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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CRYSTAL HILLSLEY, et al.,  
12 Plaintiffs,  
13 v.  
14 GENERAL MILLS, INC. et al.,  
15 Defendants.

Case No.: 3:18-cv-00395-L-BLM

**CLASS ACTION**

**ORDER DENYING PLAINTIFFS’  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT AND GRANTING  
MOTION TO INTERVENE**

**[ECF Nos. 45, 52]**

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19 In this putative class action alleging deceptive food labeling, Plaintiffs filed an  
20 unopposed motion for preliminary settlement approval. (ECF No. 45, “Prelim. Approval  
21 Mot.”). David Hayes, a named plaintiff in a related putative class action pending in the  
22 Northern District of Illinois, filed a motion to intervene, which Plaintiffs opposed. (ECF  
23 No. 52.) The Court decides these matters on the briefs without oral argument. *See* Civ.  
24 L. R. 7.1(d)(1). For the reasons stated below, the Preliminary Approval Motion is denied  
25 and the motion to intervene is granted.

26 **I. BACKGROUND**

27 Plaintiffs, consumers who purchased fruit flavored snacks manufactured by  
28 Defendant General Mills, Inc. (“General Mills”), brought this putative class action

1 alleging that the product label was misleading because it falsely claimed that the snacks  
2 had "no artificial flavors" and were "naturally flavored," although they contained d-l  
3 malic acid as an artificial flavoring. (ECF no. 1-2, Class Action Compl. ("Compl.") ¶¶  
4 46, 47, 53.) According to the complaint, d-l malic acid is a "synthetic petrochemical."  
5 (*Id.* ¶ 50.) Plaintiff claimed that it "simulates, resembles, and reinforces the  
6 characterizing fruit flavor of the Products." (*Id.* ¶ 72; *see also id.* ¶52.) Specifically, d-l  
7 malic acid "confers a tart, fruit-like flavor" to "help[] make the Products – which are over  
8 50% corn syrup and sugar – taste more like fruit." (*Id.* ¶¶ 50 (internal quotation marks  
9 omitted), 59.)

10 The initial complaint alleged violations of California Unfair Competition Law,  
11 California False Advertising Law, and California Consumer Legal Remedies Act, as well  
12 as breach of express and implied warranties. Plaintiff filed the complaint in State court.  
13 Defendants removed the action to federal court. The court has subject matter jurisdiction  
14 pursuant to 28 U.S.C. §1332.

15 Defendants filed a motion to dismiss for failure to state a claim under Federal Rule  
16 of Civil Procedure 12(b)(6). They argued that General Mills used d-l malic acid as a pH  
17 control agent and not as an artificial flavor. (*See generally* ECF no. 13-1 (Defs' mot. to  
18 dismiss).) At the pleading stage, the court did not resolve the factual dispute whether  
19 malic acid in the fruit snacks was used as a flavoring ingredient or a pH balancing agent.  
20 (ECF no. 17 (order) at 4.) *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997, 999  
21 n.3 (9th Cir. 2006) (the court must assume the truth of the factual allegations in the  
22 complaint and construe them most favorably to the moving party). Defendants' motion  
23 was denied insofar as Plaintiff's theory of liability was based on the contention that the  
24 products were mislabeled because the packaging falsely stated they were "naturally  
25 flavored" and had "no artificial flavors."

26 Defendants answered the complaint, the parties participated in an early neutral  
27 evaluation conference, and commenced discovery. (ECF no. 45-2, Decl. of Ronald A.  
28 Marron ("Marron Dec.") at 2.) During discovery, the parties entered settlement

1 negotiations and mediation. (*Id.* at 3.) The negotiations included a related action,  
2 prosecuted by the same counsel who represent Plaintiffs herein, pending in the Central  
3 District of California, *Morris et al. v. Motts LLP et al.*, case no. 18cv1799 (the “Morris  
4 Action”). (*Id.*) The Morris Action alleged essentially the same claims about fruit  
5 flavored snacks manufactured by General Mills which were sold under the Motts brand.  
6 (*Id.* at 2.) General Mills was one of the named defendants. (*Id.* at 3.) On March 9, 2020,  
7 the parties “finalized the terms of the settlement.” (*Id.* at 4.)

