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

CHANEY THURSTON, et al.,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

BEAR NAKED, INC.,

Defendant.

CASE NO. 11-CV-2890-H
(BGS)¹

ORDER:

**(1) CERTIFYING CLASS
FOR SETTLEMENT
PURPOSES;**

**(2) PRELIMINARILY
APPROVING CLASS
SETTLEMENT**

**(3) APPROVING CLASS
NOTICE; and**

**(4) SCHEDULING FAIRNESS
HEARING**

[Doc. Nos. 166; 167]

On May 2, 2014, Plaintiff Chaney Thurston (“Plaintiff”) filed a motion for preliminary approval of class settlement, conditional certification of the settlement class, approval of the class notice, and scheduling of a fairness hearing. (Doc. No. 166.) On May 2, 2014, Defendant Bear Naked, Inc. (“Defendant” or “Bear Naked”) filed a stipulation of settlement. (Doc. No. 167.) The Court held a hearing on May 27,

¹This is the lead case, along with consolidated case 11-CV-2985-H (BGS). (Doc. No. 34.) This Order applies to both cases.

1 2014. Attorneys Michael Braun and Janet Spielberg appeared on behalf of Plaintiffs.
2 Attorney Dean Panos appeared on behalf of Defendant.

3 **Background**

4 **I. Factual and Procedural Background**

5 This is a consumer class action lawsuit brought on behalf of people who have
6 purchased Bear Naked food products. Plaintiff claims the products contained deceptive
7 and misleading labeling and advertisements. (Doc. No. 36 ¶¶ 1-2.) Plaintiff alleges that
8 Defendant packaged, marketed, distributed, and sold Bear Naked products as
9 being “100% Natural” or “100% Pure and Natural.” (Id.) Plaintiffs claim certain
10 ingredients or processes used to manufacture Bear Naked products are not “natural,”
11 but rather are synthetic. (Id.)

12 In 2011, Plaintiffs filed class action complaints against Bear Naked: Thurston,
13 et al. v. Bear Naked, Inc., 11-CV-2890 (initially filed in the U.S. District Court for the
14 Northern District of California (11-cv-4678)), and Babic v. Bear Naked, Inc.,
15 11-CV-02985 (collectively “the Original Complaints”). On February 9, 2012, the Court
16 ordered the consolidation of the Thurston case with the Babic case. (Doc. No. 34.)

17 On March 12, 2012, Plaintiffs filed a First Amended Consolidated Complaint
18 (the “First Amended Consolidated Complaint”), which amended and superseded the
19 Original Complaints. (Doc. No. 36.) On April 11, 2012, Bear Naked filed a motion to
20 dismiss the First Amended Consolidated Complaint. (Doc. No. 40.) On July 16, 2012,
21 the Court granted in part and denied in part Defendant’s motion to dismiss. (Doc. No.
22 50.) The Court dismissed Plaintiffs’ Magnuson-Moss Warranty Act (“MMWA”) causes
23 of action, common law fraud cause of action, and claim for unjust enrichment. (Id.) The
24 Court denied the remaining portions of Bear Naked’s motion to dismiss the First
25 Amended Consolidated Complaint. (Id.)

26 On August 15, 2012, Bear Naked answered the First Amended Consolidated
27 Complaint. (Doc. No. 52.) The parties engaged in extensive discovery, including
28 depositions of Bear Naked’s marketing expert, multiple sets of requests for production

1 of documents and interrogatories, and several subpoenas to third parties. (Doc. No.
2 166-1 at 11.) Further, Bear Naked deposed the named Plaintiffs as well as Plaintiffs’
3 marketing expert. (Id.)

4 On April 15, 2013, Plaintiffs filed a motion for class certification. (Doc. No. 73.)
5 On July 30, 2013, the Court granted in part and denied in part Plaintiffs’ motion for
6 class certification. (Doc. No. 110.) The Court certified a class of California purchasers
7 of Bear Naked products marketed and labeled as “100% Pure and Natural” or “100%
8 Natural” but which contained Hexane-Processed Soy ingredients. (Id. at 21.) The Court
9 appointed Feinstein Doyle Payne & Kravec, LLC, Finkelstein Thompson LLC, Braun
10 Law Group, P.C. and the Law Offices of Janet Lindner Spielberg as class counsel.²
11 (Id.)

12 On August 12, 2013, Bear Naked filed a petition to appeal the Court’s class
13 certification order pursuant to Federal Rule of Civil Procedure 23(f) in the United
14 States Court of Appeals for the Ninth Circuit. (Doc. No. 112.) On October 22, 2013,
15 the Ninth Circuit denied Bear Naked’s petition for permission to appeal the District
16 Court’s class certification ruling. (Doc. No. 129.)

