

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

LUIS LERMA, an Individual and
NICK PEARSON, an Individual,
On Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

v.

SCHIFF NUTRITION
INTERNATIONAL, INC., a
Delaware Corporation and
SCHIFF NUTRITION GROUP,
INC., a Utah Corporation,

Defendants.

CASE NO. 11cv1056-MDD

ORDER OF PRELIMINARY
APPROVAL OF CLASS
SETTLEMENT

[ECF NO. 81]

Before this court is Plaintiff's unopposed motion for preliminary approval of class settlement and provisional class certification pursuant to Fed. R. Civ. P. 23.

BACKGROUND

On May 13, 2011, Plaintiffs Luis Lerma, on behalf of himself and all others similarly situated, initiated this action by filing a class action Complaint against Defendants, Schiff International, Inc., a Utah Corporation and Schiff Nutrition Group, Inc., a Utah Corporation (ECF

1 No. 1)¹. On March 12, 2012, Plaintiff filed a Third Amended Complaint
 2 (“TAC”) incorporating Plaintiff Pearson and his claims against
 3 Defendants². (ECF No. 33). Plaintiffs alleged that Defendants violated
 4 the Consumers Legal Remedies Act, Civil Code § 1750, et seq.; Unfair
 5 Competition Law, Business and Professions Code § 17200 et seq.; Illinois
 6 Consumer Fraud Act, 502/1, et seq.; personal injuries/medical
 7 monitoring; personal injuries/negligence; and breach of express warranty.
 8 (*Id.* at 33).

9 On March 28, 2012, Defendant Schiff Nutrition International, Inc.
 10 filed an Answer to the TAC. (ECF No. 37). On February 14, 2012, the
 11 court issued the first Fed. R. Civ. P. 26 scheduling order in the case and
 12 discovery commenced. (ECF No. 29).

13 In the fall of 2013, the parties informally notified the court that a
 14 settlement in principle had been reached. On March 28, 2014, the
 15 parties consented to the jurisdiction of this court for all purposes. (ECF
 16 No. 84).

17 On March 25, 2014, Plaintiffs filed the Unopposed Motion for
 18 Preliminary Approval of Class Action Settlement and Certification of
 19 Settlement Class, accompanied by the declaration of Plaintiffs’ counsel
 20
 21
 22

23
 24 ¹ The designation ECF denotes “Electronic Filing” and refers to this court’s docket sheet
 25 and the enumerated documents listed therein for this case. Specific page numbers parallel the
 ECF designation and do not necessarily sync with the page numbers found in the original
 document.

26 ² “On December 15, 2011, Plaintiff Pearson filed a Class Action Complaint in the
 27 Northern District of Illinois against Defendants, Pearson v. Schiff Nutritional Int’l, et al.,
 1:11cv08914 (N.D. Ill.) . . . alleging similar claims to the Lerma Action . . . On February 27, 2012,
 28 Plaintiff Pearson voluntarily dismissed his Complaint. . . . [A]fter meeting and conferring with
 Defendants, Plaintiff Lerma prepared a Third Amended Complaint incorporating Plaintiff
 Pearson and his claims against Defendants.” (ECF No. 33, at 2).

1 and several exhibits.³ (ECF No. 81). Plaintiffs request the court enter an
 2 order that: (1) preliminarily approves the terms of the Settlement; (2)
 3 approves the Notice Plan as set forth in pleadings; (3) schedule a final
 4 Fairness Hearing; (4) conditionally certify the Class for settlement
 5 purposes; (5) conditionally appoint Plaintiffs Lerma and Pearson as Class
 6 Representatives; (6) conditionally appoint Elaine A. Ryan; Stewart M.
 7 Weltman, and Jeffrey Carton as Class Counsel.

8 A hearing on Plaintiffs' unopposed motion for preliminary approval
 9 of class settlement was held on July 10, 2014. After hearing from
 10 counsel, the court issued an order granting Plaintiffs an opportunity to
 11 file an amended motion for preliminary approval of class settlement.
 12 (ECF No. 100). On September 15, 2014, Plaintiffs filed a supplemental
 13 brief re: Plaintiffs' motion for preliminary approval of class settlement.
 14 (ECF. No. 107). Also filed on September 15, 2014, was Defendants
 15 response in support of Plaintiffs' motion. (ECF. No. 108).

16 TERMS OF PROPOSED SETTLEMENT

17 The proposed settlement class (the "Class") consists of "[a]ll
 18 residents of the United States who purchased for personal use, and not
 19 resale or distribution, a Covered Product between January 1, 2005, and
 20 the Preliminary Approval Date" (ECF No. 81 at 3). Class members
 21 do not include "Schiff and its respective affiliates, employees, officers,
 22 directors, agents, and representatives and their immediate family
 23 members; Settlement Class Counsel; and the judges who have presided
 24 over the Litigation and their immediate family members." (*Id.* at 4).

25 I. Class Benefits

26
 27 ³ Plaintiff submits the following exhibits: (1) Settlement Agreement and Release (Exh.
 28 1); (2) proposed Postal Notice (Exh. 1-A); Expert Report of Dr. Thomas Schnitzer, M.D. (Exh.3);
 Lawyer Resumes (Exh 4); Declaration of Claims Administrator (Exh. 5); Settlement Notice Plan
 (2nd Exh. 1); Vita of KCC Legal Notification Service team (Attachment A); proposed Summary
 Notice (Attachment B).

