEMENT)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

If you purchased Diamond of California Walnuts between March 22, 2006 and [DATE], you could get a payment from a class action settlement.

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

This notice (the "Notice") informs you of a proposed settlement of class action claims against Diamond Foods, Inc. ("Diamond") alleging that Diamond mislabeled and misbranded its walnut products and describes your rights as a potential settlement class member. Diamond has agreed, under the terms of the settlement, to provide you with the opportunity to submit a valid and timely claim form through which you may be eligible to receive monetary compensation as discussed below.

Your legal rights are affected whether you act, or don't act. Read this notice carefully.

Your Legal Rights and Options in this Settlement:	
SUBMIT A CLAIM FORM	The only way to get a payment.
EXCLUDE YOURSELF	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against Diamond, about the legal claims in this case.
OBJECT	Write to the Court about why you don't like the settlement.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	Get no payment. Give up rights.

Any questions? Read on and visit [www.\[website\].com](http://www.[website].com)

- These rights and options—and the deadlines to exercise them—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals are resolved. Please be patient.

**QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://www.[website].com)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE**

BASIC INFORMATIONPAGE 3

- 1. Why has this notice been publicized?
- 2. What is this lawsuit about?
- 3. Why is this a class action?
- 4. Why is there a settlement?

WHO IS IN THE SETTLEMENTPAGE 4

- 5. How do I know if I am part of the settlement?
- 6. I'm still not sure if I'm included.

THE SETTLEMENT BENEFITS—WHAT YOU GETPAGE 4

- 7. What does the settlement provide?
- 8. Do I have to do anything?

HOW TO GET A PAYMENT – SUBMITTING A FORM..... PAGE 5

- 9. How do I get a payment?
- 10. When will I receive payment?
- 11. What am I giving up by participating in the settlement?

EXCLUDING YOURSELF FROM THE SETTLEMENTPAGE 6

- 12. How do I exclude myself from the settlement?
- 13. If I don't exclude myself, can I sue Diamond for the same thing later?
- 14. If I exclude myself, can I get money from this settlement?

THE LAWYERS REPRESENTING YOU PAGE 7

- 15. Do I have a lawyer in the case? If so, who?
- 16. How will the lawyers be paid?

OBJECTING TO THE SETTLEMENT PAGE 7

- 17. How do I tell the Court that I don't like the settlement?
- 18. What's the difference between objecting and excluding?

THE COURT'S FINAL SETTLEMENT APPROVAL HEARING PAGE 8

- 19. When and where will the Court decide whether to approve the settlement?
- 20. Do I have to come to the hearing?
- 21. Can I appear at the final settlement approval hearing?

IF YOU DO NOTHING PAGE 9

- 22. What happens if I do nothing at all?

GETTING MORE INFORMATION PAGE 9

- 23. Are there more details about the settlement?

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://www.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

BASIC INFORMATION

1. Why has this notice been publicized?

This Notice, given pursuant to an order of the Court dated _____, describes a proposed settlement of a class action against Diamond Foods, Inc. in a lawsuit known as *Zeisel v. Diamond Foods, Inc.*, Civil Action No. 3:10-cv-1192-JSW.

This Notice provides a summary of the terms of the proposed settlement. It also explains the lawsuit, your potential legal rights under the settlement, what benefits may be available to you under the settlement, and how to get them. **If you are a class member, your legal rights are affected whether you act or do not act so read this Notice carefully.**

2. What is this Lawsuit About?

This lawsuit claims that Diamond misbranded its walnut products by making false and misleading statements on package labels and the company's website relating to the health benefits of walnut consumption. Diamond denies it did anything wrong, defended itself throughout this litigation and asserts that its labels and website were truthful and consistent with the law. The court has not decided who is right. Both sides have agreed to settle the dispute and get benefits to consumers.

3. Why is this a class action?

In a class action, one or more people, called Class Representatives (in this case Elliott Zeisel), sue on behalf of people who have similar claims. All these people are a Class or Class Members. One court resolves the issues for all Class Members, except for those who exclude themselves from the Class. U.S. District Judge Jeffrey White is in charge of this class action.

4. Why is there a settlement?

The Court did not decide in favor of Plaintiffs or Defendant. Instead, both sides agreed to a settlement. That way, they avoid the cost of a trial, and the people affected will get compensation. The Class Representative and the attorneys think the settlement is best for everyone who was a member of the class.

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

WHO IS IN THE SETTLEMENT

To see if you will get money from this settlement, you first have to decide if you are a Class Member.

5. How do I know if I am part of the settlement?

You are a member of the proposed Settlement Class (*i.e.*, "Class Member") if you purchased, for personal or household use, Diamond of California brand walnuts, which include, but are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell Walnuts (collectively "Walnuts") products in the United States from March 22, 2006 through [the date of preliminary approval of settlement]. Class Members are entitled to the settlement restitution described below for their eligible purchases of Diamond Walnut products. Purchasers who bought Diamond Walnut products for resale are not included.

