

1 69.) It then licensed those products to Guthy-Renker, which manufactured, marketed,
2 and sold them throughout the United States. (*Id.*) According to Plaintiffs, the WEN
3 Cleansing Conditioner causes hair loss and scalp irritation. (*Id.* ¶ 3.) Friedman
4 alleges that she lost one-quarter to one-third of the hair on her head after using WEN’s
5 Sweet Almond Mint basic kit. (*Id.* ¶¶ 35, 36.) Miller similarly alleges that she began
6 “losing abnormal amounts of hair” after using the Sweet Almond Mint and
7 Pomegranate kits. (*Id.* ¶¶ 37, 38.) Plaintiffs also point to numerous online complaints
8 of hair loss caused by the use of WEN Cleansing Conditioner. (*Id.* ¶ 40.) Plaintiffs
9 further allege that Guthy-Renker falsely advertised the product as safe, failed to warn
10 consumers about the potential for hair loss, and erroneously instructed consumers to
11 use excessive amounts of the product. (*Id.* ¶¶ 25–34.)

12 **B. Pre-Settlement Procedural History**

13 Plaintiffs originally filed this lawsuit on July 31, 2014, and filed a First
14 Amended Complaint on November 3, 2014. (ECF Nos. 1, 34.) About seven months
15 later, after the Court granted in part and denied in part Guthy-Renker’s motion to
16 dismiss or compel arbitration, Plaintiffs filed a Second Amended Complaint, in which
17 they asserted the following claims: (1) breach of warranty under the Magnuson-Moss
18 Warranty Act, 15 U.S.C. §§ 2301–2312, and California Commercial Code section
19 2314; (2) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code
20 § 17200; (3) violation of the California False Advertising Law, Cal. Bus. & Prof.
21 Code § 17500; (4) breach of contract; (5) negligent failure to warn; (6) negligent
22 failure to test; and (7) strict products liability. (ECF No. 69.) All claims, save for the
23 federal MMWA claim, are brought under California law. Plaintiffs assert all claims
24 on behalf of the following class: “All persons or entities in the United States who
25 purchased WEN Cleansing Conditioner via (a) WEN’s Website from August 1, 2009
26 to February 26, 2014; or (b) by telephone from August 1, 2009 to the date of the
27 Court’s Class Certification Order.” (*Id.* ¶ 42.)

1 Since then, all parties have invested substantial time and resources conducting
2 extensive pre-certification discovery, including numerous depositions and discovery
3 motions. (*See generally* ECF Nos. 60–124; Class Counsel Decl. ¶ 3, ECF No. 153-2.)
4 On September 24, 2015, this Court stayed the case and vacated all dates and deadlines
5 relating to Plaintiffs’ class certification motion. (ECF No. 125.) After conducting a
6 status conference with the parties, the Court extended the stay and ordered the parties
7 to mediation. (ECF Nos. 130, 131.) After participating in four mediation sessions,
8 the parties settled all class claims. (ECF Nos. 135, 137, 140, 144; Class Counsel Decl.
9 ¶ 4.) The Court appointed Plaintiffs’ counsel as interim class counsel soon thereafter.
10 (ECF No. 146.)

11 **C. Third Amended Complaint**

12 In conjunction with the settlement, the parties filed a stipulation for leave to file
13 a Third Amended Complaint. (ECF No. 152-1.) The Third Amended Complaint
14 substantially broadens the number of WEN products at issue, adds two more Plaintiffs
15 to the action, and broadens the class definition. (*Id.*) The WEN Hair Care Products
16 subject to the settlement now include: “All fragrances and variations of Cleansing
17 Conditioner, Re-Moist Mask, Treatment Mist Duo, Treatment Oil, SIXTHIRTEEN
18 Ultra Nourishing Cleansing Treatment, Re Moist Intensive Hair Treatment, Styling
19 Crème, Anti-Frizz Styling Crème, Nourishing Mousse, Volumizing Treatment Spray,
20 Replenishing Treatment Mist, Defining Paste, Straightening Smoothing Gloss,
21 Smoothing Glossing Serum, Glossing Shine Serum, Finishing Treatment Crème,
22 Volumizing Root Lift, Texturizing Spray, Detangling Treatment Spray, Men Control
23 Texture, Men Hair and Body Oil, Bath, Body and Hair Oil, and Texture Balm.”
24 (Proposed Third Am. Compl. ¶ 27.) The two additional Plaintiffs are Krystal Henry-
25 McArthur (who was previously dismissed from this action) and Lisa Rogers. After
26 Henry-McArthur used “WEN Hair Care Products,” she “began noticing substantial
27 hair loss.” (*Id.* ¶¶ 46–47.) Rogers purchased and used “WEN Hair Care Products” for
28

1 three years, after which she also experienced hair loss. (*Id.* ¶¶ 49–52.) Finally, the
2 class definition was broadened as follows:

3 All purchasers or users of WEN Hair Care Products in the United States
4 or its territories between November 1, 2007 and August 1, 2016,
5 excluding (a) any such person who purchased for resale and not for
6 personal or household use, (b) any such person who signed a release of
7 any Defendant in exchange for consideration, (c) any officers, directors
8 or employees, or immediate family members of the officers, directors or
9 employees, of any Defendant or any entity in which a Defendant has a
10 controlling interest, (d) any legal counsel or employee of legal counsel
11 for any Defendant, and (e) the presiding Judge in the Lawsuit, as well as
12 the Judge’s staff and their immediate family members.