1 1. Monetary Relief

2 Defendants will create a \$2 million fund to be paid to Settlement
3 Class Members who make valid claims. (*Id.*). “Settlement Class
4 Members who have adequate Proof of Purchase⁴ shall be entitled to
5 reimbursement of \$10 for each purchased bottle of the Covered Products
6 up to five (5) bottles per household.” (P’s Supplemental Mem., ECF No.
7 107 at 14). “Settlement Class Members who do not have any adequate
8 proof of purchase will be entitled to reimbursement of \$3 per bottle of the
9 Covered Products purchased up to a maximum of four (4) bottles per
10 household.” (ECF No. 81 at 4). “There is no ceiling on the amount of
11 monies that Defendants may have to pay for Valid Claims. Defendants
12 have agreed to pay all Valid Claims.” (*Id.*). In the event that the total
13 value of Valid Claims do not reach \$2 million, the payment to each
14 Settlement Class Member who submits a Valid Claim with Adequate
15 Proof of Purchase shall be increased pro rata up to a maximum of triple
16 of what he or she would be entitled to under the Settlement Agreement.”
17 (*Id.* at 5). “If, after that increase, the total payments still do not reach \$2
18 million, then the payment to each Settlement Class Member who submits
19 a valid claim without Adequate Proof of Purchase shall be increased pro
20 rata up to a maximum of double what he or she would be entitled to
21 under the Settlement Agreement.” (*Id.*) After these increases “any
22 residual amounts up to \$2 million will be divided pro rata among the
23 Settlement Class Members who have submitted Valid Claims.” (*Id.*).

24 2. Injunctive Relief

25 Defendants have “agreed to the removal of certain labeling claims
26 from all of the Covered Products currently being manufactured or sold by

27
28 ⁴“e.g. receipts, intact boxes or bottles that display a readable UPC code and readable lot number, or similar documentation that identifies the Covered Product and date and location of purchase.” (*Id.*).

1 Defendants.” (*Id.* at 5). “[F]or a period of twenty four (24) months
2 commencing six (6) months after the Effective Date, Defendants will not
3 make the following statements in the packaging or marketing of the
4 Covered Products: ‘repair joints,’ ‘repair cartilage,’ ‘rebuild joints,’
5 ‘rejuvenate joints,’ or ‘rejuvenate cartilage.’” (*Id.*). If the labeling changes
6 are kept in place by Defendants beyond the 24-month period “no
7 Settlement Class Member who purchases such product after the 24-
8 month period can sue Defendants on any claim that was or could have
9 been asserted in the litigation.” (*Id.*). “[I]f subsequent to the Effective
10 Date, Defendants possess and rely upon an independent, well-conducted,
11 published clinical trial that substantiates the representations.” (*Id.*).

12 II. Incentive Awards to Class Representatives

13 Plaintiffs Luis Lerma and Nick Pearson shall be provisionally
14 appointed as the Class Representatives to implement the Parties
15 proposed Settlement in accordance with the Settlement Agreement.
16 Plaintiffs’ Counsel Bonnett, Fairbourn, Friedman & Balint, P.C., Stewart
17 M. Weltman LLC and Denlea & Carton are appointed as Class Counsel.
18 Plaintiffs and Class Counsel must fairly and adequately protect the
19 Class’ interests.

20 Defendants have agreed not to oppose or cause any other person to
21 oppose Class Counsels’ application for attorneys’ fees, costs and expenses
22 in an amount of \$3.0 million. (*Id.* at 6).

23 The parties agree to an incentive award to the Class
24 Representatives “not to exceed \$10,000 for the Plaintiffs.” (*Id.*). “All
25 attorneys’ fees and expenses are to be paid separate and apart from, and
26 will not diminish or erode, the payment of claims to Settlement Class
27 Members. . . .” (*Id.*).

28 III. Consent Jurisdiction and Modification to Settlement

1 The Class Representatives and the Defendants have consented to
2 jurisdiction of the United States Magistrate Judge Mitchell Dembin for
3 all purposes in this case, pursuant to 28 U.S.C. § 636(c), including
4 approval of the settlement and the entry of final judgment. All citations
5 to this case in the notices and claim forms shall be as follows: *Luis*
6 *Lerma, an Individual, and Nick Pearson, an Individual, On Behalf of*
7 *Themselves and All Others Similarly Situated v. Schiff Nutrition*
8 *International, Inc., a Delaware Corporation, and Schiff Nutrition Group,*
9 *Inc., a Utah Corporation*, Case No. 3:11cv1056-MDD.

10 The court reserves the right to approve the Settlement with such
11 modifications, if any, as may be agreed to by Class Counsel and Counsel
12 for Defendants and without future notice to the Settlement Class
13 Members.

