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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BEVERLY BECK-ELLMAN, JOHN
AND DENISE BIELIS, and JOHN AND
SANDY MAHOY, individually and on
behalf of all others similarly situated,,

Plaintiffs,

vs.

KAZ USA, INC.; and
KAZ, INC.,

Defendants.

CASE NO. 3:10-CV-02134-H-DHB
**ORDER PRELIMINARILY
APPROVING SETTLEMENT**

On December 24, 2012, Plaintiff Beverly Beck-Ellman (“Plaintiff”), on behalf of herself and the certified class (together “Plaintiffs”) and Defendants Kaz USA, Inc. and Kaz, Inc. (together “Kaz” or “Defendants”) filed a joint motion for preliminary approval of a class settlement. (Doc. Nos. 83, 84.) The Court held a hearing on the motion on January 7, 2013. Stuart Eppsteiner and Andrew Kubik appeared on behalf of Plaintiffs. Soojin Kang appeared on behalf of Defendants. For the reasons set forth below, the Court grants the parties’ motion.

Background

A. Factual and Procedural History

On October 13, 2010, Plaintiffs Beverly Beck-Ellman, Sandy and John Mahoy, and John and Denise Bielis filed their complaint for various claims on behalf of consumers of heating pads sold or distributed by defendants. (Doc. No. 1 (“Compl.”)) California Plaintiff

1 Beck-Ellman, for herself and those similarly situated, brought claims under California’s Unfair
2 Competition Law (“UCL”), Cal. Bus. & Prof. Code §§ 17200, et seq., False Advertising Law
3 (“FAL”), id. §§ 17500, et seq., and Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code
4 §§ 1750, et seq., and asserted claims for breach of express and implied warranties. (Id.)
5 Pennsylvania Plaintiffs John and Sandy Mahoy, for themselves and those similarly situated,
6 brought claims for express and implied warranty pursuant to 13 Pa. Cons. Stat. §§ 2313 and
7 2314, respectively and for unfair, deceptive and unlawful trade practices under 73 Pa. Const.
8 St. § 201-1, et seq. (Id.) Michigan Plaintiffs John and Denise Bielis, for themselves and those
9 similarly situated, brought claims under the Michigan Consumer Protection Act, M.C.L.A. §
10 445.901 et seq. and for breach of express and implied warranty under M.C.L.A. §§ 440.2313
11 and 440.2314, respectively. (Id.) All plaintiffs brought claims under the Magnusson-Moss
12 Warranty Act, 15 U.S.C. §§ 2301, et seq., 15 U.S.C.A. 3201, et seq., and claims for unjust
13 enrichment. (Id.) On September 9, 2011, Michigan Plaintiffs John and Denise Bielis were
14 voluntarily dismissed without prejudice. (Doc. No. 28.)

15 The case was thoroughly litigated. On July 20, 2012, Plaintiffs moved for class
16 certification. (Doc. Nos. 42, 43.) Defendants opposed certification. (Doc. No. 56.) Following
17 briefing and oral argument held on October 4, 2012, the Court granted Plaintiff Beck-Ellman’s
18 motion for class certification of her FAL, CLRA, UCL, Song-Beverly Act, Magnusson-Moss
19 Consumer Warranty Act, and unjust enrichment claims, certifying a class of “[a]ll residents
20 of California who purchased Kaz-manufactured electric heating pads bearing the words "Kaz"
21 and/or "SoftHeat" and/or "Smart/Heat" and/or "Dunlap" and/or the number 1-800-477-0457
22 on the packaging or heating pads themselves for primarily personal, family, or household
23 purposes from October 13, 2006, through the date of class notice.” (Doc. No. 70.) The parties
24 filed a joint motion for preliminary approval of a class settlement (“Settlement Agreement”)
25 involving this Class. (See Eppsteiner Decl. Ex. A, Settlement Agreement.)¹

26
27 ¹ The parties request that the Court modify the class definition in order to include
28 heating pads distributed, rather than only manufactured, by Kaz. (Doc. No. 83-1 at 16-17.)
The parties additionally seek to modify the relevant time period to include those who