17 On October 24, 2013, Bear Naked filed a motion to decertify the class. (Doc. No.
18 133.) On November 22, 2013, the Court denied Bear Naked’s motion to decertify the
19 class. (Doc. No. 203 in related case 11-CV-1967.)

20 On October 23, 2013, the parties participated in a mediation before an
21 experienced mediator. (Doc. No. 167 ¶ I.M.) Subsequently, the parties engaged in
22 further negotiations. (Id.) On May 2, 2014, the parties entered into a Stipulation of
23 Settlement. (See generally id.)

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26 ² Because the First Amended Consolidated Complaint did not allege that Plaintiffs
27 Babic and Knowles purchased Bear Naked products containing hexane-processed soy
28 ingredients, the Court declined to appoint them as class representatives. (Doc. No. 110 at 21
n.4)

1 II. Proposed Settlement

2 The proposed settlement provides relief to a settlement class comprising
3 California residents who, at any time between September 21, 2007 and May 1, 2014,
4 purchased any of the Bear Naked products labeled “100% Natural” or “100% Pure and
5 Natural” that contained any of the Challenged Ingredients. (See Doc. No. 167 ¶¶ II.A.1
6 (listing all the Challenged Ingredients); II.A.23 (listing all relevant Bear Naked
7 products).) Excluded from the class are: (a) Bear Naked’s employees, officers and
8 directors; (b) persons or entities who purchased the Bear Naked products for the
9 purpose of re-sale; (c) retailers or re-sellers of the Bear Naked products; (d)
10 governmental entities; (e) persons who timely and properly exclude themselves from
11 the settlement class; and (f) the Court, the Court’s immediate family, and Court staff.
12 (Id. ¶ II.A.5.)

13 The proposed settlement provides for monetary relief to the settlement class by
14 requiring Bear Naked to pay \$325,000 into a settlement fund. (Id. ¶ IV.A.2.) The
15 settlement fund is to be applied to pay in full and in order: (i) any expense award made
16 by the Court to class counsel; (ii) any incentive award made by the Court to the class
17 representative; and (iii) payments to authorized claimants. (Id. ¶ IV.A.2.b.) The
18 settlement fund will not be used to pay for the costs of providing notice to the
19 settlement class, or claims administration. (Id. ¶ IV.A.2.c.) Bear Naked will retain a
20 Class Action Settlement Administrator to provide notice and claims administration.
21 (Id.)

22 Class counsel may apply for an award of reasonable, out-of-pocket expenses
23 from the settlement fund in an amount to be determined. (Id. ¶ VIII.A.) The named
24 Plaintiff may apply for a \$2,000 incentive award from the settlement fund. (Id. ¶
25 VIII.C.)

26 Settlement class members may seek reimbursement of \$.50 per package for every
27 Bear Naked product purchased from September 21, 2007 to May 1, 2014. (Id. ¶
28 IV.A.1.) Settlement class members may seek reimbursement by presenting written

1 proof of purchase in the form of a receipt or a retail rewards submission, in which case
2 there is no limit on the amount of their recovery. (Id.) Alternatively, settlement class
3 members may seek reimbursement by submitting a valid claim form, in which case
4 there is a maximum recovery of \$10 per household. (Id.) If the total amount of eligible
5 claims exceeds the \$325,000 settlement fund, then each claimant’s award shall be
6 proportionately reduced. (Id. ¶ IV.A.3.) If after all valid claims (plus other authorized
7 costs and expenses) are paid, money remains in the settlement fund, the remaining
8 amount shall be used to increase pro rata the recovery of each eligible claim. (Id.)

9 Furthermore, the proposed settlement requires that Bear Naked modify its
10 labeling and advertising to remove “100% Natural” and “100% Pure and Natural” from
11 those products that contain hexane-processed soy ingredients unless the ingredients are
12 approved or determined as acceptable for products identified as “natural” by a federal
13 agency or controlling regulatory body. (Id. ¶ IV.B.)

14 In exchange, class members, other than those who opt-out, agree to release all
15 claims asserted in the First Amended Consolidated Complaint relating to Bear Naked’s
16 packaging, marketing, distribution, or sale of food products labeled as “100% Natural”
17 or “100% Pure and Natural” (Id. ¶ VII.)

18 Discussion

19 The Court previously certified a classes of California purchasers of Bear Naked
20 products containing hexane-processed soy ingredients. (See Doc. No. 110.) The parties
21 seek to expand the settlement class to include Bear Naked products containing any of
22 the Challenged Ingredients. (See Doc. No. 167 ¶ II.A.) Accordingly, the Court must
23 review “the proposed compromise to ratify both the propriety of the certification and
24 the fairness of the settlement.” Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).

