HULETT HARPER STEWART LLP
Kirk B. Hulett (SBN 110726)
550 West C Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139
Email: kbh@hulettharper.com

NICHOLAS & TOMASEVIC, LLP
Craig M. Nicholas (SBN 178444)
Alex Tomasevic (SBN 245598)
225 Broadway, 19th Floor
San Diego, CA 92101
Telephone: (619) 325-0492
Facsimile: (619) 325-0496
Email: cnicholas@nicholaslaw.org
Email: atomasevic@nicholaslaw.org

McCOLLOCH LAW FIRM
Michael T. McColloch (SBN 66766)
545 2nd Street, Suite 3
Encinitas, CA 92024
Telephone: (760) 632-1100
Facsimile: (760) 650-0016
Email: mike@moonlightlaw.com

Attorneys for Plaintiff, William Grivas

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM GRIVAS, On Behalf of Himself, All Others Similarly Situated,

Plaintiff,

v.

METAGENICS, INC.,

Defendant.

CASE NO. 8:15-cv-01838-CJC-DFM

PLAINTIFF'S NOTICE OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: January 10, 2019
Time: 1:30 p.m.
Dept.: 7C

Judge: Honorable Cormac J. Carney

Action Filed: November 9, 2015
Trial Date: None Set

TO THE COURT, DEFENDANT, AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs William Grivas ("Plaintiff") hereby moves this Court for Preliminary Approval of the Class Action Settlement in this case.

This Motion is based upon the accompanying memorandum of points and authorities, the Declaration of Alex Tomasevic, and the pleadings, papers, and records on file in this action, and such other information as the Court may find it appropriate to consider.

A proposed Order is submitted herewith.

DATED: December 6, 2018

NICHOLAS & TOMASEVIC, LLP

By: */s/ Alex Tomasevic*

ALEX TOMASEVIC (SBN 245598)
225 Broadway, 19th Floor
San Diego, CA 92101
Telephone: (619) 325-0492
Facsimile: (619) 325-0496
Email: atomasevic@nicholaslaw.org

HULETT HARPER STEWART LLP
KIRK B. HULETT, SBN: 110726
550 West C Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139
Email: kbh@hulettharper.com

McCOLLOCH LAW FIRM
MICHAEL T. McCOLLOCH, SBN: 66766
545 2nd Street, Suite 3
Encinitas, CA 92024
Telephone: (760) 632-1100
Facsimile: (760) 650-0016
Email: mike@moonlightlaw.com

Attorneys for Plaintiff, William Grivas

HULETT HARPER STEWART LLP
Kirk B. Hulett (SBN 110726)
550 West C Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139
Email: kbh@hulettharper.com

NICHOLAS & TOMASEVIC, LLP
Craig M. Nicholas (SBN 178444)
Alex Tomasevic (SBN 245598)
225 Broadway, 19th Floor
San Diego, CA 92101
Telephone: (619) 325-0492
Facsimile: (619) 325-0496
Email: cnicholas@nicholaslaw.org
Email: atomasevic@nicholaslaw.org

McCOLLOCH LAW FIRM
Michael T. McColloch (SBN 66766)
545 2nd Street, Suite 3
Encinitas, CA 92024
Telephone: (760) 632-1100
Facsimile: (760) 650-0016
Email: mike@moonlightlaw.com

Attorneys for Plaintiff, William Grivas

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM GRIVAS, On Behalf of Himself, All Others Similarly Situated,

Plaintiff,

v.

METAGENICS, INC.,

Defendant.

CASE NO. 8:15-cv-01838-CJC-DFM

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL]

Date: January 10, 2019
Time: 1:30 p.m.
Dept.: 7C

Judge: Honorable Cormac J. Carney

Action Filed: November 9, 2015
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiff William Grivas filed his original class action complaint in 2015 alleging that Defendant Metagenics, Inc.'s "Medical Food" products were deceptively and illegally marketed. Finally, and after many challenges, years of investigation, and only after mediation with a retired Judge, the parties have reached a class-wide settlement. The settlement creates a common fund of $1.3 million that, after reasonable costs, fees, and administration, will provide cash refunds to a nationwide class of Metagenics "Medical Food" purchasers.

Because the law favors settlement, and because this case has been thoroughly litigated and investigated by skilled and experienced adversaries, the Court should preliminarily approve the settlement. This settlement enjoys a presumption of fairness under the law, which is well-deserved under the circumstances. This proposed settlement is well within the range of reasonableness worthy of preliminary approval at this stage.

II. BACKGROUND

A. The Allegations

Metagenics sells non-prescription powdered beverages that it labels as "Medical Foods." ECF No. 47, First Amended Complaint ("FAC"), ¶ 1. According to California's Sherman Food, Drug and Cosmetic Act, a Medical Food is supposed to be "a food which is formulated to be consumed or administered internally under the supervision of a physician and which is intended for the dietary management of a specific disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation." Cal. Health & Safety Code § 110100; 21 U.S.C. § 360ee(b)(3) (incorporated by § 110100).

Plaintiff alleges that Metagenics deceptively and illegally labeled such products—some of which cost $150 per container—as "Medical Food," when they were not real Medical Food, thereby enabling Metagenics to extract a much higher price when compared to ordinary foods or dietary "supplements." *See* ECF No. 47, FAC, ¶ 2. Plaintiff further alleged that Metagenics' business practices violated California's Sherman Food, Drug, and

Cosmetic Law and California's Unfair Competition Law (Cal. Bus. & Prof. Code Sections 17200, *et seq.*).

During the class period, Plaintiff William L. Grivas, Sr. purchased four varieties[1] of Metagenics' "Medical Foods." ECF No. 47, FAC, ¶ 24. He claims he lost money and was damaged as a result of Metagenics' behavior. He filed this case as a putative class action seeking, among other things, restitution of at least a part of the purchase price for Metagenics "Medical Foods" sold nationwide. *See id.* at ¶ 5.

Metagenics has stopped selling the class products. *See id.* at ¶ 32. And Metagenics discontinued or re-labelled other previously-described "Medical Foods" after Mr. Grivas brought this lawsuit. *See* https://www.metagenics.com/medical-foods (current Metagenics website only advertises six medical foods) (last accessed November 28, 2019.)

B. Procedural History

Mr. Grivas filed his original class action complaint in November of 2015. ECF No. 1. Metagenics responded with a motion to dismiss or stay the complaint and a motion to strike. ECF No. 22. Metagenics argued, among other things, that this Honorable Court should dismiss or stay the case to defer to the FDA's "Primary Jurisdiction" to decide matters related to "Medical Food" labelling – an area which Metagenics argued was highly technical and evolving. *Id.* The Court rejected Metagenics' Primary Jurisdiction arguments, but held that it was "willing to revisit the issue when the full record is before it after discovery, of if the FDA alters course." ECF No. 33 at 10:16-19, Order.

While the Court denied Metagenics' motion to dismiss and motion to strike without prejudice, the Court granted Metagenics' motion to stay the case pending resolution of appeals in three other consumer class actions that were pending before the Ninth Circuit at the time. *See* ECF No. 33, Order. The appeals were eventually resolved and the stay of this case was lifted in September of 2017. *See* ECF No. 37.

[1] The four varieties that Mr. Grivas purchased, and which are no longer sold, are *UltraMeal Plus*, *UltraMeal Plus 360*, *UltraGlycemX* and *UltraClear*. ECF No. 47, FAC, ¶ 13. These are sometimes referred to as the "class products." The settlement release extends to purchases of these four products only.

Metagenics then launched another pleading challenge: a Motion for Reconsideration of the Order denying their 2016 Motion to Dismiss. *See* ECF. No. 41 (asking the Court to reconsider the Primary Jurisdiction issues). Metagenics also filed a motion to dismiss claiming that Mr. Grivas failed to sufficiently plead some of his claims and that he lacked standing to, among other things, pursue theories concerning Metagenics products he never bought. *Id.* Metagenics argued that Mr. Grivas could only pursue theories related to the four varieties of Metagenics "Medical Foods" he himself purchased, rather than the whole line of products. Mr. Grivas opposed and Metagenics replied.

Ultimately, the Court declined to reconsider its prior ruling on Primary Jurisdiction. *See* ECF No. 46, Order. But the Court, once again, kept the door open to revisiting the issue at a later time. *Id.* at 8:10-13.

On standing, the court sided with Metagenics, holding that Mr. Grivas did not sufficiently allege a basis to pursue restitution for the entire product line. *Id.* at pp. 8-12. Mr. Grivas, for example, had not adequately pled that the products were similar enough to confer standing over all of them at once. *Id.* The Court also held that Mr. Grivas failed to plead his deception claims with the requisite particularity. *Id.* at pp. 12-14. However, the Court gave Mr. Grivas leave to amend. *Id.* at p. 15.

Mr. Grivas filed his First Amended Complaint – the operative complaint – in January of 2018. *See* ECF. No. 47. Metagenics responded with another Motion to Dismiss, claiming that Mr. Grivas had failed to fix the deficiencies affecting his original complaint, e.g. that Mr. Grivas still lacked standing to sue for any Metagenics products other than the four products he actually purchased. ECF No. 52. Metagenics also argued that the First Amended Complaint lacked the requisite particularity and that Plaintiff's claims were overbroad insofar as it was inappropriate for him to pursue a nationwide class based on violations of only California law. *Id.*

Regarding the appropriateness of pursuing *all* of the Metagenics products, the Court elected to defer the issue to the class certification stage. *See* ECF No. 56 at 10:1-3. The Court noted, however, that it was "still concerned about the similarity of the Class

Products," signaling that certification of all of the products in one case might be inappropriate. *Id.* Similarly, the Court elected to defer issues concerning the scope of the class definition. *Id.* at 16:3-4 ("The Court agrees with Grivas that whether he may represent a nationwide class is more properly considered at class certification.").

C. Discovery, Continued Investigation, and the Mediation

The parties then met and conferred about discovery, eventually drafting a detailed joint discovery plan pursuant to Fed. R. Civ. P. 26. Declaration of Alex Tomasevic ("Tomasevic Decl."), ¶ 15. The parties also exchanged Initial Disclosures. *Id.* Defendant served written discovery requests and noticed Mr. Grivas' deposition. *Id.*

Plaintiff continued the investigations he started years prior, including by gathering and analyzing copious amounts of publicly-available data, FDA records, sales information, scientific literature regarding "Medical Foods" and the medical conditions they were meant to treat, and the like. Tomasevic Decl., ¶ 16. Plaintiff also completed and received information from several Freedom of Information Act Requests. *Id*. Plaintiff also hired and consulted with renowned nutritional, biochemical, and physiological expert (and professor of clinical pharmacy), Dr. Edward R. Blonz, PhD, who assisted Plaintiff's counsel with understanding the relevant science, the ingredients and medical conditions at issue, the scope of the potential claims, and possible damage theories. *Id.*

Per the Court's typical procedures, the parties were required to select an early ADR process. Tomasevic Decl., ¶ 17. The parties opted for private mediation. *Id*. The parties then selected as their mediator the Honorable Peter D. Lichtman, of JAMS – one of the founders of the Los Angeles Superior Court's Complex Civil Litigation program.[2] The parties scheduled their mediation for August 14, 2018. Before the mediation, and after agreeing to a Protective Order, the parties exchanged and analyzed additional information and data including detailed nationwide product sales data. *Id*.

[2] More information about Judge Lichtman can be found on the JAMS website at: https://www.jamsadr.com/lichtman/ (last accessed November 27, 2018.)

The parties then attended their full-day mediation in Los Angeles before Judge Lichtman. Tomasevic Decl., ¶ 18. While the parties did not resolve the case in-person at the mediation, Judge Lichtman continued to work with the parties afterward. *Id*. Eventually, Judge Lichtman offered a written mediator's proposal that he concluded could be a fair resolution of all of the disputed issues. *Id*. After considering additional information, the parties accepted Judge Lichtman's proposal in mid-September of 2018. *Id*.

D. The Settlement

The primary terms of the Settlement Agreement, a complete copy of which is attached to the accompanying Declaration of Alex Tomasevic as Exhibit A, are summarized below.

In short, and as originally proposed by Judge Lichtman, Metagenics will pay $1.3 million into a common fund on a non-reversionary basis. Ex. A, Settlement Agreement at § III.A. After allowing for court-approved costs (including settlement administration costs), attorneys' fees, and a class representative service award for Mr. Grivas, the remaining money (defined as the "Net Settlement Fund" in the Settlement Agreement) will be distributed to consumers who purchased any of the four Metagenics products that Mr. Grivas also purchased and who submit claims. *Id.* at II.E.

More specifically, the settlement will be administered by a third-party settlement administrator who, first, will provide notice to the nationwide class via print publication, press release, online banner ads, and a settlement website. Ex. A, Settlement Agreement at IV.C.; Tomasevic Decl., Exs. B & C. This was the practical way to give notice to the class because Defendant does not maintain contact information for people who purchased these consumer products. Tomasevic Decl., ¶ 20.

The notice will direct class members to a detailed settlement website where class members can read more about the case and access key documents like the complaint, the settlement agreement, this motion for preliminary approval, and any motion for final approval and award of fees, costs, and enhancement awards. Class members will also be

directed to online claim forms where they can certify that they are a class member and where they will also verify how many class products they purchased during the class period. A toll-free number with interactive voice response ("IVR") and pre-recorded voice support will also be set up to assist class members with the process and any questions they may have. Ex. A, Settlement Agreement at IV.C.

In general, the more class products a class member purchased, the more they will receive under the settlement. Class members can claim to have purchased up to five class products, and be paid the corresponding amount, *without* submitting proof of purchase. Class members who purchased more than five products will be paid in accordance with their claimed purchases, but will need to provide proof of purchase showing more than five purchases. Ex. A, Settlement Agreement at Ex. A, Settlement Agreement at II.L (definition of "Settlement Award").

Ultimately, the Settlement Administrator will pay claims on a pro-rata basis as follows. First, the Settlement Administrator will calculate the "Net Settlement Fund," meaning the money left over after deducting approved attorney's fees and costs (including case costs, the settlement notice and administration costs, and any enhancement award). Then the Settlement Administrator will calculate individual awards by taking the Net Settlement Fund and dividing by the total number of class products that all participating settlement class members have validly claimed, in their claim forms, to have purchased throughout the class period.[3] That result will then be multiplied by the number of products each individual participating settlement class member has claimed. In short, the Settlement Administrator will first calculate a per-product award using the information from the returned claim forms. Then each participating class member will get, via check, that per-product amount multiplied by each product or unit of product that the participating class member has validly claimed. Ex. A, Settlement Agreement at II.L.

[3] If Class Members prefer, they can instead request a self-addressed and pre-stamped claim form be sent to them via regular First Class Mail, which they can then fill out by hand and mail back. Or class members can request an emailed copy of the form.

All of the net settlement fund will be distributed to class members in the form of real money, not coupons. And under no circumstances will Metagenics ever receive a rebate or reversion of any of the $1.3 million.[4] Tomasevic Decl., ¶ 23.

III. PRELIMINARY APPROVAL IS APPROPRIATE HERE.

The arms-length settlement was reached among capable and experienced adversaries only after rigorous investigation and with the assistance of a retired Judge. The settlement is well within the range of settlements deserving preliminary approval.

A. The Two-Step Process for Approval of Class Settlements.

Parties may not dismiss, compromise, or settle a class action without court approval. Fed. R. Civ. P. 23(e). The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost and rigors of continued litigation. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002) (and cases cited therein); *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976). By their very nature, class actions readily lend themselves to compromise; as the difficulties of proof and lengthy duration ratchet up uncertainties regarding the outcome. *Id.* at 943, 950 (public interest in settling litigation is "particularly true in class action suits . . . which frequently present serious problems of management and expense").

To approve a class action settlement, courts utilize a two-step process: first, a court "determines whether a proposed class action settlement deserves preliminary approval;" second, after class members receive notice, the court determines "whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).[5] The preliminary approval stage is an "initial evaluation" of the fairness

[4] In the event that some amount is claimed but never collected, e.g. if a check is sent but never cashed, then those residual funds will go to a *cy pres* beneficiary: Vitamin Angels, a 501(c) charity that provides vitamins and minerals to at-risk populations in need, specifically, pregnant women, new mothers, and children under five. *See* https://www.vitaminangels.org/ (last accessed November 27, 2018); Ex. A, Settlement Agreement at III.H; Tomasevic Decl., ¶ 23.

[5] As part of the second step, courts hold a formal hearing, at which they may hear all evidence and argument necessary to evaluate the settlement. At that hearing,

of the proposed settlement made by the court based on written submissions and informal presentations from the settlement parties. Manual for Complex Litigation (Fourth) §§ 21.63, *et seq*. (2004).

B. The Court Should Grant Preliminary Approval Here

On preliminary review, courts assess only whether the settlement falls within the "range of reasonableness" and thus, whether the notice to the class is appropriate. 4 *Newberg* §§ 21.63, *et seq*.; Manual for Complex Litigation (Fourth) § 30.41 (1995). The presiding judge should grant approval unless there exists reasons to doubt the settlement's fairness or the settlement is so obviously deficient that it would not survive final approval. *See In re Prudential Securities, Inc.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

If "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. April 12, 2007). When class counsel is experienced and supports the settlement, and the agreement was reached after arm's length negotiations, courts should give the settlement a presumption of fairness. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig*., 2016 U.S. Dist. LEXIS 145701, at *742-43 (N.D. Cal. Oct. 18, 2016); *see also In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 37286, at *10-11 (N.D. Cal. Mar. 18, 2013) (applying a presumption of fairness to settlement that was "the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel"). Reviewing courts then reserve heavier scrutiny for the final approval hearing. *Harris v. Vector Marketing Corp.*, 2011 WL 1627973, at *7 (N.D. Cal. April 29, 2011).

---

proponents of the settlement may explain and describe its terms and conditions and offer argument in support of settlement approval, and members of the settlement class, or their counsel, may be heard in support of or in opposition to the settlement agreement.

In summary, a court should grant preliminary approval "if the settlement (1) appears to be 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"—in other words, whether the settlement falls within the bounds of fairness. *See Harris*, 2011 WL 1627973, at *7 (N.D. Cal. April 29, 2011) (citing *Alvarado v. Nederend*, 2011 WL 90228, at *5 (E.D. Cal. Jan.11, 2011)). Each of these elements, discussed below, are satisfied.

1. The Parties Negotiated Seriously and in Good Faith and Only Reached a Settlement after Years of Investigation and Litigation.

Courts defer to the judgment of experienced counsel when determining whether negotiations were fair and informed. Absent fraud and collusion, the court may not only rely upon the judgment of experienced attorneys, but it should be hesitant to "substitute its own judgment for that of counsel." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *see also Officers for Justice v. Civ. Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

Here, all counsel are experienced class action litigators and experienced in consumer products litigation. Their collective experience includes decades of litigating large class actions throughout the state and federal courts. Tomasevic Decl., ¶ 2–13. They have litigated class actions and advocated their clients' positions in trial courts across the nation, in state courts of appeal, in the Ninth Circuit Court of Appeal, the Sixth Circuit Court of Appeal, and the U.S. Supreme Court. *Id.*

Class counsel believes this settlement to be fair and just. Tomasevic Decl., ¶ 24. Class Counsel in this case spent years pouring over the facts and the law in this case, engaging an experienced science expert, and utilizing experience and skill to marshal evidence, data and disclosures, and scientific principles over the years this District Court action was pending. Class Counsel had the information, experience, and resolve to effectively weigh the prospects of the case over time. Those prospects evolved over the

years and were punctuated by multiple rounds of pleading challenges, a developing regulatory framework regarding "Medical Foods," and shifting class action jurisprudence. Those prospects also had to be weighed against the needs of the Class Members which include sickly citizens who likely had less patience or ability to wait additional years. *Id.* Class counsel and Mr. Grivas weighed all of this and they stand in the best position to weigh the settlement. *Id.*

Moreover, there can be no serious question that this litigation and the Settlement were non-collusive. *Cf. Officers for Justice v. Civ. Serv. Comm'n of San Francisco*, 688 F.2d at 625 (District Court scrutiny should be "limited to the extent necessary to reach a reasoned judgment 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 in all concerned.").

The parties opposed each other vigorously and repeatedly at every turn. Defendants challenged the pleadings every chance they had and stayed the course since the case was filed in 2015. Defense counsel at Morrison Forester, furthermore, have considerable experience and are recognized authorities on consumer class actions and California's Unfair Competition Law. *See* https://www.mofo.com/people/william-stern.html (biography page for lead defense counsel William L. Stern, Esq.) (last accessed November 28, 2018). In short, there was no collusion. There was only advocacy among experienced adversaries.

Moreover, while Plaintiff believed in his case, there were significant risks in continuing to pursue it. Of course, whether Mr. Grivas could win a motion for class certification, in whole or in part, was an open question. Mr. Grivas would also likely need to survive an eventual motion for decertification after the close of discovery even if originally successful.

Defendant also demonstrated that it would continue to revisit dismissing the case on Primary Jurisdiction grounds, given the evolving nature of the FDA's pronouncements on Medical Food regulation. *See* ECF. No. 41 (asking the Court to reconsider the Primary

Jurisdiction issues). Indeed, the Court indicated that it might revisit jurisdiction after the close of discovery or upon another statement by the FDA. *See, e.g.,* ECF No. 33 at 10:16-19, Order.

Plaintiff also had his work cut out for him to proffer and prove an appropriate damages model. As the Ninth Circuit reaffirmed during the pendency of this case, the proper measure of restitution where a plaintiff receives some value from the product is "[t]he difference between what the plaintiff paid and the value of what the plaintiff received." *Chowning v. Kohl's Dep't Stores, Inc.*, 735 F. App'x 924, 925 (9th Cir.), *amended on denial of reh'g*, 733 F. App'x 404 (9th Cir. 2018). Yet there is no definitive science or legal authority that establishes what the "Medical Food" label is really worth here. In summary, there were complicated risks and open questions that all counsel analyzed and had to account for in deciding to resolve and in valuing the settlement.

Finally, and importantly, the involvement of an objective, third-party neutral here demonstrates the presence of arm's-length negotiations and further supports a presumption of fairness. *See Martens v. Smith Barney*, 181 F.R.D. 243, 262-63 (S.D.N.Y. 1998); *In re Toys "R" Us-Del FACTA Litig.,* 295 F.R.D. 438, 450 (C.D. Cal. Dec. 16, 2014) (finding a presumption of fairness where the settlement was reached following a mediation). To help resolve this matter, the parties attended a full-day mediation with the Hon. Peter D. Lichtman (Ret.), of JAMS. As his resume confirms, Mr. Lichtman has significant experience with Class Actions/Mass Torts. https://www.jamsadr.com/lichtman/. Indeed, when still a Judge, he was a founder of the Los Angeles Superior Court's Complex Civil Litigation program and, more recently, was head of the Court's Mandatory Settlement Program. *Id.*

Judge Lichtman guided the parties through in-person negotiations in Los Angeles, and worked with the parties for weeks thereafter until the parties eventually accepted his mediator's proposal. Tomasevic Decl., ¶¶ 17-18. The negotiations that led to this

settlement, in short, were tested, long-term, well-informed, and done only in good faith. This warrants preliminary approval.

2. The Settlement Agreement Has No Obvious Deficiencies.

A settlement stands or falls on the adequacy of its terms. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981). The Settlement reflects an excellent compromise, particularly given that the merits and risks of the case that have been thoroughly addressed.

Here, participating Class Members will receive real money, not coupons. Defendant will pay back $1.3 million as a result of this lawsuit. The total gross sales Metagenics collected from the four class products nationwide since December of 2012 was about [redacted]. Tomasevic Decl., ¶ 19. So Metagenics has to pay back roughly [redacted]% of those nationwide sales. This is a fair amount considering that: (a) liability was hotly contested and uncertain; (b) it was uncertain if Mr. Grivas would maintain class certification throughout the case; (c) it would be challenging to prove what the price differential or "premium" attributable to the "Medical Foods" label really was;[6] and (d) trial and eventual appeals would likely take another three years from this point should the parties have elected not to settle. While Mr. Grivas and his counsel certainly believed in their case, they also understood the value of compromise. This settlement is certainly within the range of possible settlements worthy of approval under the circumstances.

3. The Settlement Justly Compensates the Named Plaintiff.

The parties intend to seek the approval of an incentive award for Named Plaintiff William Grivas of $20,000. "Courts routinely recognize and approve incentive awards

[6] Metagenics maintained throughout the case that if the "Medical Food" label/theory was worth anything, it was worth, at most, 10% of sales. If Metagenics successfully convinced a jury of that, *even if* Mr. Grivas certified a nationwide class, and *even if* he prevailed at trial, then a "win" would have been worth only [redacted] (10% of the gross sales). And the "win" would be worth only a fraction of that had Mr. Grivas certified merely a California-only case. Comparatively, $1.3 million is a successful result that weighs all of the risks and all of the potential outcomes.

for class representatives . . . " *Wineland v. Casey's General Stores, Inc.*, 267 F.R.D. 669, 677 (S.D. Iowa 2009); *see also In re U.S. Bancorp Litigation*, 291 F.3d 1035, 1038 (8th Cir. 2002) ("[R]elevant factors in deciding whether [an] incentive award to [a] named plaintiff is warranted include actions [the] plaintiff took to protect class's interests, [the] degree to which [the] class has benefitted from those actions, and [the] amount of time and effort [the] plaintiff expended in pursuing litigation.") (*citing Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

First, Mr. Grivas took on the burden of litigating on behalf of a class of purchasers—acting for the good of the public at large. *Cf. In Re SmithKline Beckman Corp. Securities Litigation*, 751 F. Supp. 525, 535 (E.D. Pa. 1990) (noting that class representatives perform a public good by acting in representative capacity). The class will benefit greatly because they will get cash refunds as a result of Mr. Grivas' efforts. Indeed, because of the pro-rata nature of the settlement Mr. Grivas negotiated, class members could receive many times *more* than what they originally paid for their products – depending on the number of claims.

Mr. Grivas also had to spend a significant amount of his time to achieve these results. Mr. Grivas stood by the case for all the years it was pending. He travelled to and met repeatedly with his counsel. He made himself available for discovery and investigation and, due to the subject matter of this case, he put his own personal medical history at issue. Mr. Grivas also conducted his own factual research and gathered key documents. Finally, Mr. Grivas traveled to and attended the mediation that brought about the settlement. Under the circumstances, Mr. Grivas is deserving of a service award. *See* Tomasevic Decl., ¶ 25.

IV. CONDITIONAL CLASS CERTIFICATION IS APPROPRIATE FOR SETTLEMENT PURPOSES

A. The Proposed Class Meets the Requirements of Rule 23

Before granting preliminary approval of the Settlement, the Court should determine that the proposed settlement class meets the requirements of Rule 23. *See*

Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997); Manual for Complex Litigation, § 21.632. An analysis of the requirements of Rule 23(a) and (b)(3), commonly referred to as numerosity, commonality, typicality, adequacy, predominance, and superiority, shows that certification of this proposed Settlement Class is appropriate.[7]

Here, the Court should certify the following Settlement Class:

> *all persons who at any time since November 9, 2011 to the present purchased one or more of the following products labelled as "Medical Foods" and who do not file a valid and timely request to opt-out of the Lawsuit: UltraMeal Plus, UltraMeal Plus 360, UltraGlycemX and UltraClear.*

B. The Proposed Class Is Sufficiently Numerous

The numerosity requirement is met where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Generally, courts will find a class sufficiently numerous if it consists of 40 or more members. *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009) (numerosity is presumed at a level of 40 members). Here, the settlement class consists of thousands of purchasers of Metagenics' Medical Foods. We know this because, among other reasons, the class encompasses millions of dollars in sales across products that cost, at most, about $150 each.

C. There are Questions of Law and Fact that Are Common to the Class

The second Rule 23(a) requirement is commonality, which is satisfied "if there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The operative criterion for commonality is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The "commonality requirement has been 'construed permissively,' and its requirements deemed minimal." *Estrella v. Freedom Fin'l Network*, No. C-09-03156-SI, 2010 U.S. Dist. LEXIS 61236, at *25 (N.D. Cal. June 2, 2010) [quoting *Hanlon*

[7] As the Ninth Circuit recently clarified, there is no threshold "ascertainability" requirement in this Circuit. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 n.4 (9th Cir. 2017).

v. Chrysler Corp., 150 F.3d 1011, 1019-20 (9th Cir. 1998)].The existence of a single common question of law or fact satisfies this requirement. *See Dukes*, 564 U.S. at 369.

Here, each Class Member purchased a Metagenics product labelled as a "Medical Food." Medical Foods, furthermore, are all measured against one common definition supplied by the FDA and California's Sherman Food, Drug and Cosmetic Act. Metagenics contends that its products satisfy that common legal definition. In short, a major issue in dispute—*e.g.*, whether the Medical Foods meet this common definition - reflects a common question of fact and law, the resolution of which is apt to drive resolution of this litigation.

D. Plaintiff's Claims Are Typical of the Proposed Settlement Class

"In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's legal theory, not the injury caused to the plaintiff." *Lozano v. AT&T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007). Thus, typicality is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citation omitted).

Here, Class Members' claims arising from the mislabeled "Medical Foods" are reasonably coextensive with the claims asserted by Mr. Grivas. Each Class Member's claim arises from the same alleged course of conduct—that Metagenics mislabeled ordinary mass-produced ingredients as "Medical Foods" (which does not satisfy the legal definition of Medical Food). Plaintiff's claims are thus typical of the Class, as "they are reasonably coextensive with those of absent class members." Plaintiff and Class Members would also similarly benefit from the relief provided by the Settlement. Accordingly, typicality is satisfied.

E. Plaintiff and His Counsel Will Adequately Represent the Interests of the Proposed Settlement Class

Adequacy is satisfied when "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4); specifically: (1) the proposed

representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) Plaintiffs are represented by qualified and competent counsel. *Hanlon*, 150 F.3d at 1020. Here, Mr. Grivas is an adequate class representative, as he has no conflict of interest with the proposed Class. In fact, Plaintiff shares a common interest in holding Metagenics accountable for selling mislabeled or falsely-advertised products. In addition, Plaintiff is represented by competent counsel well-versed in prosecuting consumer class action matters. *See, e.g.*, Tomasevic Decl., ¶¶ 2-13.

F. Common Issues Predominate Over Individual Issues

"In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2) or (3)." *Hanlon*, 150 F.3d at 1022. The predominance inquiry under Rule 23(b)(3) asks "whether the common, aggregation-enabling issue are more prevalent or more important than the non-common, aggregation-defeating, individual issues." *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* So long as there is a "clear justification for handling the dispute on a representative rather than an individual basis" (*Hanlon*, 150 F.3d at 1022), the inquiry is satisfied.

Notably, manageability at trial is not a concern in the class action settlement context, "for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Indeed, the predominance inquiry in the context of a nationwide settlement should be considered under "three guideposts:" [F]irst, that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members; second, that variations in state law do not necessarily defeat predominance; and third, that concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class. *Sullivan v. DB Invs. Inc.*, 667 F.3d 273, 297 (3d

Cir. 2011) (en banc); *see also, Wakefield v. Wells Fargo & Co*., No. C 13-05053 LB, 2014 WL 7240339, at *4 (N.D. Cal. Dec. 18, 2014) (adopting *Sullivan*'s analysis that state law variations dissipate in a settlement class). Under similar guiding principles, the Ninth Circuit has similarly upheld settlement-only class certification in nationwide settlements. *See*, *e.g*., *Hanlon*, 150 F.3d at 1022–23 ("[G]iven the limited focus of the action, the shared factual predicate and the reasonably inconsequential differences in state law remedies, the proposed class was sufficiently cohesive to survive Rule 23(b)(3) scrutiny."); *see also Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987); *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68 (2010); *In re Conseco Life Ins. Co.*, 270 F.R.D. 521 (N.D. Cal. 2010); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012) (California may certify a nationwide class if the interests of other states are not found to outweigh California's interest in having its laws applied).

Here, for purposes of settlement, the predominance test is satisfied, as the proposed settlement makes the relief of cash payment available for all Class Members based on easily ascertainable criteria, bypassing whatever individual evidentiary and factual issues that could arise in litigation in determining liability or damages.

Furthermore, it cannot be said here that the interests of some other state would outweigh California's interest in having its laws applied. Metagenics is a California-based company with headquarters in Orange County. ECF 47, FAC, ¶ 9. California has a clear and compelling interest in assuring that corporations within California do not use California as a haven from which to promulgate materially false and misleading product labeling. *Cf. Clothesrigger,* 191 Cal. App. 3d at 609.

Given this showing, no one can then prove that each of the other states has some interest that conflicts with California's interest in "protecting" consumers against corporations who make and distribute falsely labeled consumables across the nation. *Cf. Clothesrigger,* 191 Cal. App. 3d at 614; *Mazza,* 666 F.3d at 589-90. Nor *could* any state adopt a position materially in conflict with California under these circumstances because California's definition of "Medical Food" adopts the federal definition. Cal. Health &

Safety Code § 110100; 21 U.S.C. § 360ee(b)(3) (incorporated by § 110100). In other words, if the class products were mislabeled or illegal in California, they were also illegal in New York, New Jersey, Texas, and so on. Predominance is satisfied for purposes of settlement.

G. Class Settlement Is Superior to Other Available Means of Resolution

Finally, there is little doubt that resolving all Class Members' claims through a single class action is superior to a series of small individual lawsuits. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023.

Indeed, the terms of the Settlement negotiated on behalf of the Class demonstrate the advantages of a collective bargaining and resolution process. The damages sought by each Class Member here are not so large as to weigh against the certification of a class action. *See Smith v. Cardinal Logistics Mgmt. Corp*., 2008 WL 4156364, at **32-33 (N.D. Cal. Sep. 5, 2008) (finding that class members had a small interest in personally controlling the litigation even where the average amount of damages were $25,000-$30,000 per year). The sheer number of separate trials that would otherwise be required also weighs in favor of settlement.

As the class action device provides the superior means to effectively and efficiently resolve this controversy, and because the other requirements of Rule 23 are satisfied, certification of the proposed Settlement Class is appropriate.

V. THE PROPOSED NOTICE IS ADEQUATE

A. The Proposed Notice Satisfies Due Process

Rule 23(c) requires only notice "that is practicable under the circumstances." The district court has wide discretion in fashioning the proposed notice. *In re "Agent Orange" Product Liability Litigation,* 818 F.2d 145, 168 (2d Cir.1987).

Here, it is not practicable to give direct individual notice by first class mail because Metagenics does not have, and cannot get through reasonable effort, contact information for people who purchased the class products. *See* Declaration of William L. Stern ("Stern Decl."), ¶¶ 2-3. Under such circumstances, the Supreme Court allows for notice by publication. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights.").

Here, the parties have designed a robust publication notice protocol put together and which will be administered by an experienced class action administrator. The publication will include notice in USA Today National Edition, circulated to over 740,000 readers. The administrator will also leverage modern technology by deploying internet banner ads, and a text and image ad display campaign over 30 days that is designed to garner approximately 10,000,000 impressions.[8] Notice will also be disseminated via press release to PR Wire. Ex. A, Settlement Agreement at IV.C; Tomasevic Decl., Exs. B & C. Under the circumstances, notice is adequate and presents no due process issues.

B. The Proposed Notice is Accurate & Informative

Finally, the proposed Notice will provide information on the meaning and nature of the proposed Settlement and Settlement Class, the terms and provisions of the Settlement, the relief the Settlement will provide Settlement Class Members, the amounts of attorneys' fees and costs that Class Counsel may request, and the date, time and place of the final approval hearing. The Notice clearly and accurately describes the nature of

[8] An "impression" happens every time an online ad is viewed once by a visitor, or displayed once on a web page.

the action, the definition of the Settlement Class, and the Class claims. *See* Tomasevic Decl., Exs. B & C (Long Form and Short Form/Publication notices, respectively). The Notice also informs Class Members that they may enter an appearance through their own counsel if they so desire, and explains the binding nature of class judgment under Rule 23(c)(3). *Id.* The Notice also provides Class Members with an opportunity to opt out or file objections to the Settlement as required by Rule 23(e)(4)(A). *Id.*

Further, the Notice also fulfills the requirement of neutrality in class notices. *See* 2 *Newberg* § 8.39. The Notice summarizes proceedings to date, Plaintiff's allegations, and the terms and conditions of the Settlement, in an informative and coherent manner, in compliance with the *Manual's* statement that "the notice should be accurate, objective, and understandable to Class Members. . . ." *Manual* (Fourth) at § 21.63 *et seq*. The Notice clearly states that the Settlement does not constitute an admission of liability, and recognizes that the Court has not ruled on the merits of the action. It also states that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness and neutrality required of a settlement class notice disseminated under authority of the Court. *See* Fed. R. Civ. P. 23(c)(2), 23(e); 2 *Newberg* §§ 8.21, 8.39; *Manual* (Fourth) §§ 21.63 *et seq*.

VI. CONCLUSION

The settlement is fair, reasonable, and the best way to lay to rest a long-lived and contested case. The Court should grant this motion and execute the concurrently-filed proposed order, which will:

a) Certify the settlement class;

b) Preliminarily approve the Settlement;

c) Direct the dissemination of notice to the Class as proposed; and

d) Set a schedule for final Settlement approval and Plaintiff's fee and expense application as follows:

   a. Settlement Administrator to comply with the Settlement Agreement's notice provisions within 30 days of preliminary approval;

b. Plaintiff shall file his motion for attorneys' fees and costs by February 15, 2019;

c. The deadline for objections by Class Members to the settlement is March 8, 2019, in the form and manner described in the Class Notice;

d. The deadline for a response to any objections by Class Members to the settlement is March 29, 2019;

e. The motion for Final Approval and Dismissal of the Action shall be filed by March 29, 2019;

f. A hearing on the Final Approval and Dismissal of the Action shall be held on April 22, 2019, at 1:30 p.m. before the undersigned Judge.

DATED: December 6, 2018

NICHOLAS & TOMASEVIC, LLP

By: */s/ Alex Tomasevic*

ALEX TOMASEVIC (SBN 245598)
225 Broadway, 19th Floor
San Diego, CA 92101
Telephone: (619) 325-0492
Facsimile: (619) 325-0496
Email: atomasevic@nicholaslaw.org

HULETT HARPER STEWART LLP
KIRK B. HULETT, SBN: 110726
550 West C Street, Suite 1500
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139
Email: kbh@hulettharper.com

McCOLLOCH LAW FIRM
MICHAEL T. McCOLLOCH, SBN: 66766
545 2nd Street, Suite 3
Encinitas, CA 92024
Telephone: (760) 632-1100
Facsimile: (760) 650-0016
Email: mike@moonlightlaw.com

Attorneys for Plaintiff, William Grivas