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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ALBA MORALES; LANIE COHEN;
LINDA CLAYMAN; and KENNETH
DREW, on behalf of themselves
and all others similarly
situated,

Plaintiffs,

v.

CONOPCO, INC., d/b/a
UNILEVER,

Defendant.

CIV. NO. 2:13-2213 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT

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Plaintiffs Alba Morales, Lanie Cohen, Linda Clayman,
and Kenneth Drew brought this putative class action against
defendant Conopco, Inc., d/b/a Unilever, asserting claims arising
out of defendant's alleged labeling of certain hair care products
as "TRESemmé Naturals" despite them containing synthetic
ingredients. Presently before the court is plaintiffs' motion
for preliminary approval of the class action settlement. (Docket

1 No. 57.)

2 I. Factual and Procedural Background

3 Defendant is a multinational consumer goods company
4 whose products include food, beverages, cleaning agents, and
5 personal care products, including the TRESemmé brand.

6 Plaintiffs contend that defendant violated California's
7 Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et
8 seq., California's Consumer Legal Remedies Act ("CLRA"), Cal.
9 Civ. Code § 1750 et seq., and various other state consumer
10 protection laws. (See Second Amended Complaint ("SAC") (Docket
11 No. 30).) The parties litigated the case for nearly two years
12 before reaching a settlement agreement on February 5, 2016 before
13 mediator Jonathan Marks. (Stipulation of Settlement ("Settlement
14 Agreement") ¶¶ 3-10 (Docket No. 57-2).)

15 Plaintiffs brought this lawsuit on behalf of a putative
16 class of consumers in the United States who have purchased
17 TRESemmé Naturals products. (Id. at 2-3.) Plaintiffs now seek
18 preliminary approval of the parties' stipulated class-wide
19 settlement, pursuant to Federal Rule of Civil Procedure 23(e).
20 (Id. at 4.)

21 II. Discussion

22 Rule 23(e) provides that "[t]he claims, issues, or
23 defenses of a certified class may be settled . . . only with the
24 court's approval." Fed. R. Civ. P. 23(e). "Approval under 23(e)
25 involves a two-step process in which the Court first determines
26 whether a proposed class action settlement deserves preliminary
27 approval and then, after notice is given to class members,
28 whether final approval is warranted." Nat'l Rural Telecomms.

1 Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004)
2 (citing Manual for Complex Litig., Third, § 30.41 (1995)).

3 This Order is the first step in that process and
4 analyzes only whether the proposed class action settlement
5 deserves preliminary approval. See Murillo v. Pac. Gas & Elec.
6 Co., 266 F.R.D. 468, 473 (E.D. Cal. 2010). Preliminary approval
7 authorizes the parties to give notice to putative class members
8 of the settlement agreement and lays the groundwork for a future
9 fairness hearing, at which the court will hear objections to (1)
10 the treatment of this litigation as a class action and (2) the
11 terms of the settlement. See id.; Diaz v. Trust Territory of
12 Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) (stating that a
13 district court's obligation when considering dismissal or
14 compromise of a class action includes holding a hearing to
15 "inquire into the terms and circumstances of any dismissal or
16 compromise to ensure that it is not collusive or prejudicial").
17 The court will reach a final determination as to whether the
18 parties should be allowed to settle the class action on their
19 proposed terms after that hearing.

20 The Ninth Circuit has declared a strong judicial policy
21 favoring settlement of class actions. Class Plaintiffs v. City
22 of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). Nevertheless,
23 where, as here, "the parties reach a settlement agreement prior
24 to class certification, courts must peruse the proposed
25 compromise to ratify both [1] the propriety of the certification
26 and [2] the fairness of the settlement." Staton v. Boeing Co.,
27 327 F.3d 938, 952 (9th Cir. 2003).

28 The first part of this inquiry requires the court to

1 "pay 'undiluted, even heightened, attention' to class
2 certification requirements" because, unlike in a fully litigated
3 class action suit, the court "will lack the opportunity . . . to
4 adjust the class, informed by the proceedings as they unfold."
5 Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997); see
6 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).
7 The parties cannot "agree to certify a class that clearly leaves
8 any one requirement unfulfilled," and consequently the court
9 cannot blindly rely on the fact that the parties have stipulated
10 that a class exists for purposes of settlement. See Windsor, 521
11 U.S. at 621-22 (stating that courts cannot fail to apply the
12 requirements of Rule 23(a) and (b)).

