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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 HEATHER MAXIN, individually and on
12 behalf of all others similarly situated,
13 Plaintiff,
14 v.
15 RHG & COMPANY, INC.,
16 Defendant.

Case No.: 16CV2625 JLS (BLM)

**ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

(ECF No. 6)

17
18 Presently before the Court is Plaintiff’s Motion for Preliminary Approval of Class
19 Action Settlement (“Prelim. Settlement Mot.”). (ECF No. 6.) Because the Preliminary
20 Settlement Motion is unopposed, the Court vacated oral argument on the matter and took
21 it under submission without oral argument pursuant to Civil Local Rule 7.1(d). (ECF No.
22 10.) After reviewing Plaintiff’s arguments and the law, the Court concludes that the
23 settlement is fundamentally fair, reasonable, and adequate, and therefore **GRANTS** the
24 Preliminary Settlement Motion.

25 **GENERAL BACKGROUND**

26 Plaintiff has filed a Class Action Complaint (“CAC”) for damages and injunctive
27 relief. (ECF No. 1.) Plaintiff alleges that Defendant—“an American ‘pharmaceutical grade
28 and professional strength supplements’ manufacturer that conducts business through

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

9 In June 2015, Plaintiff sent Defendant a notice letter pursuant to California Civil
10 Code § 1782. (Kazerounian Decl. Ex. 1 (“Settlement Agreement”), § II.C, ECF No. 6-3.)
11 The following month, “Plaintiff sent Defendant a draft of the proposed complaint, alleging
12 claims” under the CLRA, the UCL, and the FAL. (Prelim. Settlement Mot. 3). In October,
13 the Parties “participated in a full day of mediation” before the Honorable Leo S. Papas, a
14 retired Federal Magistrate Judge, and Defendant later produced information “in response
15 to informal discovery requests by Plaintiff’s counsel, including a confirmatory discovery
16 request in the form of special interrogatories.” (*Id.*) Specifically, “Defendant produced
17 figures regarding the total sales of the Products, the approximate class size, Defendant’s
18 finances and other information that help determine the appropriate notice for the Class.”
19 (*Id.*) “Based upon the investigation, analysis, and discovery conducted by Class Counsel,
20 as well as information obtained through arm’s-lengths negotiations at the time of
21 mediation, the Parties have agreed to settle the claims in the Action on a nationwide basis
22 under the terms and conditions memorialized in th[e] [Settlement] Agreement.” (*Id.*)

23 SETTLEMENT TERMS

24 The Parties have submitted a comprehensive settlement document with
25 approximately twenty-two pages of substantive terms, (*see generally* Settlement
26 Agreement), and several methods of class notice, (ECF Nos. 6-4 (long-form notice), 6-5
27 (claim form), 6-9 (postcard notice), 6-10 (short-form notice), 6-11 (pharmacy notice)). The
28 Settlement Class is defined as:

1 All Persons who purchased one or more of the Products [i.e., those “that
2 contained an unqualified ‘Made in the USA’ label or were otherwise
3 represented as being ‘Made in the USA,’ including on Defendant’s website,
4 brochures, and/or any other marketing materials[,]” (Settlement Agreement §
5 III.A.27),] in the United States within the Class Period (i.e., August 1, 2012
6 through the date the Court issues the Preliminary Approval Order). Excluded
7 from the Class are Defendant, its officers, directors, or employees, and the
8 immediate family members. Also excluded is any judge who may preside over
9 this case and their immediate family members and employees, as well as all
10 persons who are validly excluded from the Settlement.

11 (Prelim. Settlement Mot. 3; *see also* Settlement Agreement § III.A.9.) This includes
12 approximately 4,665 putative Class Members Defendant has been able to identify as well
13 as “numerous others who purchased Vital Nutrients’ products through third party
14 distributors, healthcare practitioners, and other retailers” (Prelim. Settlement Mot. 3–
15 4.) Defendant estimates that “91% of its sales [are] to healthcare practitioners or
16 distributors” rather than direct-to-consumer sales, (Petarca Decl. ¶ 2, ECF No. 6-15), and
17 that it “shipped approximately 2,426,024 units of Vital Nutrients products” during the class
18 period, “not all of which contained a ‘Made in USA’ label, and some of which third parties
19 have confirmed with Certificates of Analysis that they were made in the USA[,]” (*id.* ¶ 3).

