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

MELISSA NIGH,

Plaintiff,

v.

HUMPHREYS PHARMACAL,
INCORPORATED, *et al.*,

Defendants.

CASE NO. 12-CV-2714-MMA(DHB)

**AMENDED ORDER
PRELIMINARILY APPROVING
CLASS ACTION SETTLEMENT,
CERTIFYING THE CLASS,
PROVIDING FOR NOTICE AND
SCHEDULING ORDER**

[Doc. No. 9]

The parties in this action have entered into a Settlement Agreement (“Agreement”) dated December 7, 2012, which, if approved, would resolve this putative class action. Plaintiff now moves the Court for an order preliminarily approving the settlement, certifying a settlement class, and providing for class notice and a scheduling order. The Court **GRANTS** Plaintiff’s motion, as modified by the Court, and orders as indicated below.

The capitalized terms used in this Preliminary Approval Order shall have the meanings and definitions given to them in the Agreement, or if not defined therein, the meanings and definitions given to them in this Preliminary Approval Order.

Before and during the pendency of the Litigation, Class Counsel avers that they conducted an extensive examination and evaluation of the relevant facts and law to assess the merits of the named Plaintiff’s and Class’ claims to determine how best to serve the interests of

1 Plaintiff and the Class. In the course of this examination, Class Counsel avers they reviewed
2 approximately 50,000 documents, which consisted of marketing data, label and package
3 mechanicals, sales figures, unit sales, original invoices and shipping data, promotional materials,
4 package materials, product return materials, and detailed financial information produced by
5 Defendants that was prepared by outside accountants. Class Counsel avers they have conducted
6 a thorough review of the Food, Drug and Cosmetic Act, its numerous changes over the years,
7 and the Act's implementing regulations with respect to homeopathic drugs. Class Counsel avers
8 they have carefully considered the merits of Plaintiff's claims, and the defenses raised by
9 Defendants.

10 It preliminarily appears that the proposed settlement was reached after this investigation
11 and discovery in the Litigation, and that it was the result of negotiations conducted by the Parties
12 with the assistance of The Honorable Leo Papas (ret.) of Judicate West, a California-based
13 provider of mediation, arbitration, and alternative dispute resolution services. It appears the
14 Parties engaged in numerous joint and individual mediations sessions with Judge Papas in order
15 to reach the terms of the Agreement over the course of several months.

16 Plaintiff and Class Counsel maintain that the Litigation and the claims asserted therein
17 are meritorious and that Plaintiff and the Class would have prevailed at trial. Notwithstanding,
18 Plaintiff and Class Counsel have agreed to settle the Action pursuant to the provisions of the
19 Agreement, after considering, among other things: (i) the substantial benefits to Plaintiff and the
20 Class under the terms of this Agreement; (ii) the uncertainty of being able to prevail at trial; (iii)
21 the uncertainty relating to Defendants' defenses and the expense of additional motion practice in
22 connection therewith; (iv) the issues relating to proving damages on an individual Class Member
23 basis; (v) the attendant risks of litigation, especially in complex actions such as this, as well as
24 the difficulties and delays inherent in such litigation; and (vi) the desirability of consummating
25 this Settlement promptly in order to provide effective relief to Plaintiff and the Class.

26 Plaintiff and Class Counsel believe that this Agreement is fair, reasonable and adequate
27 because it provides substantial benefits to the Class, is in the best interests of the Class, and
28 fairly resolves the claims alleged in this Action.

1 Defendants have expressly denied any wrongdoing alleged in the pleadings in the Action
2 and do not admit or concede any actual or potential fault, wrongdoing, or liability in connection
3 with any facts or claims which have been or could have been alleged against them in the
4 Action. Defendants nonetheless consider it desirable for the Action to be settled and dismissed,
5 because the proposed settlement will: (i) avoid further expense and disruption of the
6 management and operation of Defendants' businesses due to the pendency and defense of the
7 Action; (ii) finally put Plaintiff's and the Class' claims and the underlying matters to rest; and
8 (iii) avoid the substantial expense, burdens, and uncertainties associated with a potential finding
9 of liability and damages for Plaintiff and the Class on the claims alleged in the Complaint in the
10 Action.