8 As a part of the settlement, the Morris Action was dismissed and incorporated into  
9 the amended complaint filed in this action. (*See* ECF no. 45-3, Marron Dec. Ex. 1  
10 (“Settlement Agreement”) ¶¶ 1.6, 1.7.) Consistent with the Settlement Agreement, the  
11 amended complaint expanded what was previously a class of California consumers to a  
12 nationwide class action.<sup>1</sup> (*Cf.* Compl. ¶ 116 *with* ECF no. 41, First Am. Compl. (“FAC”  
13 or “amended complaint”)<sup>2</sup> ¶ 88; *see also* Settlement Agreement ¶ 2.3.)

14 Under the proposed settlement, Defendants promised to change the product  
15 packaging to “display an asterisk or a similar reference immediately following or  
16 adjacent to the ‘No Artificial Flavors’ claim that directs the consumer to the statement  
17 “\*Learn More at [the General Mills website].” (Settlement Agreement ¶ 5.2.b.) In this  
18 regard, the General Mills website would

19 disclose[] in substance the following points: (1) that . . . the flavors in the  
20 Products bearing the Challenged Claims come from all natural sources; (2)  
21 that General Mills identifies “natural flavors” in the ingredient list in

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22  
23 <sup>1</sup> The amended complaint also added David Cook as a plaintiff residing in  
24 Minnesota, omitted the breach of warranty claims, added certain fraud and unjust  
25 enrichment claims, added a claim under a Minnesota consumer fraud statute, and  
26 included additional products. (*Cf.* Compl. at 5, 11, 17-24 *with* FAC at 3-4, 19-27 and Ex.  
1.)

27 <sup>2</sup> Plaintiffs neglected to accompany the amended complaint with a redlined version  
28 showing the variances between the initial and first amended complaints. *See* Civ. L. R.  
15.1(c).

1 accordance with FDA regulations; and (3) that . . . the Products may also  
2 contain synthetic malic acid or other acidulants. Malic acid is intended for  
3 use not as a flavor or to impart the characterizing flavor of these Products,  
4 but is a substance the FDA approves for multiple uses including a flavor  
5 enhancer, a flavoring agent or adjuvant, or as a pH control agent. 21 C.F.R.  
6 § 184.1069.

7 (Settlement Agreement ¶ 5.2.a.) These statements would be provided on General Mills  
8 website for four years. (*Id.* ¶ 5.2.b.) In addition, General Mills promised not to object to  
9 Plaintiffs’ application for \$725,000 in attorneys’ fees, costs and expenses, and a \$5,000  
10 incentive award to each of the four named Plaintiffs. (*Id.* ¶ 10.1.) Finally, Defendants  
11 agreed to pay the costs of notice and settlement administration. (*Id.* ¶ 6.1.) In exchange,  
12 the nationwide class would broadly release all of its claims against Defendants, including  
13 the claims for monetary relief pled in the amended complaint.<sup>3</sup> (*Cf. id.* ¶ 7.1 with FAC at  
14 29.)

## 14 **II. DISCUSSION**

### 15 **A. Motion for Preliminary Approval**

16 According to the terms of the settlement, Plaintiffs filed the pending Settlement  
17 Approval Motion. (*See* Settlement Agreement ¶ 9.1.) Defendants filed a non-opposition,  
18 together with three expert reports. (ECF no. 46 (“Non-Opp’n”).) For the reasons stated  
19 below, the motion is denied.

20 To order notice to the putative class of the proposed settlement, the court must find  
21 that it

22 will likely be able to

- 23 (i) approve the proposal under Rule 23(e)(2); and
- 24 (ii) certify the class for purposes of judgment on the proposal.

25 Fed. R. Civ. Proc. 23(e)(1)(B).

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27 <sup>3</sup> The release also appears to exceed the permissible scope. *See Hesse v. Sprint*  
28 *Corp.* 598 F.3d 581, 590 (9th Cir. 2010).

