UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV17-00616 JAK (PLA)	Date	November 26, 2018
Title	Nicholas Miller, et al. v. Wise Company., Inc.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE MOTION FOR CLASS CERTIFICATION (DKT. 24) AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT (DKT. 40)**

I. Introduction

Nicholas Miller ("Miller") and Jeffrey Borneman ("Borneman") (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, brought this action against Wise Company Inc. ("Defendant") in the Riverside County Superior Court. Complaint, Dkt. 1-1. The claims advanced in the Complaint are based on Defendant's alleged false advertising and unfair business practices in connection with its sale of certain food products. The Complaint advances the following causes of action: (i) violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; (ii) false advertising in violation of Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (iii) unlawful business practices in violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (iv) fraudulent business practices in violation of the UCL; (v) unfair business practices in violation of the UCL; and (vi) declaratory relief. On March 30, 2017, Defendant removed that action. Notice of Removal, Dkt. 1. On October 9, 2017, Plaintiffs filed a motion for class certification. Dkt. 24.

On February 8, 2018, the parties filed a joint report stating that they reached a settlement in principle. Dkt. 36. On March 30, 2018, Plaintiffs filed a motion for preliminary approval of the settlement ("Motion" (Dkt. 40)). The Motion seeks:

- Conditional certification of the Settlement Class;
- Appointment of Miller and Borneman as Class Representatives;
- Appointment of Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP, Michael D. Braun of the Braun Law Group, P.C., and Andrew Kierstead of the Law Offices of Andrew Kierstead as Class Counsel;
- Approval of the Claim Form;
- Appointment of KCC as Settlement Administrator;
- Approval of the proposed Notice Plan; and
- Setting a Final Fairness Hearing.

Id. at 3-4.

Based on a review of these filings, it was determined that these matters are appropriate for decision without oral argument. Dkt. 42; *see* Fed. R. Civ. P. 78; Local Rule 7-15. On April 27, 2018, an order issued requesting that Plaintiff file a supplemental brief as to certain evidence presented in support of the Motion. Dkt. 44. On May 3, 2018, Plaintiffs submitted a supplemental brief regarding these issues. Dkt. 45. On July 20, 2018, Plaintiffs submitted another supplemental brief as to the billing records for one of the attorneys who was previously ill and unable to provide detailed information. Dkt. 46.

For the reasons stated in this Order, the Motion is **GRANTED**. In light of this ruling, Plaintiffs' motion for class certification is provisionally **GRANTED**; provided, however, that certification is granted provisionally in connection with the Motion, subject to further review in connection with the final, fairness hearing.

II. Background

A. The Parties

Defendant is a Utah corporation that manufactures and sells packages of emergency and long term food provisions ("Food Kits") for use in the event of natural or man-made disasters. Dkt. 40-1 at 8. The Food Kits are sold directly to consumers through Defendant's website and in retail locations. *Id.* at 9. Plaintiffs are residents of California who purchased Food Kits through the Defendant's website. *Id.* at 11.

B. Allegations Against Defendant

The Complaint alleges that Defendant represents, through its website, packaging and other marketing materials, that the Food Kits will remain usable and sustain consumers for the advertised periods of time. However, it also alleges that the Food Kits contain far less than the necessary amount of calories or nutrients to sustain a person for such periods of time. Compl. ¶ 1. It is alleged that, if a consumer were to use the Food Kits as represented, the consumer "will effectively starve or suffer adverse health effects." *Id.*

C. Procedural Background

This action was initially filed in Riverside Superior Court in February 2017. Dkt. 1-1. It was removed in March 2017, and a scheduling conference was conducted in June 2017. Dkts. 1, 17. The parties "exchanged initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), and engaged in significant discovery." Declaration of Nance F. Becker ("Becker Decl."), Dkt. 40-2 ¶ 8. Plaintiffs propounded and Defendant responded to several requests for the production of documents, interrogatories and requests for admission. *Id.* Plaintiffs also deposed Defendant's person most knowledgeable about marketing and other matters, and Defendant has produced approximately 13,000 pages of documents and summary sales information regarding the number of persons who purchased Food Kits, the means by which such purchases were made, the number of Food Kits sold and the relevant sales prices during the relevant time period. *Id.*