14 DISCUSSION

15 “Voluntary conciliation and settlement are the preferred means of
16 disputed resolution in complex class action litigation.” *Smith v. CRST*
17 *Van Expedited, Inc.* 2013 WL 162393, at *2 (S.D. Cal. Jan 14,
18 2013)(citing *Officers for Justice v. Civil Service Com’n of City and County*
19 *of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). But because “[t]he
20 class action device...is [] susceptible to abuse and carries with it certain
21 inherent structural risks, ... class actions may be settled only with the
22 approval of the district court.” *Officers for Justice*, 688 F.2d at 623; see
23 also Fed. R. Civ. P.23(e). “[A]pproval...involves a two-step process in
24 which the Court first determines whether a proposed class action
25 settlement deserves preliminary approval and then, after notice is given
26 to class members, whether final approval is warranted.” *National Rural*
27 *Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 525
28 (C.D. Cal. 2004).

1 Here, the court is at the preliminary approval stage. This “initial
2 decision to approve or reject a settlement proposal is committed to the
3 sound discretion of the trial judge.” *Officers for Justice*, 688 F.2d at 625.
4 “Because class members will subsequently receive notice and have an
5 opportunity to be heard on the settlement, th[e] Court need not review
6 the settlement in detail at this juncture.” *In re M.L. Stern Overtime*
7 *Litig.*, 2009 W.L. 995864, at *3 (S.D. Cal. April 13, 2009). However, even
8 at this preliminary stage, “a district court may not simply rubber stamp
9 stipulated settlements.” *Kakani v. Oracle Corp.*, 2007 WL 1793774, at *1
10 (N.D.Cal. June 19, 2007) (citing *Staton v. Boeing Co.*, 327 F. 3d 938, 959-
11 60 (9th Cir. 2003)). “Especially in the context of a case in which the
12 parties reach a settlement by agreement prior to class certification,
13 courts must peruse the proposed compromise to ratify both the propriety
14 of the certification and the fairness of the settlement.” *Staton v. Boeing*,
15 327 F.3d at 952.

16 I. Federal Rule of Civil Procedure 23(a) Requirements

17 “A party seeking to maintain a class action must be prepared to
18 show that Rule 23(a)’s numerosity, commonality, typicality and adequacy
19 of representation requirements have been met, *Wal-Mart Stores, Inc. v.*
20 *Dukes*, 564 U.S. ___, 131 S.Ct. 2541, and must satisfy through evidentiary
21 proof at least one or Rule 23(b)’s provisions.” *Comcast Corp. v. Behrend*,
22 133 S.Ct. 1426, 1429 (2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564
23 U.S. ___, 131 S.Ct. 2541 (2013)). Here, Plaintiff seeks certification of a
24 settlement class pursuant to Fed. R. Civ. P. 23(b)(3).

25 A. Numerosity

26 First, a proposed class must be “so numerous that joinder of all
27 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “Joinder need not be
28 impossible, as long as potential class members would suffer a strong

litigation hardship or inconvenience if joinder were required.” *Rannis v. Recchia*, 380 Fed. Appx. 646, 651 (9th Cir. May 27, 2010) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)).

Here, the parties assert that “from January 1, 2005, and the Preliminary Approval Date” the covered products have been sold nationwide. (Memo of P’s and A’s ISO of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class, ECF No. 81 at 7). Accordingly, the court finds that it is reasonable to conclude “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1).

B. Commonality

Commonality requires that the class claims depend upon a common contention . . . [and] must be of such a nature that it is capable of classwide resolution” *Wal-Mart Stores, Inc. v. Dukes*, _U.S._, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). In this case, a class of similarly situated individuals alleged that Defendant violated the Consumers Legal Remedies Act, Civil Code § 1750 *et seq.*, Unfair Competition Law, Business and Professions Code § 17200 *et seq.*, Illinois Consumer Fraud Act, 502/1, *et seq.*, Personal Injuries/Medical Monitoring, Personal Injuries/Negligence, and Breach of Express Warranty, which raised the following legal issues:

- * Whether the representations or omissions discussed herein that Defendants made about the Covered Products were or are misleading, or likely to deceive;
- * Whether Plaintiffs and the Class members were deceived in some manner by Defendants’ representations;
- * Whether the alleged conduct constitutes violations of the asserted herein;

1 * Whether Plaintiffs and Class members have been injured and
2 the proper measure of their losses as a result of those injuries;
3 * Whether Plaintiffs and Class members are entitled to
4 injunctive, declaratory or other equitable relief.
5 (ECF. No. 81 at 9).

6 Pursuant to Rule 23(b)(3) the court finds that the allegations set
7 forth in Plaintiffs' complaint are common to the Class Members and
8 predominate over any individual claims, "and that a class action is
9 superior to other available methods for fairly and efficiently adjudicating
10 the controversy." Fed. R. Civ. P. 23(b)(3).

11 C. Typicality

12 The third Rule 23(a) prerequisite is typicality of claims. "[T]he
13 claims or defenses of the representative parties are typical of the claims
14 or defenses of the class." Fed. R. Civ. P. 23(a)(3). The claims of the class
15 representatives must be "reasonably coextensive with those of absent
16 class members." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.
17 1998).

18 Plaintiffs allege that "the labeling and advertising of the Covered
19 Products all misrepresented the products' effectiveness in providing joint
20 health benefits." (ECF No. 81 at 10). "Plaintiffs further alleged that they
21 and all members of the Settlement Class were injured when they paid
22 money to purchase the Covered Products." (*Id.*) No claim has been raised
23 by Plaintiffs that is unique to themselves. Accordingly, the court finds
24 the typicality prerequisite has been preliminarily satisfied.