6. I'm still not sure if I am included.

If you are still not sure whether you are included, you can get free help at 800-XXX-XXXX or by visiting [WEBSITE], or by calling or writing to the class counsel in this case, at the phone number or address listed in question ___.

THE SETTLEMENT BENEFITS – WHAT YOU GET

7. What Does the Settlement Provide?

The Settlement creates a settlement restitution of \$2,600,000. Under the Settlement, an eligible Class Member who timely submits a completed claim form with any required proofs of purchase and who made eligible purchases of:

(a) 3-pound bags of Diamond of California walnuts at Sam's Club is entitled to receive \$8.25 per bag;

(b) any Diamond of California walnut product (other than the 3 pound bags described in (a)) is entitled to \$3.25 per bag.

In addition to the settlement restitution, Diamond agrees that the language at issue is no longer being used on its Walnut product labels and will not be used in the future. Diamond also agreed that the language at issue on its website has been removed.

8. Do I Have to Do Anything?

You have to decide whether to stay in the Class or ask to be excluded, and you have to decide this now.

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

If you are an eligible Class Member and you wish to receive monetary compensation for bags of Diamond of California walnuts that you purchased, you need to complete and submit a signed Claim Form in a timely manner. This form is necessary to ensure that only eligible Class members receive a monetary benefit.

HOW YOU GET A PAYMENT—SUBMITTING A CLAIM FORM

9. How can I get a payment?

If you are an eligible Class Member and wish to receive this benefit, you must timely submit a completed Claim Form to the claims administrator as described below. In addition, Class Members who claim more than three 3-pound bags of Walnuts or more than five bags of any other Walnut products must also submit Proof of Purchase. Proof of Purchase is not required for claims of three or less 3-pound bags of Walnuts or five or less bags of any other Walnut products. The claims administrator will determine the validity of all claims, subject to review by the Court. The Claim Form is attached to this Notice.

Even with appropriate proofs of purchase, the maximum number of bags any single claimant may receive is capped at 24. Submission of multiple Claim Forms from the same household will be subject to audit by the claims administrator for validity.

The Claim Form is attached to this Notice and is also available at the Settlement Website at [www.\[\] .com](http://www.[] .com). You can also request that a Claim Form be mailed to you by calling the claims administrator at (888) ____-____.

The fully completed and signed Claim Form must be submitted online at www.____.com or sent via U.S. Mail to the claims administrator, at _____, P.O. Box _____.

The deadline for submission of the Claim Form is [_____]. The Claim Form must be submitted online or postmarked on or before _____ to be timely.

10. When Will I Receive Payment?

The Court will hold a final approved hearing on _____ during which it will decide whether it will finally approve all terms of the settlement. If the Court approves the settlement, there may be appeals or other challenges. Checks will be mailed 35 days after the Court enters an order finally approving the settlement and all appeals (if any) are resolved. The progress of approval process and expected dates of payment will be updated periodically on the website and can also be obtained by calling the claims administrator's toll free number. The entire process

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

could take more than a year, so please be patient.

11. What am I Giving Up by Participating in the Settlement?

Unless you exclude yourself, you are staying in the Class, and that means that you can't sue, continue to sue, or be part of any other lawsuit against Diamond about the legal issues in this case. It also means that all of the Court's orders will apply to you and legally bind you. If you sign the claim form, you will agree to release claims generally described below and in this notice.

The release will extend to Diamond and its past or present directors, officers, employees, partners, principals, agents, predecessors, successors, assigns, parents, affiliated and sister corporations, subsidiaries, licensees, divisions, and related or affiliated entities.

EXCLUDING YOURSELF FROM THE SETTLEMENT

If you don't want a payment from this settlement, but you want keep the right to sue or continue to sue Diamond, on your own, about the legal issues in this case, you must take steps to get out. This is called excluding yourself—or is sometimes referred to as opting out of the settlement Class.

12. How do I exclude myself from the Settlement?

If you wish to be excluded from the settlement class, you must send a completed Request for Exclusion Form to the claims administrator by U.S. Mail to: [address] in a timely manner. The Request for Exclusion Form must be postmarked on or before _____ to be effective. Exclusions can only be filed individually—not on behalf of a group or class. If you exclude yourself from the Class and the proposed settlement is finally approved, you will not be entitled to receive any benefits of the settlement and will remain free to pursue any legal rights you may have against Diamond at your own expense, but the representative Plaintiff and their lawyers will not represent you as to any claims against Diamond.

