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

| Case No. | **EDCV 20-1374 JGB (SPx)** | Date | April 2, 2021 |
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| Title | ***Sarah Hill, et al. v. Canidae Corporation*** | | |

| Present: The Honorable | JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE |
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| MAYNOR GALVEZ | Not Reported |
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| Deputy Clerk | Court Reporter |

| Attorney(s) Present for Plaintiff(s): | Attorney(s) Present for Defendant(s): |
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| None Present | None Present |

**Proceedings:** **Order (1) GRANTING Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 45); and (2) VACATING the April 5, 2021 Hearing (IN CHAMBERS)**

Before the Court is a motion for preliminary approval of class action settlement filed by Plaintiffs Sarah Hill and Monica O'Rourke. ("Motion," Dkt. No. 45.) The Court finds this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of the matter, the Court GRANTS the Motion and VACATES the April 5, 2021 hearing.

## I. BACKGROUND

On July 9, 2020, Plaintiffs filed a complaint against Defendant. ("Complaint," Dkt. No. 1.) On October 19, 2020, Plaintiffs filed a First Amended Complaint. ("FAC," Dkt. No. 33.) On March 2, 2021, Plaintiffs filed a Second Amended Complaint, which is the operative complaint. ("SAC," Dkt. No. 44.) The SAC alleges eight causes of action: (1) breach of express warranty; (2) breach of implied warranty of merchantability; (3) unjust enrichment; (4) violation of the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1761, et seq.; (5) violation of the California False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500, et seq.; (6) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq.; (7) violation of the New York Deceptive Trade Practices Act ("GBL"), N.Y. Gen. Bus. Law § 349; and (8) violation of New York Gen. Bus. Law §350. (See SAC.)

Plaintiffs filed the Motion on March 5, 2021. (Mot.) In support of the Motion, Plaintiffs attached the following documents:

- Declaration of Lisa A. White ("White Declaration," Dkt. No. 46), along with four exhibits: (1) Settlement Agreement ("Agreement," Dkt. No. 46-1); (2) Greg Coleman Law PC firm resume (Dkt. No. 46-2); (3) Whitfield Bryson LLP firm resume (Dkt. No. 46-3); and (4) Mason Lietz & Klinger LLP firm resume (Dkt. No. 46-4); and
- Memorandum of Points and Authorities in support of the Motion (Dkt. No. 47).

Defendant does not oppose the Motion.

## II. LEGAL STANDARD

Approval of a class action settlement requires certification of a settlement class. La Fleur v. Med. Mgmt. Int'l, Inc., 2014 WL 2967475, at *2–3 (C.D. Cal. June 25, 2014) (internal quotation marks omitted). A court may certify a class if the plaintiff demonstrates the class meets the requirements of Federal Rules of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b).[1] See Fed. R. Civ. P. 23; see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). Rule 23(a) contains four prerequisites to class certification: (1) the class must be so numerous that joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the class representative must be typical of the other class members; and (4) the representative parties must fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a). Rule 23(b) requires one of the following: (1) prosecuting the claims of class members separately would create a risk of inconsistent or prejudicial outcomes; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or declaratory relief benefitting the whole class is appropriate; or (3) common questions of law or fact predominate so that a class action is superior to another method of adjudication. Fed. R. Civ. P. 23(b).

Class action settlements must be approved by the court. See Fed. R. Civ. P. 23(e). At the preliminary approval stage, the Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Id. "The settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval." Acosta v. Trans Union, LLC, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original). To determine whether a settlement agreement is potentially fair, a court considers the following factors: the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant;

[1] All references to "Rule" in this Order refer to the Federal Rules of Civil Procedure unless otherwise noted.

and the reaction of the class members to the proposed settlement. Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

## III. SETTLEMENT AGREEMENT

### A. Settlement Summary

The Settlement Agreement provides monetary benefits to Settlement Class Members who submit a valid and timely claim form, under two Options:

- Option 1: A Class Member who provides valid proofs of purchase[2] for qualifying products during the Class Period may recover five dollars ($5.00) for every fifty dollars ($50.00) spent, as reflected in the valid Proofs of Purchase, up to a maximum of one hundred and twenty-five dollars ($125.00) per household.[3] Any amounts of less than fifty dollars ($50.00) will neither be eligible for nor receive prorated Benefit amounts.
- Option 2: A Class Member who does not provide valid proof of purchase (or a Class Member who provides proofs of purchase but whose total purchases during the Class Period fall below fifty dollars ($50.00)) may recover exactly five dollars ($5.00) per household.

