UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 13-0242 JGB (SPx)**	Date	August 31, 2015
Title	***Robert McCrary v. The Elations Company, LLC***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Adele C. Frazier
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
Gillian L. Wade Sara D. Avila	Sascha V M Henry

Proceedings: Order GRANTING Plaintiff's Motion for Preliminary Approval of Class Action Settlement (Doc. No. 261)

Before the Court is Plaintiff's Motion for Preliminary Approval of Class Action Settlement. ("Motion," Doc. No. 261.) No opposition has been filed. The Court heard oral argument from the parties on August 31, 2015. For the reasons stated below, the Court GRANTS the Motion.

I. BACKGROUND

A. Procedural History

Plaintiff Robert McCrary ("Plaintiff" or "McCrary") filed his putative class action Complaint in state court on December 31, 2012. (Not. of Removal, Ex. A, Doc. No. 1.) Defendant the Elations Company, LLC ("Defendant") removed the action to this Court on February 7, 2013. (Not. of Removal.)

Plaintiff filed a First Amended Complaint on February 27, 2013. ("FAC," Doc. No. 10.) The Court granted in part Defendant's motion to dismiss, dismissing some of Plaintiff's claims with leave to amend and finding others sufficiently pleaded. (Doc. No. 21.) On May 3, 2013, Plaintiff filed a Second Amended Complaint, ("SAC," Doc. No. 23), which Defendant thereafter moved to dismiss and strike, (Doc. Nos. 26, 27). The Court granted the motions in part, dismissing some claims with, and others without, leave to amend. (Doc. No. 36.) Pursuant to the Court's order, Plaintiff filed a Third Amended Complaint on July 25, 2013. ("TAC," Doc. No. 38.) The TAC added named Plaintiff Denzel Doucette. (Id.) Defendant answered the TAC on August 20, 2013. (Doc. No. 44.)

On October 14, 2013, Plaintiff filed a motion for class certification, (Doc. No. 48), and a week later filed a motion for leave to file a Fourth Amended Complaint, (Doc. No. 56). On January 13, 2014, the Court granted the motion to amend. ("Class Order," Doc. No. 95.) In the same order, the Court certified a class of all persons residing in the state of California who purchased Elations for personal use, and not for resale, via methods other than the website, between May 28, 2009, and December 26, 2012, when the following claims were on the packaging and/or labeling of Elations: "clinically-proven combination" and/or "clinically proven formula." (Id. at 9.)

Plaintiff filed a Fourth Amended Complaint on January 21, 2014. ("4AC," Doc. No. 99.) The 4AC eliminated Plaintiff Doucette from the case. (Id.) Defendant filed a motion to dismiss the 4AC, (Doc. No. 94), which the Court denied on March 24, 2014, (Doc. No. 117). Defendant answered the 4AC on April 7, 2014. (Doc. No. 118.)

On June 3, 2014, the parties stipulated to amend the class definition, expanding the dates between which class members may have purchased Elations to include span of time between May 28, 2009, through September 30, 2013. (Doc. No. 132.) The Court granted that stipulation to amend the class definition the following day. (Doc. No. 133.)

Defendant moved to decertify the class on August 11, 2014, (Doc. No. 150), and to exclude Plaintiff's damages expert, Dr. David Sharp, (Doc. No. 151). Plaintiffs later moved to exclude two of Defendant's experts: Russell W. Mangum III, (Doc. No. 188), and Bruce R. Isaacson, (Doc. No. 189). In an order dated December 2, 2014, the Court denied Defendant's motions to exclude Sharp and decertify the class, denied Plaintiff's motion to exclude Isaacson, and granted in part Plaintiff's motion to exclude Mangum. (Doc. No. 210.)

On September 8, 2014, Defendant filed a motion for partial summary judgment as to Plaintiff's claim for injunctive relief. (Doc. No. 165.) That same day, Plaintiff also moved for summary judgment. (Doc. No. 166.) The Court granted Defendant's motion for partial summary judgment in an order dated December 9, 2014, granting summary judgment as to Plaintiff's claim for injunctive relief. (Doc. No. 214.) In that order, the Court also denied Plaintiff's motion for summary judgment. (Id.)

On February 13, 2015, Plaintiff filed a notice of settlement and a joint stipulation to vacate the trial dates. (Doc. No. 257.) The Court approved the stipulation and vacated the remaining trial and pretrial dates. (Doc. No. 258.) As ordered by the Court on June 17, 2015, Plaintiff filed a Motion for Preliminary Approval of Class Action Settlement on August 3, 2015. ("Motion," Doc. No. 261.) The Court held a preliminary approval hearing on August 31, 2015.

B. Factual Allegations

The 4AC states four claims for relief: (1) violation of the Consumer Legal Remedies Act ("CLRA") under California Civil Code Section 1750; (2) violation of the False Advertising Law ("FAL") under California Business and Professions Code Section 17500; (3) violation of the unfair and fraudulent prongs of the Unfair Competition Law ("UCL") under California Business and Professions Code Section 17200; and (4) violation of the unlawful conduct prong of the UCL.