13. If I don't exclude myself, can I sue Diamond for the same thing later?

No. Unless you exclude yourself, you give up the right to sue Diamond for the claims that this settlement resolves. If you have a pending lawsuit, speak to your lawyer in that lawsuit immediately. You must exclude yourself from this Class to continue your own lawsuit. Remember, the exclusion deadline is [date].

14. If I exclude myself, can I get money from this settlement?

No. If you exclude yourself, do not send in a claim form to ask for any money. But, you may sue, continue to sue, or be part of a different lawsuit against Diamond.

THE LAWYERS REPRESENTING YOU

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

15. Do I have a lawyer in this case? If so, who?

Class Counsel represent the Plaintiff and all persons who are members of the Class as it pertains to the claims alleged in this lawsuit. Class Counsel are:

Joseph N. Kravec, Jr. STEMBER FEINSTEIN DOYLE & PAYNE, LLC 429 Forbes Avenue, 17 th Floor Pittsburgh, PA 15219	Janet Lindner Spielberg LAW OFFICE OF JANET LINDNER SPIELBERG 12400 Wilshire Blvd., Ste 400 Los Angeles, CA 90025	Michael D. Braun BRAUN LAW GROUP, P.C. 10680 W. Pico Blvd., Suite 280 Los Angeles, CA 90064
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16. How will the lawyers be paid?

Counsel for the Class have pursued the Action on a contingent basis and have paid all costs of the action. These attorneys have not yet been paid or recovered any of their expenses associated with the Action. As part of the settlement, class counsel will request that the Court award them attorneys' fees and expenses. They intend to request \$850,000 in attorneys' fees and reasonable costs, which includes the payment of \$5,000 to compensate Mr. Zeisel, who acted as class representative. This amount is on top of the fund created to benefit the class and accordingly does not reduce the monies going to the Class. Class counsel's petition for fees and expenses will be filed with the Court no later than _____, and may be reviewed by any interested party. The petition will be available at www._____.com.

The Court will determine the reasonableness of the attorneys' fee and expense request as well as the proposed Class Representative award at the fairness hearing.

OBJECTING TO THE SETTLEMENT**17. How do I tell the Court that I don't like the settlement?**

If you are a Class Member but do not like the proposed settlement, you may object. Objecting is simply telling the Court that you don't like something about the settlement. You can object only if you stay in the Class. You can give reasons why you think the Court should not approve it. The Court will consider your views.

To object, you must send a letter with the following information: (a) a heading which refers to the Action; (b) the objector's name, address, and telephone number; (c) a statement that the objector purchased Diamond of California Walnuts in the United States, the number of bags purchased, the date(s) of purchase and the location(s) of the purchase(s); (d) a statement whether the objector intends to appear at the Final Approval Hearing, either in person or

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
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through counsel, and, if through counsel, identifying counsel by name, address, and phone number; (e) a statement of the grounds supporting the claim; (f) a list of all persons who will be called to testify in support of the objection; (g) a list of other cases in which you or your counsel have appeared either as settlement objectors or as counsel for objectors during the preceding five (5) years; (h) copies of any papers, briefs, or other documents upon which the objection is based; and (i) your signature, even if you are also represented by counsel.

Mail the objection to the following three places, postmarked no later than _____:

OFFICE OF THE CLERK	DIAMOND'S COUNSEL	PLAINTIFF'S CLASS COUNSEL
United States District Court Central District of California Western Division Clerk's Office 312 N. Spring Street Los Angeles, CA 90012	Amanda L. Groves WINSTON & STRAWN LLP 101 California Street San Francisco, CA 94111	Joseph N. Kravec, Jr. STEMBER FEINSTEIN DOYLE & PAYNE, LLC 429 Forbes Avenue, 17th Floor Pittsburgh, PA 15219

18. What's the difference between objecting and excluding?

Objecting is simply telling the Court that you don't like something about the settlement. You can object only if you stay in the Class. Excluding yourself is telling the Court that you don't want to be part of the Class. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL SETTLEMENT APPROVAL HEARING

The Court will hold a hearing to decide whether to approve the settlement. You may attend and you may ask to speak, but you don't have to.

19. When and where will the Court decide whether to approve the settlement?

The Court will conduct a "Final Approval Hearing" at the United States District Court for the Northern District of California, located 450 Golden Gate Ave., San Francisco, CA 94102 before the Honorable Jeffrey S. White in Courtroom 11 - 19th Floor on _____ at _____ a.m. (or at the dates and times to which the Court may, without further notice, reschedule the hearing). The purpose of the Final Approval Hearing will be to determine whether the proposed settlement is fair, adequate, and proper and whether the Court should enter judgments approving the

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

settlement, awarding attorneys' fees and expenses, and dismissing the class action.