20 The Settlement Agreement provides for a common fund of \$900,000 to be used to
21 pay:

22 (i) the Cash Awards, (ii) the incentive award to Plaintiff . . . , (iii) the
23 Attorneys’ Fees Award, which includes litigation costs of Class Counsel, (iv)
24 costs of administering the notice, the Claims, and the Settlement, and (v) taxes
25 due in connection with the Gross Settlement Fund and Net Settlement Fund
26 prior to distribution to the Class.

27 (Settlement Agreement § III.B.1.) Class Members will be entitled to anywhere from \$6.00
28 to \$150.00. (*See id.* § III.B.2.) “Specifically, Class Members who submit a Valid Claim
without Adequate Proof of Purchase shall receive \$6.00 per Product, up to a maximum of
5 Products per Person; Class Members who have proof of having purchased more than 5

1 Products and submit a Valid Claim accompanied by Adequate Proof of Purchase shall
2 receive \$6.00 per Product, up to a maximum of 25 Products per Person.” (*Id.* § III.B.2.(a)–
3 (b).)

4 If the combined monetary value of class member claims are in excess of the fund
5 amount then “the amount to each Class Member shall be reduced on a *pro rata* basis.” (*Id.*
6 § III.B.1.(d).) If the common fund exceeds the combined monetary value of class member
7 claims, or if there are any unclaimed funds, then the excess “shall be delivered to a *cy pres*
8 recipient selected by the parties and approved by the Court.” (*Id.* § III.B.1.(e)–(f).)

9 Additionally, Defendant has “already commenced shipping its Products with revised
10 labeling that conforms to the terms of the Settlement” and has “deleted any ‘Made in USA’
11 representation from its website.” (*Id.* § III.B.3(a).) Defendant will continue this course of
12 conduct. (Prelim. Settlement Mot. 4–5.)

13 **RULE 23 SETTLEMENT CLASS CERTIFICATION**

14 Before granting preliminary approval of a class action settlement agreement, the
15 Court must first determine whether the proposed class can be certified. *Amchem Prods. v.*
16 *Windsor*, 521 U.S. 591, 620 (1997) (indicating that a district court must apply “undiluted,
17 even heightened, attention [to class certification] in the settlement context” in order to
18 protect absentees).

19 Class actions are governed by Federal Rule of Civil Procedure 23. In order to certify
20 a class, each of the four requirements of Rule 23(a) must first be met. *Zinser v. Accufix*
21 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(a) allows a class to be
22 certified only if:

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

1 Next, in addition to Rule 23(a)'s requirements, the proposed class must satisfy the
2 requirements of one of the subdivisions of Rule 23(b). *Zinser*, 253 F.3d at 1186. Here,
3 Plaintiff seeks to certify the Settlement Class under subdivision Rule 23(b)(3), which
4 permits certification if “questions of law or fact common to class members predominate
5 over any questions affecting only individual class members,” and “a class action is superior
6 to other available methods for fairly and efficiently adjudicating the controversy.” The
7 Court addresses each of these requirements in turn.

8 **I. Rule 23(a)(1): Numerosity**

9 Federal Rule of Civil Procedure 23(a)(1) requires that a class must be “so numerous
10 that joinder of all members is impracticable.” “[C]ourts generally find that the numerosity
11 factor is satisfied if the class comprises 40 or more members and will find that it has not
12 been satisfied when the class comprises 21 or fewer.” *Celano v. Marriott Int’l, Inc.*, 242
13 F.R.D. 544, 549 (N.D. Cal. 2007).

14 Here, the proposed Settlement Class consists of at least 4,665 individuals, and there
15 are many other potential class members scattered across the nation. (Petrarca Decl. ¶¶ 2–
16 3.) Accordingly, joinder of all members would be impracticable for purposes of Rule
17 23(a)(1), and the numerosity requirement is therefore satisfied.

18 **II. Rule 23(a)(2): Commonality**

19 Federal Rule of Civil Procedure 23(a)(2) requires that there be “questions of law or
20 fact common to the class.” Commonality requires that “the class members ‘have suffered
21 the same injury.’ ” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quoting
22 *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). “The existence of shared legal
23 issues with divergent factual predicates is sufficient, as is a common core of salient facts
24 coupled with disparate legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150
25 F.3d 1011, 1019 (9th Cir. 1998).