The 4AC alleges that Defendant markets, distributes, and sells the Elations dietary joint supplement beverage and promotes it as "clinically proven" to have joint health benefits. (4AC ¶ 1.) However, Plaintiff contends that Elations is not clinically proven to have any impact on joints and that the statement on Elations' label was therefore false. (4AC ¶ 2.)

Plaintiff McCrary suffers from arthritic joint pain. (4AC ¶ 74.) Plaintiff alleges that, while shopping at a CVS pharmacy in August 2011, he reviewed the packaging of Elations, which included claims that Elations contains a "clinically-proven formula" and a "clinically-proven combination" of ingredients. (4AC ¶ 75.) Relying on these claims, he purchased Elations and used it as directed; however, he did not experience the advertised benefits. (4AC ¶¶ 76-77.) Plaintiff asserts that he would never have purchased the product had he known of its ineffectiveness. (4AC ¶ 76.) Plaintiff brought this action on behalf of a putative class of similarly situated persons. (4AC ¶ 17.)

C. Terms of the Settlement Agreement

Plaintiff submits a copy of the parties' Settlement Agreement as Exhibit A to the Declaration of Gillian L. Wade ("Wade Decl."). ("Agreement," Wade Decl., Ex. A, Doc. No. 261-1.) In the Agreement, Defendant continues to deny the claims asserted in the 4AC. (Id. § I(z).) Nevertheless, Defendant agrees to pay a total settlement amount of $1.35 million to resolve Plaintiff's claims and those of a class of purchasers. (Id. § IV(B)(1).) In exchange, Plaintiff and the Settlement Class members will release "all actions, claims, causes of action, demands, rights, and suits of whatever kind of nature that arose" between May 28, 2009 and the date of this preliminary approval order against Defendant.[1] (Id. §§ II(d), (r), (y), VIII(D).) The Agreement defines the Settlement Class as follows:

> All persons who purchased Elations from May 28, 2009 through the date of the Preliminary Approval Order of this Settlement at a retail location in the State of California for personal use and not for resale. Excluded from the Settlement Class are: (a) employees, officers and directors of Defendant; (b) persons who timely and properly exclude themselves from the Settlement; and (c) the Court, the Court's immediate family and Court staff.

(Agreement § I(w).)

The Agreement provides for a cash recovery to members of the Settlement Class. (Agreement § IV(A).) Settlement Class members who have a receipt for their purchases of Elations during the class period "will be entitled to a refund of $6.00[ ]per six pack for every six pack for which they have a valid proof of purchase" for up to three six packs. (Id. § IV(A)(1).) Settlement Class members without receipts "will be entitled to a refund of $6.00[ ]per six pack of Elations during the class period" for up to two six packs per household. (Id. § IV(A)(2).)

[1] However, Settlement Class members will not release any claims for personal injury and for violations of state or federal employment statutes. (Agreement § II(d).)

The Agreement also indicates that each Settlement Class member's award will be reduced if insufficient funds remain after the Settlement Administrator costs, costs and expenses awarded to Class Counsel, attorneys' fees, and a service award to McCrary. (Agreement §§ IV(B)(1), IV(C)(1).) The total amount available to pay eligible Settlement Class member claims shall be at least $200,000. (Id. § IV(C)(1).) In the alternative, if excess funds remain after those expenses, costs, and awards are paid, each Settlement Class member's award will be proportionately increased on a per six-pack basis. (Id. § IV(C)(2).)

Defendant agrees not to oppose Plaintiff's requests for (i) up to $585,000 in Class Counsel's costs and actual expenses incurred to date, and (ii) an award of attorneys' fees up to $362,000. (Agreement § VIII(A).) Moreover, Defendant will not oppose an incentive award of up to $5,000 for Robert McCrary, as the representative plaintiff. (Id. § VIII(B).) The application for these fees and costs will be filed at least sixty days before the Court's final approval hearing and before the deadline for class members to opt-out or object. (Id. § VIII(C); Mot. at 12 n.18.) In total, the costs, expenses, attorneys' fees, and settlement administration costs shall not exceed $1,150,000. (Id. § VIII(A).)

D. Claims Process

The Settlement Agreement proposes that the Court appoint Kurtzman Carson Consultants ("KCC") as the Settlement Administrator to provide notice to class members and administer the claims process. (Agreement § II(u).) Class notice will encompass both direct notice and notice by publication. (Id. §§ V(B), (C).) First, KCC will mail notice within fifteen days after the date of this order to those Settlement Class members for whom the parties possess a mail or email address. (Id. § V(B).) Second, within sixty days after the entry of this order, KCC will cause notice to be published.[2] (Id.) Moreover, KCC will update the settlement website with the class notice, claim form, and other relevant documents shortly after this order is issued. (Id. § V(D).)

Settlement Class members may obtain a cash payment by submitting a claim form by mail or electronically at least forty-five days before the Court's final approval hearing. (Agreement §§ IV(A)(4), IV(F)(2).) At least twenty-one days before the Court's final approval hearing, KCC shall send a notice explaining the rejection of any claim and allowing the Settlement Class member until five days before the final approval hearing to correct any identified deficiencies. (Id. § IV(D)(1).) KCC shall send payment directly to each eligible Settlement Class member no later than sixty days after the settlement is finalized (i.e. after the time to appeal the Court's final approval order has expired and/or all appeals are resolved). (Id. § II(j), IV(D)(2).)