25 D. Adequacy

26 "Rule 23(a)(4) permits the certification of a class action only if the
27 'representative parties will fairly and adequately protect the interests of
28 the class.'" *Staton v. Boeing*, 327 F. 3d. at 957. "To determine whether the

1 representation meets this standard, we ask two questions: (1) Do the
2 representative plaintiffs and their counsel have any conflicts of interest
3 with other class members, and (2) will the representative plaintiffs and
4 their counsel prosecute the action vigorously on behalf of the class?” *Id.*
5 Counsel for Plaintiffs have submitted exhibits outlining Plaintiffs
6 counsels’ experience prosecuting complex consumer actions. (See ECF
7 No. 81-5, Exh. 4). Based upon the record before the court, it appears that
8 neither Plaintiffs nor their counsel have any conflict of interest with any
9 other class member. The court finds the adequacy prerequisite has been
10 preliminarily satisfied.

11 E. Predominance and Superiority

12 In addition to meeting all four of the Rule 23(a) prerequisites,
13 Plaintiff must also meet one of the Rule 23(b) requirements. As
14 previously stated, Plaintiff seeks certification pursuant to Rule 23(b)(3):
15 (1) “the questions of law or fact common to class members predominate
16 over any questions affecting only individual members,” and (2) “a class
17 action is superior to other available methods for fairly and efficiently
18 adjudicating the controversy.” *Id.*

19 Predominance concerns whether “questions of law or fact common
20 to the class will predominate over any questions affecting only individual
21 members as the litigation progresses.” *Amgen*, 133 S. Ct. at 1195. In
22 Plaintiffs’ unopposed motion for preliminary approval of class settlement,
23 Plaintiffs assert the proposed settlement satisfies the predominance
24 requirement because “the central issues for every claimant are whether
25 Defendants’ claims that the Covered Products provided clinically proven
26 joint health benefits were false or deceptive and whether Defendants
27 alleged misrepresentations regarding the effectiveness of the Covered
28 Products was likely to deceive a reasonable consumer.” (ECF No. 81-1 at

21). “These issues predominate and are together the ‘heart of the litigation’ because they would be decided in every trial brought by individual members of the Settlement Class and can be proven or disproven with the same class-wide evidence.” (*Id.*).

On these facts, the court finds that the Rule 23(b)(3) predominance requirement has been preliminarily established.

The court must next consider whether “a class action [would be] ‘superior to other available methods for fairly and efficiently adjudicating the controversy.’” *Colin v. Jaguar Land Rover North America, LLC*, 619 F.3d 1168, 1175 (9th Cir. 2010) (quoting Fed. R. Civ. P. 23(b)(3)). Whether class certification is the superior method for adjudicating class members’ claims, the four factors enumerated in Rule 23(b)(3) must be considered: (a) the class members interests in controlling litigation, (b) the nature of litigation, (c) the desirability of concentrating the litigation of the claims, and, (3) the manageability of the class. “[Consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis.” *Zinser v. Accujix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001).

In this case, the relatively small amount of money involved and the expense associated with each class member prosecuting a separate case makes it highly unlikely that individual litigation would be undertaken. “Where damages suffered by each putative class member are not large, this factor weighs in favor of certifying a class action.” *See Id.* at 1190. A class action would offer those with small claims the opportunity for meaningful redress. Here, the court finds that the Rule 23(b)(3) superiority requirement has been preliminarily established.

1 The court grants preliminary certification of the proposed
2 settlement class.

3 F. Fairness of the Proposed Settlement

4 The court must carefully consider “whether a proposed settlement
5 is fundamentally fair, adequate, and reasonable,” understanding that
6 “[i]t is the settlement taken as a whole, rather than the individual
7 component parts, that must be examined for overall fairness....” *Staton v.*
8 *Boeing Company*, 327 F.3d 938, 952 (9th Cir. 2003) (internal citations
9 omitted). “In making this appraisal, courts have broad discretion to
10 consider a range of factors such as ‘the strength of the plaintiffs’ case; the
11 risk, expense, complexity, and likely duration of further litigation; the
12 risk of maintaining a class action status throughout the trial; the amount
13 offered in settlement; the extent of discovery completed and the stage of
14 the proceedings; the experience and views of counsel; the presence of a
15 governmental participant; and the reaction of the class members to the
16 proposed settlement.” *Id.* at 959 (internal citations omitted). “The
17 relative importance to be attached to any factor will depend upon and be
18 dictated by the nature of the claim(s) advanced, the type(s) of relief
19 sought, and the unique facts and circumstances presented by each
20 individual case.” *Officers for Justice v. Civil Service Commission of San*
21 *Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

22 “The first step in district court review of a class action settlement is
23 a preliminary, pre-notification hearing to determine whether the
24 proposed settlement is ‘within the range of possible approval.’” *Gautreaux*
25 *v. Pierce*, 690 F. 2d 616, 621 ftnt 3 (7th Cir. 1982). The purpose of Rule
26 23(e) is to protect the unnamed members of the class from unjust or
27 unfair settlements affecting their rights. *See Davis v. City and County of*
28 *San Francisco*, 890 F.2d 1438, 1444 n. 5 (9th Cir. 1989).