1 The parties participated in three full-day mediation sessions with Judge Leo Papas and
2 Magistrate Judge David H. Bartick. (Doc. No. 83-1 at 4.) The parties additionally participated
3 in two settlement conferences with Judge Bartick and, in a subsequent teleconference with
4 Judge Bartick, announced that they had reached a settlement. (Doc. Nos. 74-76, 78.) On or
5 about November 30, 2012, the parties executed a Settlement Term Sheet. Since then, the
6 parties have fully documented the settlement in a proposed settlement agreement (“Settlement”
7 or “Settlement Agreement”),)

8 **B. The Settlement**

9 **1. Monetary Relief**

10 The proposed Settlement Agreement provides as follows: Defendants will pay a
11 guaranteed minimum of \$1,450,000 and a maximum of \$2,700,000 to be distributed to Class
12 members who submit valid and timely claims. (Settlement Agreement ¶ 8.3) If an insufficient
13 number of valid and timely claims are submitted and paid to exhaust the minimum amount of
14 \$1,450,000, then the remaining funds, subject to the Court’s approval, will be distributed
15 among four cy pres recipients: Consumers Union (“CU”), AARP Foundation (“AARP”), the
16 Better Business Bureau Center (“BBB”), and the Consumer Federation of California (“CFC”).
17 (Id. ¶¶ 9.3, 9.6.)

18 Class members, individuals who purchased Kaz heating pads between October 13, 2006
19 and the date of the Court’s order granting preliminary approval (the “Class Period”), may each
20 submit one claim. Class members have the right to object to and or opt out of the settlement
21 if they submit timely, written requests. (Id. ¶¶ 7.1, 7.2.) Each class member who submits a
22 timely and valid claim is expected to be paid between \$10 and \$20. (Id. ¶ 9.3.) If fewer than
23 145,000 timely and valid claims are received, then each Class member claimant will be paid
24 up to \$20. (Id. ¶ 9.3(i).) If fewer than 72,500 timely and valid claims are received, then the
25 difference between the total amount to be paid to Class member claimants and \$1,450,000, will

26 _____
27 purchased Kaz heating pads from October 13, 2006, through the date the Court issues this
28 Order preliminarily approving the Settlement. (Id.) Pursuant to the Court’s authority under
Rule 23(c)(1)(C), the Court grants the parties’ request and modifies the class definition.

1 be paid by Kaz to the approved cy pres recipient(s). (Id.) If between 145,000 to 270,000
2 timely and valid claims are received, then each claimant will receive \$10. (Id. ¶ 9.3(ii).) If
3 more than 270,000 timely and valid claims are received, then each claimant's share of the
4 Settlement payments will be decreased pro rata so that the total amount paid to claimants does
5 not exceed \$2,700,000. (Id.)

6 The costs of giving notice to Class members and to administer this Settlement will be
7 paid by Defendants and are in addition to the amounts designated to be paid to Class members;
8 that is, the cost to give notice and administer the Settlement does not reduce the Class member
9 benefits and payments described above. (Id. ¶ 8.3.1.)

10 The parties propose that the cy pres recipients receive their distributions as follows:
11 The Consumers Union, the Better Business Bureau and AARP Foundation will each receive
12 27% of the cy pres distribution. (Id. ¶¶ 9.6, 9.8.) The Consumer Federation of California will
13 receive the other 19%. (Id.) The maximum amount given to CFC will be \$125,000. (Id.) If
14 19% is more than \$125,000, the Consumers Union, Better Business Bureau and AARP
15 Foundation will receive the difference in equal amounts. (Id.)

16 **2. Injunctive Relief**

17 Although pursuant to the terms of the Settlement Agreement Kaz denies that its
18 packaging was in any way deceptive or misleading and there has been no finding on the issue,
19 the Settlement Agreement nonetheless provides for injunctive relief relating to Plaintiffs'
20 claims. (Settlement Agreement ¶¶ 3.4, 8.2.) First, Kaz packaging will not feature models
21 whose eyes are closed and who are in a prone or reclining position. (Id. ¶ 8.2(i).) Second, any
22 packaging description of a heating pad with an automatic shut-off feature will be qualified by
23 words that describe it as being time-based rather than heat or temperature-based. (Id. ¶
24 8.2(iii).) Kaz heating pads with an automatic shut-off feature will be described as "60 minute
25 auto-off" or its equivalent, or, if the time length is different or variable, the description will
26 make equally clear that the "Auto shut off" feature of Kaz heating pads is a time-, not
27 temperature-based function. (Id.) Third, Kaz will include the following warning on the side
28 panel of the heating pad box:

1 WARNING: During use, do not sit on or against, or lie on, sleep with, fold or crush the
2 pad. Not for use with infants. Do not use with ointments or salves. Check skin
3 frequently. ADDITIONAL IMPORTANT SAFETY WARNINGS INSIDE BOX.