11 The Court has reviewed and considered the Agreement and all exhibits thereto, including
12 the proposed notices and claim form, and finds there is sufficient basis for: (1) granting
13 preliminary approval of the Agreement; (2) certifying a class for settlement purposes; (3)
14 appointing Plaintiff Melissa Nigh as Class Representative and her counsel as Class Counsel; (4)
15 directing that Notice be disseminated to the Class; and (5) setting a hearing at which the Court
16 will consider whether to grant final approval of the Agreement.

17 The Court now **GRANTS** the motion for preliminary approval and makes the following
18 findings and orders:

19 1. Pursuant to Federal Rule of Civil Procedure 23, and for settlement purposes only,
20 the Court hereby certifies this Litigation as a class action on behalf of the following certified
21 Class:

22 All persons in the United States who purchased the Products (as defined in **Exhibit D** of
23 the Agreement) for personal or household use from June 20, 2008 to the Opt
24 Out/Objection Deadline (as defined in **paragraphs 8.5 and 8.7** of the Agreement) ("the
25 Class Period"). Excluded from the Class are Defendants; and persons who during or after
26 the Settlement Period were officers or directors of Defendants, or any corporation, trust
27 or other entity in which any Defendant has a controlling interest; and the members of the
28 immediate families of Defendants' employees or their successors, heirs, assigns and legal
representatives; any judicial officer hearing this Action, and their family members and
employees.

1 2. The Court finds, for purposes of settlement only, that the Settlement Class meets
2 the requirements of Rule 23 of the federal Rules of Civil Procedure. Joinder of all Class
3 Members in a single proceeding would be impracticable, if not impossible, because of their
4 numbers and dispersion. Common issues exist among Class Members and predominate over
5 questions affecting individual Class Members only; in particular, each Class Members' claims
6 depend on whether the representations made by Defendants on the packaging, labeling and
7 marketing of the Products at issue in this litigation were misleading. Plaintiff's claims are
8 typical of those of the Class, as Plaintiff was exposed to Defendants' claims and purchased the
9 Products in reliance on those claims. The Plaintiff and her counsel will fairly and adequately
10 protect the interests of the Class as Plaintiff has no interests antagonistic to the Class, and has
11 retained counsel who are experienced and competent to prosecute this matter on behalf of the
12 Class. Finally, a class settlement is superior to other methods available for a fair resolution of
13 the controversy.

14 3. The Court approves Plaintiff Melissa Nigh as Class Representative.

15 4. Having considered the factors set forth in Rule 23(g)(1) of the Federal Rules of
16 Civil Procedure, the Court appoints Plaintiff's counsel, the Law Offices of Ronald A. Marron,
17 APLC to serve as Class Counsel.

18 5. The Court preliminarily approves the Agreement, finding that its terms appear
19 sufficient, and fair, reasonable and adequate to warrant dissemination of notice of the proposed
20 settlement to the Class. The Agreement contains no obvious deficiencies and the parties have
21 entered into the Agreement in good faith, following arms-length negotiation between their
22 respective counsel. The Court's approval of this Agreement is made subject to further
23 consideration at the Final Approval Hearing Date.

24 6. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court will
25 hold a final approval hearing (the "Final Approval Hearing Date") on **October 21, 2013, at 2:30**
26 **p.m.**, in Courtroom 5 before the Honorable Michael M. Anello, United States District Court for
27 the Southern District of California, for the following purposes:
28

- 1 a. finally determining whether the Class meets all applicable requirements of
2 Federal Rule of Civil Procedure 23, and, thus, whether the Class' claims
3 should be certified for purposes of effectuating the settlement;
- 4 b. determining whether the proposed settlement of the Litigation on the terms
5 and conditions provided for in the Agreement is fair, reasonable, and adequate
6 and should be approved by the Court;
- 7 c. considering the application of Class Counsel for an award of attorneys' fees
8 and costs, as provided for in the Agreement;
- 9 d. considering the application of the named Plaintiff for a class representative
10 incentive award, as provided for in the Agreement;
- 11 e. considering whether the Court should enter the [Proposed] Judgment, Final
12 Order and Decree;
- 13 f. considering whether the release by the Settlement Class Members of the
14 Released Claims as set forth in the Agreement should be provided; and
- 15 g. ruling upon such matters as the Court may deem appropriate.