1 If, as here, the proposed settlement “would bind the class members, the court may  
2 approve it . . . only on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. Proc.  
3 23(e)(2). “[S]ettlement of class actions present[s] unique due process concerns for absent  
4 class members [in part because] class counsel may collude with the defendants, tacitly  
5 reducing the overall settlement in return for a higher attorney's fee.” *In re Bluetooth*  
6 *Headset Prod. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011);<sup>4</sup> *see also Evans v. Jeff*  
7 *D.*, 475 U.S. 717, 733 (1986) (noting the possibility of tradeoff between merits relief and  
8 attorneys' fees often implicit in class action settlement negotiations.) The court's role in  
9 reviewing class action settlements "is to police the inherent tensions among class  
10 representation, defendant's interests in minimizing the cost of the total settlement  
11 package, and class counsel's interest in fees." *Staton v. Boeing Co.*, 327 F.3d 938, 972  
12 n.22 (9th Cir. 2003); *see also Bluetooth*, 654 F.3d at 946.

13 In this regard, the court considers whether:

- 14 (A) the class representatives and class counsel have adequately  
15 represented the class;  
16 (B) the proposal was negotiated at arm's length;  
17 (C) the relief provided for the class is adequate, taking into account:  
18 (i) the costs, risks, and delay of trial and appeal;  
19 (ii) the effectiveness of any proposed method of distributing relief  
20 to the class, including the method of processing class-member  
21 claims;  
22 (iii) the terms of any proposed award of attorney's fees, including  
23 timing of payment; and  
24 (iv) any agreement required to be identified under Rule 23(e)(3);  
25 and  
26 (D) the proposal treats class members equitably relative to each other.

27 Fed. R. Civ. Proc. 23(e)(2).

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<sup>4</sup> Unless otherwise noted, internal quotation marks, citations, brackets, and footnotes are omitted from citations.

1 Where, as here,  
2 a settlement agreement is negotiated prior to formal class certification,  
3 . . . [¶] . . . such agreements must withstand an even higher level of scrutiny  
4 for evidence of collusion or other conflicts of interest than is ordinarily  
5 required under Rule 23(e) before securing the court's approval as fair.

6 *Bluetooth*, 654 F.3d at 946. The court has a duty to look for any "subtle signs that class  
7 counsel have allowed pursuit of their own self-interests and that of certain class members  
8 to infect the negotiations." *Id.* at 947. Examples of such subtle signs are

- 9 (1) when counsel receive a disproportionate distribution of the settlement ...;
- 10 (2) when the parties negotiate a "clear sailing" arrangement providing for the  
11 payment of attorneys' fees separate and apart from class funds ...; and
- 12 (3) when the parties arrange for fees not awarded to revert to defendants  
13 rather than be added to the class fund.

14  
15 *Id.*

16 The Settlement Agreement here includes all three features. First, the class receives  
17 no monetary award while the counsel receives \$725,000 for fees and costs, and each  
18 named Plaintiff receives \$5,000.

19 Second, the settlement includes a "clear sailing" arrangement (*see* Settlement  
20 Agreement ¶ 10.1) whereby "the defendant agrees not to oppose a petition for a fee award  
21 up to a specified maximum value." *Bluetooth*, 654 F.3d at 940 n.6. This "carries the  
22 potential of enabling a defendant to pay class counsel excessive fees and costs in  
23 exchange for counsel accepting an unfair settlement on behalf of the class." *Id.* at 947.

24 Finally, the settlement includes an implied "kicker," whereby "all fees not awarded  
25 would revert to defendants rather than be added to the *cy pres* fund or otherwise benefit  
26 the class." *Bluetooth*, 654 F.3d at 947. The kicker is implicit in that Defendants agreed  
27 to pay without objection up to \$725,000 for attorneys' fees, costs, and litigation expenses

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1 but the Settlement Agreement does not provide for any funds to be applied for the benefit  
2 of the class should the court award less.

3 Although the \$725,000 sum was negotiated with a mediator's assistance (Marron  
4 Dec. at 3-4), this, by itself, is not sufficient to assure that the attorneys' fee amount was  
5 the product of collusion-free negotiations in light of the clear sailing and kicker  
6 provisions. *Bluetooth*, 654 F.3d at 948.

7 [W]hen confronted with a clear sailing provision, the district court has a  
8 heightened duty to peer into the provision and scrutinize closely the  
9 relationship between attorneys' fees and benefit to the class, being careful to  
10 avoid awarding “unreasonably high” fees simply because they are  
11 uncontested.