4 (Id. ¶ 8.2(ii).)

5 **3. Costs of Notice and Administration, Attorneys' Fees, and Incentive Award**

6 Defendants have also agreed to pay the costs of providing notice to the Class and
7 administering the consideration and payment of claims. (Settlement Agreement ¶ 8.3.1.)
8 Defendants have agreed to pay up to \$500,000 for the combination of these services. (Id.)
9 Defendants will retain any residual amount if the cost of notice and administration is less than
10 \$500,000. (Id.) Subject to approval by the Court, and separate and apart from the sums Kaz
11 has agreed to pay to Class members and for administration of the Settlement, Kaz also has
12 agreed not to oppose or object to an incentive award of up to \$20,000 for Plaintiff
13 Beck-Ellman. (Id. ¶ 8.5.) Also subject to the Court's consideration and approval, Kaz has
14 agreed to not oppose or object to an application to the Court by Class Counsel for an award of
15 attorneys' fees of not more than \$1,500,000 and for reimbursement of litigation costs and
16 expenses of up to \$350,000. (Id. ¶ 8.4.)

17 **4. Proposed Notice Plan**

18 The parties have developed a Notice Plan with the assistance of Kurtzman Carson
19 Consultants Class Action Services, LLC ("KCC" or "Settlement Administrator"), a firm that
20 specializes in developing class action notice plans. (Doc. No. 83-7, Declaration of Gina M.
21 Intrepido-Bowden ("Intrepido-Bowden Decl."), Ex. 1 ("Notice Plan.")). The Notice Plan
22 includes a Publication Notice, a Website Notice, and a potential Mailed Notice. (Notice Plan,
23 Attach. B.)

24 The Publication Notice is designed to provide potential Class members with information
25 about the Settlement and their rights, in easy-to-comprehend language. (Id.) The Publication
26 Notice contains a general description of the lawsuit, the Settlement relief, how a Claim can be
27 filed, a general description of Class members' legal rights, the Class members' right to opt-out
28 of the lawsuit and Settlement, their right to, if they do not opt-out, object to a term or condition

1 of the Settlement, their right to retain their own counsel and their right to address the Court at
2 the fairness hearing. (Settlement Agreement Ex. 2B.) The Publication Notice directs
3 consumers to the Settlement Website, provides a toll-free number, information on how to
4 obtain a Claim Form, and the Claim submission deadline. (Id.) The proposed Notice Plan has
5 been specially developed to cause Class members to see the Publication Notice or see an
6 advertisement that directs them to the Settlement Website. KCC identified that the Class
7 members belong to a demographic group known as "Pain Relief Users." (Intrepido-Bowden
8 Decl. ¶¶ 17.) The Heating Pads are considered a Pain Relief product. The publications that
9 KCC's Notice Plan proposes to use are publications and websites whose viewers and readers
10 include a high percentage of Pain Relief product users. (Id. ¶¶ 17-18.) The Publication Notice
11 will be published in the California editions of Better Homes & Gardens, Parade, People,
12 Reader's Digest and USA Weekend; 16 Spanish language newspapers; and as an internet
13 banner notice on the 24/7 Network, which allows access to over 4,000 premium websites,
14 including MSNBC, Monster, Match.com and the Weather Channel. (Intrepido-Bowden Decl.
15 ¶¶ 25-30.) As described in the KCC Notice Plan and Declaration of Gina Intrepido-Bowden,
16 these publications were selected to increase the likelihood that the Publication Notice will be
17 seen by Class members. (Id. ¶¶ 18-20.) KCC projects that the proposed Notice Plan will result
18 in the Publication Notice being seen by at least 70% of the Class members. (Id. ¶ 33.)

19 If the Court so orders, the Settlement Administrator will send by first class mail, postage
20 pre-paid, a copy of the Class Notice and Claim Form approved by the Court to (i) each
21 individual who purchased a heating pad through Kaz.com using a shipping address in
22 California between October 13, 2006 and the date of entry of the Preliminary Approval Order
23 and (ii) individuals who, based on call center records (and MedWatch reports if disclosure is
24 permitted by the FDA and applicable law), appear to have purchased a Kaz heating pad in
25 California between October 13, 2006 and the date of entry of the Preliminary Approval Order.
26 (Settlement Agreement ¶ 6.1.)