On October 9, 2017, Plaintiffs filed a motion for class certification. Dkt. 24. On November 8, 2017, the

parties stipulated to stay proceedings so that they could engage in settlement efforts. Dkt. 30. On November 29, 2017, an order was issued staying the litigation and any new discovery pending the completion of the mediation that had been scheduled for January 2018. Dkt. 31. On January 16, 2018, the parties conducted a full-day mediation with Judge Dickran Tevrizian (Ret.), which resulted in significant progress toward settlement. Dkt. 32 at 2. The parties conducted another mediation session and filed a notice of agreement to settlement in principle on February 8, 2018. Dkt. 36 at 2. On March 7, 2018, an order was issued granting the parties' stipulation for an extension of the time for Plaintiffs to file a motion for preliminary approval of the settlement agreement, in light of ongoing efforts to finalize certain details. Dkt. 39. On March 30, 2018, Plaintiffs filed the Motion, which is unopposed. Dkt. 40.

III. Terms of Settlement

The Motion includes a detailed summary of the Settlement, a full copy of which was filed concurrently with the Motion. *See* Dkt. 40-2, Ex. 1. These terms are set forth below.

A. Class Definition

The proposed Settlement defines the Settlement Class as:

> All persons who purchased one or more of the following products ("Eligible Products") for shipment to California during the period February 15, 2013 through December 31, 2017:
>
> - 1-Month Emergency Food Supply Box;
> - 56 Serving Breakfast/Entrée Bucket;
> - 84 Serving Grab and Go Bucket;
> - 240 Serving Long Term Food Supply Package;
> - 3-Month Emergency Food Supply Box;
> - 360 Serving Long Term Food Supply Package;
> - 6-Month Emergency Food Supply Box;
> - 720 Serving Long Term Food Supply Package;
> - 1080 Serving Long Term Food Supply Package;
> - 12-Month Emergency Food Supply Box;
> - 1440 Serving Long Term Food Supply Package;
> - 2160 Serving Long Term Food Supply Package;
> - 2880 Serving Long Term Food Supply Package;
> - 4320 Serving Long Term Food Supply Package;
> - Ultimate Emergency Prepper Pack, 1 Month for 2 adults;
> - Ultimate Emergency Prepper Pack, 1 Month for 4 adults;
> - Ultimate Emergency Prepper Pack, 3 Month for 1 adults; or
> - Ultimate Emergency Prepper Pack, 3 Month for 2 adults.

Dkt. 40-2 at 17, 19.

The Settlement Class does not include current and former employees, officers and directors of Defendant and its agents, subsidiaries, parents, successors, predecessors and assigns; and the judge

overseeing this action and his or her immediate family. *Id.* at 19. The sales records attached to the Motion show that there were 21,270 sales of Food Kits during the Class Period. *See* Dkt. 40-2 at 82-87. Thus, the Settlement Class has no more than 21,270 members, and Plaintiffs acknowledge it is likely substantially smaller given that members of the Settlement Class likely made more than one purchase. Dkt. 45 at 2. Plaintiffs have not provided an estimate of the number of Settlement Class Members.

B. Class Period

As set forth above, the Class Period extends from February 15, 2013 through December 31, 2017. Dkt. 40-2 at 19.

C. Payments to Class Members

The Settlement provides for the payment of a 20% cash rebate of the purchase price of each Food Kit purchased by a Class Member during the Class Period. *Id.* at 21. These payments will range from $15 to $1400 per product purchased. Becker Decl. ¶ 10. For customers who purchased a Food Kit directly from Defendant ("Known Customers"), the purchase price shall be the amount charged to that customer, as shown in Defendant's records. *Id.* at 18. For customers who purchased a Food Kit through a retailer or a distributor other than Defendant ("Unknown Customers"), the purchase price shall be the average price charged by Defendant through its website during the year of purchase, adjusted for promotions and discounts. *Id.* at 18-19. It is estimated that Known Customers purchased 78% of Food Kits sold during the Class Period. Becker Decl. ¶ 11; Dkt. 45 at 2-3 (16,562 of Food Kits sold directly by Defendant, through its website or by telephone).