In the alternative, purchasers of Elations may request exclusion from the Settlement Class by submitting a completed and signed Request for Exclusion form at least forty-five days before

[2] Plaintiff's Motion indicates that one-time notices will appear in the California state editions of Arthritis Today, National Geographic, People, Sunset, and Parade magazines. (Mot. at 10.) In addition, notice will appear once-per-week for four consecutive weeks in the Redlands Daily Facts newspaper. (Mot. at 10-11.) As for internet notice, internet banners will appear on Facebook and Run of Network over a two- to three-week period. (Mot. at 11.)

the Court's final approval hearing. (Agreement § V(F)(1).) In addition, a Settlement Class member may object to or oppose the settlement and/or the fee and cost application by filing a written objection and sending it to Class Counsel at least forty-five days before the Court's final approval hearing. (Id. § VII(B).)

II. LEGAL STANDARD

Class action settlements must be approved by the Court. See Fed. R. Civ. P. 23(e). Court approval occurs in three steps, the first of which is a preliminary approval hearing. See Manual for Complex Litigation (Fourth) §§ 21.632 (2012). At the preliminary approval stage, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Id. "The settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval." Acosta v. Trans Union, LLC, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original). A court considers the following factors to determine whether a settlement agreement is potentially fair: the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

Approval of a class action settlement requires certification of a settlement class. A court may certify a class if the plaintiff demonstrates that the class meets the requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b). See Fed R. Civ. P. 23; see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(a) contains four prerequisites to class certification: (1) the class must be so numerous that joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the class representative must be typical of the other class members; and (4) the representative parties must fairly and adequately protect the interests of the class. See Fed R. Civ. P. 23(a). Rule 23(b) requires that the class satisfy one of the following requirements: (1) prosecuting the claims of class members separately would create a risk of inconsistent or prejudicial outcomes; (2) the party opposing the class has acted or refused to act on ground that apply generally to the class, so that final injunctive or declaratory relief benefitting the whole class is appropriate; or (3) common questions of law or fact predominate so that a class action is superior to another method of adjudication. Fed. R. Civ. P. 23(b). Courts have added to the federal rules a prerequisite that the class be ascertainable. In re Northrop Grumman Corp. ERISA Litig., No. cv-06-06213, 2011 WL 3505264 (C.D. Cal. Mar. 29, 2011).

III. DISCUSSION

Plaintiff moves for preliminary approval of the Settlement Agreement entered into with Defendant, which is summarized above and attached to Plaintiff's Motion. Plaintiff seeks conditional certification, under Rule 23, of the Settlement Class based on Defendant's alleged violations of the CLRA, FAL, and UCL. Plaintiff also contends that the proposed Settlement Agreement is reasonable and fair.

A. Conditional Certification of the Proposed Settlement Class

As noted above, the Court previously certified a class of Elations purchasers on January 13, 2014. (Doc. No. 95.) Later, the Court expanded the applicable class period pursuant to the parties' stipulation, thus amending the class definition to include "[a]ll persons residing in the State of California who purchased Elations, from May 28, 2009 through September 30, 2013, for personal use and not for resale, when the following claims were on the packaging and/or labeling of Elations: 'clinically-proven combination' and/or 'clinically proven formula.'" (Doc. No. 133 at 2 (emphasis added).)

The Motion requests conditional certification of a somewhat expanded Settlement Class, consisting of the following: "All persons who purchased Elations from May 28, 2009 through the date of the Preliminary Approval Order of this Settlement at a retail location in the State of California, for personal use and not for resale." (Mot. at 7 (emphasis added).) The Settlement Class has thus been expanded to include all California purchasers of Elations since May 28, 2009 and not just those who purchased Elations with the relevant clinically-proven claims on the package. (Id. at 12.) As discussed below, much of the Court's analysis regarding class certification remains unchanged despite these small alterations to the class definition.

1. Requirements of Rule 23(a)

a. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient but need not be impossible. Keegan v. American Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity, but forty or more members will generally satisfy the numerosity requirement. Id.

The Court previously concluded that the class was sufficiently numerous. (Class Order at 11.) The Settlement Class is expanded to include additional California purchasers of Elations, by expanding the dates and removing a limitation on class membership. Thus the Settlement Class is even more numerous than the class as previously certified. Accordingly, the numerosity requirement remains satisfied.

b. Commonality

The commonality requirement is met when the plaintiff's claims "depend upon a common contention . . . capable of classwide resolution — which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011). Commonality does not require "that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" Abdullah v. U.S. Sec. Associates, Inc., 731 F.3d 952, 957 (9th Cir. 2013) (quoting Mazza v. Am. Honda Motor Co., 666 F.3d 581, 589 (9th Cir. 2012)).