27 Finally, the Settlement Administrator will establish a Settlement Website for the
28 purposes of disseminating the Class Notice, the Claim Form, allowing for electronic

1 submission of Claim Forms, the Settlement Agreement, information relating to filing a Claim,
2 opting out of the Settlement, objecting to the Settlement, deadlines relating to the Settlement,
3 pleadings, and other information relevant to Class members. (Id. ¶ 6.2.1.) The Settlement
4 Administrator will have the Settlement Website functioning and the internet advertising
5 underway no later than the date on which it mails notice to the known addresses of Class
6 members. (Id.) The Settlement Website will have an electronic Claim Form, in Spanish and
7 English, available for printing and mailed submission or on-line submission. (Id.) The
8 Settlement Website will have Spanish iterations of its Homepage, Important Dates &
9 Deadlines page, and FAQ page, as well as a downloadable Spanish language Settlement
10 Notice. (Id.)

11 The Class Notices contain detailed information about the lawsuit, the Settlement
12 Agreement, the release of liability Class members will provide Kaz, and how to opt-out, object
13 and exercise other rights under the Settlement. (Id. Exs. 2A, 2B.) The Class Notice directs
14 individuals to the Settlement Website for purposes of obtaining an electronic Claim Form, and
15 provides instructions for contacting Class Counsel and the Settlement Administrator in order
16 to communicate about the Settlement or obtain a paper Claim Form or the Class Notice in
17 Spanish. (Settlement Agreement ¶ 6.3; Id. Exs. 2A, 2B.) The Class Notice advises that
18 objections to the Settlement will only be considered at the fairness hearing and provides the
19 date and place of the fairness hearing. (Id. ¶ 6.3.) The Settlement Administrator will cause the
20 Class Notice, in the form approved by the Court, to be published to Class members within 75
21 days of entry of the order preliminarily approving the Settlement Agreement. (Id. ¶ 6.2.)

22 **5. Release**

23 If the settlement is approved by the Court, this matter will be dismissed, with prejudice,
24 and Defendants will receive a release of claims as set forth in the Settlement Agreement. (Id.
25 ¶¶ 8.5.1, 11.1, 11.2.) Specifically, Plaintiff and the Class members will release Defendants
26 from any and all claims, actions or causes of action which arise from the allegations in the
27 Complaint or Defendants' marketing and advertising of the heating pads at issue in the
28 Complaint prior to the effective date of the Settlement. (Id. ¶¶ 2.25, 11.1, 11.2.) The released

1 claims specifically exclude any claims for personal injury or property damage caused by Kaz
2 heating pads. (Id. ¶ 2.25.)

3 Discussion

4 **A. The Settlement**

5 Federal Rule of Civil Procedure requires the Court to determine whether a proposed
6 class action settlement is “fair, adequate and reasonable,” and not a product of collusion.
7 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). To make this determination,
8 the Court must consider a number of factors, including:

9 [1] the strength of plaintiffs' case; [2] the risk, expense, complexity, and likely duration
10 of further litigation; [3] the risk of maintaining class action status throughout the trial;
11 [4] the amount offered in settlement; [5] the extent of discovery completed, and the
12 stage of the proceedings; [6] the experience and views of counsel; [7] the presence of
13 a governmental participant; and [8] the reaction of the class members to the proposed
14 settlement.

15 Staton v. Boeing, 327 F.3d 938, 959 (9th Cir. 2003) (citations omitted). In determining
16 whether a proposed settlement should be approved, the Ninth Circuit has a “strong judicial
17 policy that favors settlement, particularly where complex class action litigation is concerned.”
18 In re Heritage Bond Litigation, 2005 WL 1594403, at *2 (C.D. Cal. June 10, 2005) (citing
19 Class Plaintiffs v. Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992)).