16 7. Class Members must file and serve any objections to the proposed settlement **no**
17 **later than September 3, 2013**, including any memoranda and/or submissions in support of the
18 objections.

19 8. All papers in support of the Agreement must be filed with the Court and served
20 **no later than August 1, 2013**. The papers shall include the following information: (1) the total
21 number of opt out requests received; (2) the total number of valid claims received; (3) the total
22 dollar amount to be paid to Class Members who submitted valid claim forms; (4) a best estimate
23 of the dollar amount that will be paid to the Class Administrator, or to be used for other costs and
24 expenses (not including attorneys' fees and costs), or both; and (5) the dollar amount that
25 remains from the settlement fund after valid claims are paid.

26 9. Any response to an objection to the settlement which is filed as provided for in
27 paragraph 27 below shall be filed and served **no later than October 10, 2013**.

28

1 10. Any application for an award of attorneys' fees and costs and class representative
2 incentive award must be filed with the Court and served **no later than August 1, 2013.**

3 11. Except as modified below, the Court approves the form and procedure for
4 disseminating notice of the proposed settlement to the Class as set forth in the Agreement. The
5 Court finds that the Notice Plan the parties propose to give constitutes the best notice practicable
6 under the circumstances, and constitutes valid and sufficient notice to the Class in full
7 compliance with the requirements of applicable law, including the Due Process Clause of the
8 United States Constitution. However, the Court orders that the following modifications be made
9 to the Notice Plan:

10 a. That notice be published as 1/6-page advertisements (color or black-and-
11 white, at the parties' option) once per week for four consecutive weeks in
12 the *New York Times* or *USA Today* rather than the *San Diego Union Tribune*;
13 and

14 b. That published notice or advertisement of notice prominently include the
15 logo of Defendant Humphreys Pharmacal, Inc., which depicts a
16 "Humphreys" curved banner, and includes a depiction of a female holding
17 leafy branches above her head with a meadow-like background and trees.
18 [See Ex. 1 to Compl., Doc. No. 1-1 at 2 ("Humphrey's Teething Relief Very
19 Cherry Pellets").

20 i. The parties have sought clarification of the above paragraph and
21 have submitted to the Court two revised proposed notices for
22 publication. [Ex. B to Alan Vasquez Decl., Doc. No. 12-1 (color and
23 black-and-white versions).] The Court finds both revised proposed
24 notices are acceptable. The parties may choose to use either the
25 color or black-and-white version at the parties' option.¹

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28 ¹ Because the black-and-white version is less costly, the Court prefers the black-and-white version. However, publication of either version is acceptable.

1 c. The Court previously ordered that “[a]ny additional expense that results
2 from the modifications above shall reduce the \$38,009 estimated cost of
3 advertising notice in *Parents Magazine* unless notice cannot be published in
4 *Parents Magazine* at the reduced cost.” The parties have indicated that the
5 cost of publication in the *New York Times* and *USA Today* exceeds the
6 \$38,009 cost of publication in *Parents Magazine*. The Court modifies the
7 Preliminary Approval Order to delete the sentence quoted above.
8 Accordingly, notice shall be published in (1) either the *New York Times* or
9 *USA Today* and (2) *Parents Magazine*. Although the cost of publication in
10 the national newspapers is higher than publication in the local newspaper,
11 the Court finds the cost justified in light of the national reach of the
12 replacement papers and given that the Court has preliminarily certified a
13 national class for settlement purposes.

14 12. **On or before February 19, 2013**, Defendants shall disseminate the Class Notice
15 in the form attached as **Exhibit B** to the Settlement Agreement, Summary Notice in the form
16 attached thereto as **Exhibit C**, and the Claim Form in the form attached thereto as **Exhibit A**.
17 The manner and form of such dissemination is set forth in the Notice Plan, as modified herein,
18 attached as **Exhibit G** to the Agreement.

19 13. The Court approves the designation of Gilardi & Co. to serve as the Court-
20 Appointed Class Action Administrator for the settlement. The Class Action Administrator shall
21 disseminate Class Notice and supervise and carry out the Notice Plan, the processing of claims,
22 and other administrative functions, and shall respond to Class Member inquiries under the
23 direction and supervision of the Court.