To receive a payment, a Class Member must submit a Claim Form within 75 days of the date upon which Notice is first provided to the Class ("Action Deadline"). Becker Decl., Dkt. 40-2 at 29. Known Customers will be provided a summary of their Food Kit purchases during the Class Period and will only be asked to verify that they are the purchaser as part of the Claim Form. Unknown Customers will be asked to submit a form stating the Food Kits they purchased and to provide supporting receipts or other documentation. The Settlement Administrator will submit bi-weekly reports to Defendant about submitted Claim Forms, and Defendant shall provide the corresponding amount of funds to the Settlement Administrator for immediate disbursement to the Class Members who submitted such forms. *Id.* at 28-29. Any settlement checks not cashed within six months of their issuance will become void, and such funds will be distributed as a *cy pres* award to Public Health Advocates, or another nonprofit organization approved by the Court. *Id.* at 29.

D. Injunctive Relief

The Settlement provides that Defendant shall, within 14 days of the effective date of the Settlement, modify its website and packaging of Food Kits to eliminate the use of any claim, through words, graphics or otherwise, that the Food Kits contain an "X Day" or "X Month" supply. *Id.* at 21. The packaging change is subject to "a soft conversion and sell-through of then-existing products and inventory contained in current [non-compliant] packaging." *Id.* at 21-22. Defendant is not required to destroy any packaging inventory existing on such date. *Id.* at 22. Defendant is permitted to represent that its products contain an "X Day Supply" in the future provided that the daily supply of such products contain at least 2000 calories or another figure consistent with the recommended daily intake adopted

by the U.S. Department of Agriculture. *Id.*

E. Incentive Awards

The Settlement permits each of the two named Plaintiffs to apply to the Court for an incentive award up to $3000. Any such application must be filed at least 14 days prior to the Action Deadline. *Id.* at 30.

F. Release of Claims

The Settlement provides that Plaintiffs and Class Members "shall release and forever discharge any and all direct, individual, or class claims, rights or causes of action or liabilities whatsoever, whether known or unknown, whether accrued or unaccrued, and whether arising under federal, state, local, statutory, common or any other law, rule, or regulation that were or could have been asserted against [Defendant] and its present and former owners, officers, directors, employees, parents, predecessors, successors and assigns . . . predicated upon the facts alleged in the Action." *Id.* at 20. This release does not apply to "claims for personal injuries." *Id.*

G. Exclusion from and Objection to Settlement

The Settlement provides that a Class Member is subject to the terms of the Settlement unless he or she submits a written request for exclusion postmarked on or before the Action Deadline. *Id.* at 30. Any Class Member who does not opt out of the Settlement may object to any portion of the Settlement during the Final Fairness Hearing as long as he or she files a notice of the intention to do so prior to the Action Deadline. *Id.* at 31.

H. Settlement Administration Costs

The Settlement provides that Defendant shall pay to the Settlement Administrator all costs for administering and implementing the Settlement, in an amount not to exceed $110,000. *Id.* at 27-29.

I. Attorney's Fees and Costs

The Settlement provides that Class Counsel is entitled to an award of reasonable attorney's fees and costs for their work on this action. Dkt. 40-2 at 30. The parties have not negotiated a precise amount, or a ceiling. *Id.* Class Counsel shall file a motion seeking such award at least 14 days prior to the Action Deadline.

J. Notice Plan

Within 14 days of the order granting preliminary approval, Defendant shall send to the Settlement Administrator the names, mailing addresses, email addresses and Food Kit purchase history for each of the Known Customers. *Id.* at 26. The Settlement Administrator will then update these addresses through reasonable tracking procedures. *Id.* at 26-27. Within 30 days of the order granting preliminary approval, the Settlement Administrator shall send by U.S. mail the Notice and Claim form to all Known Customers for whom Defendant has provided a mailing address and send by email the Notice and Claim form to all Known Customers for whom Defendant has provided an email address. *Id.* at 27.

Within 30 days of the order granting preliminary approval and continuing for at least 75 days thereafter, the Settlement Administrator shall: (i) design and implement a digital notice campaign structured to reach Class Members, including Unknown Customers, through the use of multiple media channels and targeted advertisements; (ii) design and activate a Settlement Website with contact information for the Settlement Administrator and links to a detailed version of the Notice, the Claim Form and other relevant documents; (iii) cause to be released from Defendant's Twitter account a tweet mentioning the Settlement; and (iv) cause to be placed in a conspicuous location on Defendant's website and Facebook page a summary of the Notice and link to Settlement Website. *Id.* at 28.