The Court determined in its January 2014 Class Order that sufficient common questions existed among the class members. (Class Order at 12.) Specifically, the Court identified one central common question as follows: whether the claims on Elations' packaging indicating that it contains a "clinically proven combination" and/or "clinically-proven formula" are material and false. (Id.) Defendant did not challenge the commonality requirement. That common question remains applicable to most members of the Settlement Class. The Settlement Class is defined somewhat over-inclusively, such that some Class Members may have purchased Elations that lacked the clinically-proven claims on the label. Nevertheless, a class may be certifiable even if not perfectly tailored to exclude every person who may not have suffered the relevant harm. The Court concludes that common questions exist that drive the resolution of this litigation. Therefore, the commonality requirement is satisfied.

c. Typicality

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named [p]laintiff, and whether other class members have been injured by the same course of conduct." Wolin v. Jaguar Land Rover N. Am., 617 F.3d 1168, 1175 (9th Cir. 2010). Typicality is a permissive standard. Hanlon, 150 F.3d at 1020. The claims of the named plaintiff need not be identical to those of the other class members. Alonzo v. Maximus, Inc., 275 F.R.D. 513, 523 (C.D. Cal. 2011).

Plaintiff Robert McCrary's claims are reasonably co-extensive with those of absent class members. The Court previously explained that the typicality requirement was satisfied by McCrary's purchase of Elations based on representations that it was proven to reduce his joint pain. (Class Order at 12-14.) The slight changes to the Settlement Class do not alter that analysis, and McCrary remains sufficiently typical as a representative of the Settlement Class.

d. Adequacy

In determining whether a proposed class representative will adequately protect the interests of the class, courts are to inquire (1) whether the proposed class representative and class counsel have any conflicts of interest with the rest of the potential class, and (2) whether the proposed class representative and class counsel will prosecute the action vigorously on behalf of the class as a whole. See Hanlon, 150 F.3d at 1020; Johnson v. General Mills, Inc., 275 F.R.D. 282, 288 (C.D. Cal. 2011). The Court previously concluded that McCrary and Class Counsel lacked conflicts of interest with absent members of the Class and would prosecute the action vigorously. (Class Order at 14.) That analysis is unaffected by the slight changes to the Settlement Class. McCrary and Milstein Adelman LLP remain an adequate Class Representative and Class Counsel, respectively.

2. Ascertainability

Ascertainability is satisfied when it is "administratively feasible for the court to determine whether a particular individual is a member" of the proposed class. In re Northrop Grumman Corp. ERISA Litig., No. CV 06-06213 MMM JCX, 2011 WL 3505264, at *7 (C.D. Cal. Mar. 29, 2011). Despite Defendant's vigorous opposition on this issue when the Court initially considered class certification, the Court found the Class sufficiently ascertainable.

(Class Order at 9-11.) The Court explained that Class Members need not have retained receipts for their vitamin supplement purchases and that self-identification would be sufficient. (Id.) The Settlement Class remains sufficiently ascertainable, as the means of ascertaining the class will be the same despite slight changes to the class definition. Accordingly, the ascertainability requirement is satisfied.

3. Requirements of Rule 23(b)

Certification is sought pursuant to Rule 23(b)(3). (Mot. at 15-16.) Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

First, the Rule 23(b)(3) predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by a class action. Hanlon, 150 F.3d at 1022. A class should not be certified if the issues of the case require separate adjudication of each individual class member's claims. Id. That plaintiffs may be owed different amounts of damages is not fatal to the 23(b)(3) prerequisite as long as the individualized damages are a matter of "straightforward accounting." See In re Facebook, Inc., PPC Adver. Litig., 282 F.R.D. 446, 459 (N.D. Cal. 2012). Here, no separate adjudication is required to resolve individual claims. As noted above, the central question is whether the disputed claims (regarding clinical proof of effectiveness) are material and misleading, and, if materiality and falsity are established, purchasers of Elations would have valid claims.

Satisfying the second prong of Rule 23(b)(3) requires a class action to be a superior method of adjudication for resolving the controversy. See Fed. R. Civ. P. 23(b)(3). When undertaking this inquiry, courts consider factors such as (i) the individual class members' interest in controlling the litigation of separate actions, (ii) whether there is any pre-existing litigation of the controversy, (iii) the desirability of concentrating the litigation of the claims in the particular forum, and (iv) any difficulties that may arise from maintaining a class action. Fed R. Civ. P. 23(b)(3); accord Wolin, 617 F.3d at 1175. Where parties seek class certification for settlement purposes only, courts need not consider the final two factors which address trial manageability. Franco v. Ruiz Food Prods., Inc., No. 1:10-cv-02354-SKO, 2012 WL 5941801, at *9 (E.D. Cal. Nov. 27, 2012).

The facts relevant to this suit do not suggest that individual class members would have a strong interest in controlling the litigation of separate actions. As the Court explained when initially certifying a class of Elations purchasers in January 2014, the damages of each class member are not large, which would make individual litigation inefficient and virtually impossible. See Astiana v. Kashi Co., 291 F.R.D. 493, 507 (S.D. Cal. 2013). The Court is unaware of any other cases challenging Defendant's advertising claims under California consumer protection statutes. Accordingly, the superiority requirement is satisfied.

B. Preliminary Approval of the Settlement

Federal Rule of Civil Procedure 23(e)(2) requires that any settlement in a class action be approved by the trial court, which must find that the settlement is fair, reasonable, and adequate.