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1 **I. Class Certification**

2 A plaintiff seeking to certify a class under Rule 23(b)(3) of the Federal Rules of
3 Civil Procedure must first satisfy the requirements of Rule 23(a). Fed. R. Civ. P. 23(b).
4 Once subsection (a) is satisfied, the purported class must then fulfill the requirements
5 of Rule 23(b)(3). In the present case, Plaintiff seeks to certify a class for settlement
6 purposes consisting of all California residents who, at any time between September 21,
7 2007 and May 1, 2014 purchased any of the Bear Naked products labeled “100%
8 Natural” or “100% Pure and Natural” that contained any of the Challenged Ingredients.
9 (See Doc. No. 167 ¶¶ II.A.1 (listing all the Challenged Ingredients); II.A.23 (listing all
10 relevant Bear Naked products).)

11 **A. Rule 23(a) Requirements**

12 Rule 23(a) establishes that one or more plaintiffs may sue on behalf of class
13 members if all of the following requirements are met: (1) numerosity; (2) commonality;
14 (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a).

15 The numerosity prerequisite is met if “the class is so numerous that joinder of all
16 members is impracticable.” Fed. R. Civ. P. 23(a)(1). Plaintiffs assert that the class
17 consists of thousands of consumers, and notes that Bear Naked has sold millions of
18 units in the United States in the past four years. (Doc. No. 73-1 at 22.) Accordingly, the
19 class meets the numerosity prerequisite in this case.

20 The commonality prerequisite is met if there are “questions of law or fact
21 common to the class.” Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) is construed permissively.
22 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). “[T]he key inquiry is
23 not whether the plaintiffs have raised common questions, ‘even in droves,’ but rather,
24 whether class treatment will ‘generate common answers apt to drive the resolution of
25 the litigation.’” Abdullah v. U.S. Sec. Associates, Inc., 731 F.3d 952, 957 (9th Cir.
26 2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)). Here,
27 there are many questions of law and fact that are common to the class, such as whether
28 settlement class members were exposed to advertising using the terms “100% Natural”

1 or “100% Pure and Natural” and purchased Bear Naked products containing the
2 Challenged Ingredients based on those representations. Accordingly, the class meets
3 the commonality prerequisite.

4 Typicality requires that “the claims or defenses of the representative parties [be]
5 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). A plaintiff’s
6 claims are “‘typical’ if they are reasonably co-extensive with those of absent class
7 members; they need not be substantially identical.” Hanlon, 150 F.3d at 1020.
8 Typicality requires that a representative plaintiff “possess the same interest and suffer
9 the same injury as the class members.” Gen. Tel. Co. of the Southwest v. Falcon, 457
10 U.S. 147, 156 (1982). Here, Plaintiff and settlement class members share the same
11 injury: purchase of a Bear Naked product based on alleged misrepresentations and false
12 advertising. (Doc. No. 36 ¶¶ 1-2.) As Plaintiff’s claims are reasonably co-extensive
13 with the claims of absent class members, the class meets the typicality prerequisite.

14 Adequacy of representation under Rule 23(a)(4) requires that the class
15 representative be able to “fairly and adequately protect the interests of the class.” Fed.
16 R. Civ. P. 23(a)(4). Representation is adequate if the named plaintiff and class counsel
17 (1) do not have any conflicts of interest with other class members and (2) will
18 prosecute the action vigorously on behalf of the class. Hanlon, 150 F.3d 1020. Here,
19 there does not appear to be any conflicts of interest between Plaintiff and the absent
20 class members. Additionally, Plaintiff has participated in the litigation process and sat
21 for depositions. (Doc. No. 166-1 at 11.) Class counsel have extensive experience and
22 expertise in prosecuting consumer class actions related to food labels. (Doc. No. 73-1.)
23 Accordingly, Plaintiff and her counsel are adequate representatives of the proposed
24 class, and Plaintiff has met all of the requirements of Rule 23(a).

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1 B. Rule 23(b)(3) Requirements

2 Rule 23(b)(3) requires the court to find that: (1) “the questions of law or fact
3 common to class members predominate over any questions affecting only individual
4 members;” and (2) “that a class action is superior to other available methods for fairly
5 and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). These
6 requirements are referred to as the “predominance” and “superiority” tests. See Vinole
7 v. Countywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009). Rule 23(b)(3)’s
8 predominance and superiority requirements are designed “to cover cases ‘in which a
9 class action would achieve economies of time, effort, and expense, and promote . . .
10 uniformity of decision as to persons similarly situated, without sacrificing procedural
11 fairness or bringing about other undesirable results.’” Amchem Products, Inc. v.
12 Windsor, 521 U.S. 591, 615 (1997) (quoting Advisory Committee’s Notes on Fed. R.
13 Civ. P. 23, 28 U.S.C. App., pp. 696-97).