26 Here, all common questions revolve around whether Defendant’s labeling of its
27 products as “Made in USA” were in violation of California law and negatively impacted
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1 the class members. Accordingly, it is appropriate for these issues to be adjudicated on a
2 class-wide basis, and Rule 23(a)(2) is satisfied.

3 **III. Rule 23(a)(3): Typicality**

4 To satisfy Federal Rule of Civil Procedure 23(a)(3), Plaintiff’s claims must be
5 typical of the claims of the Class. The typicality requirement is “permissive” and requires
6 only that Plaintiff’s claims “are reasonably coextensive with those of absent class
7 members.” *Hanlon*, 150 F.3d at 1020. “The test of typicality ‘is whether other members
8 have the same or similar injury, whether the action is based on conduct which is not unique
9 to the named plaintiffs, and whether other class members have been injured by the same
10 course of conduct.’ ” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)
11 (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). “[C]lass certification
12 should not be granted if ‘there is a danger that absent class members will suffer if their
13 representative is preoccupied with defenses unique to it.’ ” *Id.* (citation omitted).

14 Here, Plaintiff is an individual whose claims allegedly arise out of Defendant’s same
15 underlying “Made in USA” product labeling as those claims pertaining to the proposed
16 Settlement Class. (Compl. ¶¶ 14–17.) Accordingly, Plaintiff’s claims are typical of the
17 claims of the members of the proposed Settlement Class, thus satisfying Rule 23(a)(3).

18 **IV. Rule 23(a)(4): Adequacy**

19 Federal Rule of Civil Procedure 23(a)(4) requires that the named representatives
20 fairly and adequately protect the interests of the class. “To satisfy constitutional due
21 process concerns, absent class members must be afforded adequate representation before
22 entry of judgment which binds them.” *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*,
23 311 U.S. 32, 42–43 (1940)). To determine legal adequacy, the Court must resolve two
24 questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest with
25 other class members, and (2) will the named plaintiffs and their counsel prosecute the
26 action vigorously on behalf of the class?” *Id.*

27 Here, there is no reason to believe that the named representative and Class Counsel
28 have any conflict of interest with the proposed Settlement Class members. (*See* Maxin

1 Decl. ¶ 10, ECF No. 6-13; Kazerounian Decl. ¶¶ 36–38, ECF No. 6–2.) There is also no
2 reason to believe that the named representative and Class Counsel have thus far failed to
3 vigorously investigate and litigate this case. Plaintiff has retained competent counsel, who
4 has conducted pre-suit investigation, research, and informal discovery in this case. (Prelim.
5 Settlement Mot. 3.) Furthermore, Class Counsel have significant class action litigation
6 experience, are knowledgeable about the applicable law, and will continue to commit their
7 resources to further the interests of the Class. (Kazerounian Decl. ¶¶ 46–61.) Accordingly,
8 the named representative and Class Counsel adequately represent the proposed Settlement
9 Class members, and Rule 23(a)(4)’s adequacy requirement is met.

10 **V. Rule 23(b)(3)**

11 Federal Rule of Civil Procedure 23(b)(3) permits certification if “questions of law
12 or fact common to class members predominate over any questions affecting only individual
13 class members,” and “a class action is superior to other available methods for fairly and
14 efficiently adjudicating the controversy.”

15 **A. Predominance**

16 “The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are
17 sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S.
18 at 623. “Rule 23(b)(3) focuses on the relationship between the common and individual
19 issues.” *Hanlon*, 150 F.3d at 1022.

20 Here, the common issue of whether Defendant’s product labeling was in violation
21 of California law predominates over any individual issues such as the extent to which
22 individual class members relied on the labeling in deciding to purchase the products and
23 which of Defendant’s specific products Class Members purchased. (*See* Prelim. Settlement
24 Mot. 13.) Further, for purposes of settlement, Class Members are not required to prove any
25 evidentiary or factual issues that could arise in litigation. Accordingly, the predominance
26 requirement of Rule 23(b)(3) is satisfied.