(Agreement ¶ 51.) Class Members may make a claim under Option 1 or Option 2, but not both. (Id.) Although the individual claims are capped under the above Options, the total settlement is uncapped. (Mot. at 6.)

### B. Settlement Terms

#### 1. Settlement Class Members

"Settlement Class Members" is defined as "all persons residing in the United States and its territories who purchased the Products in the United States and its territories for personal, family, or household purposes, and not for resale, after July 9, 2016 and prior to and including the Notice Date." (Agreement ¶ 9.) The Products at issue are listed in Exhibit A to the Agreement.

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[2] Proofs of purchase may include credit card receipts, store receipts, physical product packaging, or other documentation that reasonably establishes the fact and date of purchase of the product. (Agreement ¶ 32.)

[3] A household is defined as "a single mailing address, regardless of the number of Class Members residing there." (Agreement ¶ 22.)

**2. Payment and Distribution of Funds**

Class Members who submit valid claims will be able to select an electronic payment option on the Claim Form. (Agreement ¶ 53.) Within 30 days of the effective date, the Settlement Administrator will send to each Claimant an email (or a postcard, if no email address is available) that (a) explains that the Court has granted final approval of the Settlement; (b) confirms the actual amount of the Claimant's benefit; (c) provides a menu of electronic payment options, including direct deposit and various digital payment methods; and (d) explains that, in the event of a non-response by the deadline, the benefit shall be paid by check and delivered by mail. Claimants must select one of the identified payment options and provide the information required to make the payment within 30 days after the email or postcard requesting the Claimant's payment preference is sent. (Agreement Ex. G ¶ 25.) The Settlement Administrator will begin to pay valid claims after this 30-day response period, and will complete payment no later than 90 days after the effective date. (Id.) All payments issued will be valid for 90 days. (Agreement ¶ 53.)

**3. Class Representative**

The Agreement provides for an incentive award of up to $5,000 to each Plaintiff, up to a total of $10,000, in recognition of their time and effort in pursuing this action. (Mot. at 11; Agreement ¶ 61.)

**4. Settlement Administration Costs**

The Parties request that the Court appoint Heffler Claims Group ("Heffler") as the settlement administrator. (Mot. at 6; Agreement ¶ 56.) Defendant agrees to pay all fees and expenses incurred by the settlement administrator, although the Agreement does not set a cap. (Agreement ¶ 54.)

**5. Attorneys' Fees and Costs**

The Agreement provides that Class Counsel may apply for attorneys' fees and costs not to exceed $1,300,000 to be paid by Defendant. (Agreement ¶ 64.)

**6. Injunctive Relief**

The Agreement does not appear to include any injunctive relief.

**7. Release**

All Settlement Class Members who do not request exclusion agree to release:

> any and all claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action under common law or statutory law (federal, state, or local) of every nature and

> description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including known and unknown claims (as described … below) as of the Claim Form Deadline by all of the Plaintiffs and all Class Members (and, to the extent on behalf of Plaintiffs and Class Members, their respective heirs, guardians, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that (1) were asserted or could have been asserted in this Action against Defendant relating to the Products (including, but not limited to, the naming of the Product(s) as "PURE" and/or "Limited Ingredient," additional labeling representations including, but not limited to that any Product is "Grain Free," and any other claims regarding the labeling and marketing of, and/or ingredients in, the Product(s)), and (2) arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, occurrences, or events that were or could have been directly or indirectly alleged or referred to in the Action (including but not limited to alleged violations of state consumer protection, unfair competition, and/or false or deceptive advertising statutes, breach of express or implied warranty, fraud, negligence, product liability, conspiracy, unjust enrichment, restitution, declaratory or injunctive relief, and other equitable claims or claims sounding in contract or tort).

("Release"). (Agreement ¶ 34.) This includes a voluntary waiver of Cal. Civil Code § 1542 by Plaintiffs and Class Members of "known and unknown claims that were or could have been brought in the Action." (Agreement ¶ 71.)