11 *Id.* at 948.

12 For this same reason, a kicker arrangement reverting unpaid attorneys' fees  
13 to the defendant rather than to the class amplifies the danger of collusion  
14 already suggested by a clear sailing provision. If the defendant is willing to  
15 pay a certain sum in attorneys' fees as part of the settlement package, but the  
16 full fee award would be unreasonable, there is no apparent reason the class  
17 should not benefit from the excess allotted for fees. The clear sailing  
18 provision reveals the defendant's willingness to pay, but the kicker deprives  
19 the class of that full potential benefit if class counsel negotiates too much for  
20 its fees.

19 *Id.* at 949.

20 The request for \$725,000 in fees and expenses appears excessive on its face. The  
21 legal work in this action consisted of investigating and drafting an initial complaint,  
22 defending a motion to dismiss, written discovery without depositions, and settlement  
23 negotiations.

24 On the other hand, the Settlement Agreement provides no meaningful benefit to the  
25 class. On behalf of a nationwide class, the Settlement Agreement abandons the monetary  
26 relief requested in the amended complaint. Plaintiffs do not address the aggregate  
27 amount of monetary relief they would recover had they prevailed on the merits, raising  
28 the question whether the settlement is based on a substantive analysis of Plaintiffs' case.

1 Plaintiffs cite *Littlejohn v. Copland*, 819 Fed. App'x. 491 (9th Cir. 2020), for the  
2 proposition that the Settlement Agreement should be approved notwithstanding lack of  
3 monetary relief. In addition, Defendants filed a declaration of Ran Keivetz, Ph.D., a  
4 marketing professor at Columbia University Business School. (Non-Opp'n at 10-11 &  
5 Ex. A.) He opined that the proposed asterisk on the product packaging is likely to benefit  
6 the consumers because, in his opinion, consumers do not assign any value to a claim of  
7 no artificial flavors, and the few who do would be willing to visit a website for more  
8 information. Neither *Littlejohn* nor the Keivetz opinion assist Plaintiffs.

9 In *Littlejohn*, the Court of Appeals affirmed a consumer class action settlement  
10 where the class members received only injunctive relief. The case involved a similar  
11 claim as this action. The plaintiff alleged a representation that SweetTARTS candy  
12 contained "no artificial flavors" was false and misleading because the candy contained dl  
13 malic acid. *Id.* at 492. The same counsel who represents Plaintiffs here settled *Littlejohn*  
14 for \$272,000 in attorneys' fees and injunctive relief requiring the defendant "*to remove*  
15 *the phrase 'no artificial flavors' from SweetTARTS packages and to identify dl malic*  
16 *acid as an ingredient.*" *Id.* (emphasis added). The court found the settlement adequate  
17 because "modification of SweetTARTS packaging and advertising adequately addresses  
18 the very claims raised in Plaintiff's Complaint, providing value to the Class." *Id.* at 493.  
19 By contrast, Defendants here have not agreed to remove the allegedly misleading  
20 statements but propose only to embellish them with an asterisk.

21 *Littlejohn* is consistent with relevant California law. Under California consumer  
22 protection statutes alleged in the amended complaint, an asterisk would not alleviate the  
23 misleading nature of false representations. *See Williams v. Gerber Prods. Co.*, 552 F.3d  
24 934, 939 (9th Cir. 2008) ("We disagree with the district court that reasonable consumers  
25 should be expected to look beyond misleading representations on the front of the box to  
26 discover the truth from the ingredient list in small print on the side of the box," even  
27 when the ingredient list complies with FDA regulations.) Accordingly, Keivetz'

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1 declaration notwithstanding, the proposed injunctive relief provides very little value to  
2 the class, if any.

3 Although Plaintiffs' counsel asserts that the settlement provides "exceptional  
4 results" (Marron Dec. at 4), Plaintiffs provide no discussion of the weaknesses in their  
5 case to justify the extent of compromise reflected in the Settlement Agreement. The  
6 counsel notes that settlement was reached after discovery and provides a wholly generic  
7 explanation -- the uncertainty and delay inherent in litigation. (Marron Dec. at 4 ("I  
8 conclude that the Settlement provides exceptional results for the Class while sparing the  
9 Class from the uncertainties of continued and protracted litigation.").)