IV. Analysis

A. Class Certification

1. Legal Standards

a) Certifying a Class for Purposes of Settlement

The first step in a preliminary approval process is to determine whether a putative class can be certified. "[T]he Ninth Circuit has taught that a district court should not avoid its responsibility to conduct a rigorous analysis because certification is conditional: 'Conditional certification is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of [Rule 23] have been substantially met.'" *Arabian v. Sony Elecs., Inc.*, No. 05-cv-1741-WQH, 2007 WL 627977, at *2 n.3 (S.D. Cal. Feb. 22, 2007) (quoting *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974)). "When, as here, the parties have entered into a settlement agreement before the district court certifies the class, reviewing courts must pay undiluted, even heightened, attention to class certification requirements." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (internal citations omitted).

The existence of a settlement "is relevant to a class certification" analysis:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.

Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 619-20 (1997) (internal citation omitted).

"In the context of a request for settlement-only class certification, the protection of absentee class members takes on heightened importance." *Gallego v. Northland Grp. Inc.*, 814 F.3d 123, 129 (2d Cir. 2016) (citing *Amchem*, 521 U.S. at 620).

b) Class Certification in General

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (internal quotation marks omitted). Under Fed. R. Civ. P. 23, a class may "only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). That "rigorous analysis" will "frequently" include "some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351. "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160.

The first step in establishing the propriety of class certification requires a showing that the proposed class meets each of the prerequisites of Rule 23(a). *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). These are (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)-(4). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350 (emphasis in original).

If these four prerequisites are met, the next issue is whether the proposed class satisfies the requirements of Rule 23(b). *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Here, because the Settlement provides for monetary relief, the parties seek preliminary certification under Rule 23(b)(3). This provision requires that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that class resolution "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

2. Application

a) Rule 23(a) Requirements

(1) Numerosity

Rule 23(a)(1) requires that a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Impracticability does not mean impossibility, but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (internal quotation marks and citation omitted). In general, courts have found that a class of at least 40 members meets this requirement. *See Rannis v. Recchia*, 380 Fed Appx. 646, 651 (9th Cir. 2010). Defendant has admitted that there are more than 100 Class Members. Dkt 1 at 4. Further, that 21,270 Food Kits were sold during the Class Period supports the inference that there are far more than 40 Class Members. *See* Becker Decl. ¶ 10; Dkt. 45 at 1-3. Therefore, the numerosity requirement is satisfied.

(2) Commonality

Rule 23(a)(2) provides that a class may be certified only if "there are questions of law or fact common

to the class." Commonality requires a showing that the "class members have suffered the same injury" and "does not mean merely that they have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 350 (internal quotation marks omitted). The class claims must "depend on a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In measuring commonality, "even a single common question will do." *Dukes*, 564 U.S. at 359 (internal quotation marks omitted). Commonality is satisfied where the action challenges "a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

The challenge raised in this action is based upon Defendant's representations about the quantity and quality of the food contained in the Food Kits. Plaintiffs contend that common questions exist as to whether Defendant's website and product packaging contained deceptive statements and/or omissions about the quantity and quality of food in Food Kits, whether such representations would be material to the reasonable consumer deciding whether to purchase a Food Kit, and whether the Class Members have been harmed.

Plaintiffs also contend that all Class Members have suffered the same injury through the purchase of a Food Kit that contained fewer calories and nutrients than had been represented. It is undisputed that the number of servings, calories and nutrients in each Food Kit was the same throughout the Class Period. Dkt. 40-2 at 112. It is also undisputed that certain representations on Defendant's website as to how long Food Kits would remain fresh and usable were consistent throughout the Class Period. *Id.* Although the caloric and nutritional needs may vary among Class Members, such differences are not sufficient to require individualized inquiries in this action. Commonality does not require "that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact," class treatment of which will "generate common answers apt to drive the resolution of the litigation." *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (internal citations omitted).

For these reasons, the commonality requirement is satisfied.