13 (*Id.* ¶ 55.)

14 **C. Settlement Terms**

15 **1. Class Definition**

16 As part of the settlement, the parties stipulate to the Court certifying a
17 settlement-only class as defined in the Third Amended Complaint. (Class Counsel
18 Decl., Ex. A (“Settlement Agreement”) § 4A, ECF No. 170-1.)

19 **2. Settlement Fund**

20 The total settlement fund is \$26,250,000 (Settlement Agreement § 6),
21 distributed as follows:

23 Tier 1 Claims	\$5,000,000
24 Tier 2 Claims	\$13,867,500 (Court’s estimate)
25 <i>Incentive Awards</i>	
26 Amy Friedman	\$25,000
27 Judi Miller	\$25,000
28 Krystal Henry-McArthur	\$5,000

Lisa Rogers	\$2,500
Attorneys' Fees	\$6,500,000
<i>Administrative Costs</i>	
Special Master	\$250,000 (max.)
Cost of Notice to Class	\$500,000 (Court's estimate)
Settlement Administrator	\$75,000 (Court's estimate)
TOTAL	\$26,250,000

Tier 1 Claims. Any class member who purchased WEN Hair Care Products can submit a claim for a one-time payment of \$25. This will constitute compensation for all advertising and bodily injury claims. The claimant need only submit a one-and-one-half page claim form to receive payment; no supporting documentation is required. \$5,000,000 from the settlement fund is earmarked for Tier 1 claims. (*Id.* § 6A.)

Tier 2 Claims. Class members who seek a larger recovery can submit a Tier 2 claim. The claim form is more extensive, and generally must be supported by documentation such as photographs, videos, medical records, declarations, etc. Tier 2 claims shall be paid from whatever remains in the settlement fund after all other payments and expenses are deducted, which the Court calculates will be approximately \$13,867,500. The maximum award for each Tier 2 claim is \$20,000. A special master will be appointed to value Tier 2 claims, and his or her decision will be final and not subject to appeal or reconsideration. (Settlement Agreement § 6B.) The special master will use the following guidelines in evaluating the claims:

\$0 to \$2,500:	Mild scalp irritation or up to 20% of hair loss. Hair regrowth took between one and four months. No emotional distress, no medical evidence to support claims, and limited photographic evidence. Counsel estimate that the majority of claimants will fall into this category.
------------------------	---

<p>1 \$2,500 to \$7,500:</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p>	<p>Noticeable hair loss (up to 33%) or scalp irritation. Small bald spots and/or obvious thinning can be observed in photographs. Claimant likely filed a documented complaint with their WEN retailer, or another entity, prior to becoming aware of this lawsuit and detailed their hair loss in that complaint. Hair regrowth likely took between five to ten months. Claimant possesses photographic evidence documenting hair loss and timing of regrowth. Witness statements verifying the hair loss is required.</p>
<p>7 \$7,500 to \$12,500:</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p>	<p>Large bald spots or overall thinning that covered more than one-third of the Claimant’s head. Claimant sought treatment from a doctor or other healthcare provider related to their hair loss and possesses evidence of the visit(s). Claimant received medical advice and subsequent treatment regarding their hair loss and spent money on treatment forms for which Claimant possesses receipts. Witness statements verifying the hair loss is required. Hair regrowth took between eleven and eighteen months. Claimant likely suffered documented moderate to severe emotional distress resulting from their hair loss.</p>
<p>14 \$12,500 to \$20,000:</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p>Loss of more than 50% of hair, including but not limited to, large bald spots. Hair regrowth has been minimal. Claimant made complaints, possesses photographic evidence of the condition, and visited a healthcare provider. Claimant saw a therapist or other healthcare provider one or more times prior to receiving notice of this settlement to discuss depression, anxiety or other emotional distress caused by hair loss and possesses receipts for same.</p>

20 (Class Counsel Decl., Ex. D (“Long-Form Notice”) at 6–8.)

21 Class members shall have six months from the date of the Court’s preliminary
 22 approval of the settlement to submit either Tier 1 or Tier 2 claims. Claims will be
 23 evaluated and paid out only after all claims have been submitted. In the event the
 24 number of claims submitted exceeds the funds set aside to pay the claims, all claim
 25 payments will be proportionally reduced. (Settlement Agreement §§ 7, 15.)

26 Incentive Awards. The named plaintiffs in this action shall receive \$57,500 in
 27 incentive awards, paid as follows: Amy Friedman: \$25,000; Judi Miller: \$25,000;
 28 Krystal Henry-McArthur: \$5,000; Lisa Rogers: \$2,500. (*Id.* § 8.)

1 Attorneys' Fees. Class Counsel intend to move for an award of fees and costs
2 in the amount of \$6,500,000, which Defendants agree not to oppose. (*Id.* § 9.)