20. Do I have to come to the hearing?

No. Class Counsel will answer questions Judge White may have. But, you are welcome to come at your own expense. If you send an objection, you don't have to come to Court to talk about it. As long as you mailed your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it's not necessary.

21. Can I Appear at the Final Settlement Approval Hearing?

You may attend the Final Approval Hearing, but your attendance is not required nor will it affect your eligibility to submit the claim form. You do not need to appear in court, and you do not need to hire your own attorney to represent you in this case, although you are free to do so. Any Class member may appear at the Final Approval Hearing (also known as the "Fairness Hearing") in person or by a duly appointed authorized attorney and show cause, if any, why the settlement should not be approved; provided that (except by special permission of the court) no Class member shall be heard unless, on or before, _____, the Class member files with the court a written "Notice of Intent to Appear" to the clerk's address below, setting forth all of the Class member's objections to the settlement, and mails copies of all such papers to Plaintiff's and Diamond's counsel at the addresses specified in Paragraph 17.

IF YOU DO NOTHING

22. What happens if I do nothing at all?

If you do nothing, you'll get no money from this settlement. But, unless you exclude yourself, you won't be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against Diamond about the legal issues in this case, ever again.

GETTING MORE INFORMATION

23. Are there more details about the settlement?

Yes. You can call [_____] toll free; write to _____ or visit the settlement website at www._____.com, where you will find answers to common questions about the settlement, a claim form, plus other information to help you determine whether you are a Class Member and whether you are eligible for a payment.

QUESTIONS? CALL _____ TOLL FREE, OR VISIT [WWW.\[WEBSITE\].COM](http://WWW.[WEBSITE].COM)
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

**EXHIBIT A-4
TO MOTION FOR
PRELIMINARY APPROVAL**

(EXHIBIT 4 TO SETTLEMENT AGREEMENT)

LEGAL NOTICE

**If you purchased Diamond of California walnuts
between March 22, 2006 through _____ you could
get a payment from a class action settlement**

Para una notificación en Español, llamar o visitar nuestro website.

A settlement has been proposed in a class action lawsuit alleging that Diamond of California mislabeled and misbranded its walnut products.

The United States District Court for the Northern District of California authorized this notice. Before any money is paid, the Court will have a hearing to decide whether to approve the settlement.

WHO IS INCLUDED?

All consumers who, for personal or household use, purchased Diamond of California brand walnuts, which include, but are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell Walnuts products in the United States from March 22, 2006 through [the date of preliminary approval of settlement]. Purchasers who bought these walnut products for resale are not included.

WHAT IS THIS CASE ABOUT?

The lawsuit claims that Diamond mislabeled and misbranded its walnut products by making false and misleading statements on package labels and the company's website relating to the health benefits of walnut consumption. Diamond denies it did anything wrong, defended itself throughout this litigation and asserts its labels and website were truthful and consistent with law. The Court has not decided who is right. Both sides have agreed to settle the dispute and get benefits to consumers.

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides a settlement restitution of \$2,600,000. Class Members who timely submit valid Claim Forms by _____, 201__ are entitled to receive a cash payment from the settlement restitution in the amount of: (a) \$8.25 per 3 pound bag of Diamond of California walnuts purchased; and (b) \$3.25 per

bag of any other Diamond of California walnut product purchased. Class members who claim more than three 3-pound bags or more than five of any other bag of Diamond of California walnuts must submit Proofs of Purchase establishing the purchase(s) during the Class Period.

The details of this settlement, including Claim Forms, are available at www._____.com.

WHO REPRESENTS YOU?

The Court appointed the law firms Stember Feinstein Doyle & Payne LLC, Braun Law Group, P.C., and the Law Offices of Janet Lindner Spielberg to represent you as "Class Counsel."

WHAT ARE YOUR OPTIONS?

If you don't want to be legally bound by the settlement, you must exclude yourself by _____, or you won't be able to sue, or continue to sue, Diamond about the legal claims in this case. If you exclude yourself, you can't get money from this settlement. If you stay in the settlement, you may object to it by _____. The detailed notice explains how to exclude yourself or object.

The Court will hold a hearing at ____ a.m. on [date] at the United States District Court for the Northern District of California, located 450 Golden Gate Ave San Francisco, CA 94102 before the Honorable Jeffrey S. White in Courtroom 11 - 19th Floor. The Court will consider whether to approve the settlement and whether to grant Co-Lead Counsel's request for \$850,000 in attorneys' fees and costs, including a \$5,000 incentive award to the Plaintiff. You do not need to retain an attorney or attend the hearing, although you have the right to do so.

www.-----.com

1-800-XXX-XXXX

LEGAL NOTICE

HOW CAN I GET MORE INFORMATION?

You can get a detailed notice and other information that explains this case and how to exclude yourself by calling toll free 1-800-XXX-XXXX, visiting www.-----.com, or write to _____.