(3) Typicality

The typicality requirement is met if the "representative claims are 'typical,'" *i.e.*, "if they are reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. Representative claims "need not be substantially identical." *Id.* The test of typicality is whether "other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508.

The commonality and typicality requirements of Rule 23(a) tend to merge. *See Dukes*, 564 U.S. at 349 n.5. Accordingly, whether the claims are sufficiently typical presents similar issues to those discussed above. Here, the claims of Miller and Borneman are typical of those of the Class, because each was exposed to the same allegedly misleading marketing and is alleged to have suffered the same type of

injury as a result. Further, typicality is present even when putative class members suffered different degrees of injury. *See Armstrong*, 275 at F.3d at 869.

For these reasons, the typicality requirement is satisfied.

(4) Adequacy of Lead Plaintiff and Class Counsel

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

Miller and Borneman each purchased Food Kits from Defendant through its website. Proposed Class Counsel includes Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP, Michael D. Braun of the Braun Law Group, P.C., and Andrew Kierstead of the Law Offices of Andrew Kierstead. Plaintiffs assert that there is no antagonism between their interests and those of the proposed Class. They contend that they are seeking the largest possible recovery for the Class and that their recovery is not antagonistic to this shared goal. They further contend that they seek to protect other consumers from Defendant's deceptive advertising.

The Settlement provides for monetary relief of between $15 and $1400 for each Food Kit purchased by members of the Class. Class Counsel are permitted to seek an award of reasonable attorney's fees, but the amount awarded will not affect the amount of the recovery for Class Members. Nor is the support of Class Counsel for the settlement conditioned on the award of attorney's fees and costs. Dkt. 40-2 at 30.[1] The Settlement also provides that Plaintiffs may apply for incentive rewards of $3000.[2] However, Plaintiffs' support for the Settlement is not conditioned upon the approval of such awards. *Id.* Although the incentive awards are disproportionate to the monetary payments to be received by many Class Members, they are not so disproportionate to warrant a finding that Plaintiffs and counsel are not adequate representatives. *Cf. Staton*, 327 F.3d at 975-78 (rejecting incentive awards to 29 class representatives of up to $50,000 each). Such concerns are more appropriately addressed in the context of the fairness of the Settlement. *See id.* at 958 ("Although we later question whether the settlement agreement . . . was the result of disinterested representation, that question is better dealt with as part of the substantive review of the settlement than under the Rule 23(a) inquiry. Otherwise, the preliminary class certification issue can subsume the substantive review of the class action settlement.").

Therefore, the adequacy of representation requirement is satisfied.

* * *

[1] Documentation filed in support of the Motion states that Class Counsel seek fees of $611,642.50, based in part on the 850.2 combined, total hours they spent on this litigation. Dkt. 46 at 4-9.

[2] Documentation filed in support of the Motion states that Miller has spent 22 hours in his role in this action, and that Borneman has spent 27 hours. Dkt. 46 at 9.

For the reasons stated above, the requirements of Fed. R. Civ. P. 23(a) are satisfied.

b) Rule 23(b)(3) Requirements

(1) Predominance

Before certifying a class under Rule 23(b)(3), a court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. The predominance analysis assumes that the Rule 23(a)(2) commonality requirement has already been established. *See Hanlon*, 150 F.3d at 1022 ("[T]he presence of commonality alone is not sufficient to fulfil Rule 23(b)(3) . . . [which instead] focuses on the relationship between the common and individual issues."). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal citations and quotation marks omitted). Where the issues of a case "require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001).

Common questions are presented as to whether Defendant's representations as to the quantity and quality of the Food Kits, through its website and other marketing, were misleading and harmed purchasers. These questions predominate over any individual issues that have been presented, and do not turn on an assessment of individual facts. Although awards to claimants will be calculated based on the number of Food Kits purchased and the price of such items at the time of purchase, "damage calculations alone cannot defeat certification," even if individual issues predominate. *Levya v. Medline Indus. Inc*., 716 F.3d 510, 513 (9th Cir. 2013); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167-68 (9th Cir. 2014). "[A]s long as an efficient mechanism exists to calculate damages on a class-wide basis, the existence of potential individualized damages will not defeat the predominance requirement." *Aichele v. City of Los Angeles*, 314 F.R.D. 478, 496 (C.D. Cal. 2013). Such a mechanism has been proposed here.