13 The second part of this inquiry obliges the court to
14 "carefully consider 'whether a proposed settlement is
15 fundamentally fair, adequate, and reasonable,' recognizing that
16 '[i]t is the settlement taken as a whole, rather than the
17 individual component parts, that must be examined for overall
18 fairness'" Staton, 327 F.3d at 952 (quoting Hanlon, 150
19 F.3d at 1026); see also Fed. R. Civ. P. 23(e) (outlining class
20 action settlement procedures).

21 A. Class Certification

22 A class action will be certified only if it meets the
23 four prerequisites identified in Rule 23(a) and additionally fits
24 within one of the three subdivisions of Rule 23(b). Fed. R. Civ.
25 P. 23(a)-(b). Although a district court has discretion in
26 determining whether the moving party has satisfied each Rule 23
27 requirement, the court must conduct a rigorous inquiry before
28 certifying a class. See Califano v. Yamasaki, 442 U.S. 682, 701

1 (1979); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982).

2 1. Rule 23(a) Requirements

3 Rule 23(a) restricts class actions to cases where:

4 (1) the class is so numerous that joinder of all
5 members is impracticable; (2) there are questions of
6 law or fact common to the class; (3) the claims or
7 defenses of the representative parties are typical of
the claims or defenses of the class; and (4) the
representative parties will fairly and adequately
protect the interests of the class.

8 Fed. R. Civ. P. 23(a). These requirements are more commonly
9 referred to as numerosity, commonality, typicality, and adequacy
10 of representation.

11 a. Numerosity

12 Under the first requirement, “[a] proposed class of at
13 least forty members presumptively satisfies the numerosity
14 requirement.” Avilez v. Pinkerton Gov’t Servs., 286 F.R.D. 450,
15 456 (C.D. Cal. 2012); see also, e.g., Collins v. Cargill Meat
16 Solutions Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wanger,
17 J.) (“Courts have routinely found the numerosity requirement
18 satisfied when the class comprises 40 or more members.”). Here,
19 plaintiffs estimate that the proposed class will contain
20 thousands of members because thousands of people purchased
21 TRESemé Naturals products. (Kindall Decl. ¶ 21 (Docket No. 57-
22 1).) This easily satisfies the numerosity requirement.

23 b. Commonality

24 Commonality requires that the class members’ claims
25 “depend upon a common contention” that is “capable of classwide
26 resolution--which means that determination of its truth or
27 falsity will resolve an issue that is central to the validity of
28 each one of the claims in one stroke.” Wal-Mart Stores, Inc. v.

1 Dukes, 131 S. Ct. 2541, 2550 (2011). “[A]ll questions of fact
2 and law need not be common to satisfy the rule,” and the
3 “existence of shared legal issues with divergent factual
4 predicates is sufficient, as is a common core of salient facts
5 coupled with disparate legal remedies within the class.” Hanlon,
6 150 F.3d at 1019.

7 The proposed class includes “all individuals in the
8 United States who purchased the following TRESemmé Naturals
9 products: (a) Nourishing Moisture Shampoo; (b) Nourishing
10 Moisture Conditioner; (c) Radiant Volume Shampoo; (d) Radiant
11 Volume Conditioner; (e) Vibrantly Smooth Shampoo; and (f)
12 Vibrantly Smooth Conditioner” while they were still being sold.
13 (Pls.’ Mot. for Prelim. Approval (“Pls.’ Mot.”) at 2, 18 (Docket
14 No. 57).) The class would be comprised of individuals alleging,
15 like the named plaintiffs, that they purchased a Unilever product
16 labeled “TRESemmé Naturals” that contained synthetic ingredients
17 in violation of state consumer protection laws. Due to the
18 common core of salient facts and legal contentions, the proposed
19 class meets the commonality requirement.