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1 **B. Superiority**

2 The final requirement for certification pursuant to Federal Rule of Civil Procedure
3 23(b)(3) is “that a class action [be] superior to other available methods for fairly and
4 efficiently adjudicating the controversy.” The superiority inquiry requires the Court to
5 consider the four factors listed in Rule 23(b)(3):

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

13 *See also Zinser*, 253 F.3d at 1190. A court need not consider the fourth factor, however,
14 when certification is solely for the purpose of settlement. *See True v. Am. Honda Motor*
15 *Co.*, 749 F. Supp. 2d 1052, 1066 n.12 (C.D. Cal. 2010); *see also Amchem*, 521 U.S. at 620
16 (“Confronted with a request for settlement-only class certification, a district court need not
17 inquire whether the case, if tried, would present intractable management problems, for the
18 proposal is that there be no trial.”). The superiority inquiry focuses “ ‘on the efficiency and
19 economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those
20 that can be adjudicated most profitably on a representative basis.’ ” *Zinser*, 253 F.3d at
21 1190 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*
22 *Practice and Procedure* § 1780, at 562 (2d ed. 1986)). A district court has “broad discretion”
23 in determining whether class treatment is superior. *Kamm v. Cal. City Dev. Co.*, 509 F.2d
24 205, 210 (9th Cir. 1975).

25 Here, Class Members’ claims involve the same issues arising from the same factual
26 bases. If Class Members’ claims were considered on an individual basis, potentially
27 thousands of cases would follow a similar trajectory, and each would come to a similar
28 result. Furthermore, individual cases would consume a significant amount of the Court’s
and the Class Members’ resources. It is also likely that Class Members would not pursue

1 litigation on an individual basis due to the high costs of pursuing individual claims. The
2 interests of the Settlement Class Members in individually controlling the litigation are
3 minimal, especially given that Defendant's same product labeling would be at issue. Given
4 all of the above, class treatment is the superior method of adjudicating this controversy,
5 and the superiority requirement of Rule 23(b)(3) is met.

6 **VI. Conclusion**

7 For the reasons stated above, the Court finds certification of the Settlement Class
8 proper under Rule 23(b)(3). Accordingly, the Settlement Class is **CERTIFIED** for
9 settlement purposes only.

10 **RULE 23 PRELIMINARY FAIRNESS DETERMINATION**

11 Having certified the Settlement Class, the Court must next make a preliminary
12 determination as to whether the proposed settlement is "fair, reasonable, and adequate"
13 pursuant to Federal Rule of Civil Procedure 23(e)(1)(C). Relevant factors to this
14 determination include:

15 The strength of the plaintiffs' case; the risk, expense, complexity, and likely
16 duration of further litigation; the risk of maintaining class action status
17 throughout the trial; the amount offered in settlement; the extent of discovery
18 completed and the stage of the proceedings; the experience and views of
19 counsel; the presence of a governmental participant; and the reaction of the
class members to the proposed settlement.

20 *Hanlon*, 150 F.3d at 1026. Furthermore, due to the "dangers of collusion between class
21 counsel and the defendant, as well as the need for additional protections when the
22 settlement is not negotiated by a court designated class representative," any "settlement
23 approval that takes place prior to formal class certification requires a higher standard of
24 fairness." *Id.* Additionally, although in the present case the Court has not been presented
25 with formal applications for class counsel's attorney fees or class service awards, the Court
26 nonetheless considers these potential fees because they form part of the settlement
27 agreement.

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1 **I. Strength of Plaintiff’s Case**

2 In order to succeed on the merits, Plaintiff would have to prove that Defendant’s
3 product labeling violated California law. (*See generally* CAC.) Defendant denies all
4 Plaintiff’s allegations, believes it has meritorious defenses to all of Plaintiff’s claims, and
5 maintains that its products and all of its representations and labeling were in compliance
6 with all applicable laws. (Settlement Agreement § II.C.) Plaintiff’s Counsel, however,
7 believes Plaintiff has a strong case and that the \$900,000 proposed settlement is “in part
8 due to the strength of Plaintiff’s claims.” (Prelim. Settlement Mot. 19; *see also*
9 Kazerounian Decl. ¶¶ 42–43.) Additionally, the Settlement Agreement is the result of
10 arm’s-length negotiations conducted over several months, including each Party’s
11 individual discovery and valuation of the case and one full-day mediation session before
12 an experienced mediator. (Prelim. Settlement Mot. 1–3.) Given this disagreement and
13 neutral third-party evaluation of the same, the Court thus finds that this factor weighs in
14 favor of the \$900,000 settlement being fair, reasonable, and adequate.