At this juncture, Plaintiff's counsel has sufficiently demonstrated that the procedure for reaching this settlement was fair and reasonable. Weighing all the factors in favor of preliminary approval, the court finds the settlement is within the range of possible approval. This preliminary determination establishes an initial presumption of fairness. *See In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 785 (3rd Cir. 1995).

II. Notice

The Notice of Class Action Settlement will be provided through the following methods:

A. "[The proposed] Notice Plan uses a combination of notice placements in well-read consumer publications and on a variety of websites to effectively reach Class members. To fulfill the CLRA (California Consumer Legal Remedies Act) notice requirement, the notice program also includes four placements, once a week for four consecutive weeks in San Diego Union Tribune." (ECF No. 81-6, at 25).

B. Notices will be placed in the seven following publications:

Arthritis Today	Prevention
First for Women	Reader's Digest
Parade	Woman's World
People	

C. Notices will be placed on the following internet networks:

Google Display	Google Search
Microsoft Display	Yahoo! RMX
Facebook	

D. "An informational website will be established The website address will be prominently displayed in all printed notice materials and accessible through a hyperlink embedded in the internet banner notices."

1 (*Id.* at 26).

2 E. “A toll-free number will be established to allow a simple way for
3 Class members to learn more about the settlement in the form of
4 frequently asked questions and answers and to request to have more
5 information mailed directly to them. The toll-free number will be
6 prominently displayed in all printed materials.” (*Id.*).

7 F. A Facebook webpage will be established enabling Class
8 members to learn more about the class action settlement. (*Id.* at 35).

9 III. Right to Elect Not to Participate in Settlement

10 “A member of the Settlement Class who wishes to opt-out of the
11 Settlement Class must complete and send to the Settlement
12 Administrator a request for exclusion that is post-marked or submitted
13 electronically not later than the Opt-Out and Objection Date. The
14 request for exclusion must be personally signed by the member of the
15 Settlement Class and contain a statement that he or she is otherwise a
16 member of the Settlement Class and purchased one or more of the
17 Covered Products. A member of the Settlement Class may opt-out on an
18 individual basis only. So-called “mass” or “class” opt-outs whether filed
19 by third parties on behalf of a “mass” or “class” of class members or
20 multiple class members where no personal statement has been signed by
21 each and every individual class member, shall not be allowed.” (ECF No.
22 107-12, at 19). A Class Member who desires to be excluded but who fails
23 to comply with the opt-out procedure shall not be excluded from the class.
24 (*Id.*). “The Settlement Administrator shall provide Settlement Class
25 Counsel and Defendants’ Counsel with the Opt-Out List within (7) Days
26 after the Opt-Out and Objection Date.” (*Id.*).

27 IV. Right to Object

28 Any Settlement Class Member who does not opt-out and who

1 wishes to object to the Settlement “must do so on or before the Opt-Out
2 and Objection Date.” (*Id.* at 18). To be considered valid the objection
3 must be submitted to the court and served on Settlement Class Counsel
4 and Defendant’s Counsel. An objection must provide: (a) the name,
5 address, telephone number of the person objecting and, if represented by
6 counsel, of his/her counsel; (b) a signed declaration that he or she is a
7 member of the Settlement Class and purchased one or more of the
8 Covered Products; (c) a statement of all objections to the Settlement; and
9 (d) a statement whether he or she intends to appear at the fairness
10 hearing. (*Id.*). Class members who fail to file and serve timely written
11 objections in the manner specified above shall be deemed to have waived
12 any objections and shall be foreclosed from making any objection to the
13 settlement. (*Id.*).

14 The Settlement Administrator shall make available an electronic
15 copy of this preliminary approval Order in a prominent location on the
16 informational website. The Settlement Administrator shall include a
17 statement, in a prominent location on the Class Notice, Publication
18 Notice and claim forms, informing the putative class members that a
19 copy of this Order is available on informational website.

20 In all other respects, the court finds that the proposed notice
21 procedures are reasonably calculated to adequately apprise Class
22 Members of (a) a pending lawsuit; (b) the proposed settlement; and (c)
23 their rights, including the right to either participate in the settlement,
24 exclude themselves from the settlement, or object to the settlement.

25 //

26 //

27 V. Preliminary Injunction

28 Defendant’s request a preliminary injunction “enjoining all

1 members of the Settlement Class from commencing or continuing any
 2 lawsuit or other proceeding relating to the Released Claims.” (ECF No.
 3 108 at 10). According to the Defendants, an injunction is appropriate
 4 under the All Writs Act, 28 U.S.C. § 1651 to keep a parallel proceeding
 5 from undermining settlement in this case. (ECF No. 108 at 12).
 6 Defendants contend that a preliminary injunction is particularly justified
 7 here because a settlement has been reached “and parallel proceedings
 8 create the risk of inconsistent decisions . . . and impair this Court’s
 9 flexibility in reviewing and approving the settlement.” (*Id.*). The parties
 10 specifically cite two other on-going federal cases in support of their
 11 request for injunctive relief: *Mitchell v. Schiff Nutrition, et al.*,
 12 3:14cv00387 (S.D. Cal.); *Flowers v. Schiff Nutrition, et al.*, 2:13cv09406
 13 (C.D. Cal.).