20 c. Typicality

21 Typicality requires that named plaintiffs have claims
22 “reasonably coextensive with those of absent class members,” but
23 their claims do not have to be “substantially identical.”
24 Hanlon, 150 F.3d at 1020. The test for typicality “is whether
25 other members have the same or similar injury, whether the action
26 is based on conduct which is not unique to the named plaintiffs,
27 and whether other class members have been injured by the same
28 course of conduct.” Hanon v. Dataproducts Corp., 976 F.2d 497,

1 508 (9th Cir. 1992) (citation omitted).

2 The putative class members allege a simple set of facts
3 that is essentially identical to those alleged by the named
4 plaintiffs. Both the class members and the named plaintiffs were
5 allegedly injured by paying a premium for the TRESemmé Naturals
6 products over comparable products that are not represented to be
7 natural. (SAC ¶ 63.) Although class members may have purchased
8 varying amounts of the products and therefore have claims for
9 different amounts, the class members' claims appear to be
10 reasonably coextensive with those of the named plaintiffs.
11 Moreover, the differences in amounts purchased are taken into
12 account by the settlement agreement's "Plan of Allocation," which
13 allots payments based on the number of products each class member
14 purchased. (Settlement Agreement Ex. A, Plan of Allocation at 1
15 (Docket No. 57-2).) The proposed class therefore meets the
16 typicality requirement.

17 d. Adequacy of Representation

18 To resolve the question of adequacy, the court must
19 make two inquiries: "(1) do the named plaintiffs and their
20 counsel have any conflicts of interest with other class members
21 and (2) will the named plaintiffs and their counsel prosecute the
22 action vigorously on behalf of the class?" Hanlon, 150 F.3d at
23 1020. These questions involve consideration of a number of
24 factors, including "the qualifications of counsel for the
25 representatives, an absence of antagonism, a sharing of interests
26 between representatives and absentees, and the unlikelihood that
27 the suit is collusive." Brown v. Ticor Title Ins., 982 F.2d 386,
28 390 (9th Cir. 1992).

1 First, there do not appear to be any conflicts of
2 interest. The named plaintiffs' interests are generally aligned
3 with the putative class members. The putative class members
4 suffered a similar injury as the named plaintiffs, and the
5 definition of the class is narrowly tailored and aligns with the
6 named plaintiffs' interests. See Windsor, 521 U.S. at 625-26
7 ("[A] class representative must be part of the class and possess
8 the same interest and suffer the same injury as the class
9 members."); Murillo, 266 F.R.D. at 476 (finding that an
10 appropriate class definition ensured that "the potential for
11 conflicting interests will remain low while the likelihood of
12 shared interests remains high").

13 In this case, the settlement agreement provides a
14 collective incentive award of up to \$15,000 to the named
15 plaintiffs, at the court's discretion. (Settlement Agreement
16 ¶ 60.) While the provision of an incentive award raises the
17 possibility that the named plaintiffs' interest in receiving that
18 award will cause their interests to diverge from the class's
19 interest in a fair settlement, the Ninth Circuit has specifically
20 approved the award of "reasonable incentive payments." Staton,
21 327 F.3d at 977-78. The court, however, must "scrutinize
22 carefully the awards so that they do not undermine the adequacy
23 of the class representatives." Radcliffe v. Experian Info. Sys.,
24 Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).

25 Courts have generally found that \$5,000 incentive
26 payments are reasonable. Hopson v. Hanesbrands Inc., Civ. No.
27 08-0844 EDL, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009)
28 (citing In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th

1 Cir. 2000); In re SmithKline Beckman Corp., 751 F. Supp. 525, 535
2 (E.D. Pa. 1990); Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D.
3 Cal. 2008). Here, the incentive awards average \$3,750 to each
4 named plaintiff and are to be paid separate and apart from the
5 settlement fund. (Settlement Agreement ¶ 60.) The max recovery
6 per bottle of TRESemmé Naturals per class member is \$5.

7 (Settlement Agreement Ex. A, Plan of Allocation at 1.) Class
8 members may recover for the purchase of up to ten bottles per
9 household without providing proof of purchase and can recover for
10 more than ten bottles if they submit adequate proof of a greater
11 number of purchases along with their claim forms. (Id.) While
12 the incentive award is relatively high in comparison to class
13 recovery, it is well below the \$5,000 benchmark and does not
14 appear on its face to create a conflict of interest given that it
15 does not detract from the settlement fund. Accordingly, the
16 court preliminarily finds that the proposed incentive awards do
17 not render plaintiffs inadequate representatives of the class.