For the foregoing reasons, the predominance requirement is satisfied.

(2) Superiority

Rule 23(b)(3) also requires a showing that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Matters pertinent to this issue include: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.*

Here, the class action is superior to individual actions. The class members may not have an incentive to

bring individual actions due to the relatively small amount of recovery they could obtain, *i.e*, as little as $15 for certain purchases. *Amchem Prods*., 521 U.S. at 617 (internal quotation marks and citation omitted) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . . . A class action solves this problem . . . ."). Under the Settlement, calculating damages will be straightforward. Consequently, judicial economy will be served by class certification. The alternative could be hundreds of individual actions. Further, there will be no difficulties in managing the class action because, by requesting approval of a settlement, the parties are proposing "that there be no trial." *Id.* at 620.

For the foregoing reasons, the superiority requirement is satisfied. Further, the Motion to certify the Class, for purposes of settlement only, is provisionally **GRANTED**.

B. Preliminary Approval of Settlement Award

1. Legal Standards

Fed. R. Civ. P. 23(e) requires a two-step process in considering whether to approve the settlement of a class action. First, in the preliminary approval process, a court must make a preliminary determination whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003)). In the second step, which occurs after preliminary approval, notification to class members, and the compilation of information as to any objections by class members, a court determines whether final approval of the settlement should be granted by applying several criteria.

At the preliminary stage, "the settlement need only be potentially fair." *Id.* This is due, in part, to the policy preference for settlement, particularly in the context of complex class action litigation. *See Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . .").

As the Ninth Circuit has observed:

> the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Id.

In evaluating fairness, a court must consider "the fairness of a settlement as a whole, rather than assessing its individual components." *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012). A court is to consider and evaluate several factors as part of its assessment of a proposed settlement. The following non-exclusive factors are among those that may be considered during both the preliminary and final approval processes:

(1) the strength of the plaintiff's case;
(2) the risk, expense, complexity, and likely duration of further litigation;
(3) the amount offered in settlement;
(4) the extent of discovery completed and the stage of the proceedings;
(5) the experience and views of counsel;
(6) any evidence of collusion between the parties; and
(7) the reaction of the class members to the proposed settlement.

See In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458-60 (9th Cir. 2000).

Each factor does not necessarily apply to every class action settlement, and other factors may be considered. For example, courts often consider whether the settlement is the product of arms-length negotiations. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."). As noted, in determining whether preliminary approval is warranted, a court is to decide whether the proposed settlement has the potential to be deemed fair, reasonable and adequate in the final approval process.

2. Application

a) Strength of Plaintiffs' Case and the Risks and Expense of Further Litigation

Plaintiffs have advanced theories of liability against Defendant due to its alleged violations of California consumer protection laws. These arise from alleged misrepresentations as to the quantity and quality of food in its Food Kits. Defendant has contested liability. It contends that its marketing materials do not represent that the Food Kits are sufficient to sustain a user for a certain period of time. Dkt. 40-1 at 12. It further argues that its nutritional labels are truthful, which bars the present claims. *Id.* Defendant previously argued that class certification is unwarranted. Thus, it argued that, because the nutritional needs of consumers vary by gender, age and activity level, individualized inquiries would be necessary if the matter were to proceed on the merits.

Due to these defenses, Plaintiffs had to reflect on the value of their claims, including as to the likelihood of success. "Both parties, represented by experienced class action counsel, believe that the Settlement is fair, reasonable, and in the interests of the members of the proposed Settlement Class." Dkt. 40-1 at 8.

When assessing the fairness of a proposed class action settlement in light of the risks of continued litigation, a court is not to "reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice*, 688 F.2d at 625. "Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Id.* (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974)).

There are significant issues as to whether Plaintiffs would ultimately prevail on their claims if this litigation were to proceed on the merits. No class had been certified when the settlement was entered.

Discovery had not yet concluded. Defendant may have planned to bring a motion for summary judgment.