24 14. The Court directs the Class Action Administrator to establish a Settlement
25 Website, making available copies of this Order, Class Notice, Claim Forms that may be
26 downloaded and submitted online or via mail, the Agreement and all exhibits thereto, a toll-free
27 hotline, and such other information as may be of assistance to Class Members or required under
28 the Agreement. The Claim Form shall be made available to Class Members through the

1 Settlement Website, **no later than February 4, 2013**, and continuously thereafter through the
2 entry of judgment and dismissal of this case.

3 15. As set forth in the Agreement, the costs and expenses associated with the Class
4 Notice, processing of claims, creating and maintaining the Settlement Website, and all other
5 Class Action Administrator and Class Notice expenses shall be paid from the Settlement Fund.
6 The Class Action Administrator is authorized to receive reimbursement of out-of-pocket notice
7 publication expenses from the Settlement Fund pursuant to this Order, with Class Counsel's
8 approval.

9 16. No later than fourteen (14) days prior to the Final Approval Hearing Date,
10 Defendants, through the Class Action Administrator, shall file an affidavit and serve a copy on
11 Class Counsel, attesting that notice was disseminated as required by the terms of the Notice Plan
12 or as ordered by the Court. Defendants shall also notify Class Counsel of the costs of attaining
13 the labeling changes per the injunctive relief set forth in the Agreement, including but not limited
14 to costs associated with the Defendants' efforts to remove Products from distribution and retail
15 store shelves.

16 17. In the event of final approval, all Class Members shall be bound by all
17 determinations and judgments in the Litigation concerning the settlement, whether favorable or
18 unfavorable to the Class.

19 18. The Court modifies the Parties' Claims-In Period. Any Class member who
20 wishes to participate in the settlement shall complete a Claim Form and submit it to the Class
21 Action Administrator **no later than June 19, 2013**. Such deadline may be further extended
22 without notice to the Class by Court order.

23 19. Any person falling within the definition of the Class may, upon his or her request,
24 be excluded from the Class. Any such person must submit a completed request for exclusion to
25 the Claims Action Administrator—not the Clerk of Court or the Court—postmarked or
26 delivered **no later than June 19, 2013**. Requests for exclusion purportedly filed on behalf of
27 groups of persons are prohibited and will be deemed void.
28

1 20. Any Class Member who does not send a completed, signed request for exclusion
2 to the Claims Action Administrator postmarked or delivered on or before the Opt-Out and
3 Objection Deadline will be deemed to be a Class Member for all purposes and will be bound by
4 all further orders of the Court in this Litigation and by the terms of the settlement, if finally
5 approved by the Court. The written request for exclusion must request exclusion from the
6 Class, must be signed by the potential Class Member and include a statement indicating that the
7 person is a member of the Class. All persons who submit valid and timely requests for
8 exclusion shall not be bound by the Agreement or the Final Judgment and Order.

9 21. Any person falling within the definition of the Class may object to the Agreement.
10 To be considered, all objections must be timely, in writing, signed and dated by the objector (or
11 his or her attorney, if applicable), must reference the name and case number of the Action, and
12 must contain the following information: (i) the objector's name, address, and telephone number;
13 (ii) the name, address, and telephone number of any attorney for the objector with respect to the
14 objection; (iii) the factual basis and legal grounds for the objection; and (iv) identification of the
15 case name, case number, and court for any prior class action lawsuit in which the objector and
16 the objector's attorney (if applicable) has objected to a proposed class action settlement, the
17 general nature of such prior objection(s), and the outcome of said prior objection(s).

18 22. A request for exclusion or an objection that does not include all of the foregoing
19 information, that is sent to an address other than the one designated in the Class Notice, or that is
20 not received within the time specified, shall be invalid and the person serving such a request
21 shall be deemed a member of the Class, and shall be bound as a Class Member by the
22 Agreement. The Class Action Administrator shall promptly forward copies of all requests for
23 exclusion and objections to Class Counsel and counsel for Defendants.

24 23. If a Class Member hires an attorney to represent him or her in support of a timely
25 and properly submitted objection, and the attorney wishes to appear at the Final Approval
26 Hearing, in addition to the foregoing requirements that attorney must (1) file both an entry of
27 appearance and a notice of intention to appear and participate at the Final Approval Hearing with
28 the Clerk of the Court no later than thirty (30) days before the Final Approval Hearing, and (2)

1 mail copies of the entry of appearance and the notice of intention to appear and participate at the
2 Final Approval Hearing to Counsel for Defendants and Class Counsel, postmarked no later than
3 thirty (30) days before the Final Approval Hearing.