18 The second prong of the adequacy inquiry examines the
19 vigor with which the named plaintiffs and their counsel have
20 pursued the common claims. "Although there are no fixed
21 standards by which 'vigor' can be assayed, considerations include
22 competency of counsel and, in the context of a settlement-only
23 class, an assessment of the rationale for not pursuing further
24 litigation." Hanlon, 150 F.3d at 1021.

25 Plaintiffs' counsel Mark Kindall and his colleagues at
26 Izard, Kindall & Raabe, LLP have significant experience with
27 litigating class action suits and have been appointed as lead
28 counsel or co-counsel in over sixty class actions. (See Pls.')

1 Mot. Ex. 3, Firm Resume of Izard, Kindall & Raabe, LLP ("Izard
2 Resume") at 1 (Docket No. 57-4).) Plaintiffs' liaison counsel
3 Bramson, Plutzik, Mahler & Birkhaeuser, LLP is similarly
4 experienced with class actions, having recovered hundreds of
5 millions of dollars in class action settlements while serving as
6 lead or co-counsel. (See Pls.' Mot. Ex. 4, Firm Resume of
7 Bramson, Plutzik, Mahler & Birkhaeuser, LLP ("Bramson Resume") at
8 1 (Docket No. 57-5).) The court finds no reason to doubt that
9 plaintiffs' attorneys are qualified to conduct the proposed
10 litigation and assess the value of the settlement.

11 In addition, plaintiffs' counsel seems to have
12 seriously considered the risks of continued litigation in
13 deciding to settle this action. Both parties have aggressively
14 litigated the case, filing and briefing numerous motions,
15 engaging in extensive discovery, and participating in mediation.
16 (Kindall Decl. ¶¶ 2-14.) Plaintiffs' counsel was therefore
17 informed about the strengths and weaknesses of this case when
18 they decided to accept the terms of the mediator's proposed
19 settlement agreement. (Pls.' Mot. at 17.)

20 Accordingly, the court concludes that the absence of
21 conflicts of interest and the vigor of counsel's representation
22 satisfy Rule 23(a)'s adequacy assessment for the purpose of
23 preliminary approval.

24 2. Rule 23(b)

25 An action that meets all the prerequisites of Rule
26 23(a) may be certified as a class action only if it also
27 satisfies the requirements of one of the three subdivisions of
28 Rule 23(b). Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th

1 Cir. 2013). Plaintiffs seek certification under Rule 23(b)(3),
2 which provides that a class action may be maintained only if (1)
3 “the court finds that questions of law or fact common to class
4 members predominate over questions affecting only individual
5 members” and (2) “that a class action is superior to other
6 available methods for fairly and efficiently adjudicating the
7 controversy.” Fed. R. Civ. P. 23(b)(3).

8 “Because Rule 23(a)(3) already considers commonality,
9 the focus of the Rule 23(b)(3) predominance inquiry is on the
10 balance between individual and common issues.” Murillo v. Pac.
11 Gas & Elec. Co., 266 F.R.D. 468, 476 (E.D. Cal. 2010) (citing
12 Hanlon, 150 F.3d at 1022); see also Windsor, 521 U.S. at 623
13 (“The Rule 23(b)(3) predominance inquiry tests whether proposed
14 classes are sufficiently cohesive to warrant adjudication by
15 representation.”).

16 The class members’ contentions appear to be similar, if
17 not identical. Although there are differences in the total
18 number of bottles of TRESemmé Naturals products purchased by
19 class members, there is no indication that those variations are
20 “sufficiently substantive to predominate over the shared claims.”
21 See id. Accordingly, the court finds that common questions of
22 law and fact predominate over the class members’ claims.

23 Rule 23(b)(3) also sets forth four non-exhaustive
24 factors to consider in determining whether “a class action is
25 superior to other available methods for fairly and efficiently
26 adjudicating the controversy”:

27 (A) the class members’ interests in individually
28 controlling the prosecution or defense of separate
actions; (B) the extent and nature of any litigation

1 concerning the controversy already begun by or against
2 class members; (C) the desirability or undesirability
3 of concentrating the litigation of the claims in the
particular forum; and (D) the likely difficulties in
managing a class action.