20 Court approval involves a two-step process in which the Court first determines whether
21 a proposed class action settlement deserves preliminary approval and then, after notice is given
22 to class members, whether final approval is warranted. Federal Judicial Center, Manual for
23 Complex Litigation § 21.632 (4th ed. 2004). Given that some of the noted factors cannot be
24 fully assessed until the Court conducts the final approval hearing, “a full fairness analysis is
25 unnecessary at this stage.” Alberto v. GMRI, Inc., 252 F.R.D. 652, 665 (E.D. Cal. 2008)
26 (citation omitted). Rather, at the preliminary approval stage the Court need only review the
27 parties’ proposed settlement to determine whether it is within the permissible “range of
28 possible judicial approval” and, thus, whether the notice to the class and the scheduling of the
formal fairness hearing is appropriate. See William B. Rubenstein, et. al., 2 Newberg on Class
Actions § 11:25 (4th ed. & Supp. 2002) (citations omitted); see also Wright v. Linkus

1 Enterprises, Inc., 259 F.R.D. 468, 473 (E.D. Cal. 2009); Alberto, 252 F.R.D. at 666.

2 The Ninth Circuit favors deference to the “private consensual decision of the
3 [settling] parties,” particularly where the parties are represented by experienced counsel and
4 negotiation has been facilitated by a neutral party—in this instance, a private mediator and a
5 magistrate judge. See Rodriguez v. West Publishing Corp., 563 F.3d 948, 965 (9th Cir. 2009).
6 “In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range
7 for settlements by considering the likelihood of a plaintiff’s or defense verdict, the potential
8 recovery, and the chances of obtaining it, discounted to present value.” Id.

9 After reviewing the settlement for overall fairness according to the above factors, the
10 Court finds that preliminary approval is appropriate. The disputed factual and legal issues
11 would be costly and complex to resolve at trial. Plaintiff may have a meritorious claim, but
12 both parties have already expended significant time, effort, and resources supporting their
13 positions, and would continue to do so should the settlement fail to get approval. (Doc. No.
14 83-1 at 3-4, 12-14.) Both parties have considered the uncertainty and risk of the outcome of
15 future litigation, the burdens of proof for liability, as well as the general difficulties and delays
16 of litigation. (Doc. No. 83-1 at 12-14; Eppsteiner Decl. ¶ 39.) These considerations led the
17 parties to conclude that a timely settlement would be best for all involved parties. See Linney
18 v. Cellular Alaska P’ship, 151 F.3d 1234, 1242 (9th Cir. 1998) (“[I]t is the very uncertainty of
19 outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual
20 settlement.”).

21 The proposed settlement is the result of lengthy, arm’s-length negotiations, including
22 several mediation sessions and settlement conferences over two years of litigation, between
23 counsel on both sides with extensive experience in employment class action litigation. (Doc.
24 No. 83-1 at 4; Eppsteiner Decl. ¶¶ 4-30.) The parties have conducted significant discovery and
25 analysis of data, including comprehensive depositions, numerous document production
26 requests and interrogatories, and retainer of qualified experts regarding heating pads,
27 advertising, warnings, and damages/restitution. (Doc. No. 83-1 at 3; Eppsteiner Decl. ¶¶ 31-
28 34.) The settlement represents a substantial recovery for the class, and a well-crafted

1 compromise of the divergent positions of the parties in relation to penalties. In addition, there
2 is no evidence that the settlement, the award of attorney’s fees, the enhancement award for
3 Plaintiff, or the cy pres distribution was the result of collusion between the parties.

4 Further, the Court preliminarily approves the parties’ choice in cy pres recipients. “Cy
5 pres distributions must account for the nature of the plaintiffs’ lawsuit, the objectives of the
6 underlying statutes, and the interests of the silent class members, including their geographic
7 diversity.” Nachsin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011) “Appropriate cy pres
8 recipients [in UCL and CLRA actions] are . . . organizations dedicated to protecting consumers
9 from, or redressing injuries caused by, false advertising.” Dennis v. Kellogg Co., 697 F.3d
10 858, 866-67 (9th Cir. 2012). Each cy pres recipient has provided a declaration that describes
11 its organization’s work, which demonstrates its dedication to protecting consumers from
12 injuries caused by false advertising. (See Doc. Nos. 83-3, 83-4, 83-5, 83-8.) Accordingly, at
13 this time the CU, AARP, BBB, and CFC all appear to be organizations appropriate to receive
14 cy pres distributions in the settlement of this action.