14 “The All Writs Act provides that: ‘The Supreme Court and all
 15 courts established by Act of Congress may issue all writs necessary or
 16 appropriate in aid of their respective jurisdictions and agreeable to the
 17 usages and principles of law.’” *Negrete v. Allianz Life Insurance Company*
 18 *of North America*, 523 F.3d 1091, 1098 (9th Cir. 2008). However, a court
 19 should not enjoin conduct under the Act that is “not shown to be
 20 detrimental to the court’s jurisdiction.” *ITT Community Development*
 21 *Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). “[T]he mere fact
 22 that some other court might complete its proceedings before the district
 23 court [is] able to complete the proceedings in [its own] case does not
 24 justify an injunction.”⁵ *Negrete*, 523 F.3d at 1100, ftnt 13 (*citing Vendo*

26 ⁵ “[A] district court’s injunctive power is not unfettered under the All Writs Act;
 27 rather it is circumscribed by the Anti-Injunction Act [which] generally prohibits courts
 28 from enjoining state proceedings, except for three enumerated exceptions.” *Negrete* 523
 F.3d at 1100. Although, as Defendants have noted, the only other pending cases at
 issue are in federal court, therefore, the court will not address the essentials of the Anti-
 Injunction Act.

1 *Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42, 97 S.Ct. 2881, 2893, 53
 2 L.Ed.2d 1009 (1977)). In addition, “[t]here is precious little authority
 3 dealing with injunctions . . . to another federal district court.” *Negrete*,
 4 523 F.3d at 1099. In *Bergh v. Washington*, 535 F.2d 505 (9th Cir. 1976),
 5 the Ninth Circuit held:

6 [W]hen an injunction sought in one federal proceeding would
 7 interfere with another federal proceeding, considerations of
 8 comity require more than the usual measure of restraint, and
 9 such injunctions should be granted only in the most unusual
 10 cases. Where, as here, the [] federal courts are of coordinate
 11 jurisdiction, and their decisions are reviewed by the same
 12 Court of Appeals, the issuance of such an injunction is rarely,
 13 if ever, justified.

14 *Id.* at 507 (internal citations omitted).

15 The two Ninth Circuit cases cited by Defendants are not
 16 particularly instructive and do not support their assertion that federal
 17 district courts “routinely” and “regularly” preliminarily enjoin pending
 18 cases.” (ECF No. 108 at 10-11). Defendants cite *Wright v. Linkus*
 19 *Enterprises, Inc.*, 259 F.R.D. 468 (E.D.Cal. 2009). In its order of
 20 preliminary approval of class settlement the court in *Wright* issued an
 21 injunction pursuant to the All Writs Act recognizing that “the existence
 22 of other actions by class members for the same or similar claims could
 23 jeopardize the ability to proceed with final approval of the settlement.”
 24 *Id.* at 477.

25 Here, the court does not perceive a threat from the other pending
 26 cases that would persuade it to set aside the principles of comity and
 27 enjoin a pending action in a court of equal jurisdiction. As the court in
 28 *National Union Fire Insurance Company of Pittsburgh, PA., v. Payless*
Shoesource, Inc., et al., 2012 WL 3277222 (N.D. Cal), pointed out, “the
 limited instances in which a district court in this Circuit has enjoined
 [later filed cases] dealt with unusual factors that counseled in favor of
 enjoining the [later filed] action[s]. . . .” *Id.* at 9. See *Broadcom Corp v.*

1 *Qualcomm Inc.*, 2005 WL 5925582 (C.D.Cal. 2005) (enjoining the second-
2 filed of three actions for patent infringement with a parallel proceeding
3 on the same patent claims pending before the United States Trade
4 Commission.); *Kiland v. Boston Sci. Corp.*, 2011 WL 1261130 (N.D.Cal.
5 2011) (enjoining second-filed action in the District of Minnesota but after
6 the district court voluntarily stayed its own proceedings in favor of the
7 California case.).

8 Defendants also cite *Hanlon v. Chrysler*, 150 F.3d 1011 (9th Cir.
9 1998) in support of their request for an injunction. The court in *Hanlon*
10 invoked its authority under the All Writs Act and enjoined a state class
11 action brought by a class member who attempted to opt out an entire
12 state sub-class from the pending federal case. *Hanlon* was a complex
13 mass tort litigation involving potentially 3.3 million class members with
14 a settlement valuation of \$115 million. The instant case is not complex
15 and while the potential pool of class members could top two million this
16 is not a case where an injunction would aid the court's jurisdiction. Nor
17 does the court find that the other pending federal cases are "in a position
18 to frustrate the implementation of a court order or the proper
19 administration of justice." *U.S. v. New York Tel. Co.*, 434 U.S. 159, 174,
20 98 S.Ct. 364, 373 (1977).

21 As stated previously, the All Writs Act exists to avoid any threat to
22 the court's jurisdiction that has "the practical effect of diminishing the
23 court's power." *ITT Community Dev. Corp.*, 569 at 1359. It does not
24 apply to a party's "continuing interest in prosecuting a lawsuit." *Sea*
25 *Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1213 (DCC 1989). No
26 identifiable threat to the jurisdiction of this court has been presented.
27 Applying the limited precedent in this area, the court finds no basis for
28 issuing an injunction in this case. Accordingly, Defendant's motion for

1 injunctive relief pursuant to the All Writs Act is denied.