The role of a district court in evaluating the fairness of the settlement is not to assess the individual components but to instead evaluate the settlement as a whole. See Lane v. Facebook, Inc., 696 F.3d 811, 818–19 (9th Cir. 2012). In assessing the fairness of the settlement, a court shall ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Hanlon, 150 F.3d at 1027. When determining whether a settlement agreement is potentially fair, a court considers the following factors: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Lane, 696 F.3d at 819.

After the class members have been notified of the Settlement and given an opportunity to object, the Court will hold a formal fairness hearing to determine whether the Settlement is fair, reasonable, and adequate. See Manual for Complex Litigation (Fourth) §§ 21.632-34 (2012). A full fairness analysis is unnecessary until the Court conducts the formal fairness hearing. Campbell v. First Investors Corp., No. 11-CV-0548 BEN WMC, 2012 WL 5373423, at *4 (S.D. Cal. Oct. 29, 2012). At the Preliminary Approval phase, the Court need only decide whether the settlement is potentially fair. Acosta, 243 F.R.D. at 386. The Court must determine whether the proposed settlement is "within the permissible 'range of possible approval' and thus, whether the notice to the [C]lass and the scheduling of the formal fairness hearing is appropriate." Campbell, 2012 WL 5373423, at *4 (quoting Alberto v. GMRI, Inc., 252 F.R.D. 652, 666 (E.D. Cal. 2008)). Courts presume fairness and reasonableness of settlement agreements that were the product of "non-collusive, arm's length negotiations conducted by capable and experienced counsel." In re Netflix Privacy Litig., No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013). If the settlement agreement "[1] is the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls within the range of possible approval," then preliminary approval should be granted. Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 454 (E.D. Cal. 2013) (quoting In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)).

1. Product of Serious, Informed, Non-collusive Negotiations

For a court to approve a proposed settlement, "[t]he parties must . . . have engaged in sufficient investigation of the facts to enable the court to 'intelligently make . . . an appraisal' of the settlement." Acosta, 243 F.R.D. at 396 (quotation omitted). The parties reached this proposed Settlement Agreement just four weeks before trial, after all discovery had concluded. As detailed in the Motion, the parties engaged in a large amount of fact and expert discovery. Plaintiff propounded numerous interrogatories, document requests, and requests for admissions; litigated discovery motions; received and reviewed thousands of pages of documents; deposed seven fact witnesses; retained three experts; and deposed one of Defendant's expert witnesses. (Mot. at 4-5.) Each party filed and opposed a motion for summary judgment, both of which the Court decided. (Doc. Nos. 210, 215.) Thus the parties certainly have a clear idea of the strengths and weaknesses of their respective cases. See Lewis v. Starbucks Corp., No. 2:07-cv-00490-MCE, 2008 WL 4196690, at *6 (E.D. Cal. Sept. 11, 2008) ("[A]pproval of a class action

settlement is proper as long as discovery allowed the parties to form a clear view of the strengths and weaknesses of their cases.").

The parties reached the Settlement Agreement at issue after arms-length negotiations. In September 2014, the parties attended private mediation before a retired judge. (Mot. at 6; Wade Decl. ¶ 22.) Following decision on their respective motions for summary judgment and motions to exclude experts, as well as Defendant's motion to decertify the class, the parties re-engaged in settlement negotiations, both with and without the help of the private mediator. (Mot. at 7; Wade Decl. ¶ 23.)

The parties thus settled this case following lengthy and vigorous litigation; the Court perceives no indication that the settlement is the result of anything but serious, informed, and non-collusive negotiations.

2. No Obvious Deficiencies and Falls Within Range of Possible Approval

To evaluate the "range of possible approval" criterion, which focuses on "substantive fairness and adequacy," "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." In re Tableware Antitrust Litig., 484 F. Supp. 2d at 1080.

Settlement Class members submitting a claim will receive a payment of approximately six dollars per six-pack of Elations for up to two or three six-packs. (Agreement § IV(A)(1)-(2).) Persons submitting a receipt with their claim form may be reimbursed for up to three six-packs, while those lacking a receipt will be limited to reimbursement for two six-packs. (Id.)

The total amount that Defendant will pay to settle this action is $1.35 million. (Agreement § IV(B)(1).) A large portion of that total settlement amount will be devoted to costs associated with class notice, litigation costs, and attorneys' fees. (Id. § IV(B)(1)(i)-(iv).) The exact amount to be received by each Settlement Class member submitting a form is not clear at this time. That amount will depend on the number of claims submitted as well as the total costs associated with class notice, litigation costs, and attorneys' fees. (Mot. at 8; Agreement § IV(C)(1)-(2).) Settlement Class members may receive more or less than six dollars per six-pack. However, the total amount available for eligible claims will not be less than $200,000. (Agreement § IV(C)(1).)

a. Reimbursement for Maximum of Two or Three Six-Packs

The Court first considers the logic of limiting Settlement Class members to a cash payment for only two or three six-packs. Some Settlement Class members likely purchased a greater quantity of Elations. In fact, Defendant maintained throughout the litigation that repeat purchasers constituted a large portion of sales of Elations. (Mot. at 22; Wade Decl. ¶ 65.) However, as argued by Defendant throughout this litigation, it is possible that repeat purchasers did not make their subsequent purchases of Elations based on the clinically-proven claims on the labels, but rather because they had independently determined that they enjoyed the product or perceived some benefit from it. Logically, it makes sense that purchasers would have relied most heavily on the label's claims when initially deciding to purchase Elations. Accordingly, it seems most important to reimburse purchasers for their first few six-packs of Elations. Although

class members would ideally be reimbursed for all of their purchases, the settlement remains at least potentially fair despite this limitation.