14 1. Predominance

15 “The main concern in the predominance inquiry [is] the balance between
16 individual and common issues.” In re Wells Fargo Home Mortg. Overtime Pay
17 Litigation, 571 F.3d 953 (9th Cir. 2009). This analysis requires more than proof of
18 common issues of law and fact. Hanlon, 150 F.3d at 1022. Rather, the common
19 questions should “present a significant aspect of the case and . . . be resolved for all
20 members of the class in a single adjudication.” Id. (internal quotation omitted).

21 Courts have found that common factual issues involving a single advertisement
22 seen by all class members can predominate over individual issues. See Weeks v.
23 Kellogg Co., No. 09-8102, 2011 U.S. Dist. LEXIS 155472 (C.D. Cal. Nov. 23, 2011)
24 (certifying a class under Rule 23(b)(3) alleging that defendant’s marketing campaign
25 that certain of its cereal products can support a family’s immune system was false and
26 misleading). On the basis of additional evidence after the certification order, and after
27 considering the merits, the parties have agreed that an expanded settlement class
28 encompassing all the Challenged Ingredients best resolves the common questions

1 regarding Bear Naked's alleged conduct. (Doc. No. 166-1 at 6; 22.) The Court agrees.

2 For the purposes of class certification, it is sufficient that the statements
3 regarding the "100% Natural" and "100% Pure and Natural" products were part of a
4 common advertising scheme to which the entire class was exposed, and is a sufficiently
5 definite representation whose accuracy has been legitimately called into question. See
6 Hanlon, 150 F.3d at 1019-22; Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d
7 1168, 1173 (9th Cir. 2010). Accordingly, Plaintiff has met her burden to show that the
8 issues common to the class predominate over the individual issues. Fed. R. Civ. P.
9 23(b)(3).

10 2. Superiority

11 "Rule 23(b)(3)'s superiority test requires the court to determine whether
12 maintenance of this litigation as a class action is efficient and whether it is fair." Wolin,
13 617 F.3d at 1175-76. Notably, the class action method is considered to be superior if
14 "classwide litigation of common issues will reduce litigation costs and promote greater
15 efficiency." Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)
16 (citation omitted). Here, there is no evidence that absent class members wish to pursue
17 their claims individually. Further, class-wide treatment of these issues will be efficient
18 as the settlement class members' claims appear to involve a relatively small amount of
19 damages per member. (See generally Doc. No. 36.) Accordingly, the class action meets
20 the superiority requirement. As Plaintiff has satisfied the requirements of Rule
21 23(b)(3), the Court grants preliminary certification to the expanded settlement class.

22 **II. Settlement**

23 Rule 23(e) requires a court to determine whether a proposed settlement is
24 "fundamentally fair, adequate, and reasonable." Staton, 327 F.3d at 959 (quoting
25 Hanlon, 150 F.3d at 1026). To make this determination, a court must consider a number
26 of factors, including: (1) the strength of plaintiff's case; (2) the risk, expense,
27 complexity, and likely duration of further litigation; (3) the risk of maintaining class
28 action status throughout the trial; (4) the amount offered in settlement; (5) the extent

1 of discovery completed, and the stage of the proceedings; (6) the experience and views
2 of counsel; (7) the presence of a governmental participant; and (8) the reaction of class
3 members to the proposed settlement. Staton, 327 F.3d at 959. In addition, the
4 settlement may not be the product of collusion among the negotiating parties. In re
5 Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Class Plaintiffs
6 v. City of Seattle, 955 F.2d 1268, 1290 (9th Cir. 1992)).

7 At the preliminary approval stage, the Court reviews the parties' proposed
8 settlement to determine whether it is within the permissible "range of possible judicial
9 approval" and thus, whether the notice to the class and the scheduling of a fairness
10 hearing is appropriate. See 4 William B. Rubenstein et al., Newberg on Class Actions
11 § 11:25 (4th ed. 2002) (citations omitted); see also Alberto v. GMRI, Inc., 252 F.R.D.
12 652, 665 (E.D. Cal. 2008) (citation omitted); Annotated Manual for Complex Litigation
13 (Fourth) § 21.63 (2013) ("At the stage of preliminary approval, the questions are
14 simpler, and the court is not expected to, and probably should not, engage in analysis
15 as rigorous as is appropriate for final approval.")