3 Administrative Costs. Administrative costs to be deducted from the settlement
4 fund include: (a) fees and costs incurred by the Settlement Administrator, which the
5 Court estimates will be \$75,000; (b) fees and costs incurred by the Special Master, up
6 to a maximum of \$250,000; and (c) the cost of providing notice to the class, which the
7 Court estimates will be \$500,000. (*Id.* §§ 9, 11, 13, 14.)

8 **3. Warning**

9 Defendants agree to put a warning label on its products bearing a caution
10 materially consistent with the following: “If you experience any adverse reaction after
11 using this product, immediately cease use and consult a physician.” (*Id.* § 6C.)

12 **4. Class Notice**

13 Notice will be given to approximately 6 million class members as follows: (1)
14 E-Mail: Approximately 5 million class members will be sent e-mail notice; (2) Mail:
15 Approximately 1 million class members, for whom no e-mail contact information is
16 available, will receive notice by mail in the form of a postcard; (3) Publication: Class
17 members for whom Defendants do not have an e-mail address or physical address will
18 receive notice by publication in print and electronic media; and (4) Website/Long-
19 Form: The parties will set up a website that provides extensive details regarding the
20 settlement and the class members' rights. The e-mail, mail, and publication notices
21 will also direct class members to this website. (*Id.* § 11; Class Counsel Decl., Exs. B–
22 E.) Notice shall be completed within 60 days after the Court grants preliminary
23 approval of the settlement.

24 **5. Opting Out and Objecting**

25 Any request to opt out of the settlement must be submitted to Defendants by
26 mail no later than 105 days after the Court grants preliminary approval of the
27 settlement. (Settlement Agreement § 12.) Opt outs must be exercised individually
28 and not on behalf of a group or class of persons. (*Id.*) In addition, the parties reserve

1 the right to withdraw from the settlement if more than a certain number of class
2 members opt out of the settlement; the exact threshold has been filed under seal. (*Id.*
3 § 18; ECF No. 177.) Any class member may object to the class settlement within 105
4 days after the Court grants preliminary approval of the settlement. Objections must be
5 made individually and not on behalf of a group or subclass of persons. (Settlement
6 Agreement § 12.)

7 **D. Post-Settlement Procedural History**

8 On June 28, 2016, Class Counsel moved for class certification and preliminary
9 approval of the class settlement. (ECF No. 153.) The parties also filed a stipulation
10 for leave to file a Third Amended Complaint. (ECF No. 152.) No opposition to either
11 was received. On August 1, 2016, the Court held a hearing on the Motion and
12 discussed with counsel its concerns regarding certain settlement terms and the class
13 notice. (ECF No. 155.) The Court continued the hearing to give the parties time to
14 iron out these problems. (*Id.*) On September 13, 2016, Class Counsel filed a
15 supplemental declaration in support of its Motion, which sought to address the Court’s
16 prior concerns. (ECF No. 170.) Two weeks later, Defendants filed under seal the opt-
17 out threshold that would trigger their right to withdraw from the settlement. (ECF No.
18 177.) The Court vacated the continued hearing date and took the pending Motion and
19 Stipulation under submission. (ECF No. 175.) That Motion and Stipulation are now
20 before the Court for review.

21 **III. CLASS CERTIFICATION**

22 **A. Legal Standard**

23 Class certification is appropriate only if “each of the four requirements of Rule
24 23(a) and at least one of the requirements of Rule 23(b)” are met. *Zinser v. Accufix*
25 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(a), the
26 plaintiff must show that: “(1) the class is so numerous that joinder of all members is
27 impracticable; (2) there are questions of law and fact common to the class; (3) the
28 claims or defenses of the representative parties are typical of the claims or defenses of

1 the class; and (4) the representative parties will fairly and adequately protect the
2 interests of the class.” Fed. R. Civ. P. 23(a). These requirements are colloquially
3 referred to as numerosity, commonality, typicality, and adequacy. *Mazza v. Am.*
4 *Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

5 Next, the proposed class must meet the requirements of at least one of the three
6 types of class actions listed in Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.
7 2541, 2548 (2011). A class action may be maintained under Rule 23(b)(3) as long as
8 (1) “questions of law or fact common to class members predominate over any
9 questions affecting only individual members,” and (2) a class action is “superior to
10 other available methods for fairly and efficiently adjudicating the controversy.” Fed.
11 R. Civ. P. 23(b)(3). Where class certification is sought for settlement purposes only,
12 the certification inquiry still “demand[s] undiluted, even heightened, attention.”
13 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Hanlon v. Chrysler Corp.*,
14 150 F.3d 1011, 1022 (9th Cir. 1998) (“Settlement benefits cannot form part of a Rule
15 23(b)(3) analysis; rather the examination must rest on ‘legal or factual questions that
16 qualify each class member’s case as a genuine controversy, questions that preexist any
17 settlement.’” (quoting *Amchem Prods.*, 521 U.S. at 620)).