15 **II. Risk, Expense, Complexity, and Likely Duration of Further Litigation**

16 Were the case to proceed to further litigation rather than settlement, the Parties
17 would each bear substantial risk and a strong likelihood of protracted and contentious
18 litigation. Even though the Parties have agreed to settle this action, they fundamentally
19 disagree regarding the validity of Plaintiff’s claims. (Settlement Agreement § II.)
20 Additionally, the Parties document a number of risks in litigating Plaintiff’s claims—
21 including an expert survey assessment “that the ‘Made in USA’ language was not material
22 to [the majority of] class members[,]” (*id.* § II.D)—and thus argue that the present
23 Settlement affords class members at least some compensation where there might be none.
24 Indeed, the fact that Defendant disputes all aspects of Plaintiff’s claims, and might contend
25 that the California statutes have recently been amended “in a way that [could] diminish[]
26 the value of the claims asserted in this Action[,]” (Prelim. Settlement Mot. 20), suggests
27 that these issues would be vigorously (and therefore costly) litigated were there to be

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1 further litigation. Given the foregoing, this factor weighs in favor the settlement being fair,
2 reasonable, and adequate.

3 **III. Risk of Maintaining Class Action Status Throughout Trial**

4 The Parties dispute whether the classes can be validly certified in the absence of the
5 Settlement Agreement. (*See id.* at 19–20.) Implicit in this disagreement is the likelihood of
6 initial challenges to class certification and the potential for decertification motions even if
7 class status is granted. Weighed against the fact that Defendant does not object to a finding
8 that the class elements are met for purposes of this settlement, this factor also weighs in
9 favor of the settlement being fair, reasonable, and adequate.

10 **IV. Amount Offered in Settlement**

11 Defendant has agreed to pay \$900,000 to settle this lawsuit. This amounts to
12 potential value to each class member (i.e., \$6–\$150 per member) that “is arguably more
13 than the value representing a reduction in Defendant’s product’s value due to the alleged
14 false advertising, which would otherwise be highly contested and require expert testimony
15 to determine.” (*Id.* at 20.) Further, the value offered compares favorably to many other
16 “similarly approved settlements, some of which only offer vouchers or discounts.” (*Id.*; *see*
17 *id.* n.4 (collecting similar, lower-award-value cases that were approved).) Although there
18 are a great many potential class members—and thus great potential recovery—given the
19 foregoing and the slim chance of Class Members otherwise individually seeking recovery,
20 this factor nonetheless weighs in favor of settlement.

21 **V. Extent of Discovery Completed and Stage of Proceedings**

22 Prior to the agreed-upon settlement, the Parties engaged in informal discovery,
23 including analysis of Defendant’s allegedly non-compliant products and locating putative
24 Class Members from Defendant’s sales records. (*Id.* at 1–4; 21–22.) And as discussed, the
25 Parties engaged a neutral third-party mediator who fully examined and discussed with each
26 party the strengths and weakness of each party’s case. (*Id.* at 3.) Both Class Counsel and
27 Defense Counsel gained significant knowledge of the relevant facts and law throughout the
28 discovery process and through independent investigation and evaluation. Accordingly, it

1 appears the Parties have entered into the Settlement Agreement with a strong working
2 knowledge of the relevant facts, law, and strengths and weaknesses of their claims and
3 defenses. Given all of the above, this factor weighs in favor of the proposed settlement
4 being fair, reasonable, and adequate.

5 **VI. Experience and Views of Counsel**

6 “The recommendations of plaintiffs’ counsel should be given a presumption of
7 reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). And
8 here, Class Counsel believes the Settlement Agreement is fair, reasonable, adequate, and
9 in the best interest of the Settlement Class. (*Id.* at 22.) Furthermore, in the present case the
10 presumption of reasonableness is warranted based on Class Counsel’s expertise in complex
11 litigation, familiarity with the relevant facts and law, and significant experience negotiating
12 other class and collective action settlements. (Kazerounian Decl. ¶¶ 46–61.) Given the
13 foregoing, and according the appropriate weight to the judgment of these experienced
14 counsel, this factor weighs in favor the proposed settlement being fair, reasonable, and
15 adequate.

