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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 MICHAEL RHOM,  
8 Plaintiff,  
9 v.  
10 THUMBSTACK, INC.,  
11 Defendant.

Case No. [16-cv-02008-HSG](#)

**ORDER GRANTING PLAINTIFF'S  
UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT**

Re: Dkt. No. 33

12 Pending before the Court is Plaintiff Michael Rhom's unopposed motion for preliminary  
13 approval of class action settlement, Dkt. No. 33 ("Mot."), which came before the Court for hearing  
14 on February 9, 2017, Dkt. No. 34. The parties filed a joint supplemental submission in support of  
15 the motion on February 16, 2017. Dkt. No. 35. The submission attached an amended settlement  
16 agreement, claim form, email notice, and website notice. Dkt. No. 35-1 & Exs. A-C. Having  
17 carefully considered these filings, as well as the arguments made at hearing, the Court hereby  
18 **GRANTS** the motion.

19 **I. PROVISIONAL CLASS CERTIFICATION**

20 If a district court concludes that the moving party has met its burden of proof under  
21 Federal Rule of Civil Procedure 23, then the court has broad discretion to certify the class. *Zinser*  
22 *v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001).  
23 To meet that burden, the moving party must satisfy each of the four requirements of Rule 23(a)  
24 and at least one subsection of Rule 23(b). *Id.* Rule 23(a) provides that a district court may certify  
25 a class only if:

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

1 Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality,  
2 typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor*  
3 *Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Moreover, where the plaintiff seeks to certify a class  
4 under Rule 23(b)(3), she must show that “questions of law or fact common to class members  
5 predominate over any questions affecting only individual members, and that a class action is  
6 superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed.  
7 R. Civ. P. 23(b)(3). Here, Plaintiff has shown that Rule 23(a)’s requirements of numerosity,  
8 commonality, typicality, and adequacy of representation are satisfied, as are Rule 23(b)(3)’s  
9 requirements of predominance and superiority.<sup>1</sup> Accordingly, the Court provisionally certifies a  
10 damages class under Rule 23(b)(3). Moreover, the Court appoints Plaintiff as the class  
11 representative and CounselOne, P.C. as class counsel, finding that the relevant requirements are  
12 satisfied. See Fed. R. Civ. P. 23(a)(4); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.  
13 1998) (requirements to satisfy Rule 23(a)(4)); Fed. R. Civ. P. 23(c)(1)(B) (appointment of class  
14 counsel); Fed. R. Civ. P. 23(g)(1) (factors to consider re: same).

## 15 **II. PRELIMINARY SETTLEMENT APPROVAL**

16 Having found provisional certification appropriate, the Court considers whether to grant  
17 preliminary approval of the proposed class action settlement under Rule 23(e). See Fed. R. Civ. P.  
18 23(e) (“The claims, issues, or defenses of a certified class may be settled . . . only with the court’s  
19 approval.”) “A district court may approve a proposed settlement in a class action only if the  
20 compromise is fundamentally fair, adequate, and reasonable.” *In re Heritage Bond Litig.*, 546  
21 F.3d 667, 674–75 (9th Cir. 2008). Specifically, courts scrutinize whether the proposed settlement

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23 <sup>1</sup> The settlement agreement allows class counsel to request an incentive award of up to \$5,000 for  
24 the class representative, Dkt. No. 35-1 ¶ 8.2, which raises potential concerns regarding the  
25 adequacy of representation. If presented with such a request at the final approval hearing, the  
26 Court will consider various factors to determine whether approval is warranted. See *Staton v.*  
27 *Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (actions plaintiff took to protect class’s interests,  
28 how much class benefited from such actions, and time and effort expended by plaintiff). In so  
doing, the Court will also be guided by the Ninth Circuit’s declaration that “district courts must be  
vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the  
class representatives.” See *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir.  
2013).