18 **B. Discussion**

19 **1. Rule 23(a)**

20 The Court concludes that the Rule 23(a) requirements are met. First, with
21 upward of 6 million class members, numerosity is clearly satisfied. *See, e.g., Hanlon*,
22 150 F.3d at 1019 (numerosity is “clearly satisfied” where there is “a nationwide class
23 with millions of class members residing in fifty states”); *Wolph v. Acer Am. Corp.*,
24 272 F.R.D. 477, 483 (N.D. Cal. 2011) (numerosity satisfied where “proposed class
25 consists of approximately 1 million persons”). Second, commonality is satisfied
26 because the claims of each class member arise from a common factual predicate: the
27 manufacture, sale, and use of WEN Hair Care Products. *Hanlon*, 150 F.3d at 1019
28 (“All questions of fact and law need not be common to satisfy the rule. The existence

1 of shared legal issues with divergent factual predicates is sufficient, as is a common
2 core of salient facts coupled with disparate legal remedies within the class.”). Third,
3 typicality appears to be satisfied. “[R]epresentative claims are ‘typical’ if they are
4 reasonably co-extensive with those of absent class members; they need not be
5 substantially identical.” *Id.* at 1020. Each of the four class representatives bought and
6 used WEN Hair Care Products for varying amounts of time, and each of them suffered
7 varying degrees of hair loss thereafter. Finally, adequacy is satisfied. “Resolution of
8 two questions determines legal adequacy: (1) do the named plaintiffs and their counsel
9 have any conflicts of interest with other class members and (2) will the named
10 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Id.*
11 This Court has previously determined that Class Counsel is sufficiently well versed in
12 consumer class actions and product liability law to adequately protect the interest of
13 the class. (ECF No. 146.) Moreover, there is no evidence that the class
14 representatives have any interests antagonistic to those of the settlement class
15 members. The Court therefore finds that the Rule 23(a) requirements are met.

16 **2. Rule 23(b)(3)**

17 The Court also concludes that predominance and superiority are satisfied, and
18 thus the class may be certified for settlement purposes under Rule 23(b)(3).

19 **i. Predominance**

20 “The Rule 23(b)(3) predominance inquiry tests whether proposed classes are
21 sufficiently cohesive to warrant adjudication by representation. . . . When common
22 questions present a significant aspect of the case and they can be resolved for all
23 members of the class in a single adjudication, there is clear justification for handling
24 the dispute on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d
25 at 1022 (citations and internal quotation marks omitted). While establishing
26 predominance in multi-state products liability class actions is oftentimes difficult,
27 there is no per se rule in the Ninth Circuit against certifying such a class. *Id.*; *see also*
28 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230 (9th Cir. 1996).

1 Choice of Law. Where, as here, the plaintiff seeks to apply California law to a
2 nationwide class, the Court must apply California’s choice of law rules. *Mazza*, 666
3 F.3d at 589. To satisfy due process, the proponent of class certification has the initial
4 burden of showing that “California has ‘significant contact or significant aggregation
5 of contacts’ to the claims of each class member.” *Id.* (quoting *Wash. Mut. Bank, FA v.*
6 *Superior Court*, 24 Cal. 4th 906, 921 (2001)). Here, the Court finds that California
7 has significant contact to the claims of each class member. Both Defendants are
8 headquartered in California; all decisions concerning the ingredients and formulations
9 of the products were made in California; Defendants directed their national sales
10 campaign from California; and Guthy-Renker’s Terms and Conditions have a forum
11 selection clause requiring the resolution of disputes in California. (Mot. at 10–11,
12 ECF No. 153.)

13 Once the proponent meets their burden, the burden then shifts to the other side
14 to show that foreign law, rather than California law, should apply under a three-step
15 government interest test. *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 602 (N.D. Cal.
16 2015); *Mazza*, 666 F.3d at 589.¹ However, with no party opposing class certification
17 to satisfy that burden, the three-step government interest test cannot defeat the
18 application of California law. Consequently, applying California law to the
19 nationwide class is appropriate.

20 Predominance. Common issues predominate over individual issues in this case.
21 First, because the Court applies California law to the entire class, there are no

22 ¹ “First, the court determines whether the relevant law of each of the potentially affected
23 jurisdictions with regard to the particular issue in question is the same or different.” *Mazza*, 666
24 F.3d at 589 (citations and quotation marks omitted). “Second, if there is a difference, the court
25 examines each jurisdiction’s interest in the application of its own law under the circumstances of the
26 particular case to determine whether a true conflict exists.” *Id.* (citations and quotation marks
27 omitted). “Third, if the court finds that there is a true conflict, it carefully evaluates and compares
28 the nature and strength of the interest of each jurisdiction in the application of its own law to
determine which state’s interest would be more impaired if its policy were subordinated to the policy
of the other state, and then ultimately applies the law of the state whose interest would be more
impaired if its law were not applied.” *Id.* (citations and quotation marks omitted).

1 individual issues with respect to the application of the law of different states.
2 Questions of liability will therefore be uniform for the entire class. Second, the two
3 main types of damage alleged here—the cost of the WEN Hair Care Products, and the
4 resulting loss of hair—are also uniform. While there will obviously be individual
5 issues with respect to the degree of hair loss, and to some extent causation, this is
6 insufficient to preclude class certification. *See, e.g., Leyva v. Medline Indus. Inc.*, 716
7 F.3d 510, 514 (9th Cir. 2013) (“[T]he amount of damages is invariably an individual
8 question and does not defeat class action treatment.”). Predominance is thus satisfied.