16 After reviewing the proposed settlement in light of the relevant factors and the
17 current stage of the litigation, the Court grants preliminary approval. The proposed
18 settlement is the result of serious, informed, and non-collusive negotiations. E.g., Tijero
19 v. Aaron Bros., Inc., C 10-01089-SBA, 2013 WL 6700102, at *7-8 (N.D. Cal. Dec. 19,
20 2013). After two years of litigation, and following negotiation with an experienced
21 mediator, Plaintiff's counsel agreed to the proposed settlement in light of the
22 uncertainties of trial and the costs, risks, and delays associated with continued
23 litigation. (Doc. No. 166-1 at 13.) Class counsel has extensive experience in class
24 actions and represents that the settlement provides meaningful relief to the class. (Doc.
25 No. 166-1 at 26.) Additionally, settlement class members may opt-out if they believe
26 the proposed settlement does not adequately compensate them. (Doc. No. 167 ¶ VI.B.)

27 The proposed settlement is fair, adequate, and reasonable. Alberto, 252 F.R.D.
28 at 666. Accordingly, the Court grants preliminary approval of the settlement.

1 **III. Approving Class Notice**

2 The class notice must be “reasonably calculated, under all the circumstances, to
3 apprise interested parties of the pendency of the action and afford them an opportunity
4 to present their objections.” Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306,
5 314 (1950). In addition, the class notice must satisfy the content requirements of Rule
6 23(c)(2)(B). It provides the notice must clearly and concisely state in plain, easily
7 understood language:

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

14 A. Content of the Notice

15 In the present case, the Court approves the content of the notice. It provides the
16 following: a description of the lawsuit; a description of the settlement class and the
17 class claims; a statement that class members may appear at the fairness hearing through
18 an attorney; a statement that class members may exclude themselves from the
19 settlement; a description of how class members may request exclusion; and a
20 description of the effect on class members if the Court approves the proposed
21 settlement. (See Doc. No. 167-3; 167-4.) The Court approves the content of the
22 proposed notice.

23 B. Method of Notice

24 The proposed method of notice is reasonable. Because individual settlement
25 class members cannot be identified through reasonable effort due to the nature of the
26 consumer product at issue, the parties have devised a media plan designed to reach
27 settlement class members. (See Doc. No. 167-7.) Bear Naked, via the Settlement
28 Administrator, will publish the summary notice once in the California editions of
People Magazine; Parade; USA Weekend; and will publish four consecutive weekly
notices in the San Diego Union-Tribune; Los Angeles Times; San Francisco Chronicle;

1 and Sacramento Bee. (Id.) Bear Naked, via the Settlement Administrator, will also
2 purchase Internet banner notices via the Xaxis Premium Network, Yahoo.com, and
3 Advertising.com. (Id.) Additionally, notice of the settlement will be posted on the
4 Settlement Website and, at their option, on the websites of class counsel. (Doc. No. 167
5 ¶ V.A.3.) The class notice shall also be sent via electronic mail or regular mail to those
6 settlement class members who so request. (Id.)

7 The class notice is adequate and sufficient to inform the class members of their
8 rights. Accordingly, the Court approves the form and manner of giving notice of the
9 settlement.

10 **V. Scheduling Fairness Hearing**

11 Finally, the Court sets the Final Approval hearing for Tuesday, September 2,
12 2014 at 10:30 a.m. Plaintiff must file a motion for final approval of the settlement, as
13 well as any motions for out-of-pocket expenses and incentive awards, on or before July
14 28, 2014.³

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28 ³Counsel may appear telephonically if counsel provides the Court with the relevant
telephone numbers.

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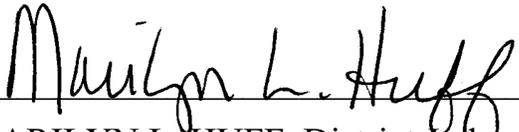
Conclusion

The Court approves:

- (1) Plaintiff’s request for provisional certification of the class for purposes of settlement;
- (2) Plaintiff’s request for preliminary approval of the proposed settlement; and
- (3) The form and manner of giving notice of the proposed settlement to the class members; and
- (4) Additionally, the Court sets a fairness hearing on Tuesday, September 2, 2014 at 10:30 a.m. Plaintiff must file a motion for final approval of the settlement, as well as any motions for attorneys’ expenses and incentive awards, on or before July 28, 2014.

IT IS SO ORDERED.

DATED: May 27, 2014



MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT