UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HEATHER MAXIN, individually and on behalf of all others similarly situated, Plaintiff, v. RHG & COMPANY, INC., Defendant.	Case No.: 16-CV-2625 JLS (BLM) **ORDER (1) GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; AND (2) GRANTING MOTION FOR ATTORNEYS' FEES AND COSTS** (ECF Nos. 19, 22)

Presently before the Court are (1) Plaintiff's Motion for Attorneys' Fees and Costs, ("Fee Mot.," ECF No 19) and (2) Plaintiff's Motion for Final Approval of Class Action Settlement ("Final Settlement Mot."), (ECF No. 22). Both Motions are unopposed. (*See* Final Settlement Mot. 8; ECF No. 24.) The Court held a final fairness hearing on February 15, 2018 at 1:30 p.m. For the reasons stated below, the Court **GRANTS** Plaintiff's Motions.

GENERAL BACKGROUND

Plaintiff has filed a Class Action Complaint for damages and injunctive relief. ("Compl.," ECF No. 1.) Plaintiff alleges that Defendant—"an American 'pharmaceutical grade and professional strength supplements' manufacturer that conducts business through

Internet sales and mail orders, and a numerous pharmaceutical and supplement stores within the United States," (Compl. ¶ 11)—"made, and continues to make, affirmative misrepresentations regarding its Products, including the Vitamin D3 product purchased by Plaintiff, it manufactures, markets and sells," (*id.* ¶ 12). Specifically, Plaintiff alleges that "Defendant packaged, advertised, marketed, promoted, and sold its Products as 'Made in the USA,'" (*id.*), in violation of California Civil Code section 1750, *et seq.*, (*id.* ¶¶ 50–62); California Business & Professions Code section 17533.7, (*id.* ¶¶ 63–68); California Business and Professions Code section 17200, *et seq.*, (*id.* ¶¶ 69–84).

In June 2015, Plaintiff sent Defendant a notice letter pursuant to California Civil Code § 1782. (Final Settlement Mot. 9.) The following month, "Plaintiff sent Defendant a draft of the proposed complaint, alleging claims" under the Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), and False Advertising Law ("FAL"). (*Id.*) In October 2015, the Parties "participated in a full day of mediation" before the Honorable Leo S. Papas, a retired federal Magistrate Judge, after which Defendant produced information "in response to informal discovery requests by Plaintiff's counsel, including a confirmatory discovery request in the form of special interrogatories." (*Id.*) Specifically, Defendant produced figures "regarding the total sales of the Products, the approximate class size, and the appropriate notice for the Class." (*Id.*) "After thorough investigation and settlement discussions between Counsel, the Parties, fully apprised of the relative strengths and weaknesses of each other's claims and defenses and the potential risks to each party of pursuing further litigation, determined that a Settlement Agreement would be the most efficient method of resolving this matter." (*Id.* at 10–11.)

SETTLEMENT TERMS

The Court preliminary approved the Parties' Settlement Agreement. (*See generally* "Prelim. Approval Order," ECF No. 11; "Settlement Agreement," ECF No. 6-3.) The Settlement Class is defined as:

> All Persons who purchased one or more of the Products [i.e., those "that contained an unqualified 'Made in the USA' label or were otherwise

> represented as being 'Made in the USA,' including on Defendant's website, brochures, and/or any other marketing materials," (Settlement Agreement § III.A.27),] in the United States within the Class Period (i.e., August 1, 2012 through the date the Court issues the Preliminary Approval Order). Excluded from the Class are Defendant, its officers, directors, or employees, and the immediate family members. Also excluded is any judge who may preside over this case and their immediate family members and employees, as well as all persons who are validly excluded from the Settlement.