2
3 CONCLUSION

4 IT IS HEREBY ORDERED that the Unopposed Motion for
5 Preliminary Approval of Class Action Settlement (ECF No. 81) filed by
6 Plaintiffs is GRANTED as follows:

- 7 1. The Amended Settlement Agreement (Pl. Exh. 13, ECF No. 107-13
8 at 2) including the Class Notice provisions and claim form, are
9 preliminarily approved;
- 10 2. If the Settlement Agreement terminates by its terms for any
11 reason, the following will occur: (a) this Order will be vacated; (b)
12 class certification will automatically be vacated, Plaintiffs will stop
13 functioning as class representatives and , Class Counsel will revert
14 to interim class counsel; and (c) this Action will revert to its
15 previous status in all respects as it existed immediately before the
16 Parties executed the Settlement Agreement.
- 17 2. The Class is provisionally certified as a class of all persons who
18 purchased one of the Covered Products during the period from
19 January 1, 2005 and the date of preliminary approval;
- 20 3. Plaintiffs Lerma and Pearson are conditionally certified as the
21 Class Representatives to implement the Parties' settlement in
22 accordance with the Settlement Agreement. Settlement Class
23 Counsel (for settlement purposes only) are: Elaine A. Ryan; Stewart
24 M. Weltman, and; Jeffrey I. Carton. Plaintiffs and Class Counsel
25 must fairly and adequately protect the Class' interests.
- 26 4. The court expressly reserves the right to determine, if necessary,
27 whether the Named Plaintiffs' proposed claims may be certified as a
28 class action for purposes other than settlement, and Defendants

1 hereby retain all rights to assert that the Named Plaintiffs'
2 proposed claims may not be certified as a class action except for
3 settlement purposes.

4 5. The court finds the proposed settlement is sufficiently fair,
5 reasonable and adequate to warrant providing notice to the
6 Settlement Class. This determination permitting notice to the
7 Settlement Class is not final, but a determination that there is
8 probable cause to submit the proposed Settlement Agreement to the
9 Settlement Class and to hold a Fairness Hearing to consider the
10 fairness, reasonableness, and adequacy of the proposed Settlement.

11 6. The court appoints KCC Class Action Services as Settlement
12 Administrator in accordance with Section III Paragraph C of the
13 Amended Settlement Agreement.

14 7. The court approves the Class Notice, the content of which is
15 without material alteration from Attachment B to Exhibit 1 to the
16 Declaration of Gina Intrepido-Bowden (ECF No. 81-6 at 53) and
17 directs the Settlement Administrator to publish the Class Notice in
18 accordance with the Settlement Class Notice Program provided for
19 in the Declaration of Gina Intrepido-Bowen. (ECF No. 81-6).

20 8. Defendants will notify Class Members of the Settlement in the
21 manner specified under Section VII of the Settlement Agreement.
22 Defendant will pay all costs associated with claims administration
23 and providing notice to Class Members. Within a reasonable
24 amount of time before the filing date of Plaintiffs' application or
25 motion in support of the Final Approval Order and Judgment,
26 Defendants are to provide Plaintiffs with a declaration or
27 declarations from the Settlement Administrator confirming that the
28 notice has been provided in accordance with the Settlement

1 Agreement.

2 9. The Settlement Administrator shall make available an electronic
3 copy of this preliminary approval Order in a prominent location on
4 the informational website. The Settlement Administrator shall
5 include a statement, in a prominent location on the Class Notice
6 and claims forms, informing putative class members that a copy of
7 this Order is available on the informational website.

8 10. Class Members who want to receive a monetary settlement must
9 accurately and completely fill out a Claim Form and submit it to
10 the Claims Administrator within one hundred twenty (120) days
11 from the date of this Order. Settlement Class Members who do not
12 submit a complete and timely Claim Form in compliance with the
13 Settlement Agreement shall not be entitled to any benefits under
14 the Settlement, but nonetheless shall be barred by the Release and
15 provisions of the Settlement Agreement and the Final Order and
16 Judgment.

17 11. The court approves the creation and maintenance of the Settlement
18 Class website that shall include, at a minimum, downloadable
19 copies of the Class Notice, Claim Form and Settlement Agreement
20 and shall be maintained in accordance with terms of the Settlement
21 Agreement.

22 12. The court orders any members of the Settlement Class who wish to
23 exclude themselves from the Settlement Class to submit
24 appropriate, timely requests for exclusion in accordance with the
25 procedures outlined in the Settlement Agreement and Class Notice,
26 postmarked no later than one hundred twenty (120) days from the
27 entry of this Order, or as the court may otherwise direct, and sent
28 to the Settlement Administrator at the address on the Class Notice.