16 **VII. Settlement Attorney Fees Provision**

17 In the Ninth Circuit, a district court has discretion to apply either a lodestar method
18 or a percentage-of-the-fund method in calculating a class fee award in a common fund case.
19 *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). When
20 applying the percentage-of-the-fund method, an attorneys’ fees award of “twenty-five
21 percent is the ‘benchmark’ that district courts should award” *In re Pac. Enters. Sec.*
22 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (citing *Six (6) Mexican Workers v. Ariz. Citrus*
23 *Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)); *Fischel*, 307 F.3d at 1006. However, a
24 district court “may adjust the benchmark when special circumstances indicate a higher or
25 lower percentage would be appropriate.” *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 379
26 (citing *Six (6) Mexican Workers*, 904 F.2d at 1311). “Reasonableness is the goal, and
27 mechanical or formulaic application of either method, where it yields an unreasonable
28 result, can be an abuse of discretion.” *Fischel*, 307 F.3d at 1007.

1 In the present case, the Settlement Agreement specifies that Defendant will not
2 oppose Class Counsel’s request to the Court for approval of attorney fees in the amount of
3 \$270,000. (Settlement Agreement § III.I.) This would be approximately thirty percent of
4 the \$900,000 common fund— five percent more than the Ninth Circuit benchmark.
5 Although the Court does not conclude that the attorney fee provision is fatal to preliminary
6 approval of the settlement, the Court notes that counsel will need to address in their formal
7 attorney fee application any arguments supporting the heightened award. Additionally, the
8 Court will carefully scrutinize any class member objections to the proposed thirty-percent
9 award.

10 **VIII. Class Representative Service Award Provision**

11 The Ninth Circuit recognizes that named plaintiffs in class action litigation are
12 eligible for reasonable incentive payments. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th
13 Cir. 2003). The district court must evaluate each incentive award individually, using “
14 ‘relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the
15 class, the degree to which the class has benefitted from those actions, . . .[and] the amount
16 of time and effort the plaintiff expended in pursuing the litigation’ ” *Id.* (citing *Cook*
17 *v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)).

18 In the present case, the Settlement Agreement provides an incentive award of up to
19 \$5,000 to the Class Representative. (Settlement Agreement § III.I.) Plaintiff Heather Maxin
20 declares “that she “understand[s] the obligations of serving as a Class Representative” and
21 has “and will adequately . . . represent the interest of the putative class.” (Maxin Decl. ¶ 7,
22 ECF No. 6-13.) Ms. Maxin has thus far “met with [her] attorneys for the initial consultation,
23 participated in calls regarding fact-finding efforts with [her] attorneys, [and] made [her]self
24 available telephonically for a full day of mediation in case [she] was needed” (*Id.*)
25 Given the foregoing, the Court concludes that the current Settlement Agreement Class
26 Representative Payment provision should not bar preliminary approval of the Settlement
27 Agreement.

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1 **IX. Conclusion**

2 For the reasons stated above, Plaintiff’s Preliminary Settlement Motion is
3 **GRANTED.**

4 **NOTICE OF CLASS CERTIFICATION AND SETTLEMENT**

5 Pursuant to Federal Rule of Civil Procedure 23(c)(2)(B), “[f]or any class certified
6 under Rule 23(b)(3) the court must direct to class members the best notice that is
7 practicable under the circumstances, including individual notice to all members who can
8 be identified through reasonable effort.” Because the Court has determined that
9 certification is appropriate under Rule 23(b)(3), the mandatory notice procedures required
10 by Rule 23(c)(2)(B) must be followed.

11 Where there is a class settlement, Federal Rule of Procedure 23(e)(1) requires the
12 court to “direct notice in a reasonable manner to all class members who would be bound
13 by the proposal.” “Notice is satisfactory if it ‘generally describes the terms of the settlement
14 in sufficient detail to alert those with adverse viewpoints to investigate and to come forward
15 and be heard.’ ” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) (quoting
16 *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)); *see also Grunin v.*
17 *Int’l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975) (“[T]he mechanics of the notice
18 process are left to the discretion of the court subject only to the broad ‘reasonableness’
19 standards imposed by due process.”).