15 Finally, the plan for distributing the settlement appears sufficiently fair for conditional
16 approval, although a further showing will be needed for final approval. The amount of
17 payment received by each class member is estimated to be between \$10 and \$20, depending
18 on how many timely and valid claims are submitted, based on the purchase price of the heating
19 pads. (Class Settlement ¶ 9.3.) Further, at this stage, the requested attorneys fees of up to \$1.5
20 million and the enhancement to Plaintiff of up to \$20,000—approximately 0.7-1.4% of the
21 settlement amount—appear to be reasonable. See In re Mego Fin. Corp. Sec. Litig., 213 F.3d
22 454, 457, 463 (9th Cir. 2000); Vasquez v. Coast Valley Roofing, Inc., 266 F.R.D. 482, 491
23 (E.D. Cal. 2010) (noting that “[t]he typical range of acceptable attorneys’ fees in the Ninth
24 Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the benchmark”
25 (citing Powers v. Eichen, 229 F.3d 1249, 1256 (9th Cir. 2000))). Accordingly, the Court
26 preliminarily approves the proposed class settlement.

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1 **B. Class Counsel and Class Representative**

2 Traditionally, the choice of counsel has been left to the parties, “whether they sue in
3 their individual capacities or as class representatives.” In re Cavanaugh, 306 F.3d 726, 734
4 (9th Cir. 2002) (citations omitted). In determining whether Plaintiff’s counsel is adequate, a
5 court must consider “(i) the work counsel has done in identifying or investigating potential
6 claims in the action; (ii) counsel's experience in handling class actions, other complex
7 litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the
8 applicable law; and (iv) the resources that counsel will commit to representing the class.” Fed.
9 R Civ. P. 23(g)(1)(A).

10 In the present case, the law firm of Eppsteiner & Fiorica Attorneys, LLP is experienced
11 in serving as class counsel. (See Eppsteiner Decl ¶¶ 4-20.) The Court concludes this law firm
12 is competent to represent the class. Additionally, as noted, Plaintiff Beck-Ellman and other
13 purchasers of Kaz heating pads share the same claims and interest in obtaining relief. (See
14 Doc. No. 71 at 9-10.) Therefore Plaintiff Beck-Ellman remains an appropriate class
15 representative.

16 **C. Nature and Method of Class Notice**

17 The class notice must be “reasonably calculated, under all the circumstances, to apprise
18 interested parties of the pendency of the action and afford them an opportunity to present their
19 objections.” See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In
20 addition, the class notice must satisfy the content requirements of Federal Rule of Civil
21 Procedure 23(c)(2)(B), which provides that the notice must clearly and concisely state in plain,
22 easily understood language:

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

28 Rule 23(e) requires generally the same.

Here, the proposed method for notice to the Class members is comprehensive and
reasonable. The proposed Class Notice, Publication Notice, and Settlement Website are

1 reasonably calculated to inform potential Class members of the Settlement, and are the best
2 practicable methods under the circumstances. This case primarily involves retail purchases
3 from third party stores to consumers; as a result, Defendants do not have contact information
4 for the majority of Class members. The Settlement Website will contain the product name, and
5 to further assist absent Class Members, will also contain photographs of the controller, heating
6 pad box and a close up of the heating pad, increasing the likelihood that Class members will
7 learn that they are entitled to benefits provided by this Settlement. (Settlement Agreement ¶
8 6.2.1.) The Publication Notice will be printed in Better Homes & Gardens, Parade, People,
9 Reader's Digest, USA Weekend, and 16 Spanish language newspapers. (Intrepido-Bowden
10 Decl. ¶¶ 25-28.) The Notice Plan includes 15 million online internet banner ads, 5 million
11 placed through the 24/7 Real Media Network, and 10 million on Facebook. (Id. Ex. 1.) The
12 internet banner ads will appear on some mixture of the following websites: Walmart, Verizon,
13 MSNBC, evite, White Pages, People, USA Today, Citysearch, EveryDayHealth, Oprah,
14 Monster, TIME, HGTV, Oxygen, Food Network, Fox News Channel, trolia, Match.com, The
15 Weather Channel and iVillage. (Id.) KCC selected these publications based on an analysis of
16 these publications' Pain Relief User demographics, and its own experience with the
17 effectiveness of other notice plans. (Id. ¶¶ 25-26.); see also Mirfasihi v. Fleet Mortg. Corp.,
18 356 F.3d 781, 786 (7th Cir. 2004) ("When individual notice is infeasible, notice by publication
19 in a newspaper of national circulation . . . is an acceptable substitute.").