- 1 13. The court orders that any member of the Settlement Class who does
2 not submit a timely, written request for exclusion from the
3 Settlement Class (i.e. become an Opt-Out) on or before one hundred
4 twenty days (120) days from the entry of the Order will be bound by
5 all proceedings, orders and judgments in the litigation, even if such
6 Settlement Class Member has previously initiated or subsequently
7 initiates individual litigation or other proceedings encompassed by
8 the Release (as set forth in Section II Paragraphs Z-CC of the
9 Settlement Agreement).
- 10 14. Class Members who have not submitted a timely written exclusion
11 request pursuant to this Order who want to object to the
12 Settlement Agreement must file a written objection and/or Notice of
13 Intention to Appear with the court, and serve copies on Class
14 Counsel and Defendants' Counsel no later than one hundred twenty
15 (120) days after the date of this Order. The Objection must state:
16 (a) the Settlement Class member's full name, address and
17 telephone number; (b) a signed declaration that he or she is a
18 member of the Settlement Class and purchased Covered Product(s);
19 (c) a written statement of all grounds for the objection; (d) a
20 statement of whether the objector intends to appear at the Fairness
21 Hearing; and (e) if the objector intends to appear at the Fairness
22 Hearing through counsel, the objection must also identify the
23 attorney representing the objector who will appear at the Fairness
24 Hearing. Any response to an objection shall be filed with the court
25 no later than seven (7) days prior to the Fairness Hearing.
- 26 15. The court orders that any attorney hired by a Settlement Class
27 Member for the purpose of objecting to the proposed Settlement, the
28 Attorneys' Fee Award or the Incentive Award and who intends to

1 make an appearance at the Fairness Hearing to provide to the
2 Settlement Administrator (who shall forward it to Settlement Class
3 Counsel and Defendants' Counsel) and to file with the Clerk of
4 Court a notice of intention to appear no later than one hundred
5 twenty (120) days from the entry of this Order or as the court may
6 otherwise direct. Counsel who do not adhere to these requirements
7 will not be heard at the Fairness Hearing.

8 16. Any Settlement Class Member who does not file a timely written
9 objection to the Settlement or who fails to otherwise comply with
10 the requirements of Section VII Paragraph C of the Amended
11 Settlement Agreement shall be foreclosed from seeking any
12 adjudication or review of the Settlement by appeal or by any other
13 means.

14 17. The Settlement Administrator shall establish a post office box in
15 the name of the Settlement Administrator to be used for receiving
16 requests for exclusion, and any other communications, and
17 providing that only the Settlement Administrator, Settlement Class
18 Counsel, Defendants' Counsel, the court, the Clerk of Court and
19 their designated agents shall have access to this post office box,
20 except as otherwise provided in the Settlement Agreement.

21 18. The court directs that Settlement Class Counsel shall file their
22 applications for the Attorneys' Fee Award and Named Plaintiffs'
23 Incentive Award one hundred ten (110) days from the entry of this
24 Order in accordance with the terms set forth in Section VI
25 Paragraph A of the Settlement Agreement.

26 19. The Settlement Administrator shall compile a list of all Class
27 Members who timely send a written request to be excluded from the
28 settlement and provide a copy of that list to Class Counsel ten (10)

1 calendar days after the Opt-Out Date, and then file with file with
2 Court the Opt-Out List with an affidavit attesting to the
3 completeness and accuracy thereof no later than five (5) days
4 thereafter or on such other date as the Parties may direct.

5 20. If the Settlement Agreement terminates by its terms for any
6 reason, the following will occur: (a) this Order will be vacated; (b)
7 class certification will automatically be vacated; (c) Plaintiffs will
8 stop functioning as class representatives and Class Counsel will
9 revert to interim class counsel; (d) this Action will revert to its
10 previous status in all respects as it existed immediately before the
11 Parties executed the Settlement Agreement; and, e) no reference to
12 the Settlement Class, the Settlement Agreement, or any
13 documents, communications, or negotiations related in any way
14 thereto shall be made for any purpose in the litigation or in any
15 other action or proceeding.

16 21. Neither the Settlement Agreement, nor any of its provisions, nor
17 any of the documents (including but not limited to drafts of the
18 Settlement Agreement, this Preliminary Approval Order or the
19 Final Order and Judgment), negotiations, or proceedings relating in
20 any way to the Settlement, shall be construed as or deemed to be
21 evidence of any admission or concession by any person, including
22 Schiff, and shall not be offered or received in evidence, or subject to
23 discovery, in this or any other action or proceeding except in an
24 action brought to enforce its terms or except as may be required by
25 law or Court order.

26 22. All discovery and pretrial proceedings and deadlines are stayed and
27 suspended until further notice from the court, except for such
28 actions as are necessary to implement the Settlement Agreement

1 and this Order.

- 2 23. The court directs that settlement class counsel shall file their
3 applications for the Attorney's Fee Award and Named Plaintiffs'
4 Incentive Award fourteen (14) days prior to the date set for final
5 approval of the Settlement and Settlement Agreement.
- 6 24. The Court reserves the right to adjourn or continue the Fairness
7 Hearing, or any further adjournment or continuance thereof,
8 without further notice other than announcement at the Fairness
9 Hearing or at any adjournment or continuance thereof, and to
10 approve the Settlement with modifications, if any, consented to by
11 the Settlement Class Counsel and Defendants' Counsel without
12 further notice.
- 13 25. Final Approval Hearing. A Final Approval Hearing shall be held
14 before this court on **April 8, 2015, at 10:00 a.m. in Courtroom 1E**
15 **in the Edward J. Schwartz Federal Courthouse, 221 W.**
16 **Broadway, San Diego, CA, 92101.**
17 IT IS SO ORDERED.

18
19 DATED: November 21, 2014

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21 
22 Hon. Mitchell D. Dembin
23 U.S. Magistrate Judge
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