20 In the present case, the Parties have agreed to notify the Class by four distinct
21 methods: “(1) by mailing or emailing Direct Notice, (2) by establishing a Settlement
22 Website and toll-free number, (3) by providing notice to the Pharmacies that sell
23 Defendant’s Products and requesting that they post a copy of the Short-Form Notice on
24 their websites and in their stores, and (4) by Publication Notice” in USA Today. (Prelim.
25 Settlement Mot. 5–7; *see also* Settlement Agreement § III.C–D.) In particular, each notice
26 method directs putative Class Members to the website www.RHGsettlement.com, which
27 will contain “the Long-Form Notice, the Agreement, the Complaint, a Claim Form that can
28 be downloaded, the ability to make a claim online, and any additional relevant documents

1 as later determined.” (Prelim. Settlement Mot. 6–7.) The proposed Long-Form Notice
2 explains, in part: (i) the nature of the action; (ii) the definition of class certified; (iii) the
3 class claims, issues, and defenses; (iv) the proposed Class Member Settlement amounts;
4 (v) that class members may timely object to the proposed Settlement; (vi) that the court
5 will exclude from the class any member who requests exclusion; (vii) the time and manner
6 for requesting exclusion; and (viii) the binding effect of a class judgment on class members
7 under Rule 23(c)(3). (*See generally* Long Form Notice, ECF No. 6-4.)

8 Having thoroughly reviewed the jointly drafted Notice, the Court finds that the
9 method and content of the Notice comply with Rule 23. Accordingly, the Court approves
10 the Parties’ proposed notification plan.

11 CONCLUSION

12 For the reasons stated above, the Court **GRANTS** Plaintiff’s Preliminary Settlement
13 Motion. The Court **ORDERS** as follows:

14 **1. PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT**
15 **AGREEMENT:** The Settlement Agreement is preliminarily approved as fair, reasonable,
16 and adequate pursuant to Federal Rule of Civil Procedure 23(e).

17 **2. PRELIMINARY CLASS CERTIFICATION:** Pursuant to Federal Rule of
18 Civil Procedure 23(b)(3), the action is preliminarily certified, for settlement purposes only,
19 as a class action on behalf of the following Settlement Class Members with respect to the
20 claims asserted in this Action:

21 **Settlement Class:** All Persons who purchased in the United States between August
22 1, 2012 and the date on which this Order is electronically docketed one or more of
23 Defendant’s products that contained an unqualified “Made in USA” label or were
24 otherwise represented as being “Made in USA,” including on Defendant’s website,
25 brochures, and/or any other marketing materials.

26 **3. CLASS REPRESENTATIVE, CLASS COUNSEL, AND SETTLEMENT**
27 **ADMINISTRATOR:** Pursuant to Federal Rule of Civil Procedure 23, the Court
28 preliminarily certifies, for settlement purposes only, Plaintiff Heather Maxin as the Class

1 Representative, and Abbas Kazerounian of the Kazerouni Law Group, A.P.C. and Joshua
2 B. Swigart of Hyde & Swigart as Class Counsel. Additionally, the Court approves and
3 appoints Kurtzman Carson Consultants as the Claims Administrator.

4 **4. NOTICE:** The Court preliminarily approves the form and substance of the
5 proposed notice set forth in the Settlement Agreement and the notice forms and
6 corresponding documents attached as Exhibits 1A, 1B, 1F, 1G, and 1H to the Preliminary
7 Settlement Motion. (ECF Nos. 6-3, 6-4, 6-5, 6-9, 6-10, 6-11.) The form and method for
8 notifying the Class Members of the Settlement and its terms and conditions satisfies the
9 requirements of Federal Rules of Civil Procedure 23(c)(2)(B) and 23(e). The Court
10 concludes that the Notice Procedure submitted by the Parties constitutes the best notice
11 practicable under the circumstances. As provided in the Settlement Agreement, the Claims
12 Administrator shall provide notice to the Class Members and respond to Class Member
13 inquiries.