**8. Notice**

The Notice Program consists of multiple components, designed to reach approximately 75 percent of the target audience, which is defined as "all [consumers] who purchase 'other' brand dry pet food (i.e., brands other than Alpo, Eukanuba, Pedigree, Purina, etc.)." (Agreement Ex. H, Decl. of Jeanne C. Finegan ("Finegan Decl.") at ¶ 18.) This is estimated to be 24,757,000 consumers. (Id.) While the actual class is much smaller than the target audience population, the Notice Plan is calculated to reach the larger target audience population. (Id.) In addition, the Notice Plan will have an estimated minimum frequency (the average number of times each Class member will have the opportunity to see the message) of 2 times. (Id. ¶ 19.) The Notice Plan will include the following elements: (1) targeted online display banner advertising; (2) "Keyword Search" targeting class members; (3) a press release; (4) social media advertising on Facebook, Instagram, and Twitter; (5) a settlement informational website; and (6) a 24-hour, 7-day a week toll-free information telephone line. (Id. ¶¶ 20-27.)

The Notice Administrator will establish an official settlement website that will serve as a "landing page for the banner advertising," provide detailed information about the Settlement, how to obtain Notices, and how to submit Claim Forms. (Id. ¶ 31.) The website will also provide forms for Class Members to exclude themselves from the Settlement. (Id.) The Settlement Administrator shall also establish a Toll-Free phone number with recordings of information about this Settlement, and will remain open and accessible through the Claim Deadline. (Id. ¶ 32.)

### 9. Claims Process

Class Members will have access to the Claim Form via the Settlement's website. (Agreement, Ex. C.) Class Members may choose to submit a Claim Form either by completing a paper Claim Form and submitting it to the Settlement Administrator via first class mail, or by submitting a Claim Form electronically online from the website. (Agreement ¶¶ 32, 49.) Class Members will be able to submit proofs of purchase with their Claim Forms. (Id.)

Settlement Class Members who wish to opt-out may do so by sending a written request to the Settlement Administrator at the address designated in the Long Form Notice. (Agreement ¶ 57; Ex. D, Long Form Notice ¶ 15.) Class Members who intend to object to the fairness, reasonableness, and/or adequacy of the Settlement must file a written objection with the Court and send the written objection to the Settlement Administrator, Class Counsel, and Defense Counsel. (Agreement ¶¶ 99-100.)

## IV. CONDITIONAL CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS

The parties seek certification of the proposed settlement class for purposes of the Agreement. (Mot. at 18.) The Agreement defines the class as follows: "all persons residing in the United States and its territories who purchased the Products in the United States and its territories for personal, family, or household purposes, and not for resale, after July 9, 2016 and prior to and including the Notice Date." (Agreement ¶ 9.) The Settlement Class Period is from July 9, 2016 through the Notice Date, or "the first date upon which the Class Notice is disseminated by the Settlement Administrator." (Id. ¶¶ 13, 25.)

The Court first addresses the Rule 23(a) requirements and then turns to the Rule 23(b) requirements.

### C. Requirements of Rule 23(a)

#### 1. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). To be impracticable, joinder must be difficult or inconvenient, but need not be impossible. Keegan v. Am. Honda Motor Co., 284 F.R.D. 504, 522 (C.D. Cal. 2012). There is no numerical cutoff for sufficient numerosity. Id. However, 40 or more members will generally satisfy the numerosity requirement. Id. A plaintiff has the burden to establish that this requirement is satisfied. United Steel, Paper & Forestry, Rubber, Mfg. Energy v. Conoco Phillips Co., 593 F.3d 802, 806 (9th Cir. 2010). Here, while the parties do not provide an estimate of the number of individuals within the class definition, but they suggest that they far exceed 40. (Mot. at 18.) Accordingly, the Court concludes that the numerosity requirement is satisfied.

**2. Commonality**

The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention . . . capable of classwide resolution—which means that a determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Here, Plaintiffs argue that all settlement class members were subject to the same misrepresentations on the actual ingredients of its Limited Ingredient Diet Products. (Mot. at 19.) Their claims are also subject to a common legal theory. (Id.) Accordingly, Plaintiffs have established commonality.

**3. Typicality**

"The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff, and whether other class members have been injured by the same course of conduct." Wolin v. Jaguar Land Rover No. Am., 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting Hanon, 976 F.2d at 508). Because typicality is a permissive standard, the claims of the named plaintiff need not be identical to those of the other class members. Hanlon, 150 F.3d at 1020.

Here, Plaintiffs claim that their claims are typical of the class because they arise out of the purchase of Defendant's Limited Ingredient Diet Products after relying on Defendant's limited ingredient representations included on the labels of the products. (Mot. at 20.) The named Plaintiffs represent that they have been injured in the same manner and have the same claims as the Class, and must therefore satisfy the same elements of each of their claims. (Id.) Accordingly, the Court is satisfied that Plaintiffs have met the typicality requirement.

**4. Adequacy**

In determining whether a proposed class representative will adequately protect the interests of the class, the court should ask whether the proposed class representative and their counsel have any conflicts of interest with any class member and whether the proposed class representative and their counsel will prosecute the action vigorously on behalf of the class. Johnson v. General Mills, Inc., 275 F.R.D. 282, 288 (C.D. Cal. 2011).

Plaintiffs have no apparent conflicts of interest with any members of the class. Plaintiffs' interest are unified with the class and Plaintiffs thus have a strong interest in proving Defendant's common course of conduct and obtaining redress. (Mot. at 20.) Plaintiffs also represent that they have vigorously litigated this case, and engaged in arms'-length settlement negotiations. (Id. at 20-21.) In addition, Class Counsel is experienced in litigating complex class actions and consumer fraud and mislabeling litigation. (White Decl. ¶¶ 15-16; Exs. 2-4 (firm resumes).)

Accordingly, the Court concludes that both the class representatives and Class Counsel will adequately represent the interests of the proposed class.

**D. Requirements of Rule 23(b)**

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Here, Plaintiffs assert the Agreement satisfies the requirements of Rule 23(b)(3). (Motion at 20.)

Rule 23(b)(3) requires (1) issues common to the whole class to predominate over individual issues and (2) that a class action be a superior method of adjudication for the controversy. See Fed. R. Civ. P. 23(b)(3). As to predominance, the "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Hanlon, 150 F.3d at 1022 (quoting Amchem, 521 U.S. at 623). "[T]he examination must rest on 'legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.'" Id. (same). A class should not be certified if the issues of the case require separate adjudication of each individual class member's claims. Id.

Here, adjudication by representation is warranted because questions common to the settlement class represent a significant aspect of the case and can be resolved for all members the class in a single adjudication. Specifically, Plaintiffs contend that common issues predominate because the claims of both Plaintiffs and the proposed class stem from Defendant's common representations regarding the actual ingredients of its Limited Ingredient Diet Products. (Mot. at 21-23.) The Court is satisfied that the common questions predominate.

A class action must also be superior to other methods of adjudication for resolving the controversy. Fed. R. Civ. P. 23(b)(3). To determine superiority, a court's inquiry is guided by the following pertinent factors:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)–(D). However, "[confronted] with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." Amchem, 521 U.S. at 620.

Here, Plaintiffs note the class mechanism provides an effective mechanism for vindicating the claims of class members because it would not be economical for individuals to the complex and extensive litigation necessary to establish Defendant's liability. (Mot. at 23.) Accordingly, the Court concludes the superiority requirement is satisfied.

## V. PRELIMINARY APPROVAL OF THE SETTLEMENT

"[Rule 23] requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." Hanlon, 150 F.3d at 1026. To determine whether a settlement agreement meets these standards, the court considers a number of factors, including "the strength of the plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout trial, the amount offered in settlement, the extent of discovery completed, and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." Stanton, 327 F.3d at 959 (internal citations omitted). The settlement may not be a product of collusion among the negotiating parties. In re Mego Fin, Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1290 (9th Cir. 1992)).

"At the preliminary approval stage, some of the factors cannot be fully assessed. Accordingly, a full fairness analysis is unnecessary." Litty v. Merrill Lynch & Co., 2015 WL 4698475, *8 (C.D. Cal. Apr. 27, 2015). Rather, the court need only decide whether the settlement is potentially fair, Acosta, 243 F.R.D. at 386, in light of the strong judicial policy in favor of settlement of class actions. Class Plaintiffs, 955 F.2d 1276. "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must 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 to all concerned." Hanlon, 15 F.3d at 1027.

### A. Extent of Discovery and Stage of the Proceedings

For a court to approve a proposed settlement, "[t]he parties must . . . have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement." Acosta, 243 F.R.D. at 396 (internal quotation marks omitted).