Accordingly, this factor weighs in favor of preliminary approval of the settlement.

b) Amount Offered in Settlement

The Settlement provides for monetary and injunctive relief. Under the Settlement, Class Members will have the opportunity to recover cash rebates on more than 21,000 purchases of Food Kits, in amounts ranging from $15 to $1400 depending on the cost of the Food Kits that were purchased. The parties do not provide an estimate of Defendant's possible exposure at trial. However, attached to the Settlement is a table setting forth the number of purchases of each type of Food Kit and the corresponding purchase price during the Class Period. Dkt. 40-2, Ex. E; *see* Dkt. 45 at 2-3 (clarifying that these figures include Food Kits sold directly by Defendant and indirectly through retailers). This table shows that 2283 Food Kits were sold in 2013 at an average price of $379.05, 3846 Food Kits were sold in 2014 at an average price of $357.14, 5177 Food Kits were sold in 2015 at an average price of $330.84, 6833 Food Kits were sold in 2016 at an average price of $276.46 and 3133 Food Kits were sold in 2017 at an average price of $345.56. Dkt. 40-2, Ex. E. These sales total $6,923,422.69. Thus, if claims were timely submitted for all such sales, Defendant would pay cash rebates totaling $1,384,684.54 to the Class.

A significant percentage of these items cost several hundred dollars or more, and only a small percentage of such purchases were less than $100. *Id.* Thus, it appears that many Class Members will have the opportunity to obtain a significant recovery. Although there is no basis to conclude that all members of the Class will submit claims, this amount is significant. That the relief is in the form of cash, and not a coupon or discount for a future purchase, adds further support to this conclusion.

It is "well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625; *see also Hanlon*, 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question [to be] address[ed] is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."). An analysis of what constitutes a fair settlement must also be "tempered by factors such as the risk of losing at trial, the expense of [continuing to] litigat[e] the case, and the expected delay in recovery (often measured in years)." *In re Toys R Us Delaware, Inc. – Fair & Accurate Credit Transactions Act (FACTA) Litig.,* 295 F.R.D. 438, 453 (C.D. Cal. 2014).

Had the litigation proceeded, there was a risk of no recovery. Moreover, the 20% of purchase price cash rebates provided by the Settlement likely represents more than a "fraction" of the total realistic value of the claims, particularly in light of the strength of certain of Defendant's defenses. Further, the Settlement provides certain injunctive relief that will benefit Class Members and other prospective purchasers in the future.

Viewed collectively, these considerations support the conclusion that the overall amount offered in the Settlement is reasonable. Therefore, this factor weighs in favor of preliminary approval.

c) Extent of Discovery Completed and the Stage of Proceedings

"The extent of the discovery conducted to date and the stage of the litigation are both indicators of [Class] Counsel's familiarity with the case and of Plaintiffs having enough information to make informed decisions." *In re Omnivision Techs., Inc.* 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008); *see also Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.").

This matter was litigated for about a year. Plaintiffs filed a motion for class certification in October 2017, which included supporting declarations from experts in diet, consumer advertising, marketing and forensic accounting. The parties have engaged in significant discovery, including Defendant's responses to requests for production, interrogatories and requests for admission, the deposition of Defendant's person most knowledgeable about marketing and other matters, and the production of approximately 13,000 pages of documents and summary sales information. Becker Decl. ¶ 8. Thus, there is evidence that Plaintiffs and counsel are familiar with the issues at hand and have developed a reasonable understanding of the legal and factual issues. Further, the Settlement was reached after two mediation sessions with a well-respected neutral. *See Satchell v. Fed. Exp. Corp.*, No. 03-CV-2659-SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.").

For these reasons, this factor weighs in favor of preliminary approval.

d) Experience and Views of Counsel

In the context of class action settlement approval, "[g]reat weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *DIRECTV*, 221 F.R.D. at 528; *see also Betancourt v. Advantage Human Resourcing, Inc.*, No. 14-cv-1788-JST, 2016 WL 344532, at *6 (N.D. Cal. Jan. 28, 2016) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.") (quoting *Omnivision*, 559 F. Supp. 2d at 1043).

Plaintiffs have submitted evidence that proposed Class Counsel is experienced in litigating similar class action claims. Becker Decl. ¶¶ 15-26; Ex. 5 (Chavez & Gertler LLP firm resume); Ex. 6 (Braun Law Group, P.C. firm resume); Ex. 7 (Andrew Kierstead biography). Counsel declares that the "Settlement achieves an excellent result for the Settlement Class, especially when measured against the time and expense necessary to prosecute the Action through trial; the uncertainty of outcome at trial; the potential for lengthy appeals; the possibility that class certification could be denied; and the risk of Wise filing a successful motion for summary judgment." Becker Decl. ¶ 13.