b. Sufficiency of Six Dollars Per Six-Pack Reimbursement

Six dollars per six-pack falls within a reasonable range of recovery. Plaintiff's damages expert — economist Dr. David Sharpe — set forth five damages models in his expert report (discussed in-detail in the Court's December 2, 2014 Order, Doc. No. 210). He estimated that $7.25 was the average price paid for a six-pack of Elations in California and that reimbursement of that amount would constitute a full refund. (Doc. No. 151-7 at 109.) As an alternative to a full refund, Dr. Sharp calculated that restitution of the net revenues would be approximately $3.58 per six-pack and repayment of net profits would be approximately $1.91 per six-pack. (Doc. No. 151-7 at 110-13.) Plaintiff asserted that one of these three reimbursement amounts would be appropriate if the jury determined that Elations had no value to purchasers. Last, Dr. Sharp estimated that the price premium paid for the clinical proof claims was approximately $0.91 per six-pack. (Doc. No. 151-7 at 115.) This level of reimbursement might have been more appropriate if the jury determined that purchasers received some value from Elations (such as calories, flavor, etc.).

Reimbursement of six dollars per six-pack, as contemplated by the Settlement Agreement, would be a level of reimbursement near the upper-end of the damages range suggested by Dr. Sharp — which ranged from $0.91 to $7.25 per six-pack. Accordingly, if Settlement Class members actually receive six dollars per six-pack (or a significant portion of that amount), they will receive close to a full refund for the first two or three six-packs purchased.

It is unclear whether a jury would have determined that a full refund, disgorgement of profits, or reimbursement of a price premium was appropriate. Moreover, Defendant's expert, Dr. Russell W. Mangum III, disputed the figures reached by Sharp as inflated and incorrect. He asserted that Defendant realized no profit from Elations, and thus there were no profits to be disgorged. (Doc. No. 191-1, Ex. A.) He also maintained that there was no price premium for the clinically-proven claims because Elations was sold at the same price both with and without those claims on the labels. (Doc. No. 191-1, Ex. A.) Accordingly, comparing the reimbursement per six-pack to the retail price is not necessarily the proper way to analyze the sufficiency of the settlement, for a jury may have awarded much less.

c. Amount Predicted to be Recovered by Settlement Class Members Submitting a Claim Form

Plaintiff predicts that, following the claims process, Settlement Class members will likely recover at least $6.60 per six-pack. (Mot. at 22; Wade Decl. ¶ 67.) Plaintiff formulated this prediction based on estimates regarding the number of purchasers of Elations and estimates of the likely percentage of purchasers who will submit a claim form.

Dr. Sharp estimated that approximately 464,527 six-packs of Elations were sold in California between May 28, 2009 and September 30, 2013. (Doc. No. 151-7 at 116.) He also estimated that there were between 52,137 and 256,039 California purchasers of Elations during

that time period. (Id. at 109.) The Court notes that the time period examined by Dr. Sharp is almost two years' shorter than the Settlement Class period, which extends until the Court issues this preliminary approval order. Additional purchases of Elations were certainly made during those two years. Nevertheless, sales of Elations decreased after 2009. (Wade Decl. ¶ 65.) Moreover, Defendant maintained throughout the litigation that repeat purchasers constituted a large portion of sales of Elations, (Mot. at 22; Wade Decl. ¶ 65), and thus the number of new purchasers who bought Elations between September 30, 2013 and today may not be very large.

Plaintiff expects that — despite Class Counsel's earnest efforts to provide the best practicable class notice — only a small percentage of purchasers will actually submit claim forms. (Mot. at 22; Wade Decl. ¶ 67.) "The reality is the number of class members who actually file claims is relatively low. '[T]he prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3–5 percent.'" Forcellati v. Hyland's, Inc., No. CV 12–1983–GHK (MRWx), 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014) (alterations in original) (quoting Ferrington v. McAfee, Inc., 2012 WL 1156399, at *4 (N.D. Cal. Apr. 6, 2012)).

Plaintiff calculates that, even if the number of California purchasers of Elations during the Settlement Class period was 300,000 (on the higher end of relevant estimates), and even if five percent of California purchasers submit claim forms (which would be on the upper end of the range of expected response percentages), only approximately 15,000 Settlement Class members would submit claim forms. (Mot. at 22.) Even if the amount available for claims is limited to $200,000, each claimant would nonetheless receive a total of $13.33. (Id.) Plaintiff reasonably expects that most Settlement Class members will not have receipts because of "the nature of the product — an inexpensive over-the-counter dietary supplement." (Id.) Accordingly, if each claimant recovers for two six-packs of Elations, the recovery would be approximately $6.66 per six-pack. (Id.)