**CLAIM FORMS MUST BE POSTMARKED
OR SUBMITTED ONLINE BY: DATE**

www.-----.com

1-800-XXX-XXXX

**EXHIBIT A-5
TO MOTION FOR
PRELIMINARY APPROVAL**

(EXHIBIT 5 TO SETTLEMENT AGREEMENT)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

ELLIOT ZEISEL, on behalf of himself and all
others similarly situated,

Plaintiff,

v.

DIAMOND FOODS, INC., a Delaware
corporation,

Defendant.

Case No. 3:10-cv-01192 JSW (EDL)

Honorable Jeffrey S. White

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

Date Complaint Filed: March 22, 2010

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

1 The parties to this litigation have entered into a Stipulation of Settlement (“Stipulation”)
2 dated December ___, 2011, which if approved, would resolve this putative class action. Plaintiffs
3 have filed a motion for preliminary approval of the Stipulation. Defendant does not oppose the
4 motion, and supports preliminary approval of the Stipulation by the Court.

5 The Court has read and considered the Stipulation and all exhibits thereto, including the
6 proposed class notice and claim form, and finds there is sufficient basis for: (1) granting preliminary
7 approval of the Stipulation; (2) certifying the Class for settlement purposes; (3) appointing Plaintiff
8 Elliot Zeisel as Class Representative and his counsel as Class Counsel; (4) directing that Notice be
9 disseminated to the Class; and, (5) setting a hearing at which the Court will consider whether to
10 grant final approval of the Settlement.

11 The Court now GRANTS the motion for preliminary approval and makes the following
12 findings and orders:

13 1. The Court preliminary certifies, for settlement purposes only, the following
14 settlement class (the “Class”) pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure:

15 all consumers who, for personal or household use, purchased Diamond of California brand
16 walnuts, which include, but are not limited to, Shelled, Halves, Chopped, Finely Diced,
17 Chips, Nut Topping, and In-the-Shell Walnuts products in the United States from March 22,
18 2006 through [*the date of preliminary approval of settlement*]. Excluded from the Settlement
19 Class are: (i) all persons who purchased or acquired Diamond of California walnuts for
20 resale; (ii) Diamond and its employees, principals, affiliated entities, legal representatives,
21 successors and assigns; (iii) any person who files a valid, timely Request for Exclusion; and
22 (iv) the Judges to whom this Action is assigned and any members of their immediate
23 families.

24 2. The Court approves Plaintiffs Elliot Zeisel as Class Representative.

25 3. The Court appoints the following law firms to serve as Class Counsel: STEMBER
26 FEINSTEIN DOYLE & PAYNE, LLC, 429 Forbes Avenue, Allegheny Building, 17th Floor,
27 Pittsburgh, Pennsylvania 15219, LAW OFFICES OF JANET LINDNER SPIELBERG, 12400
28 Wilshire Boulevard, #400, Los Angeles, California 90025, and BRAUN LAW GROUP, 10680 West
Pico Boulevard, Suite 280, Los Angeles, California 90064.

4. The Court finds that, for purposes of settlement only, the requirements of Rule 23 of

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1 the Federal Rules of Civil Procedure are met by the Class. Joinder of all Class Members in a single
2 proceeding would be impracticable, if not impossible, because of their numbers and dispersion.
3 Common issues exist among Class Members and predominate over questions affecting only
4 individual Class Claims regarding whether Diamond Foods, Inc. misbranded or mislabeled its
5 Walnut products by making false and misleading statements on package labels and the company's
6 website relating to the health benefits of walnut consumption. Plaintiffs' claims are typical of those
7 of the Class, in that (i) the interests of the Plaintiff are consistent with those of the Class; (ii) there
8 are no apparent conflicts between or among the named Plaintiff and the Class; (iii) the Plaintiff has
9 been and is capable of continuing to be an active participant in both the prosecution of, and the
10 negotiations to settle, the Action; and (iv) the Plaintiff and the Class are represented by qualified,
11 reputable counsel who are experienced in preparing and prosecuting class actions, including those
12 involving the sort of practices alleged in the Complaint. Finally, a class settlement is superior to
13 other available methods for a fair resolution of the controversy.

14 5. The Court preliminary approves the Stipulation, finding that its terms appear
15 sufficient and fair, reasonable and adequate to warrant dissemination of notice of the proposed
16 settlement to the Class. The Court finds that the Stipulation contains no obvious deficiencies and
17 that the parties entered into the Stipulation in good faith, following arms-length negotiation between
18 their respective counsel.

19 6. The Court hereby approves the form and procedure for disseminating notice of the
20 proposed settlement to the Class as set forth in the media plan agreed to in the Stipulation and
21 attached hereto as Exhibit 1. The Court finds that the notice to be given constitutes the best notice
22 practicable under the circumstances, and constitutes valid, due and sufficient notice to the Class in
23 full compliance with the requirements of applicable law, including the Due Process Clause of the
24 United States Constitution.

25 7. Diamond Foods, Inc. shall cause notice to be disseminated pursuant to that plan
26 within 90 days of this Order or May 1, 2012, whichever is later. The short and long-form notices
27 shall be substantially in the form attached hereto as Exhibits 2 and 3, respectively.

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1 8. As set forth in the Stipulation, Diamond Foods, Inc. shall bear all costs and expenses
2 in connection with providing notice to the Class, complying with 28 U.S.C. § 1715(b) and
3 administering the proposed settlement.

4 9. The Court authorizes and directs Defendant to retain one or more Administrators to
5 implement the terms of the proposed Settlement, including Kurtzman Carson Consultants LLC, and
6 authorizes and directs such Administrator(s) to (i) publish the Short Form Notice, (ii) mail by U.S.
7 mail or email the Long-Form notice to those individuals for whom such contact information is
8 available, (iii) establish the 1-800 phone line, (iv) establish the Internet site, (v) receive and process
9 settlement claims, and (vi) carry out such other responsibilities as are provided for in the Stipulation
10 or may be agreed to by the Parties in the Action.

11 10. At or before the Final Approval Hearing (defined below), the Administrator shall
12 provide the Court with documentation showing and an affidavit attesting that Notice was
13 disseminated in accordance with the Court's Preliminary Approval Order.

14 11. A hearing on entry of final approval of the Stipulation, an award of attorneys fees and
15 expenses to Class Counsel and incentive payments to named Plaintiff (the "Final Approval
16 Hearing") shall be held at on _____ 2011, before the undersigned Courtroom 11 of the
17 United States District Court for Northern District of California, 450 Golden Gate Avenue, San
18 Francisco, CA 94102. At the Final Approval Hearing, the Court will consider: (a) whether the
19 Settlement should be approved as fair, reasonable, and adequate for the Class; (b) whether a
20 judgment granting approval of the Settlement and dismissing the lawsuit with prejudice should be
21 entered; and (c) whether Class Counsel's application for attorneys' fees and expenses and incentive
22 award for the named Plaintiffs should be granted.

23 12. Objections. Any Class Member who complies with the requirements of this
24 Paragraph may object to any aspect of the proposed Settlement either on his or her own or through
25 an attorney hired at his or her expense. Any Class Member who wishes to object to the proposed
26 settlement must file with the Court and serve on Class Counsel and Defendant's Counsel a written
27 statement of objection no later than twenty five (25) days before the Final Approval Hearing
28

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1 (“Objection Date”). Such statement shall include (i) the name, address, telephone number and e-
2 mail address of the Person objecting and, if represented by counsel, of his/her counsel; (ii)
3 specifically and in writing, all objections; (iii) whether he/she intends to appear at the Final Approval
4 Hearing, either with or without counsel; and (iv) a statement of his or her membership in the Class
5 including all of the information required by the Claim Form, and shall be provided to the Court,
6 Class Counsel and Defendant. In addition, any Class Member objecting to the Settlement shall
7 provide a detailed list of any other objections submitted by the objector, or the objector’s counsel, to
8 any class actions submitted in any court, whether state or otherwise, in the United States in the
9 previous five (5) years. If the Class Member or his/her/its counsel has not objected to any other
10 class action settlement in any court in the United States in the previous five (5) years, he/she/it shall
11 affirmatively state so in the written materials provided in connection with the objection to this
12 Settlement.

13 13. Any Class Member who does not timely file and serve a written objection pursuant to
14 the terms hereof shall be deemed to have waived, and shall be foreclosed from thereafter raising, any
15 objection to the Settlement. Any objection that is not timely made shall be barred. The filing of the
16 objection allows Class Counsel or Diamond Foods, Inc.’s counsel to notice such objecting person for
17 and take his or her deposition consistent with the Federal Rules of Civil Procedure at an agreed-upon
18 location, and to seek any documentary evidence or other tangible things that are relevant to the
19 objection. Failure by an objector to make himself or herself available for a deposition or to comply
20 with expedited discovery requests may result in the Court striking said objectors’ objection and
21 otherwise denying that person the opportunity to make an objection or be further heard. The Court
22 reserves the right to tax the costs of any such discovery to the objector or the objector’s counsel
23 should the Court determine that the objection is frivolous or is made for an improper purpose.