4 24. A Class Member who appears at the Final Approval Hearing, either personally or
5 through counsel, will be permitted to argue only those matters that were set forth in the timely
6 and validly submitted written objection filed by such Class Member. No Class Member shall be
7 permitted to raise matters at the Final Approval Hearing that the Class Member could have raised
8 in his/her written objection, but failed to do so, and all objections to the Agreement that are not
9 set forth in a timely and validly submitted written objection are deemed waived.

10 25. If a Class Member wishes to present witnesses or evidence at the Final Approval
11 Hearing in support of a timely and validly submitted objection, all witnesses must be identified
12 in the objection, and true and correct copies of all supporting evidence must be appended to, or
13 filed and served with, the objection. Failure to identify witnesses or provide copies of supporting
14 evidence in this manner waives any right to introduce such testimony or evidence at the Final
15 Approval Hearing. While the declaration described above is prima facie evidence that the
16 objector is a member of the Class, Plaintiff or Defendants or both may take discovery regarding
17 the matter, subject to Court approval.

18 26. Any Class Member who fails to comply with the applicable provisions of the
19 preceding paragraphs concerning their objection shall waive and forfeit any and all rights he or
20 she may have to object, appear, present witness testimony, and/or submit evidence, shall be
21 barred from speaking or introducing any testimony or evidence at the Final Approval Hearing,
22 and shall be bound by all the terms of the Agreement and by all proceedings, orders and
23 judgments in the Litigation.

24 27. All objections must be filed with the Clerk of Court and served on the parties'
25 counsel **no later than September 3, 2013**. Objections received after the Opt-Out and Objection
26 Deadline will not be considered at the Final Approval Hearing. A Class Member's failure to
27 submit a written objection within the Opt-Out and Objection Deadline, in conformance with the
28 procedures set forth in the Class Notice, and above, waives any right the Class Member may

1 have to object to the settlement, the Agreement, attorneys' fees and costs, class representatives'
2 incentive awards, or to appeal or seek other review of the Final Judgment and Order.

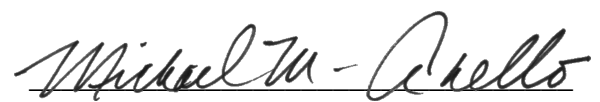
3 28. Class Members who do not oppose the settlement, the applications for attorneys'
4 fees and costs, or class representative incentive awards need not take any action to indicate their
5 approval.

6 29. The Agreement and the proceedings and statements made pursuant to the
7 Agreement or papers filed relating to the approval of the Agreement, and this Order, are not and
8 shall not in any event be construed as, offered in evidence as, received in evidence as, and/or
9 deemed to be evidence of a presumption, concession, or an admission of any kind by any of the
10 Parties of (i) the truth of any fact alleged or the validity of any claim or defense that has been,
11 could have been, or in the future might be asserted in the Action, any other litigation, court of
12 law or equity, proceeding, arbitration, tribunal, investigation, government action, administrative
13 proceeding, or other forum, or (ii) any liability, responsibility, fault, wrongdoing, or otherwise of
14 the Parties. Defendants have denied and continue to deny the claims asserted by Plaintiff.
15 Nothing contained herein shall be construed to prevent a Party from offering the Agreement into
16 evidence for the purposes of enforcement of the Agreement.

17 30. The certification of the Class shall be binding only with respect to the settlement
18 of this Litigation. In the event that the Agreement is terminated pursuant to its terms or is not
19 finally approved by the Court, or such approval is reversed, vacated, or modified in any material
20 respect by this or any other Court, the certification of the Class shall be deemed vacated, the
21 Litigation shall proceed as if the Class had never been certified (including Defendants' right to
22 oppose any subsequent motion for class certification), and no reference to the Class, the
23 Agreement, or any documents, communications, or negotiations related in any way thereto shall
24 be made for any purpose.

25 **IT IS SO ORDERED.**

26 DATED: January 29, 2013


27 Hon. Michael M. Anello
28 United States District Judge