10 Defendants filed two expert declarations to argue weaknesses in Plaintiffs' case --  
11 reports by Dolf DeRovira, B.S., a highly experienced flavor chemist, and Marianne  
12 Gillette, M.S., a food scientist with a high level of expertise in sensory science. (Non-  
13 Opp'n at 6-9 & Exs. B (Expert Dec. of Dolf DeRovira ("DeRovira Dec.")), C (Expert  
14 Dec. of Marianne Gillette ("Gillette Dec.")).)<sup>5</sup>

15 DeRovira opined that malic acid is not a flavor in part because in 40 years none of  
16 his clients has "requested a malic acid flavor." (DeRovira Dec. at 6.) More specifically,  
17 DeRovira relied on the food industry definition of "flavor," which is distinct from "taste."  
18 (*Id.* at 6, 9-12.) According to this definition a taste is sensed only on the tongue and is  
19 limited to five taste sensations – salty, sweet, bitter, sour, and umami, while flavor  
20 includes an aroma which is sensed in the nose. He reasoned that although malic acid has  
21 a sour taste, it is not a flavor because it lacks aroma. He conceded that malic acid, due to  
22 its sour taste, is sometimes used as a flavor enhancer. (*Id.* at 2.) DeRovira's opinion that  
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25 <sup>5</sup> The expert reports were filed in partially redacted form. Defendants' motion to  
26 seal was denied indicating that the unredacted versions of the reports, which had been  
27 lodged to facilitate the court's review of the motion to seal, would not be considered on  
28 the merits of Defendants' Non-Opposition. (*See* ECF no. 49.) Although Defendants  
were granted leave to renew their motion to make the showing necessary for sealing (*see*  
*id.*), they have not done so.

1 malic acid was not used a flavor in General Mills' Scooby Doo Snacks is based on the  
2 industry definition of "flavor" and Gillette's report, discussed below. (*Id.* at 9, 12.)

3 Gillette conducted sensory testing to determine the flavor impact of malic acid as  
4 formulated in General Mills fruit flavored snacks. (Gillette Dec. at 2.) After testing she  
5 opined that malic acid "does not impart or reinforce a characterizing flavor in the cherry  
6 and grape flavored snacks." (*Id.* at 16-24) She did not test any other flavors of the  
7 relevant products. (*See id.*) Based on the industry definition of "flavor," which requires  
8 aroma, she opined that malic acid does not function as a flavor in the fruit flavored  
9 snacks. (*Id.* at 2, 24.) Like DeRovira, she allowed that malic acid imparts "a tart  
10 sourness," "a basic taste," and can be used as a flavor enhancing ingredient. (*Id.* at 24-  
11 25.)

12 Plaintiffs designated Dr. Laszlo Somogyi as an expert who opined that malic acid  
13 is used as a flavoring ingredient in the products at issue. (Marron Dec. at 2.) Plaintiffs  
14 provided no further information about these opinions or why they would or would not  
15 support their' case.

16 As relevant to California consumer protection claims alleged in the amended  
17 complaint, the representations on General Mills' fruit snacks that they have "no artificial  
18 flavors" and are "naturally flavored," are considered misleading if they had the "capacity,  
19 likelihood, or tendency to deceive or confuse" the "reasonable consumer." *Williams*,  
20 552 F.3d at 938. Neither Gillette nor DeRovira opined that a reasonable consumer would  
21 interpret "no artificial flavors" using the food industry definition rather than a lay  
22 definition of "flavor." They conceded that malic acid imparts a sour taste and can be  
23 used as a flavor enhancer. On this record, the court cannot conclude that Plaintiffs' case  
24 was so weak as to justify accepting the terms of the Settlement Agreement. The court  
25 therefore cannot find it is likely ultimately to approve the settlement as fair, reasonable,  
26 and adequate.

27 Finally, for the foregoing reasons, the court also cannot conclude that Plaintiffs and  
28 their counsel adequately represented the interests of the class either for purposes of

1 settlement or class certification. *See* Fed. R. Civ. Proc. 23(a)(4), (e)(2)(A). Accordingly,  
2 Plaintiffs' Preliminary Approval Motion is denied.

3 **B. Motion to Intervene**

4 Approximately a month after Plaintiffs filed their Preliminary Approval Motion,  
5 David Hayes filed a motion to intervene. Hayes is a named plaintiff in a related putative  
6 class action pending in the Northern District of Illinois, *Hayes v. General Mills et al.*,  
7 case no. 19cv5626 ("Hayes Action"). It is undisputed that his action asserts essentially  
8 the same claims as the action pending in this court. He intends to "protect the class  
9 members from a facially unfair settlement," request consolidation of the actions, and  
10 move for appointment of interim lead counsel." (ECF no. 52-1 ("Mot. to Intervene") at  
11 3.) Plaintiffs opposed the motion claiming that Hayes filed a "copy-cat case." (ECF no.  
12 53 ("Opp'n") at 1.)

13 "On timely motion, the court may permit anyone to intervene who: [¶] has a claim  
14 or defense that shares with the main action a common question of law or fact." Fed. R.  
15 Civ. Proc. 24(b)(1). "In exercising its discretion, the court must consider whether the  
16 intervention will unduly delay or prejudice the adjudication of the original parties'  
17 rights." *Id.* 24(b)(3). Accordingly,

18 An applicant who seeks permissive intervention must prove that it meets  
19 three threshold requirements: (1) it shares a common question of law or fact  
20 with the main action; (2) its motion is timely; and (3) the court has an  
21 independent basis for jurisdiction over the applicant's claims. Even if an  
22 applicant satisfies those threshold requirements, the district court has  
23 discretion to deny permissive intervention. In exercising its discretion, the  
24 district court must consider whether intervention will unduly delay the main  
25 action or will unfairly prejudice the existing parties.

24 *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998).<sup>6</sup> Although the movant bears  
25 the burden of showing that he meets these requirements, they are broadly interpreted in

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28 <sup>6</sup> Hayes initially argued for intervention as of right under Rule 24(a). Nevertheless,  
in their opposition Plaintiffs thoroughly briefed permissive intervention under Rule 24(b).

1 favor of intervention. *Smith v. Los Angeles Unif. Sch. Dist.*, 830 F.3d 843, 853 (9th Cir.  
2 2016).

3 The Hayes Action widely overlaps with this action. (Cf. ECF no. 20, “Hayes  
4 FAC,” filed in Hayes Action 10/8/2019 with FAC filed in this action 8/27/20; *see also*  
5 Opp’n at 1 (“copy-cat case”).) The actions name the same defendants, relate to  
6 essentially the same products manufactured by General Mills, are based on the same false  
7 advertising contention, seek monetary and injunctive relief, and allege a putative  
8 nationwide class. The actions therefore share common questions of law and fact.

9 This court can exercise federal jurisdiction over Hayes’ claims independently of  
10 Plaintiffs’ pending action. Hayes is an Illinois citizen. He alleges that Defendants are  
11 citizens of Delaware and Minnesota. (Hayes FAC at 2.) He also alleges that the matter in  
12 controversy exceeds \$ 5 million as required by 28 U.S.C. § 1332(d). (*Id.*)

13 Plaintiffs claim the motion should be denied as untimely because Hayes knew  
14 about this action over a year ago. (Opp’n at 3.)

15 While the length of time that has passed since a suit was filed is not, in and  
16 of itself, determinative of timeliness, a party seeking to intervene must act as  
17 soon as he knows or has reason to know that his interests might be adversely  
18 affected by the outcome of the litigation.

19 *Cal. Dept. of Toxic Substances Control v. Comm. Realty Projects, Inc.*, 309 F.3d 1113,  
20 1120 (9th Cir. 2002). Accordingly, Plaintiffs’ argument is not determinative of  
21 timeliness.

22 Hayes argues his motion is timely because it was triggered by Plaintiffs’  
23 settlement. Plaintiffs do not dispute Hayes’ explanation for the timing of his decision to  
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26 (Opp’n at 9-10.) In the reply brief, Hayes argued for permissive intervention as an  
27 alternative to his request for intervention as of right. (ECF no. 55 (“Reply”) at 9-10.)  
28 Because the motion is granted under Rule 24(b), the court need not consider whether it  
could also be granted under Rule 24(a).

1 intervene. (*See* Opp’n at 3 (citing Mot. to Intervene at 2 n.1).) Defendants had made  
2 multiple attempts to settle with Hayes individually. (Mot. to Intervene at 2.) When he  
3 insisted that the settlement include class-wide relief, Defendants redirected their  
4 settlement efforts to this action. (*Id.* at 2-3.) Hayes’ counsel Adrian R. Bacon held  
5 multiple calls with Ron Marron, Plaintiffs’ counsel in this action. (*Id.* at 2 n.1.) Marron  
6 does not deny he told Bacon that Defendants wanted to settle for injunctive relief only,  
7 and “wanted to engage in a reverse auction by pitting both pending lawsuits’ counsel  
8 against one another in a race to the bottom.” (*Id.*) Bacon urged Marron to resist because  
9 any such settlement “would be detrimental to class members.” (*Id.*) “Mr. Marron  
10 assured him he would not do so under any circumstances and would not settle without  
11 including Hayes’ counsel in the discussion.” (*Id.*) However, Marron “apparently did not  
12 keep his word.” (*Id.*)

13         As is evident from the pending Preliminary Approval Motion, Marron agreed to a  
14 class-wide settlement for injunctive relief only. Hayes contends the proposed settlement  
15 “fails to protect the significant interest of the Class in obtaining monetary relief.” (Mot.  
16 to Intervene at 3.) Because of the overlap in the claims and class membership there is a  
17 significant possibility that the settlement of this action would release the claims asserted  
18 in the Hayes Action. Based on Marron’s prior assurances that he would not settle for  
19 injunctive relief only, it was reasonable for Hayes to forego intervention until Plaintiffs  
20 filed their Preliminary Approval Motion.

21         Plaintiffs’ Preliminary Approval Motion was filed September 4, 2020. Hayes filed  
22 his Motion to Intervene on October 16, 2020. Because it was the Preliminary Approval  
23 Motion that put Hayes on notice that his interests and the interests of the class might be  
24 adversely affected, his Motion to Intervene was timely filed.

25         Plaintiffs’ argument that the settlement would not adversely affect Hayes’ or class  
26 members’ interests because they could opt out or object, *see* Fed. R. Civ. Proc.  
27 23(c)(2)(B)(v)-(vi), (e)(5), is rejected. As discussed in the context of the Preliminary  
28 Approval Motion, the proposed settlement falls short of the likelihood it could be found

1 fair, reasonable, and adequate, and raises questions of adequacy of representation. (*Cf.*  
2 *Opp'n* at 8.) Accordingly, the proposed settlement would adversely affect consumer  
3 interests implicated both in the Hayes Action as well as in this action.

4 Finally, Plaintiffs maintain that granting the Motion to Intervene after this action  
5 had settled would unduly delay and prejudice the adjudication of the parties' rights in this  
6 action. This argument lost its potency with the denial of Plaintiffs' Preliminary Approval  
7 Motion. Furthermore, this action is not significantly more advanced than the Hayes  
8 Action. The complaints have survived pleading challenges, no class certification or  
9 summary judgment motions have been filed, and neither Plaintiffs nor Hayes have been  
10 deposed. To the extent discovery is more advanced in this action, it is equally relevant to  
11 the Hayes Action. (*See* Hayes Action current docket sheet.) Accordingly, Hayes'  
12 intervention would not cause undue delay or prejudice to the adjudication of the parties'  
13 rights in this action. The Motion to Intervene is granted.

### 14 **III. CONCLUSION**

15 For the reasons stated above, it is ordered as follows:

- 16 1. Plaintiffs' motion for preliminary approval of class action settlement (ECF  
17 no. 45) is denied.
- 18 2. Motion filed by David Hayes to intervene in this action (ECF no. 52) is  
19 granted pursuant to Federal Rule of Civil Procedure 24(b).
- 20 3. The parties, including Hayes, shall forthwith contact the chambers of  
21 Magistrate Judge Barbara L. Major to schedule a case management conference.
- 22 4. Any further motion for preliminary class action settlement approval shall be  
23 filed no later than July 7, 2021.

24 **IT IS SO ORDERED.**

25 Dated: June 4, 2021

26   
27 Hon. M. James Lorenz  
28 United States District Judge