1 (1) appears to be the product of serious, informed, non-collusive negotiations; (2) does not grant  
2 improper preferential treatment to class representatives or other segments of the class; (3) falls  
3 within the range of possible approval; and (4) has no obvious deficiencies. In re Tableware  
4 Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). Finally, where the parties reach a  
5 class action settlement prior to class certification, as they did here, the district courts apply “a  
6 higher standard of fairness and a more probing inquiry than may normally be required under Rule  
7 23(e).” Dennis v. Kellogg Co., 697 F.3d 858, 864 (9th Cir. 2012) (internal quotations marks  
8 omitted). Here, having rigorously scrutinized the settlement agreement in light of the higher  
9 standard of fairness that applies, the Court preliminarily finds that the proposed settlement is fair,  
10 adequate, and reasonable on its face, and that all four Tableware factors weigh in favor of  
11 preliminary approval.<sup>2</sup>

12 **III. PROPOSED CLASS NOTICE PLAN**

13 Class notice in a Rule 23(b)(3) class action must comport with the requirements of due  
14 process. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173–77 & n.14 (1974). The notice must be  
15 “the best practicable, reasonably calculated, under all the circumstances, to apprise interested  
16 parties of the pendency of the action and afford them an opportunity to present their  
17 objections.” Philips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (internal quotation marks  
18 omitted). “The notice should describe the action and the plaintiffs’ rights in it.” Id. Rule  
19 23(c)(2)(B) provides, in relevant part:

20 The notice must clearly and concisely state in plain, easily  
21 understood language: (i) the nature of the action; (ii) the definition  
22 of the class certified; (iii) the class claims, issues, or defenses;  
23 (iv) that a class member may enter an appearance through an  
attorney if the member so desires; (v) that the court will exclude  
from the class any member who requests exclusion; (vi) the time and  
manner for requesting exclusion; and (vii) the binding effect of a  
class judgment on members under Rule 23(c)(3).

24 Here, the Court finds that the notice plan described in the amended settlement agreement, see Dkt.

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26 <sup>2</sup> With regard to the second factor, preferential treatment of class members, an incentive award of  
27 \$5,000 for Plaintiff could raise substantial concerns in light of the an estimated settlement  
28 payment of only about \$15.00. See Dkt. No. 35 at 2 (assuming a 10% claims rate). At this  
juncture, however, the Court need not weigh the impact of a request for an incentive award that  
has yet to be filed. At the final approval hearing, the Court will carefully consider any such  
request that is filed.

1 No. 35-1 ¶ 5.1, will provide the best practical notice to the class, and that the amended notices  
 2 adequately describe the action and class members’ rights and satisfy the seven requirements of  
 3 Rule 23(c)(2)(B), see Dkt. No. 35-1 Exs. B–C. In addition, the Court finds that that the CPT  
 4 Group is qualified to perform the tasks associated with administering the notice outlined in the  
 5 settlement agreement and therefore approves CPT Group as the settlement administrator. See Dkt.  
 6 No. 35-1 ¶¶ 1.29, 7.1.


7 **IV. CONCLUSION**

8 For the foregoing reasons, the Court **GRANTS** Plaintiff’s motion for preliminary approval  
 9 of class action settlement. The parties are **DIRECTED** to implement the proposed class notice  
 10 plan.<sup>3</sup> The Court **SETS** the following schedule:

Event	Date
Deadline to Execute Notice Plan	June 11, 2017
Deadline to File Motion for Fees, Costs, and Incentive Award	June 27, 2017
Deadline for Class Members to File Objections / Opt Out	July 11, 2017
Deadline for Claims Administrator to File List of Timely Requests for Exclusion	July 26, 2017
Deadline to File Motion for Final Approval of Class Action Settlement <sup>4</sup>	September 7, 2017
Deadline for Class Members to File Notice of Intent to Appear at Final Approval Hearing	September 21, 2017
Final Approval Hearing <sup>5</sup>	October 12, 2017, at 2:00 p.m.

18 **IT IS SO ORDERED.**

19 Dated: 5/12/2017

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 21   
 22 HAYWOOD S. GILLIAM, JR.  
 23 United States District Judge

24 <sup>3</sup> Although the cy pres provision has been removed from the settlement agreement, see Dkt. No.  
 25 35-1 ¶ 3.1.3, and the email notice, see id. Ex. B at 2, the latter still contains “Cy Pres Recipients”  
 26 as one of the links, see id. Ex. B at 3. That error should be corrected. In addition, the website  
 27 notice should be revised to reflect that the undersigned judge changed locations after the parties  
 28 filed their joint supplemental submission. See Dkt. No. 35-1, Ex. C at 11–12; Dkt. No. 68 (notice  
 of change of location).

<sup>4</sup> Any responses to objections should be incorporated into the motion for final approval of class  
 action settlement.

<sup>5</sup> At the final approval hearing, the Court will hear arguments not only as to the motion for final  
 approval of class action settlement, but also as to the motion for fees, costs, and incentive award.