9 **ii. Superiority**

10 “The superiority inquiry under Rule 23(b)(3) requires determination of whether
11 the objectives of the particular class action procedure will be achieved in the particular
12 case. This determination necessarily involves a comparative evaluation of alternative
13 mechanisms of dispute resolution.” *Hanlon*, 150 F.3d at 1023. As to the false
14 advertising claims, there is no question that a class action is superior. The cost of one
15 (or even several) bottles of shampoo—which is likely the limit of recovery for false
16 advertising claims—is far below the cost of litigating a case on an individual basis.
17 *Id.* (superiority exists where individual actions would “prove uneconomic for potential
18 plaintiffs”). While the hair loss claims are a closer call, the Court still concludes that a
19 class action would be superior. Retaining experts to prove that the WEN Hair Care
20 Products do in fact cause hair loss would alone swallow a substantial portion of any
21 recovery in an individual action. Moreover, many of the common law products
22 liability claims that Plaintiffs assert do not provide for the recovery of attorneys’ fees.
23 The Court therefore concludes that superiority is established, and that certification of
24 the class for settlement purposes is appropriate.

25 **IV. PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

26 **A. Legal Standard**

27 “The claims, issues, or defenses of a certified class may be settled, voluntarily
28 dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e).

1 “Approval of a class action settlement requires a two-step process—a preliminary
2 approval followed by a later final approval.” *Spann v. J.C. Penney Corp.*, 314 F.R.D.
3 312, 319 (C.D. Cal. 2016). “At the preliminary approval stage, the court ‘evaluates
4 the terms of the settlement to determine whether they are within a range of possible
5 judicial approval.’” *Id.* (quoting *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 472
6 (E.D. Cal. 2009)). Thus, “the court may grant preliminary approval of a settlement
7 and direct notice to the class if the settlement: ‘(1) appears to be the product of
8 serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3)
9 does not improperly grant preferential treatment to class representatives or segments
10 of the class; and (4) falls within the range of possible approval.’” *Id.* (quoting *Harris*
11 *v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *7 (N.D. Cal. Apr.
12 29, 2011)).

13 **B. Adequacy of Negotiations**

14 The Court is satisfied that the settlement here was the product of “serious,
15 informed, non-collusive negotiations.” Defendants challenged the viability of several
16 of Plaintiffs’ legal theories in their initial Motion to Dismiss. Thereafter, the parties
17 engaged in substantial discovery, including document exchanges and depositions, and
18 numerous discovery motions. The settlement was reached only after the Court
19 ordered a stay of the case and the parties engaged in four days of mediation. (ECF
20 Nos. 135, 137, 140, 144.) Under these circumstances, the Court is convinced that
21 there was no collusion here.

22 **C. Settlement Terms**

23 A review of the terms of the settlement show that there are no obvious
24 deficiencies, that the settlement does not improperly grant preferential treatment to
25 class representatives, and that it falls within the range of possible approval.

26 “Assessing a settlement proposal requires the district court to balance a number
27 of factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely
28 duration of further litigation; the risk of maintaining class action status throughout the

1 trial; the amount offered in settlement; the extent of discovery completed and the stage
2 of the proceedings; the experience and views of counsel; the presence of a
3 governmental participant; and the reaction of the class members to the proposed
4 settlement.” *Hanlon*, 150 F.3d at 1026. “Not all of these factors will apply to every
5 class action settlement. . . . The relative degree of importance to be attached to any
6 particular factor will depend upon and be dictated by the nature of the claim(s)
7 advanced, the type(s) of relief sought, and the unique facts and circumstances
8 presented by each individual case. Ultimately, the district court’s determination is
9 nothing more than an amalgam of delicate balancing, gross approximations, and rough
10 justice.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525–26
11 (C.D. Cal. 2004) (internal citations and quotation marks omitted). Thus, “[t]he initial
12 decision to approve or reject a settlement proposal is committed to the sound
13 discretion of the trial judge.” *Id.*

14 Here, as with most class actions, there was great risk to both parties in
15 continuing with litigation. For Plaintiffs, there was a not-insignificant risk with
16 pressing forward with the class certification motion given the Ninth Circuit’s
17 skepticism of products liability class actions, *Valentino*, 97 F.3d at 1230, and the
18 daunting challenge of showing that California law should apply to class members in
19 all fifty states, *Mazza*, 666 F.3d at 589; *Ko v. Natura Pet Prod., Inc.*, No. C 09-02619
20 SBA, 2012 WL 3945541, at *4 (N.D. Cal. Sept. 10, 2012). Moreover, in the event the
21 Court elected to certify multiple subclasses rather one nationwide class, the parties
22 would face the formidable task of efficiently managing and successfully litigating the
23 action through to trial. The parties would also need to contend with interlocutory
24 appeals from the certification order, and the potential creation of an MDL Panel. And,
25 of course, Defendants would face massive, potentially crippling, liability upon
26 certification of a nationwide class. It is through this lens that the Court now considers
27 the terms of the settlement.

