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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DAVID SWARTZ, an individual, on behalf
of himself, the general public, and those
similarly situated,

Plaintiff,

v.

DAVE’S KILLER BREAD, INC. and
FLOWERS FOODS, INC.,

Defendants.

CASE NO. 4:21-cv-10053-YGR

**PLAINTIFF’S NOTICE OF MOTION AND
MOTION FOR APPROVAL OF
PROPOSED CLASS NOTICE AND PLAN
OF NOTICE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

DATE: March 11, 2024
TIME: 2:00 p.m.
CTRM: 1, 4th Floor

Hon. Yvonne Gonzalez Rogers

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NOTICE OF MOTION AND MOTION

On March 11, 2025, at 2:00 p.m., in Courtroom number 1, on the 4th floor of the United States District Court for the Northern District of California (Oakland Division), Plaintiff David Swartz will, and hereby does, move for the following:

1. Approval of the proposed Notice of Pendency of Class Action, attached to the Declaration of Seth A. Safier in Support of Motion for Approval of Class Notice (“Safier Decl.”) as Exhibit A;
2. Approval of Plaintiff’s proposed plan of notice; and
3. Dissemination of the Notice of Pendency of Class Action no later than thirty (30) days following the Court’s approval of the Notice and Notice Plan.

This motion is based on the following memorandum of points and authorities, the complete records and files in this action, and all matters of which the Court may take notice.

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I. INTRODUCTION

On September 20, 2024, this Court certified the following class:

All persons in the State of California who purchased the Products between December 29, 2017 and September 5, 2023.

ECF 139 at 18. The Products are defined as those Products that “made a front label protein claim and fail to include the statement of the corrected amount of protein per serving expressed as the percent of daily value in the Nutrition Facts Panel during the class period.” *Id.* at 5, n. 5. These Products are identified in Exhibit A to the Court’s September 20, 2024 Order. *Id.*, Ex. A. The Court appointed David Swartz as class representative. *Id.* at 5.

The parties have met and conferred and agree on the Notice Plan attached as Exhibit A to the declaration of Seth Safier filed herewith. Defendants will either oppose or file a statement of non-opposition by the deadline under the Local Rules.

II. LEGAL STANDARD

Rule 23(c)(2) provides that “[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2). The rule continues:

The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

1 *Id.*

2 The Federal Judicial Center has issued guidelines recommending that notice reach at least
3 70% of class members. *See* Notice Checklist and Plain Language Guide (2010) (“Judges’ Class
4 Action Notice and Claims Process Checklist and Plain Language Guide”), at 1.

5 **III. PROPOSED FORMS AND METHODS OF CLASS NOTICE**

6 **A. Notice Administrator and Summary of Plan**

7 Counsel has solicited a proposal from the well-known class action administration firm
8 Verita Group, LLC (“Verita” or “Administrator”). Verita has designed a plan that will reach at least
9 70% of class members, at a frequency of 3.3 times each. *See* Declaration of Carla A. Peak, filed
10 herewith, ¶ 23.

11 The notice plan will include construction of a notice website where class members can
12 obtain information about the case and fill out a simple form to exclude themselves from the class.
13 The settlement website will include the detailed notice substantially in the form of Exhibit A, which
14 covers all issues set forth in Rule 23(c)(2). The website will include important court documents,
15 dates, FAQs, forms, and other pertinent case information. Class members will have the ability to
16 view and print the Notice and other important documents.

17 In addition, the notice administrator will (1) publish notice in the form of online banner
18 advertisements and use social media advertisements on Facebook and Instagram that directs class
19 members to the notice website, and (2) publish notice in print in the East Bay Times. This plan for
20 notice is typical in consumer class actions uses standard best practices. Peak Decl. ¶¶ 14–19. It is
21 described in more detail below and in the attached declaration of Carla A. Peak.

22 **i. Online Notice.**

23 The notice administrator will publish online notice in the form of Exhibit B, in at least
24 7,550,000 digital impressions over thirty days on a variety of websites through the one or more ad
25 exchanges and over various websites and the social media platforms Facebook and Instagram. All
26 digital media notices will include an embedded link to the case-specific website.

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1 **ii. Print Notice.**

2 Verita will cause a summary notice in the form of Exhibit A to be published once a week
3 for four consecutive weeks in the *East Bay Times*. The *East Bay Times* is the largest daily
4 newspaper covering Contra Costa and Alameda counties. Peak Decl. ¶ 19.

5 **B. Proposed Opt-Out Deadline**

6 Verita estimates that it will be able to begin executing the notice plan within 21 days of
7 receiving approval for the plan. Accordingly, Plaintiff proposes that the Court set a “Notice Date,”
8 or date on which the website will be live, 25 days from the order approving the Notice Plan. Plaintiff
9 proposes allowing Class Members 35 days from the initial Notice Date to opt out of the class.
10 Accordingly, the parties estimate that the opt-out deadline will be at least 60 days after the Court’s
11 approval of the Notice Plan. The proposed content of an online version of the opt-out form and a
12 printable version for the opt-out form are submitted with this motion. Safier Decl., Exs. D & E.

13 **C. Costs.**

14 Class counsel will bear the costs of notice as a litigation expense. In the event of a settlement
15 or judgment in favor of Plaintiff or the class, class counsel will seek reimbursement of these costs.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Plaintiff respectfully requests the Court approve the proposed
18 Notice Plan.

19 Dated: February 3, 2025

20 **GUTRIDE SAFIER LLP**

21 /s/Patrick J. Branson/s/

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23 Marie McCrary, Esq.

24 Hayley Reynolds, Esq.

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