Here, Plaintiffs note that the parties engaged in extensive research prior to mediation, including retaining experts to analyze the ingredients of multiple Canidae Limited Ingredient Products, and consulting an economist regarding the calculation of damages. (Mot. at 16-17.) The parties also exchanged confirmatory discovery on sales figures and product testing results prior to and during the course of their mediation and settlement negotiations. (Id. at 17.) Moreover, the parties reached this settlement after extensive negotiations facilitated by the Honorable Diane M. Welsh (retired). (Mot. at 3.)

Based on the Motion, it appears that each side maintains a clear idea of the strengths and weaknesses of their respective cases, such that the extent of discovery completed and the stage of the proceedings weighs at least somewhat in favor of preliminary approval. See Lewis v. Starbucks Corp., 2008 WL 4196690, at *6 (E.D. Cal. Sept. 11, 2008) ("[A]pproval of a class action settlement is proper as long as discovery allowed the parties to form a clear view of the strengths and weaknesses of their cases.").

**B. Amount Offered in Settlement**

In determining whether the amount offered in settlement is fair, a court compares the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation. In re Mego, 213 F.3d at 459. Plaintiffs do not estimate what their maximum amount of damages would be in a successful litigation.

The Settlement provides monetary benefits of $5.00 for every $50.00 spent on qualifying products up to $125 per household for Class Members who have valid proofs of purchase of at least $50 during the class period (Option A), or $5.00 for Class Members who do not have proofs of purchase or who spent less than $50 (Option B). (Agreement ¶ 51.) Defendant has not set a cap on the cumulative number of claims it will honor or on its maximum cumulative payout. (White Decl. ¶ 12.) The Court finds that the Agreement appears to provide meaningful relief to the Class Members, which supports preliminary approval. However, the Court encourages the parties to provide additional information at the final approval stage about the estimated recoverable damages to allow the Court to better evaluate the fairness of the amount offered.

**C. Strength of Case and Risk, Expense, Complexity, and Likely Duration of Litigation**

Plaintiffs argue that the value of the Agreement far outweighs the risk of producing and defending evidence about:

> (a) whether or not the non-conforming ingredients in Canidae's Limited Ingredients Diets are uniformly present across the products; (b) whether or not non-conforming ingredients are even material to reasonable consumers, which is likely to be subject to an expensive and uncertain 'battle of the experts'; (c) whether consumers frequently repeat purchase the same brands and product lines, with many purchasing the Products in a manner that would permit retrieval of Proofs of Purchase to claim the maximum permitted benefits; and (d) whether a capped settlement fund might unfairly preclude many Class members from recovering.

(Mot. at 14-15.) Plaintiffs also point to the risks associated with certifying a class and avoiding decertification. (Id. at 16.)

The Court believes the risk, expense, and likely duration of further litigation weigh in favor of preliminary approval. Without the Agreement, the parties would be required to litigate class certification, as well as the ultimate merits of the case—a process which the Court

acknowledges is long and expensive. Overall, these factors weigh in favor of preliminary approval.

**D. Experience and Views of Counsel**

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) (internal citation and quotation marks omitted). Here, Plaintiffs' Counsel have extensive experience in consumer class action litigation, and more specifically in litigation related to mislabeling and pet foods. (White Decl. ¶¶ 15-16; Exs. 2-4 (firm resumes).) Plaintiffs' Counsel recommends the settlement, asserting that "the Settlement provides exception[al] results for the Class while sparing the Class from the uncertainties of continued and protracted litigation." (White Decl. ¶ 17.) The Court finds this factor weighs in favor of preliminary approval.

**E. Collusion Between the Parties**

"To determine whether there has been any collusion between the parties, courts must evaluate whether 'fees and relief provisions clearly suggest the possibility that class interests gave way to self interests,' thereby raising the possibility that the settlement agreement is the result of overt misconduct by the negotiators or improper incentives for certain class members at the expense of others." Litty, 2015 WL 4698475, at *10 (quoting Staton, 327 F.3d at 961).

As an initial matter, the Court notes that settlement negotiations were conducted at arms'-length. (Mot. at 3; White Decl. ¶¶ 6-7.) Settlement negotiations took place under the supervision of the Honorable Diane M. Welsh (retired). (Id.) The use of a mediator experienced in the settlement process tends to establish that the settlement process was not collusive. See, e.g., Satchell v. Fed Ex. Corp., 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). The Court thus turns to the financial terms of the Settlement Agreement.