28 ///

1 **1. Settlement Funds**

2 **i. Tier 1 Claims**

3 Any class member that submits a Tier 1 claim will automatically receive a one-
4 time payment of \$25, which constitutes compensation for all claims of
5 misrepresentation and bodily injury. This tier appears to be intended primarily to
6 compensate class members for false advertising claims rather than personal injury
7 claims. While \$25 for false advertising claims appears to fairly compensate those who
8 purchased WEN Hair Care Products only a few times, it is less clear that it adequately
9 compensates those who purchased the products over, say, several years. Nonetheless,
10 given the risks inherent in further litigation of this action, the Court cannot say that
11 Tier 1 settlement claim payout is unfair or unreasonable.

12 However, the Court notes that Tier 1 claimants are not *guaranteed* to receive a
13 \$25 payment. For claimants to actually receive \$25 each, there can be no more than
14 200,000 Tier 1 claims filed—even though there are approximately 6 million class
15 members. This accounts for approximately 3.3% of the total class. The parties do not
16 estimate what percentage of class members will actually submit Tier 1 claims, and if
17 fewer than 3.3% of claimants ultimately file Tier 1 claims, then it will be no-harm-no-
18 foul. However, if significantly more than 3.3% of claimants file such claims, the
19 Court may need to revisit the fairness of the Tier 1 payments during the final
20 settlement approval hearing.

21 **ii. Tier 2 Claims**

22 The Court concludes that the estimated payouts for Tier 2 claimants are
23 generally fair and reasonable in light of the risks of continued litigation. However, as
24 with Tier 1 claims, the parties appear to assume that relatively few persons will submit
25 Tier 2 claims, and that the value of such claims will be minimal. For example, if the
26 average payout on each Tier 2 claim is even just \$2,500, then only 5,547 class
27 members—or 0.092% of the class—can submit a Tier 2 claims before the special
28 master must start making proportional reductions. If only a few hundred persons

1 submit claims, then it will be no-harm-no-foul. But if there are substantially more
2 claimants submitting Tier 2 claims, then the Court will need to revisit this issue during
3 final approval hearing.

4 **iii. Incentive Awards**

5 In the Ninth Circuit, there is no per se rule against incentive awards for class
6 representatives. However, “district courts [should] scrutinize carefully the awards so
7 that they do not undermine the adequacy of the class representatives.” *Radcliffe v.*
8 *Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). “If class
9 representatives expect routinely to receive special awards in addition to their share of
10 the recovery, they may be tempted to accept suboptimal settlements at the expense of
11 the class members whose interests they are appointed to guard.” *Id.* In evaluating
12 incentive awards, the court should look to “the number of named plaintiffs receiving
13 incentive payments, the proportion of the payments relative to the settlement amount,
14 and the size of each payment.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d
15 934, 947 (9th Cir. 2015). *Compare id.* (approving \$5,000 incentive awards for nine
16 class representatives with \$27.25 million settlement fund), *In re Mego Fin. Corp. Sec.*
17 *Litig.*, 213 F.3d 454, 457 (9th Cir. 2000) (approving \$5,000 incentive award for two
18 class representatives with \$1.725 million settlement fund), *and In re U.S. Bancorp*
19 *Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving \$2,000 incentive awards to five
20 named plaintiffs out of a class potentially numbering more than 4 million in a
21 settlement of \$3 million), *with Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)
22 (disapproving incentive awards averaging \$30,000 for 29 class representatives with a
23 \$14.8 million settlement).

24 The Court concludes that the incentive awards here are permissible. There are
25 only four named plaintiffs (out of more than six million class members) who are
26 receiving a total incentive award of \$57,500, which constitutes 0.22% of the total
27 award. This is well within the range of incentive awards previously approved by the
28 Ninth Circuit. And while Ms. Friedman and Ms. Miller’s awards come close to the

1 threshold of disapproval, *Staton*, 327 F.3d at 977, the Court finds that their
2 participation in this lawsuit—including responding to substantial discovery and sitting
3 for a deposition—justifies the award.

4 **iv. Attorneys’ Fees**

5 Class counsel intends to seek \$6.5 million in attorneys’ fees, which Defendants
6 agree not to oppose. “While attorneys’ fees and costs may be awarded in a certified
7 class action where so authorized by law or the parties’ agreement, courts have an
8 independent obligation to ensure that the award, like the settlement itself, is
9 reasonable, even if the parties have already agreed to an amount.” *In re Bluetooth*
10 *Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). “Where a settlement
11 produces a common fund for the benefit of the entire class, courts have discretion to
12 employ either the lodestar method or the percentage-of-recovery method.” *Id.* at 942.
13 “Because the benefit to the class is easily quantified in common-fund settlements, we
14 have allowed courts to award attorneys a percentage of the common fund in lieu of the
15 often more time-consuming task of calculating the lodestar. Applying this calculation
16 method, courts typically calculate 25% of the fund as the ‘benchmark’ for a
17 reasonable fee award, providing adequate explanation in the record of any ‘special
18 circumstances’ justifying a departure.” *Id.*

19 Here, the fee award contemplated by Class Counsel is 24.78% of the total
20 settlement fund, and thus is presumptively reasonable under the percentage-of-
21 recovery calculation. However, the Court is concerned that this calculation may
22 reflect an inflated fee award given that this matter settled prior to class certification.
23 Thus, when Class Counsel ultimately move for a fee award, they should be prepared
24 to submit the information necessary to allow the Court to cross-check the percentage-
25 of-recovery calculation against a lodestar calculation. *Bluetooth Headset*, 654 F.3d at
26 944 (holding that the Court abuses its discretion “when it uses a mechanical or
27 formulaic approach that results in an unreasonable reward. Thus, even though the
28 lodestar method may be a perfectly appropriate method of fee calculation, we have

1 also encouraged courts to guard against an unreasonable result by cross-checking their
2 calculations against a second method.”).