4 Fed. R. Civ. P. 23(b) (3). The parties settled this action prior
5 to certification, making factors (C) and (D) inapplicable. See
6 Murillo, 266 F.R.D. at 477 (citing Windsor, 521 U.S. at 620).

7 Here, class members likely have little interest in
8 individually pursuing litigation. Plaintiffs allege that they
9 suffered injury based on paying a premium for "natural" products.
10 (SAC ¶¶ 6-9.) Defendant's line of products only cost several
11 dollars and the premium paid constituted only a small portion of
12 the total cost of each product. (Pls.' Mot. at 12.) As a
13 result, the damages for each individual class member would be
14 nominal compared to the costs of litigation. Even though class
15 members could conceivably have an interest in individually
16 controlling prosecution given that plaintiffs estimated the
17 damages sustained by the class as a whole are approximately
18 \$12.65 million and the \$3.25 million settlement fund is only 25%
19 of this "best case" recovery amount, the costs and risks
20 associated with pursuing litigation would likely outweigh
21 recoverable damages for each individual class member. (Id. at
22 12, 18; Kindall Decl. ¶ 17.)

23 The court is also unaware of any concurrent litigation
24 already begun by class members regarding the TRESemmé Naturals
25 products sold by defendant. Objectors at the final fairness
26 hearing may reveal otherwise. See Alberto, 252 F.R.D. at 664.
27 At this stage, the class action device appears to be the superior
28 method for adjudicating this controversy.

1 3. Rule 23(c)(2) Notice Requirements

2 If the court certifies a class under Rule 23(b)(3), it
3 “must direct to class members the best notice that is practicable
4 under the circumstances, including individual notice to all
5 members who can be identified through reasonable effort.” Fed.
6 R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and
7 content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D.
8 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin,
9 417 U.S. 156, 172-77 (1974)). Although that notice must be
10 “reasonably certain to inform the absent members of the plaintiff
11 class,” actual notice is not required. Silber v. Mabon, 18 F.3d
12 1449, 1454 (9th Cir. 1994) (citation omitted).

13 The settlement agreement provides that KCC Class Action
14 Service LLC (“KCC”) will provide notice to the class and
15 administer the claims process. (Settlement Agreement at 2.)
16 “KCC has successfully served as the notice and claim
17 administrator [in] a number of other consumer class action
18 settlements where it has employed similar notice plans.” (Pls.’
19 Mot. at 15.) Because defendant does not have records showing who
20 purchased its products, KCC used class demographics to develop a
21 notice plan that it estimates will reach over 70% of the class
22 members. (Id. at 14; Settlement Agreement Ex. D, Settlement
23 Notice Plan at 10 (Docket. No. 57-2).) KCC will place month-long
24 banner advertisements on websites that class members are likely
25 to visit, an advertisement in People magazine for one week’s
26 issue, and a four-week advertisement in the Sacramento Bee. (Id.
27 at 7.) Further, KCC will provide ongoing toll-free telephone
28 support and a dedicated class action website where class members

1 can obtain additional information and fill out online claim
2 forms. (Settlement Agreement Ex. D, Settlement Notice Plan at
3 14.)

4 The notice explains the proceedings; defines the scope
5 of the class; informs the class member of the claim form
6 requirement and the binding effect of the class action; describes
7 the procedure for opting out and objecting; provides the time and
8 date of the fairness hearing; and directs interested parties to
9 more detailed information on the settlement website. (Settlement
10 Agreement Ex. E, Proposed Notice.) The notice makes clear that
11 class members may recover for the purchase of up to ten bottles
12 per household without providing proof of purchase and can recover
13 for more than ten bottles if they submit adequate proof of a
14 greater number of purchases along with their claim forms. (Id.)
15 The content of the notice therefore satisfies Rule 23(c)(2)(B).
16 See Fed. R. Civ. P. 23(c)(2)(B); see also Churchill Vill., L.L.C.
17 v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is
18 satisfactory if it 'generally describes the terms of the
19 settlement in sufficient detail to alert those with adverse
20 viewpoints to investigate and to come forward and be heard.'" (quoting Mendoza v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352
21 (9th Cir. 1980)).

23 The court is also satisfied with the claim form, which
24 allows each class member to specify his or her total number of
25 bottles purchased of each eligible TRESemmé Naturals product.
26 (Settlement Agreement Ex. F, Claim Form at 2 (Docket No. 57-2).)
27 Further, the claim form specifies the deadline for submission and
28 clarifies that completion of the form is necessary for receipt of

1 payment. (Id. at 1.)

2 Given that there is no record of potential class
3 members and that KCC is experienced in providing similar notice
4 plans in consumer class action settlements, the court is
5 satisfied that this system is reasonably calculated to provide
6 notice to class members and is the best form of notice available
7 under the circumstances as required under Rule 23(c)(2).

8 B. Preliminary Settlement Approval

9 After determining that the proposed class satisfies the
10 requirements of Rule 23, the court must determine whether the
11 terms of the parties' settlement appear fair, adequate, and
12 reasonable. See Fed. R. Civ. P. 23(e)(2); Hanlon, 150 F.3d at
13 1026. This process requires the court to "balance a number of
14 factors," including:

15 the strength of the plaintiff's case; the risk,
16 expense, complexity, and likely duration of further
17 litigation; the risk of maintaining class action
18 status throughout the trial; the amount offered in
19 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.

20 Hanlon, 150 F.3d at 1026. Many of these factors cannot be
21 considered until the final fairness hearing, so the court need
22 only conduct a preliminary review at this time to resolve any
23 "glaring deficiencies" in the settlement agreement before
24 authorizing notice to class members. Ontiveros v. Zamora, Civ.
25 No. 2:08-567 WBS DAD, 2014 WL 3057506, at *12 (E.D. Cal. July 7,
26 2014) (citing Murillo, 266 F.R.D. at 478).

27 At the preliminary stage, "the court need only
28 'determine whether the proposed settlement is within the range of

1 possible approval.'" Murillo, 266 F.R.D. at 479 (quoting
2 Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)).
3 This generally requires consideration of "whether the proposed
4 settlement discloses grounds to doubt its fairness or other
5 obvious deficiencies, such as unduly preferential treatment of
6 class representatives or segments of the class, or excessive
7 compensation of attorneys." Id. (quoting W. v. Circle K Stores,
8 Inc., Civ. No. 04-0438 WBS GGH, 2006 WL 1652598, at *11-12 (E.D.
9 Cal. June 13, 2006)).

10 1. Negotiation of the Settlement Agreement

11 Courts often begin by examining the process that led to
12 the settlement's terms to ensure that those terms are "the result
13 of vigorous, arms-length bargaining" and then turn to the
14 substantive terms of the agreement. See, e.g., West, 2006 WL
15 1652598, at *11-12; In re Tableware Antitrust Litig., 484 F.
16 Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("[P]reliminary approval of
17 a settlement has both a procedural and a substantive
18 component."). Plaintiffs' counsel states that the parties
19 reached the settlement after two years of litigation involving
20 "substantial discovery," an "extensive and contentious mediation
21 process before a highly experienced and well-regarded mediator,"
22 and thorough motions practice. (Pls.' Mot. at 17.; Kindall Decl.
23 ¶ 15.); see La Fleur v. Med. Mgmt. Int'l, Inc., Civ. No. 5:13-
24 00398, 2014 WL 2967475, at *4 (N.D. Cal. June 25, 2014)
25 ("Settlements reached with the help of a mediator are likely non-
26 collusive."). Plaintiffs' counsel declares that his decision to
27 accept the settlement agreement takes into account the
28 "significant risks" and delays associated with continuing

1 litigating. (Kindall Decl. ¶¶ 18-19.)

2 In light of these considerations, the court finds no
3 reason to doubt the parties' representations that the settlement
4 was the result of vigorous, arms-length bargaining.

5 2. Amount Recovered and Distribution

6 In determining whether a settlement agreement is
7 substantively fair to the class, the court must balance the value
8 of expected recovery against the value of the settlement offer.
9 See Tableware, 484 F. Supp. 2d at 1080. This inquiry may involve
10 consideration of the uncertainty class members would face if the
11 case were litigated to trial. See Ontiveros, 2014 WL 3057506, at
12 *14.