20 Notice is written in easy and clear language, and provides all needed information,
21 including: (1) basic information about the lawsuit; (2) a description of the benefits provided
22 by the settlement; (3) an explanation of how Class members can obtain Settlement benefits;
23 (4) an explanation of how Class members can exercise their rights to opt-out or object; (5) an
24 explanation that any claims against Kaz that could have been litigated in this action will be
25 released if the Class member does not opt out; (6) the names of Class Counsel and information
26 regarding attorneys' fees; (7) the fairness hearing date and procedure for appearing; and (8) the
27 Settlement Website and a toll free number where additional information, including Spanish
28 translations of all forms, can be obtained. (Settlement Agreement ¶ 6.2.1; Intrepido-Bowden

1 Decl. Ex. 1.)

2 After review of the proposed notice and Settlement Agreement, the Court concludes that
3 the Publication Notice and Settlement Website are adequate and sufficient to inform the class
4 members of their rights. Accordingly, the Court approves the form and manner of giving
5 notice of the proposed settlement.

6 **D. Setting Fairness Hearing**

7 Finally, the Court sets the fairness hearing for June 10, 2013. Plaintiff must file a
8 motion for final approval of the settlement, as well as any motions for fees, enhancements, and
9 costs, on or before May 1, 2013.

10 **CONCLUSION**

11 Based on the foregoing, the Court orders the following:

12 (1) The Court re-appoints Plaintiff Beverly Beck-Ellman as class representative;

13 (2) The Court grants the parties' joint request to modify the certified class definition
14 pursuant to Federal Rule of Civil Procedure 23(c)(1)(C) in accordance with the terms of the
15 Settlement Agreement. The certified class is as follows:

16 All residents of California who purchased Kaz-manufactured and/or distributed
17 electric heating pads bearing the words "Kaz" and/or "SoftHeat" and/or
18 "Smart/Heat" and/or "Dunlap" and/or the number 1-800-477-0457 on the
19 packaging or heating pads themselves for primarily personal, family, or
20 household purposes from October 13, 2006, through the date the Court orders
21 preliminary settlement approval. The Court excludes from the class anyone
22 seeking damages for personal injury or property damage caused by Kaz heating
23 pads, as well as anyone with a conflict of interest in this matter.

24 (3) The Court grants the parties' request for preliminary approval of the proposed
25 settlement, including the proposed cy pres distributions;

26 (4) The Court re-appoints the law firm of Eppsteiner & Fiorica Attorneys, LLP as Class
27 Counsel;

28 (5) The Court grants the parties' request to appoint KCC Class Action Services, LLC

1 as Settlement Administrator;

2 (6) The Court approves the form and manner of giving notice of the proposed settlement
3 to the class members using the proposed Publication Notice and Settlement Website. The
4 Court declines to order direct mailed notice to potential Class members.²

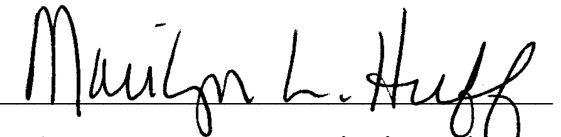
5 (7) The Court sets the fairness hearing on the proposed settlement for June 10, 2013,
6 at 10:30 a.m, before the Hon. Marilyn L. Huff. Plaintiff must file a motion for final approval
7 of the settlement, as well as any motions for fees, enhancements, and costs, on or before May
8 1, 2013.

9 (8) Any objections to the settlement or the motions for fees, enhancements, or costs,
10 must be filed on or before May 1, 2013. Any reply must be filed on or before May 24, 2013.

11 (9) The Court vacates the trial currently set to commence on January 8, 2013.

12 **IT IS SO ORDERED.**

13 DATED: January 7, 2013

14 
15 MARILYN L. HUFF, District Judge
16 UNITED STATES DISTRICT COURT
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24 _____
25 ² The parties request the Court to consider ordering Defendants to disclose certain
26 customer lists to the Settlement Administrator. (Doc. No. 83-1 at 19-20.) However, discovery
27 pertaining to issues other than damages in this matter has long since concluded. (See Doc. No.
28 39, Order Granting in Part and Denying in Part Joint Motion to Amend Scheduling Order.)
Moreover, the Court concludes that the Publication Notice and Settlement Website are together
sufficient to alert the Class of the settlement. Accordingly, the Court finds that disclosure of
Kaz heating pad customer lists is unnecessary at this time.