A court may grant a modest incentive award to class representatives, both as an inducement to participate in the suit and as compensation for the time spent in litigation activities. See In re Mego, 213 F.3d at 463 (finding the district court did not abuse its discretion in awarding an incentive award to the class representatives). Plaintiffs request an incentive fee award of $5,000 for their time and effort in pursuing this matter. (Mot. at 11; Agreement ¶ 61.) While the requested incentive award may be reasonable, the Court advises Plaintiffs to provide additional information about their involvement in the action and their efforts in pursuing the claims.

As to attorneys' fees and costs, courts in the Ninth Circuit find that a benchmark of 25% of the common fund is a reasonable fee award. Hanlon, 150 F.3d at 1029 ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."). The Court, in its discretion, may award attorneys' fees in a class action by applying either the lodestar method or the percentage-of-the-fund method. Fischel v. Equitable Life Assurance Soc'y of U.S., 307 F.3d

997, 1006 (9th Cir. 2002). The Court determines the lodestar amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. McGrath v. Cty. of Nev., 67 F.3d 248, 252 (9th Cir. 1995). The hourly rates used to calculate the lodestar must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). Next, the Court must decide whether to adjust the "presumptively reasonable" lodestar figure based upon the factors listed in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69–70 (9th Cir. 1975), abrogated on other grounds by City of Burlington v. Dague, 505 U.S. 557 (1992), that have not been subsumed in the lodestar calculation. See Caudle v. Bristow Optical Co., Inc., 224 F.3d 1014, 1028–29 (9th Cir. 2000).[4]

Here, Class Counsel agrees to seek up to $1,300,000, to be paid by Defendant. (Agreement ¶ 64.) Defendant has agreed not to contest any award of attorneys' fees and costs equal to or below that amount. (Id.) Because there is no common fund here, the Court will consider Class Counsel's lodestar and scrutinize the amount of potential class members, the total number of claims filed, and the total payout in considering whether the requested attorneys' fees are reasonable.

**F. Remaining Factors**

In addition to the factors discussed above, the Court may consider the presence of a governmental participant, and the reaction of the class members to the proposed settlement. Staton, 327 F.3d at 959 (internal citations omitted). At this stage, the Court cannot fully analyze the remaining factors. For example, there is no governmental participant in this action. Additionally, the Settlement Class Members have yet to receive notice of the Agreement and have not had an opportunity to comment or object to its terms. The Court directs Plaintiffs, in the motion for final approval, to provide briefing on these issues.

On balance, the factors above support preliminary approval of the Agreement. The Agreement is potentially fair, adequate, and reasonable.

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[4] In Kerr, the Ninth Circuit adopted the 12–factor test articulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) which identified the following factors for determining reasonable fees: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Kerr, 526 F.2d at 70.

## VI. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for Preliminary Approval, and VACATES the April 5, 2021 hearing. The Court ORDERS as follows:

1. The Settlement Agreement is preliminarily approved as potentially fair, reasonable, and adequate. However, in their motion for final approval, Plaintiffs shall address the concerns raised above.

2. The following Settlement Class is certified for settlement purposes only:

   All persons residing in the United States and its territories who purchased the Products in the United States and its territories for personal, family, or household purposes, and not for resale, after July 9, 2016 and prior to and including the date when Class Notice is disseminated by the Settlement Administrator.

3. The Court appoints Gregory F. Coleman, Lisa A. White, Alex R. Strauss, and Arthur M. Stock of Greg Coleman Law PC; Nick Suciu III of Barbat, Mansour, Suciu & Tomina, PLLC; Daniel K. Bryson and J. Hunter Bryson of Whitfield Bryson, LLP; and Gary E. Mason of Mason, Lietz, and Klinger LLP to serve as counsel on behalf of the Settlement Class for purposes of settlement only.

4. Plaintiffs Sarah Hill and Monica O'Rourke are appointed as the representatives of the Settlement Class for purposes of settlement only.

5. The Court appoints Heffler Claims Group as the settlement administrator.

6. The Class Notice form is approved.

7. The Court authorizes distribution of Class Notice to the Settlement Class members by pursuant to the Agreement.

8. The hearing date for the Final Fairness Hearing is hereby set for **Monday, September 13, 2021** at 9:00 a.m. in Courtroom 1 of the United States District Court for the Central District of California, Eastern Division located at 3470 12th Street, Riverside, California 92501.

**IT IS SO ORDERED.**