13 Here, the settlement achieved a "key goal" of the
14 litigation in that it resulted in the discontinuance of the
15 TRESemmé Naturals line of products. Further, as discussed above,
16 the \$3.25 million settlement fund is more than 25% of the "best
17 case" damages of \$12.65 million, as calculated by plaintiffs.
18 (Pls.' Mot. at 18.; Kindall Decl. ¶ 17.)

19 The court however notes that the settlement agreement
20 requires class members to take the affirmative step of opting in
21 to receive payment and opting out if they do not wish to be part
22 of the settlement class. (Settlement Agreement Ex. E, Notice of
23 Class Action Settlement ("Notice") at 2-4 (Docket No. 52-2).)
24 Class members who do not request to be excluded will release
25 defendant from any underlying claims. (Id. at 3-4) Therefore,
26 there is a risk that some members of the class will opt into the
27 judgment by default, thus releasing defendant, despite receiving
28 no recovery simply because they fail to timely return the claim

1 form.

2 While the settlement amount is on the low-end of the
3 expected recovery range and the agreement contains a potentially
4 unfair opt-in/opt-out requirement, there are many uncertainties
5 associated with pursuing litigation that justify this recovery.
6 Plaintiffs' counsel contends that plaintiffs would have been
7 required to prove both that the TRESemme Naturals labeling was
8 likely to deceive or confuse reasonable persons and that those
9 representations are material to reasonable persons. (Kindall
10 Decl. ¶ 18.) Further, establishing that all class members paid a
11 price premium that was directly related to the product being
12 "natural," rather than because of some other characteristic of
13 the product, and quantifying this premium would have involved a
14 battle of the experts. (Id.) Finally, "[w]hichever party did
15 not prevail would likely have appealed the judgment." (Id. at
16 ¶ 19.)

17 In light of the uncertainties associated with pursuing
18 litigation, the court will grant preliminary approval to the
19 settlement because it is within the range of possible approval.
20 Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d
21 616, 621 n.3 (7th Cir. 1982)).

22 3. Attorney's Fees

23 If a negotiated class action settlement includes an
24 award of attorney's fees, that fee award must be evaluated in the
25 overall context of the settlement. Knisley v. Network Assocs.,
26 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio, 291 F.R.D. at
27 455. The court "ha[s] an independent obligation to ensure that
28 the award, like the settlement itself, is reasonable, even if the

1 parties have already agreed to an amount.” In re Bluetooth
2 Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011).

3 The settlement agreement provides that plaintiffs’
4 counsel will apply to the court for a fee award of up to 30% of
5 the gross settlement amount, or \$975,000. (Settlement Agreement
6 ¶ 56.) Attorney’s fees are to be paid from the settlement fund.
7 (Id. ¶ 15.) Defendant agrees not to oppose plaintiffs’ petition
8 for the fee award so long as it does not exceed 30%. (Id. ¶ 56.)
9 If the court does not approve the fee award in whole or in part,
10 it will not prevent the settlement agreement from becoming
11 effective or be grounds for termination. (Id. ¶ 58.)

12 In deciding the attorney’s fees motion, the court will
13 have the opportunity to assess whether the requested fee award is
14 reasonable by multiplying a reasonable hourly rate by the number
15 of hours counsel reasonably expended. See Van Gerwen v. Guarantee
16 Mut. Life. Co., 214 F.3d 1041, 1045 (9th Cir. 2000). As part of
17 this lodestar calculation, the court may take into account
18 factors such as the “degree of success” or “results obtained” by
19 plaintiffs’ counsel. See Cunningham v. County of Los Angeles,
20 879 F.2d 481, 488 (9th Cir. 1988). If the court, in ruling on
21 the fees motion, finds that the amount of the settlement warrants
22 a fee award at a rate lower than what plaintiffs’ counsel
23 requests, then it will reduce the award accordingly. The court
24 will therefore not evaluate the fee award at length here in
25 considering whether the settlement is adequate.

26 IT IS THEREFORE ORDERED that plaintiffs’ motion for
27 preliminary certification of a conditional settlement class and
28 preliminary approval of the class action settlement be, and the

1 same hereby is, GRANTED.

2 IT IS FURTHER ORDERED THAT:

3 (1) The claims administrator shall notify class members
4 of the settlement in the manner specified within the Settlement
5 Notice Plan;

6 (2) Class members who want to receive a settlement
7 payment under the settlement agreement must accurately complete
8 and submit the online claim form or deliver the claim form to the
9 claims administrator no later than September 19, 2016;

10 (3) Class members who want to object to the settlement
11 agreement must either deliver written objections to the Clerk of
12 Court for the Eastern District of California, the law firm of
13 Izard, Kindall & Raabe, LLP, and the law firm of Kirkland & Ellis
14 LLP postmarked no later than September 19, 2016 or appear in
15 person at the final fairness hearing. The objection must include
16 the objecting person's full name, current address, telephone
17 number, signature, a statement that the class member purchased
18 one of the products, all objections and reasons for the
19 objections, and any supporting papers. Any class member who
20 submits an objection remains eligible to submit a claim form and
21 receive monetary compensation;

22 (4) Class members who fail to object to the settlement
23 agreement in the manner specified above shall be deemed to have
24 waived their right to object to the settlement agreement and any
25 of its terms;

26 (5) Class members who want to be excluded from the
27 settlement must submit the request for exclusion to the claims
28 administrator no later than September 19, 2016. Class members

1 who opt out shall not receive any settlement proceeds or be bound
2 by any of the terms of the settlement, including the release
3 provisions;

4 (6) The following TRESemme Naturals Settlement Class is
5 provisionally certified:

6 All individuals in the United States who purchased the
7 following TRESemme Naturals products: (a) Nourishing
8 Moisture Shampoo; (b) Nourishing Moisture Conditioner;
9 (c) Radiant Volume Shampoo; (d) Radiant Volume
10 Conditioner; (e) Vibrantly Smooth Shampoo; and (f)
11 Vibrantly Smooth Conditioner (collectively, the
12 "products"). Specifically excluded from the Class are
13 (1) defendant, (2) the officers, directors, or
14 employees of defendant and their immediate family
members, (3) any entity in which defendant has a
controlling interest, (4) any affiliate, legal
representative, heir, or assign of defendant, (5) all
federal court judges who have presided over this action
and their immediate family members, (6) all persons who
submit a valid request for exclusion from the class,
and (7) those who purchased the products for the
purpose of resale.

15 (7) Plaintiffs Alba Morales, Lanie Cohen, Linda
16 Clayman, and Kenneth Drew are conditionally certified as the
17 class representatives to implement the parties' settlement in
18 accordance with the settlement agreement. The law firm of Izard,
19 Kindall & Raabe, LLP, through Mark Kindall, is conditionally
20 appointed as class counsel. The law firm of Bramson, Plutzik,
21 Mahler & Birkhaeuser, LLP, through Alan Plutzik and Michael
22 Strimling, is conditionally appointed as liaison counsel.
23 Plaintiffs and counsel must fairly and adequately protect the
24 class's interests;

25 (8) The parties agree that KCC will serve as the claims
26 administrator;

27 (9) If the settlement agreement terminates for any
28 reason, the following will occur: (a) class certification will be

1 automatically vacated; (b) plaintiffs will stop functioning as
2 class representatives; and (c) this action will revert to its
3 previous status in all respects as it existed immediately before
4 the parties executed the settlement agreement;

5 (10) All discovery and pretrial proceedings and
6 deadlines are stayed and suspended until further notice from the
7 court, except for such actions as are necessary to implement the
8 settlement agreement and this Order;

9 (11) The final fairness hearing is set for October 17,
10 2016 at 1:30 p.m., in Courtroom No. 5, to determine whether the
11 settlement agreement should be finally approved as fair,
12 reasonable, and adequate;

13 (12) The following are the certain associated dates in
14 this settlement:

15 (a) The claims administrator shall publish notice
16 pursuant to the notice plan by August 11, 2016;

17 (b) Class members shall file objections, requests
18 for exclusion, and claim forms by September 19, 2016;

19 (c) Plaintiffs shall file a motion for attorney's
20 fees no later than September 12, 2016;

21 (13) The parties shall file briefs in support of the
22 final approval of the settlement no later than September 12,
23 2016.

24 Dated: July 11, 2016



25 **WILLIAM B. SHUBB**
26 **UNITED STATES DISTRICT JUDGE**