14 Within thirty (30) days of the date on which this Order is electronically docketed,
15 the Parties **SHALL** disseminate the notices in the forms attached as Exhibits 1A, 1B, 1F,
16 1G, and 1H to the Preliminary Settlement Motion and in the manner and form provided in
17 the Settlement Agreement and Preliminary Settlement Motion.

18 **5. FINAL APPROVAL HEARING:** Judge Sammartino shall conduct a Final
19 Approval Hearing on September 28, 2017 at 221 W. Broadway, Courtroom 4D, 4th Floor,
20 San Diego, CA 92101, to consider:

- 21
- 22 a. the fairness, reasonableness, and adequacy of the proposed settlement;
- 23 b. Plaintiff's request for the award of attorney fees and costs;
- 24 c. the Class Representative enhancement;
- 25 d. dismissal with prejudice of the class action with respect to Defendant; and
- 26 e. the entry of final judgment in this action.

27 At the Final Approval Hearing, the Parties shall also be prepared to update the Court on
28 any new developments since the filing of the motion, including any untimely submitted
opt-outs, objections, and claims, or any other issues as the Court deems appropriate.

1 The date and time of the Final Approval Hearing shall be included in the Notice to
2 be mailed to all class members.

3 **6. MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT:**

4 No later than twenty-one days before the Final Approval Hearing, the Parties shall file a
5 Motion for Final Approval of Class Action Settlement. The Motion shall include and
6 address any objections received as of the filing date. In addition to the class certification
7 and settlement fairness factors, the motion shall address the number of putative Settlement
8 Class members who have opted out and the corresponding number of claims.

9 **7. APPLICATION FOR ATTORNEY FEES, COSTS, AND CLASS**
10 **REPRESENTATIVE SERVICE AWARD:** No later than twenty-one days before the
11 Final Approval Hearing, Class Counsel shall file an application for attorney fees, costs,
12 and a class representative service award. Class Counsel shall provide documentation
13 detailing the number of hours incurred by attorneys in litigating this action, supported by
14 detailed time records, as well as hourly compensation to which those attorneys are
15 reasonably entitled. Class Counsel should address the appropriateness of any upward or
16 downward departure in the lodestar calculation, as well as reasons why a percentage-of-
17 the-fund approach to awarding attorney fees may be more preferable in this case. Class
18 Counsel should be prepared to address any questions the Court may have regarding the
19 application for fees at the Final Approval Hearing.

20 **8. MISCELLANEOUS PROVISIONS:** In the event the proposed settlement is not
21 consummated for any reason, the conditional class certification shall be of no further force
22 or effect. Should the settlement not become final, the fact that the Parties were willing to
23 stipulate to class certification as part of the settlement shall have no bearing on, nor be
24 admissible in connection with, the issue of whether a class should be certified in a non-
25 settlement context.

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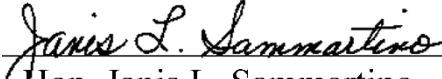
1 **9. SCHEDULE:** The Court orders the following schedule for further proceedings:

2

Event	Date
Defendant to Deliver Class List to Claims Administrator.	Within 5 days of the date on which this Order is electronically docketed.
Claims Administrator to (1) Establish Website and Toll-Free Number; (2) Publish Notice of Settlement in USA Today; and (3) Send Notice to Class Members and Relevant Pharmacies.	Within 28 days of the date on which this Order is electronically docketed.
Last Day for Class Members to File Request for Exclusion from Settlement.	No later than 90 days from the date on which this Order is electronically docketed.
Last Day for Class Members to File Objections to the Settlement.	No later than 90 days from the date on which this Order is electronically docketed.
Last Day for Class Members to File Notice of Intention to Appear at Final Approval Hearing.	No later than 100 days from the date on which this Order is electronically docketed.
Parties to File Motion for Final Approval.	No later than 21 days before the Final Approval Hearing.
Class Counsel to File Motion for Attorney Fees and Costs and Incentive Award.	No later than 21 days before the Final Approval Hearing.
Final Approval Hearing.	Thursday, September 28, 2017 at 1:30 p.m.

3 **IT IS SO ORDERED.**

4 Dated: February 27, 2017

5 
6 Hon. Janis L. Sammartino
7 United States District Judge