If Plaintiff's predictions are accurate, Settlement Class members will receive a potentially fair level of reimbursement. In contrast, if claims are submitted for most six-packs purchased, the recovery amount per six-pack may drop significantly, in which case reimbursement would be for only a small fraction of the purchase price. At this stage of the proceedings — before claims have been submitted — neither the Court nor the parties can determine the exact amount that Settlement Class members will ultimately recover. Accordingly, the Court cannot evaluate the level of recovery with much specificity. Suffice it to say that, if recovery is near six dollars per six-pack as expected by Plaintiff, the recovery will be a significant portion of the purchase price.

In sum, the Court concludes that there are no obvious deficiencies in the Settlement Agreement and that the settlement amount falls within the range of possible approval.

3. No Preferential Treatment

As noted above, a settlement agreement must not "improperly grant preferential treatment to class representatives or segments of the class." Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 454 (E.D. Cal. 2013) (quoting In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)). Other than the $5,000 incentive award for serving as the class representative, the Settlement Agreement treats McCrary similarly to the absent class members. The reasonableness of the incentive award is not currently before the Court, but the Court

concludes that the incentive award does not constitute preferential treatment that would take the settlement outside the range of possible approval. See Gripenstraw v. Blazin' Wings, Inc., No. 1:12-CV-00233-AWI, 2013 WL 6798926, at *14 (E.D. Cal. Dec. 20, 2013) (preliminarily determining that an incentive award appeared reasonable and appropriate). It is well-established that a court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for time spent in litigation activities. See In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir. 2000). The Settlement Agreement does not appear to grant preferential treatment to any segment of the Settlement Class.

4. Attorneys' Fees and Costs

"Courts must ensure that the attorneys' fees awarded in a class action settlement are reasonable, even if the parties have already agreed on an amount." Monterrubio, 291 F.R.D. at 455 (citing In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011)). "Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method." In re Bluetooth, 654 F.3d at 942. Courts generally find that a benchmark of twenty-five percent of the common fund is a reasonable fee award. Id. (citing Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990)). "The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes . . . where the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation." Id. at 941. A court's "discretion must be exercised so as to achieve a reasonable result" that reflects the success obtained for the class. Id. at 942.

The Settlement Agreement indicates that Defendant will not oppose Plaintiff's request for litigation costs and expenses and attorneys' fees of up to $1,150,000. (Agreement § VIII(A).) That amount will include up to $585,000 in litigation costs (including the cost of class notice already disseminated following class certification in January 2014) as well as attorneys' fees of up to $362,000. (Id.) In addition, Defendant will not oppose Plaintiff's motion for a service award of up to $5,000 for the Settlement Administrator. (Agreement § VIII(B).) The exact amounts of attorneys' fees and reimbursable costs are not known at this time; Plaintiff will file motions for those fees and costs at least sixty days before the Court's final approval hearing. (Agreement § VIII(C).) The Court is not currently able to assess the reasonableness of any lodestar figure proposed by Class Counsel.

When the attorneys' fees of up to $362,000 are added to the litigation costs and fees of up to $585,000, the total fees and costs constitute a large portion (approximately seventy percent) of the overall settlement amount. Nevertheless, the Court is cognizant of the fact that this case proceeded to the verge of trial and included heavy motions practice. Moreover, Class Counsel has already incurred the expense of providing notice to the class as previously certified by the Court. Accordingly, the billable hours devoted to this case naturally exceeds those accumulated in cases that reach early settlement. However, as noted above, the Court cannot fully assess the reasonableness of the attorneys' fees and costs until Plaintiff submits a detailed motion for attorneys' fees and costs.

At the preliminary approval stage, the Court need not make its final decision regarding the reasonableness of attorneys' fees and must instead only determine that the requested

attorneys' fees are not the product of apparent collusion. See Tijero v. Aaron Bros., Inc., No. C 10-01089-SBA, 2013 WL 6700102, at *8 (N.D. Cal. Dec. 19, 2013); Graham v. Overland Solutions, Inc., No. 10-CV-0672 BEN BLM, 2012 WL 4009547, at *9 (S.D. Cal. Sept. 12, 2012). Given that there is no evidence of impropriety or collusion, the Court finds that the requested attorneys' fees do not prevent preliminary approval of the Settlement Agreement.

Overall, the above factors support the preliminary approval of the Settlement.

C. Notice Plan and Fairness Hearing

Rule 23(c)(2)(B) requires that the Court "direct to [C]lass members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Similarly, Rule 23(e)(1) requires that a proposed settlement may only be approved after Notice is directed in a reasonable manner to all class members who would be bound by the agreement. Fed. R. Civ. P. 23(e)(1).

Overall, the Court finds the parties' proposal for providing notice to Settlement Class members adequately-planned and reasonable. As described in more detail above, notice to Settlement Class members will involve multiple steps. First, within fifteen days after preliminary approval, KCC will provide direct notice to those few Settlement Class members for whom the parties have contact information. (Agreement § V(B)(1).) Second, because much of Defendant's sales in California were through retailers and Defendant thus lacks contact information for purchasers, Plaintiff will publish notice in several sources within sixty days after preliminary approval: five consumer magazines, a local newspaper, and internet banner ads. (Id.; Mot. at 10-11.)