3 **2. Product Warning**

4 As part of the settlement, Defendants have agreed to place the following
5 warning on their product label: “If you experience any adverse reaction after using
6 this product, immediately cease use and consult a physician.” (Settlement Agreement
7 § 6C.) The parties concede that this is just a “common sense warning,” and thus it is
8 unclear how it adds any real value to the settlement. By the same token, however, a
9 more specific warning regarding hair loss could be construed by consumers as a tacit
10 admission by Defendants that the product *does in fact* cause hair loss, thereby
11 undermining a central purpose of the agreement: avoid the risks and liabilities of
12 litigation by settling the claim without admitting fault. So while the warning adds
13 little value to the settlement, it also does not detract from the settlement.

14 **3. Release of Claims**

15 “Beyond the value of the settlement, potential recovery at trial, and inherent
16 risks in continued litigation, courts also consider whether a class action settlement
17 contains an overly broad release of liability.” *Spann*, 314 F.R.D. at 327. Here,
18 Plaintiffs and the settlement class members who do not opt out of the Settlement
19 Agreement release “any and all claims arising out of or in any manner related to the
20 subject matter of the Lawsuit,” whether known or unknown, asserted or unasserted.
21 The release also contains a waiver of California Civil Code section 1542 “pertain[ing]
22 to the subject matter of the releases contained in this Agreement.” On the
23 understanding that this waiver relates only to claims that have been or could have been
24 asserted in this litigation, the Court concludes that the release “adequately balances
25 fairness to absent class members and recovery for plaintiffs with defendants’ business
26 interest in ending this litigation with finality.” *Spann*, 314 F.R.D. at 327–28.

27 **4. Opt Out Threshold**

28 The parties have agreed that they each have the right to withdraw from the

1 settlement in its entirety if more than a certain number of class members opt out of the
2 settlement. The threshold itself is confidential, and was filed under seal pursuant to
3 Court order. After reviewing the opt out threshold and considering the threshold in
4 connection with the settlement, the Court is satisfied that it does not substantially
5 undermine the settlement.

6 **C. Class Notice**

7 Class notice in this case will serve two functions: (1) to notify the class that a
8 class action has been certified, and that they are part of the class; and (2) to notify the
9 class that there has been a settlement.

10 **1. Notice of Class Certification**

11 Class certification notices must comply with Rule 23(c)(2)(B). “For any class
12 certified under Rule 23(b)(3), the court must direct to class members the best notice
13 that is practicable under the circumstances, including individual notice to all members
14 who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

15 The notice must clearly and concisely state in plain, easily understood
16 language:

- 17 (i) the nature of the action;
- 18 (ii) the definition of the class certified;
- 19 (iii) the class claims, issues, or defenses;
- 20 (iv) that a class member may enter an appearance through an attorney if
the member so desires;
- 21 (v) that the court will exclude from the class any member who requests
exclusion;
- 22 (vi) the time and manner for requesting exclusion; and
- 23 (vii) the binding effect of a class judgment on members under Rule
23(c)(3).

24 Fed. R. Civ. P. 23(c)(2)(B)(i)–(vii).

25 The Ninth Circuit has approved individual notice to class members via e-mail.
26 *See Online DVD-Rental Antitrust Litig.*, 779 F.3d at 946. It has also approved notice
27 via a combination of short-form and long-form settlement notices. *Id.*; *see also*
28 *Spann*, 314 F.R.D. at 331 (approving e-mail and postcard notice, each of which

1 directed the class member to a long-form notice); *Vandervort v. Balboa Capital Corp.*,
2 8 F. Supp. 3d 1200, 1204 (C.D. Cal. 2014) (approving “class notice comprised a
3 ‘Short-Form Notice’ that briefly described the litigation and explained the terms of
4 the Settlement Agreement, including class members’ options to submit a claims form,
5 opt-out of the settlement, and/or object to the settlement,” and which “directed class
6 members to a website containing a more detailed ‘Long-Form Notice’”); *In re Optical*
7 *Disk Drive Antitrust Litig.*, No. 3:10-MD-02143 RS, 2014 WL 1654028, at *2 (N.D.
8 Cal. Apr. 25, 2014).

9 **2. Notice of Class Settlement**

10 For class action settlements, “[t]he court must direct notice in a reasonable
11 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P.
12 23(e)(1). “Notice is satisfactory if it ‘generally describes the terms of the settlement
13 in sufficient detail to alert those with adverse viewpoints to investigate and to come
14 forward and be heard.’” *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th
15 Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th
16 Cir. 1980)). The notice “does not require detailed analysis of the statutes or causes of
17 action forming the basis for the plaintiff class’s claims, and it does not require an
18 estimate of the potential value of those claims.” *Lane v. Facebook, Inc.*, 696 F.3d
19 811, 826 (9th Cir. 2012).