For these reasons, this factor weighs in favor of preliminary approval.

e) Evidence of Collusion Between Parties

The Ninth Circuit has recognized that deference to an agreement entered by the parties may be appropriate. *Rodriguez*, 563 F.3d at 965 ("This circuit has long deferred to the private consensual

decision of the parties."). However, the reviewing court is to consider whether the negotiations that led to the settlement were fair. The Ninth Circuit has identified three factors that may raise concerns of tacit collusion in proposed class action settlements: (1) "when counsel receive[s] a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded"; (2) "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorney's fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class"; and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund[.]" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

None of these concerns applies here. Thus, this factor weighs in favor of preliminary approval.

* * *

A consideration of the applicable factors demonstrates that the Settlement is sufficiently fair, reasonable and adequate to warrant preliminary approval. Accordingly, the Motion is **GRANTED** as to the request that the Settlement be preliminarily approved.

C. Class Representatives and Class Counsel

The Motion seeks preliminary approval of the appointment of Miller and Borneman as Class Representatives. It has been determined that Miller and Borneman each can fairly and adequately represent the interests of the Class. Further, the parties have submitted sufficient evidence that the settlement negotiations were conducted at arm's length, without any collusion and under the direction of an experienced neutral. Therefore, the Motion is **GRANTED** as to the appointment of Miller and Borneman as Class Representatives.

The Motion also seeks preliminary designation of Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP, Michael D. Braun of the Braun Law Group, P.C., and Andrew Kierstead of the Law Offices of Andrew Kierstead as Class Counsel. The Declaration of Nancy F. Becker provides evidence that counsel have been satisfactory advocates who have litigated the claims, and are experienced in handling class actions. This evidence also shows that they are likely to continue to be committed to the Class. Therefore, it is appropriate to conclude that they have, and will continue to represent the interests of the Class in a fair and effective manner.

Therefore, the Motion is **GRANTED** as to the designation of Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP, Michael D. Braun of the Braun Law Group, P.C., and Andrew Kierstead of the Law Offices of Andrew Kierstead as Class Counsel.

D. Proposed Plan for Class Notice

Fed. R. Civ. P. 23(c)(2) requires that "the court . . . direct to class members the best notice that is practicable under the circumstances." "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza*

v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352 (9th Cir. 1980)).

The Settlement provides that approximately 78% of Class Members will receive notice of the Settlement through postal mail and/or email. For Known Customers with a known mailing address, the Settlement Administrator will send a Mailed Notice (Dkt. 40-2, Ex. B-1) and Claim Form (Dkt. 40-2, Ex. A). For Known Customers with a known email address, the Settlement Administrator will electronically send an Email Notice (Dkt. 40-2, Ex. B-2), which includes a link to a more Detailed Notice (Dkt. 40-2, Ex. B-5) and the Claim Form. Known Customers will be provided with the contact information for the Settlement Administrator, their purchase history and the amount of their Settlement payment. They will have 75 days from the issuance of the notice to return their Claim Form or object to or opt out of the Settlement. The Settlement Administrator will design and implement a robust digital notice campaign to reach Class Members, including Unknown Customers. Defendant's website and social media pages will feature prominent notices, with links to the Settlement Website managed by the Settlement Administrator. These proposed documents and procedures satisfy the requirements of Fed. R. Civ. P. 23(c)(2). The Motion is **GRANTED** as to the approval of the notice plan.

E. Appointment of Settlement Administrator

The Motion seeks appointment of KCC as the Settlement Administrator. The Motion is **GRANTED** as to this request.

V. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED**. A Final Fairness Hearing is set for May 6, 2019 at 8:30 a.m., at which time the Court will determine whether the Settlement should be finally approved and review any objections to the Settlement, and, if filed, Plaintiffs' motion for attorney's fees and costs and motion for incentive awards. The motion(s) shall be filed no later than March 25, 2019.

IT IS SO ORDERED.

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Initials of Preparer ak