Plaintiff's Motion attaches the proposed class notice, which takes several forms. A shorter version will appear in publications and be mailed to those Settlement Class members for whom the parties possess contact information, (Wade Decl., Exs. 1, 2), which will direct Settlement Class members to either obtain a longer notice form on the settlement website or request the longer notice form via phone, (Mot. at 10; Wade Decl., Ex. 5). The Court considers the class notices to be largely sufficient; however, two changes appear necessary: first, the notices should include the time for the Court's final approval hearing (i.e. 9:00 a.m.), and, second, the short versions of the notice should include the specific date of this preliminary approval order instead of defining the class period as concluding at the time of preliminary approval. With those two small changes, the notices are adequate. The Court has also reviewed the Claim Form, (Agreement, Ex. 6), and determines that it is sufficient.

Upon reviewing the parties' proposed dates (attached to Plaintiff's Motion as Schedule A, (Doc. No. 261 at 34)), the Court identifies several issues. First, and most obviously, the Court notes that, although the Settlement Agreement states that Settlement Class members may opt-out or object no later than forty-five days before the final approval hearing, the proposed cut-off date of November 30, 2015 is only forty-two days before the proposed final approval hearing date of January 11, 2016. Second, the Court is concerned that the timeline for Settlement Class members to submit claims/objections/exclusion requests is a bit too compressed. After the deadline for print notice on October 30, 2015, Settlement Class members would have only one month to submit their claim forms, objections, or requests for exclusion. (Id.) Moreover,

Settlement Class members will have only two weeks to review and object to Plaintiff's applications for attorneys' fees, costs, and service awards. (Id.)

Because of those concerns, and in order to conform to the Court's schedule, the Court adjusts the parties' proposed schedule of dates as follows:

Description of Deadline	Proposed Deadline	Court's Deadline
Update Settlement Website	September 8, 2015	September 8, 2015
Mail and Email Direct Notice	September 16, 2015	September 16, 2015
Last day for print notice to commence	October 30, 2015	October 30, 2015
File Applications for Service Award, Attorneys' Fees and Costs	November 16, 2015	November 16, 2015
Opt-Out or Object to Settlement and/or Submit Claims	November 30, 2015	December 30, 2015
File Responses to Objections and Motion for Final Approval	December 14, 2015	January 25, 2016
Final Approval Hearing	January 11, 2016	February 22, 2016

The above dates, as set by the Court, shall be incorporated into the class notices.

IV. CONCLUSION

The Court hereby conditionally certifies the Settlement Class solely for the purpose of settlement, appoints Robert McCrary as the Settlement Class Representative, appoints the law firm of Milstein Adelman LLP as Class Counsel, and orders dissemination of notice to the Settlement Class in the manner described in the Settlement Agreement, modifying the deadlines as described above. In sum, the Court GRANTS Plaintiff's Motion for Preliminary Approval of Class Action Settlement and ORDERS as follows:

1. The Court authorizes the retention of Kurtzman Carson Consultants as Settlement Administrator for the purposes of this settlement;
2. The Court authorizes the law firm of Milstein Adelman LLP to act as counsel for the Settlement Class;
3. The Court authorizes Plaintiff Robert McCrary to act as Class Representative for the Settlement Class;
4. The Court hereby approves the proposed notices of class action settlement attached to Plaintiff's Motion, incorporating the slight modifications described herein. Such notices shall be disseminated in accordance with the parties' Settlement Agreement and the Settlement Notice Plan (which was submitted as Exhibit 3 to the Settlement Agreement);
5. The Court hereby approves the proposed procedure for exclusion from the settlement by the submission of a written statement requesting exclusion as specified in the Class Notice. Such exclusion request must be postmarked no later than December 30, 2015. Any Settlement Class member who submits a valid and timely request for exclusion shall no longer be a Settlement Class member, shall be barred from participating in the

settlement, shall be barred from objecting to the settlement, and shall receive no benefit from the settlement, unless otherwise provided pursuant to the terms of the Settlement Agreement or by court order;

6. The Court hereby approves the proposed procedure for objection to the settlement. Any Settlement Class member objecting to the settlement must timely mail to Class Counsel a signed, written statement objecting to the Settlement Agreement. Such written objection must be postmarked by December 30, 2015. Any Class member who fails to file and serve a timely written objection shall be foreclosed from objecting to the proposed Settlement Agreement, unless otherwise ordered by the Court;
7. The Court further ORDERS that Class Counsel shall file a Motion for Final Approval of the Settlement, with the appropriate declarations and supporting evidence, in time to be heard at the Final Approval Hearing on February 22, 2016;
8. The Court further ORDERS that each Settlement Class member who does not exclude himself/herself from the settlement shall be given a full opportunity to object to the proposed Settlement Agreement (and Plaintiff's request for attorneys' fees and expenses) and to participate at the Final Approval Hearing, which the Court sets to commence on February 22, 2016 at 9:00 a.m. in Courtroom 1 of the United States District Court, Central District of California – Eastern Division, 3470 12th Street, Riverside, California; and
9. The parties, their counsel, and the Claims Administrator are hereby ordered to comply with all terms of the Settlement Agreement, as modified herein.

IT IS SO ORDERED.