24 14. The procedures and requirements for filing objections is in connection with the Final
25 Approval Hearing are intended to ensure the efficient administration of justice and the orderly
26 presentation of any Class Members’ objection to the Stipulation, in accordance with the due process
27 rights of all Class Members.
28

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1 15. Any Class Member who files and serves a timely written objection pursuant to the
2 terms of this Order and complies with the requirements of this Paragraph may also appear at the
3 Final Approval Hearing either in person or through counsel retained at the Class Member's expense.
4 Class Members or their attorneys intending to appear at the Final Approval Hearing must serve on
5 Class Counsel and Defendant's Counsel, and file with the Court, at the addresses specified in this
6 Order, no later than twenty five (25) days before the Final Approval Hearing, a notice of intention to
7 appear, setting forth the case number, and the name, address, and telephone number of the Class
8 Member (and, if applicable, the name, address, and telephone number of the Class Member's
9 attorney). Any Class Member who does not timely file and serve a notice of intention to appear
10 pursuant to the terms of this Order shall not be permitted to appear, except for good cause shown.

11 16. Exclusions.

12 a) Any Class Member may request to be excluded (or "opt out") from the Class.
13 A Class Member who wishes to opt out of the Settlement Class must do so no later than twenty five
14 (25) days before the Final Approval Hearing ("Opt-out Date"). In order to opt out, a Class Member
15 must complete and send to the Claims Administrator a Request For Exclusion by first-class mail,
16 postage prepaid, to the address provided in the Long Form Notice and Internet site. Any such
17 request must be post-marked no later than the Opt Out and Objection Date (*i.e.*, 25 days before the
18 Final Approval Hearing). The Request for Exclusion must be personally signed by the Class
19 Member requesting exclusion and contain a statement that indicates a desire to be excluded from the
20 Class. So-called "mass" or "class" opt-outs shall not be allowed.

21 b) Except for those Class Members who timely and properly file a Request for
22 Exclusion, all other Class Members will be deemed to be Class Members for all purposes under the
23 Agreement, and upon the Effective Date, will be bound by its terms, regardless of whether they file a
24 Claim or receive any monetary relief.

25 c) Any Class Member who properly requests to be excluded from the Class shall
26 not: (a) be bound by any orders or judgments entered in the Action relating to the Settlement; (b) be
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1 entitled to relief under, or be affected by, the Agreement; (c) gain any rights by virtue of the
2 Agreement; or (d) be entitled to object to any aspect of the Settlement.

3 17. Termination. This Order shall become null and void, and shall be without prejudice
4 to the rights of the Parties, all of whom shall be restored to their respective positions existing
5 immediately before this Court entered this Order, if (i) the proposed Settlement is not finally
6 approved by the Court, or does not become final, pursuant to the terms of the Stipulation of
7 Settlement; or (ii) the proposed Settlement is terminated in accordance with the Stipulation of
8 Settlement or does not become effective as required by the terms of the Stipulation of Settlement for
9 any other reason. In such event, and except as provided therein, the proposed Settlement and
10 Stipulation of Settlement shall become null and void and be of no further force and effect, and
11 neither the Stipulation of Settlement nor the Court's orders, including this Order, shall be used or
12 referred to for any purpose whatsoever.

13 18. Claims. The Claim Deadline shall be fourteen (14) days following the Final
14 Approval Hearing. All Claims must be submitted with a Claim Form and received by the Claims
15 Administrator or postmarked by the Claims Deadline. The Claims Deadline shall be clearly set forth
16 in the Notice, the website of the Claims Administrator, and on the Claim Form. Class Members who
17 do not timely submit a signed, completed Claim Form shall not be eligible for an Award.

18 19. Supplemental Filing Deadlines.

19 a) The Motion for Final Approval of the Settlement and Certification of the
20 Class, together with the supporting memorandum and papers, shall be filed fourteen (14)
21 days before the Objection Date and Opt-Out Date.

22 b) Co-Lead Counsel's Motion for Attorneys' Fees, Expenses and an Incentive
23 Award, together with the supporting memorandum and papers, shall be filed fourteen (14)
24 days prior to the Objection Date and Opt-Out Date.

25 c) The parties may each file a supplemental brief no longer than twenty-five (25)
26 pages in length to address any objections filed by Class Members. Said supplemental briefs
27 shall be filed no later than ten (10) days before the Final Approval Hearing.

1 20. If any deadline set forth in this Order falls on a Saturday, Sunday or federal holiday,
2 then such deadline shall extend to the next Court business day.

3 21. The Court reserves the right to adjust the date of the Fairness Hearing and related
4 deadlines. In that event, the revised hearing date and/or deadlines shall be posted on the settlement
5 website referred to in the Class Notice, and the parties shall not be required to re-send or re-publish
6 Class Notice.

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8 Dated: _____

JEFFREY S. WHITE
UNITED STATES DISTRICT
COURT JUDGE

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Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

**EXHIBIT A-6
TO MOTION FOR
PRELIMINARY APPROVAL**

(EXHIBIT 6 TO SETTLEMENT AGREEMENT)



Settlement Notice Plan

Zeisel v Diamond Foods, Inc.