(Prelim. Approval Order 3.) The settlement requires Defendant RHG to pay $900,000 into a settlement fund, out of which Class Members will receive their share of payments. (*Id.* at 15.) No amount will revert back to Defendant and Class Counsel estimates each Class Member will receive $8.77. (*Id.*) This amount was calculated by Class Counsel "after deducing the notice costs, incentive award to Maxin, as well as Maxin's attorneys' fees and costs from the Settlement Fund." (*Id.*)

MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I. Preliminary Matters

A threshold requirement for final approval of the settlement of a class action is the assessment of whether the Class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of one of the types of class actions enumerated in subsection (b). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019, 1022 (9th Cir. 1998). The Court has already certified the proposed settlement class. (*See* Prelim. Approval Order 9 (finding certification of the settlement class proper under Rule 23(b)(3) and certifying the class for settlement purposes only).) The Court renews this finding here.

Also before granting final approval of a class-action settlement, the Court must determine that the Class received adequate notice. *Hanlon*, 150 F.3d at 1025. "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Id.* The Court has found that the method and content of the Notice comply with Rule 23 and approved the Parties' proposed notification plan. (Prelim. Approval Order 14–15.) In September 2017, the Parties requested the Court modify its preliminary approval order which had set the schedule for further proceedings. (ECF No. 12.) The Parties stated because Class Counsel

was to file its Motion for Attorney Fees after the deadline for Class Members to object had passed, Class Members were not permitted to review Counsel's motion for fees in determining how to respond to the class notice. (*Id.* at 2 (citing *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993–95 (9th Cir. 2010)).) The Court agreed but found that the Class Members should receive supplemental notice regarding the fee petition. (ECF No. 13.) The Court approved the Parties' supplemental notice, both email and postcard notice, the method of notice, and set a schedule for notification. (ECF No. 18.)

Plaintiff included a declaration by Scott DiCarlo, an employee of Kurtzman Karson Consultants ("KCC"), who was retained to administer notice. ("DiCarlo Decl.," ECF No. 22-2.) Mr. DiCarlo declares KCC disseminated notice in the manner directed by the Court. (*Id.* ¶ 3.) In March 2017, Defendant provided KCC with account records for 6,449 Class Members, and KCC identified 6,425 valid mail and/or email addresses from these records. (*Id.*) KCC sent email notice to 4,860 Class Members, and postcard notice to 1,565 Class Members. In November 2017, for the reasons discussed above, KCC sent additional notice to the Class Members. KCC sent 45,248 additional emails with the supplemental notice and 98 postcards to Class Members who did not have a valid email address. (*Id.* ¶ 4.) Mr. DiCarlo declares that to date, "KCC has received 99 undeliverable mail pieces and updated 57 of these with new addresses." (*Id.* ¶ 5.)

Mr. DiCarlo declares KCC has received two requests for exclusion and has received no objections. (*Id.* ¶¶ 10–11.) DiCarlo declares KKC has received a total of 65,096 claims. (*Id.* ¶ 12.) Thus, it appears that out of 65,096 Class Members, 42 have not received notice (i.e., those whose mail was returned undeliverable). The Court finds the effort by KCC to provide notice to potential Class Members is sufficient. *See Garcia v. City of King City*, No. 14–cv–01126–BLF, 2017 WL 363257, at *5 (N.D. Cal. Jan. 25, 2017) (finding that notice was adequate where the settlement administrator made multiple attempts to provide notice to all 241 potential Class Members, but "35 notices were" nonetheless "returned as undeliverable from all the mailed-out notices"). A review of Mr. Dicarlo's declaration and exhibits reveals that KCC provided notice in accordance with the notification plan. The

Court does not believe further efforts will successfully provide notice to the remaining Class Members. Accordingly, the Court finds that the Settlement Class received adequate notice of the Settlement.

II. Fairness of the Settlement

The Ninth Circuit has enumerated various factors that the court should consider in determining whether a proposed settlement meets the fair, reasonable, and adequate standard, including: (1) the strength of plaintiffs' 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; (8) and the reaction of the Class Members to the proposed settlement. *Hanlon*, 150 F.3d at 1026. This determination is committed to the sound discretion of the trial judge. *Id.*

"Where a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the court begins its analysis with a presumption that the settlement is fair and reasonable." *Garner v. State Farm Mut. Auto Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *13 (N.D. Cal. Apr. 22, 2010). "Additionally, there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)).

A. Strength of Plaintiff's Case

In order to succeed on the merits, Plaintiff would have to prove that Defendant's product labeling violated California law. (*See generally* Compl.) Defendant denies all Plaintiff's allegations, believes it has meritorious defenses to all of Plaintiff's claims, and maintains that its products and all of its representations and labeling were in compliance with all applicable laws. (Settlement Agreement § II.C.) Class Counsel, however, believes Plaintiff has a strong case and would be a compelling case if tried. (Final Settlement Mot. 13.) Additionally, the Settlement Agreement is the result of arm's-length negotiations

conducted over several months, including each Party's individual discovery and valuation of the case and one full-day mediation session before an experienced mediator. (*Id.* at 8.) Given this agreement and neutral third-party evaluation of the same, the Court thus finds that this factor weighs in favor of the $900,000 settlement being fair, reasonable, and adequate.

B. Risk, Expense, Complexity, and Likely Duration of Further Litigation

The Parties would each bear substantial risk and a strong likelihood of protracted and contentious litigation were the case to proceed to further litigation rather than settlement. Even though the Parties have agreed to settle this action, Defendant denies all liability to Plaintiff's Complaint. (Final Settlement Mot. 14.) Additionally, the Parties document a number of risks in litigating Plaintiff's claims—including "the recently amended 'Made in the USA' standard under California law, the low number of precedents regarding [Plaintiff's] claims, . . . as well as the highly contested nature of the alleged false advertising." (*Id.*) Class counsel states the risk to the class is substantial and has stated Defendant would likely appeal any favorable outcome received at trial. (*Id.* at 14–15.) Given the foregoing, this factor weighs in favor the settlement being fair, reasonable, and adequate.

C. Risk of Maintaining Class Action Status Throughout Trial

The Parties dispute the likelihood of initial challenges to class certification and the potential for decertification motions even if class status is granted. And, the class certification area is one that is particularly fraught at this time due to the Supreme Court's recent decisions, including *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and lower courts' often-conflicting interpretations of the expansiveness of the same. Defendant argues that the Class Members "face numerous risks going forward." (Final Settlement Mot. 14.) Accordingly, the settlement here obviates the potential for class decertification motions at trial or further litigation on appeal, and thus this facto favors the Court's approval of the settlement.

D. Amount Offered in Settlement

Defendant has agreed to pay $900,000 to settle this lawsuit. This amounts to $8.77 per Class Member. (Final Settlement Mot. 15.) This amount "represents reimbursement for as much as 50% of the value of certain RHG products." (*Id.*) Although there are a great many potential Class Members—and thus great potential recovery—given the foregoing and the slim chance of Class Members otherwise individually seeking recovery, this factor nonetheless weighs in favor of settlement.

E. Extent of Discovery Completed and Stage of Proceedings

Prior to the agreed-upon settlement, the Parties engaged in informal discovery, including analysis of Defendant's allegedly non-compliant products and locating putative Class Members from Defendant's sales records. (Final Settlement Mot. 16.) And as discussed, the Parties engaged a neutral third-party mediator who fully examined and discussed with each party the strengths and weakness of each party's case. (*Id.* at 9.) Both Class Counsel and Defense Counsel gained significant knowledge of the relevant facts and law throughout the discovery process and through independent investigation and evaluation. Accordingly, it appears the Parties have entered into the Settlement Agreement with a strong working knowledge of the relevant facts, law, and strengths and weaknesses of their claims and defenses. Given all of the above, this factor weighs in favor of the proposed settlement being fair, reasonable, and adequate.

F. Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). And here, Class Counsel believes the Settlement Agreement is fair, reasonable, adequate, and in the best interest of the Settlement Class. (Final Settlement Mot. 16.) Furthermore, in the present case the presumption of reasonableness is warranted based on Class Counsel's expertise in litigating CLRA, UCL, and FAL claims, familiarity with the relevant facts and law, and significant experience negotiating other class and collective action settlements. (*Id.*; *see, e.g.*, "Kazerounian Decl.," ECF No. 19-2.) Given the foregoing, and according

the appropriate weight to the judgment of these experienced counsel, this factor weighs in favor the proposed settlement being fair, reasonable, and adequate.

G. Presence of a Governmental Participant

There is no government participant in this matter. This factor does not apply to the Court's analysis.

H. Reaction of the Class Members to the Proposed Settlement

Plaintiff asserts two Class Members have opted out and none have objected. (Final Settlement Mot. 17–18.) "The absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004). Given that almost every Class Member was served with notice of the proposed settlement, (*see* Dicarlo Decl. ¶ 5), 65,096 submitted timely claims, and no Class Member has objected to date, with only two opt-outs, the Court finds this factor weighs in favor of approval of the settlement.

III. Conclusion

Because all of the pertinent factors here weigh in favor of approving the Class Settlement, the Court **GRANTS** the Plaintiff's Motion For Final Approval of Class Action Settlement, (ECF No. 22).

MOTION FOR ATTORNEYS' FEES AND COSTS

Class Counsel moves for an order approving the payment of attorneys' fees and costs in the amount of $247,500, and an incentive award to Ms. Maxin in the amount of $5,000. (Fee Mot. 9.)

A. Legal Standard

In the Ninth Circuit, a district court has discretion to apply either a lodestar method or a percentage-of-the-fund method in calculating a class fee award in a common fund case. *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). The Court finds the percentage-of-the-fund calculation is preferable to the lodestar approach. *See, e.g., Aichele v. City of Los Angeles*, No. CV 12-10863-DMG (FFMx), 2015 WL

5286028, at *5 (C.D. Cal. Sept. 9, 2015) ("Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner." (citations omitted)). When applying the percentage-of-the-fund method, an attorneys' fees award of "twenty-five percent is the 'benchmark' that district courts should award." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)); *see Fischel*, 307 F.3d at 1006. However, a district court "may adjust the benchmark when special circumstances indicate a higher or lower percentage would be appropriate." *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 379 (citing *Six (6) Mexican Workers*, 904 F.2d at 1311). "Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel*, 307 F.3d at 1007.

> Although not mandated by the Ninth Circuit, courts often consider the following factors when determining the benchmark percentage to be applied: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of nonpayment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's lodestar.

Aichele, 2015 WL 5286028, at *2 (citing *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *18 (C.D. Cal. June 10, 2005)).

B. Analysis

Class counsel seeks fees and costs of $247,500, which is 27.5% of the common fund. (Fee Mot. 9.) The Court applies the above eight factors to Class Counsel's requested fee. First, the Court finds that Class Counsel reached a favorable result for the Class—as noted above, a Defendant will create a settlement fund of $900,000, which amounts to approximately $8.77 per Class Member. The settlement also includes injunctive relief. Second, the Court finds the effort by Class Counsel has not been proven to be significant. Plaintiff sent a notice letter to Defendant in June 2015, litigation commenced for this case

in October 2016, and the final hearing occurred in February 2018. As Class Counsel points out, they reached a favorable result early on in this matter, which did involve investigation, discovery, negotiation, and preparing a few motions and agreements. (Final Settlement Mot. 18.) While Class Counsel's efforts were valuable, the length of this case was not significant. Third, Class Counsel asserts this case has been risky because they "risked non-payment by taking on this case and risked receiving zero compensation for potential years of work and out-of-pocket expenses had this case proceeded to trial." (*Id*.) Indeed, the Court agrees taking on the case was a risk to Counsel, especially considering Counsel must have foregone other matters to take on this one. (Fee Mot. 18.) But, this case is distinguishable from others where Class Members have overcome obstacles or opposition, such as motions to dismiss, adverse rulings, or appeals by the defendant. *Cf. Beaver v. Tarsadia Hotels*, No. 11-cv-1842-GPC-KSC, 2017 WL 4310707, at *4 (S.D. Cal. Sept. 28, 2017) (noting plaintiffs' case was strong in that they overcame substantial hurdles). Here, Plaintiff sent Defendant a letter, and then informal discussions and mediation followed. The Parties conducted discovery, a resolution as reached, the Complaint was filed, and one week later, Plaintiff filed its Motion for Preliminary Approval of Class Action Settlement. (Final Settlement Mot. 9.) The Court finds the third factor does not weigh for or against approval of the Fee Motion.