20 **3. Analysis**

21 Here, the parties propose to send out notice as follows. First, the parties will
22 send e-mail notice to approximately 5 million class members. Because the majority of
23 WEN hair product sales were made online, e-mail is already the primary method of
24 communicating receipts, promotions, and delivery information. Second, the parties
25 will send mail notice to those class members for whom the parties have no e-mail
26 address (approximately 1 million class members). Third, the parties will publish
27 notice of the settlement. Finally, each notice directs the recipient to a long-form
28 notice, published on a website, which gives substantially more detail regarding the

1 claims at issue and the terms of the settlement.

2 The Court has reviewed each of the three short-form notices, and is satisfied
3 that it adequately informs the class member of the nature of the action, the class
4 claims, issues, and defenses, the ability of the members to request exclusion from the
5 class, and the time and manner for requesting exclusion. The notices also give a
6 sufficient overview of the terms of the settlement. The short-form notices also direct
7 the class member to the long-form notice, which describes in detail the definition of
8 the certified class, and advises the class member of their right to appear and contest
9 the settlement. The Court therefore concludes that the notice the parties propose to
10 provide is the best practicable notice under the circumstances.

11 IV. CONCLUSION

12 For the reasons discussed, the Court **GRANTS** the parties' Stipulation and
13 Plaintiffs' Motion, and **ORDERS** as follows:

14 (1) Plaintiffs shall file their Third Amended Complaint as a stand-alone
15 document on or before **October 31, 2016**. The Court grants Defendants an open-
16 ended extension to respond to the Third Amended Complaint, pending final approval
17 of the class settlement.

18 (2) The Court conditionally certifies a settlement-only class consisting of the
19 following class members:

20 "All purchasers or users of WEN Hair Care Products² in the United
21 States or its territories between November 1, 2007 and September 19,
22 2016, excluding (a) any such person who purchased for resale and not for
23 personal or household use, (b) any such person who signed a release of

24 ² "WEN Hair Care Products" is defined as: "All fragrances and variations of Cleansing
25 Conditioner, Re-Moist Mask, Treatment Mist Duo, Treatment Oil, SIXTHIRTEEN Ultra Nourishing
26 Cleansing Treatment, Re Moist Intensive Hair Treatment, Styling Crème, Anti-Frizz Styling Crème,
27 Nourishing Mousse, Volumizing Treatment Spray, Replenishing Treatment Mist, Defining Paste,
28 Straightening Smoothing Gloss, Smoothing Glossing Serum, Glossing Shine Serum, Finishing
Treatment Crème, Volumizing Root Lift, Texturizing Spray, Detangling Treatment Spray, Men
Control Texture, Men Hair and Body Oil, Bath, Body and Hair Oil, and Texture Balm."

1 any Defendant in exchange for consideration, (c) any officers, directors
2 or employees, or immediate family members of the officers, directors or
3 employees, of any Defendant or any entity in which a Defendant has a
4 controlling interest, (d) any legal counsel or employee of legal counsel
5 for any Defendant, and (e) the presiding Judge in the Lawsuit, as well as
6 the Judge’s staff and their immediate family members.”

7 (3) The Court appoints and designates Amy Friedman, Judi Miller, Krystal
8 Henry-McArthur, and Lisa Rogers as Settlement Class Representatives.

9 (4) The grant of class certification shall be without prejudice to Defendants
10 contesting class certification should the class settlement ultimately not be
11 consummated.

12 (5) The Court grants preliminary approval of the class settlement.

13 (6) The Court approves the form and substance of the notice to the class,
14 **with the exception that Class Counsel should correct the notices to reflect that**
15 **the final approval hearing will occur at the United States Courthouse, 350 West**
16 **First Street, Courtroom 5D, Los Angeles, CA 90012.**

17 (7) The parties shall provide notice to the class and otherwise carry out the
18 settlement and claims processing according to the terms of the Settlement Agreement.

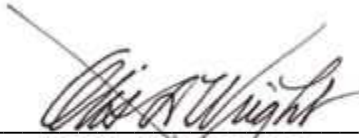
19 (8) On **May 1, 2017**, the parties shall file: (i) a Motion for Final Approval of
20 the Class Settlement, which shall include the number of class members who filed Tier
21 1 claims and Tier 2 claims, and an estimate of the funds that will be applied to pay
22 Tier 2 claims; (ii) responses to any objections filed by the class members; and (iii) a
23 motion for an award of attorneys’ fees and costs, including the information necessary
24 for the Court to conduct a lodestar analysis of the requested fee award.

25 ///
26 ///
27 ///
28 ///

1 (9) A hearing on the final approval of the class action certification and
2 settlement, as well as Class Counsel's motion for fees and costs, shall be held on **June**
3 **5, 2017 at 1:30 p.m.** at the United States Courthouse, 350 West First Street,
4 Courtroom 5D, Los Angeles, CA 90012.

5
6 **IT IS SO ORDERED.**

7
8 October 28, 2016

9
10 

11

OTIS D. WRIGHT, II
12 **UNITED STATES DISTRICT JUDGE**