Case No. CV 10-01192

U.S. District Court, Northern District of California

Prepared: December 23, 2011

Program Overview

Class Definition

The Class (or Class members) consists of all consumers who, for personal or household use, purchased Diamond of California brand walnuts, which include, but are not limited to, Shelled, Halves, Chopped, Finely Diced, Chips, Nut Topping, and In-the-Shell Walnuts products in the United States from March 22, 2006 through the date of preliminary approval of the settlement.

Situation Analysis

The Plaintiffs claim that the Defendant misbranded and mislabeled its Walnut Products by making false and misleading statements on its package labels and the company's website relating to the health benefits of walnut consumption. The Defendant denies the Plaintiffs' claims and denies any wrongdoing. The parties are settling to avoid the burden and expense of protracted litigation.

Under the proposed settlement, Class members who submit valid claim forms would receive a payment based on the amount of walnut products they purchased during the class period and how much proof they have to support their claim.

The following known factors were considered when designing this notice program:

1. Class members are located throughout the U.S., including large cities and rural areas.
2. Individual notice is generally not possible because mailing addresses are not available for this consumer Class.

Strategies

Short-form notices will be published in cooking enthusiast magazines, as well as a national newspaper. The notice effort also includes an informational release and a case website.

Notice Schedule

The notice schedule is based on preliminary approval before February 17, 2012.

Notice Tactic	Issued	Week of 4/9/12	Week of 4/16/12	Week of 4/23/12	Week of 4/30/12
Issue Informational Release					
<i>Bon Appétit</i>	Monthly (May Issue)				
<i>Cooking Light</i>	Monthly (May Issue)				
<i>USA Today</i>	Daily				
Case Website	Constant				

Blocks indicate when readers first receive publications (the on-sale date, not the issue/cover date). All media subject to change based on availability at the time of placement.

Media Selection

The media mix for this notice program provides:

- National coverage through notice placements in consumer magazines and *USA Today*
- Focused coverage through cooking enthusiast magazines that Diamond regularly publishes
- Possible repeat notice exposures as a result of the overlapping media audiences
- A written summary of settlement information that may be easily referred to or passed on to others
- Easy access to the notice documents through an established case website.
- A neutral informational release that includes the toll-free number and website address so that Class members may easily obtain more information

The Plan is consistent with the Court's order approving a notice plan with the exception that notice will not be published during the winter holiday season. The parties agreed to an additional insertion in *USA Today* to account for the publish dates not being during the winter holiday season.

Consumer Magazines

Consumer Magazine	Issuance	Notice Size	Circulation	# of Insertions
<i>Bon Appétit</i>	Monthly	1/3 page	1,522,078	1
<i>Cooking Light</i>	Monthly	1/3 page	1,783,808	1
TOTAL			3,305,886	2

- Provides a total circulation of 3,305,886
- Includes publications with a high concentration of cooking enthusiasts
- Includes publications that Diamond regularly publishes
- All placements will be tracked to ensure that they appear exactly as planned as well as meet our high standards in terms of quality and positioning

The following provides details for each of the recommended consumer magazines:

bon appétit

- Circulation: 1,522,078
- Adult Audience: 6,603,000
- Monthly magazine focuses on 'life through the lens of food'—cooking in, dining out, culture, travel, entertainment, shopping, and design

Cooking Light

- Circulation: 1,783,808
- Adult Audience: 11,446,000
- Monthly magazine focuses on quick and healthy recipes, nutrition tips, entertaining menus, and fitness guides to help readers make smart choices for a healthy lifestyle

Daily Newspapers

Newspaper	Publish day	Notice Size	Daily Circulation	# of insertions
<i>USA Today</i> <i>(Market Place Section)</i>	Mon-Thurs	1/9 page	1,829,099	2

- Provides 3.2 million daily adult audience
- All placements will be tracked to ensure that they appear exactly as planned as well as meet our high standards in terms of quality and positioning
- The parties agree to an additional insertion in *USA Today* to account for the publish dates not being during the winter holiday season.

Additional Support

Case Website

- Allows Class members the ability to obtain additional information and documents including the Long Form Notice, Short Form Notice, Settlement Agreement, Claim Form, and any other information that the parties may agree to provide or that the Court may require
- Displayed in notice documents

Toll-Free Telephone Support

- Provides a simple way for Class members to obtain additional information
- Allows Class members the opportunity to learn more about the case in the form of frequently asked questions and answers
- Displayed in notice documents

Informational Release

- Issued to approximately 6,260 press outlets throughout the U.S.
- Includes the toll-free number and website address so that Class members may easily obtain more information