Fourth, the Court finds Class Counsel is skilled in this area of the law and in litigation class actions. (Fee Mot. 19.) Fifth, without further explanation, Class Counsel deems this case complex. (*Id.*) This is indeed a class action matter, but the Court has not been presented with sufficient facts to deem it complex. Sixth, as the Court noted above, counsel took this case despite the risk of non-payment. Seventh, as to the reaction of the class, the amount of requested attorney fees and costs is less than that authorized by the Settlement Agreement and that specifically communicated in the Notice. (*Id.* at 9.) Although not specified in the Motions, the Court understands that no Class Member has objected to the requested award of attorney fees because no Class Member has filed any objection to the notice sent to all Class Members. (DiCarlo Decl. ¶ 11.) This unanimous class approval

and absence of fee-specific objections weighs in favor of the Court approving the Fee Motion.

Finally, Class Counsel states the lodestar multiplier is 2.3. (Fee Mot. 23.) Indeed, lodestar cross-check multipliers larger than this have been approved. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) (approving multiplier of 3.65); *id.* n.6 (citing appendix "finding a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range," and noting that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied" (citation omitted)).

In sum, Class Counsel has requested fees and costs of $247,500, rather than dividing up the requested fees and costs. This combined amount is 27.5% of the Settlement Fund. In other cases, class counsel request fees, up to a certain percentage of the class fund, plus costs. *See e.g.*, *Aichele*, 2015 WL 5286028, at *1; *Nunez v. Bae Sys. San Diego Ship Repair Inc.*, No. 16-CV-2162 JLS (NLS), 2017 WL 564444, at *7 (S.D. Cal. Feb. 13, 2017). Class Counsel did not separate its request for fees and costs in this case, but instead ask for a total of 27.5% of the common fund. The Court is not inclined to adjust the benchmark of 25% of the common fund upwards in this case for fees alone. However, because the requested fees and costs total 27.5% of the settlement fund, the Court finds the request appropriate. This is further supported by the lack of opposition by Class Members and by Defendant. Therefore, the Court **AWARDS** Class Counsel its fees and costs of $247,500.

IV. Class Representative Service Award

The Ninth Circuit recognizes that named plaintiffs in class action litigation are eligible for reasonable incentive payments. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Incentive awards are "fairly typical" discretionary awards "intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g*

Corp., 563 F.3d 948, 958–59 (9th Cir. 2009) (citations omitted). In deciding whether to give an incentive award, the Court may consider:

> 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (citations omitted). In the present case, Plaintiff request the Court grant a service award to the Class Representative, Heather Maxin, in the amount of $5,000. After considering the above factors, the Court finds this sum reasonable. The Court **GRANTS** the Fee Motion regarding the Class Representative Service Award and awards $5,000 to Ms. Maxin.

V. Settlement Administrator Costs

Mr. DiCarlo declares KCC has "invoiced a total of $76,270.14 to cover the costs of issuing Notice and administering the Settlement." (DiCarlo Decl. ¶ 12.) It is unclear if the Parties request an Order from the Court awarding this amount to KCC, but have that stated the cost of administering the notice and settlement is to come from the gross settlement fund. (Fee Mot. 15.) Notice expenses are generally recoverable. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007). To the extent the Parties request this amount, the Court **AWARDS** $76,270.14 to KCC for costs of administering notice and the settlement.

VI. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Attorneys' Fees and Costs, (ECF No. 19).

GLOBAL CONCLUSION

For the reasons stated above, the Court:

1. **GRANTS** Plaintiff's Motion for Final Approval of Class Action Settlement, (ECF No. 22);
2. **GRANTS** Plaintiff's Motion for Attorneys' Fees and Costs, (ECF No. 19);

3. As such, the Court **APPROVES** $247,500 in attorney fees and costs to Class Counsel;
4. **APPROVES** a $5,000 award to Ms. Heather Maxin;
5. **APPROVES** a $76,270.14 payment to KCC as settlement administrator;
6. **DISMISSES** this action **WITH PREJUDICE** with the terms of the Settlement.

IT IS SO ORDERED.

Dated: February 16, 2018

Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge