Alan R. Plutzik (State Bar No. 77785)
Michael S. Strimling (State Bar No. 96135)
BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER LLP
2125 Oak Grove Road
Walnut Creek, CA 94598
Telephone: (925) 945-0200
Facsimile: (925) 945-8792
aplutzik@bramsonplutzik.com
mstrimling@bramsonplutzik.com

Mark P. Kindall (State Bar No. 138703)
Robert A. Izard (*Admitted pro hac vice*)
IZARD, KINDALL & RAABE, LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Telephone: (860) 493-6292
Facsimile: (860) 493-6290
mkindall@ikrlaw.com
rizard@ikrlaw.com

Attorneys for Plaintiffs
[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ALBA MORALES; LAINIE COHEN; LINDA CLAYMAN; and KENNETH DREW, on behalf of themselves and others similarly situated, Plaintiffs, vs. CONOPCO INC., d/b/a UNILEVER, Defendant.	CIV. NO. 2:13-cv-2213 WBS EFB **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: October 17, 2016 Time: 1:30 p.m. Courtroom 5, 14th Floor Hon. William B. Shubb

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 17, 2016 at 1:30 p.m., or as soon thereafter as the matter may be heard by the Court, located at 501 I Street, Sacramento, California, 95814, Courtroom 5, 14th Floor, in the courtroom of the Honorable William B. Shubb, Plaintiffs will move pursuant to Fed. R. Civ. P. 23(e) for the Court to: (1) certify the Class; (2) approve the named Plaintiffs as class representatives, Izard, Kindall & Raabe, LLP ("IKR") as Class Counsel, and Bramson, Plutzik, Mahler and Birkhaeuser, LLP ("BPM&B") as Liaison Counsel for the class; (3) approve the parties' Settlement; and (4) approve the Plan of Allocation.

Approval of the proposed Settlement and Plan of Allocation is proper because each requirement of Fed. R. Civ. P. 23(e) has been met, and certification of the proposed Class is proper pursuant to the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3).

The Motion is based on the accompanying Declarations of Mark Kindall ("Kindall Decl.") and Alan Plutzik and the Exhibits attached thereto, the attached Memorandum of Law, the pleadings and papers on file in this case and any other written and oral arguments that may be presented to the Court.

Dated: September 12, 2016

Respectfully submitted,

By: /s/ Mark P. Kindall
Mark P. Kindall (State Bar No. 138703)
Robert A. Izard (admitted *pro hac vice)*
IZARD, KINDALL & RAABE, LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Telephone: (860) 493-6292
Facsimile: (860) 493-6290
mkindall@ikrlaw.com
rizard@ikrlaw.com

Alan R. Plutzik (State Bar No. 77785)
BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER LLP
2125 Oak Grove Road
Walnut Creek, CA 94598
Telephone: (925) 945-0200
Facsimile: (925) 945-8792
aplutzik@bramsonplutzik.com

Joseph J. DePalma (admitted *pro hac vice)*
Katrina Carroll (admitted *pro hac vice*)
LITE DEPALMA GREENBERG, LLC
Two Gateway Center, 12th Floor
Newark, New Jersey 07102
Telephone: (973) 623-3000
Facsimile: (973) 623-0858
jdepalma@litedepalma.com
kcarroll@litedepalma.com

Nicole A. Veno (admitted *pro hac vice)*
LAW OFFICE OF NICOLE VENO
573 Hopmeadow Street
Simsbury, CT 06070
Telephone: (860) 474-4024
Facsimile: (860) 717-3207
nveno@venolaw.com

Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION

Plaintiff Alba Morales, Kenneth Drew, Lainie Cohen and Linda Clayman ("Plaintiffs") brought this class action in 2013 to challenge the sale of hair care products (the "Products") that Defendant Conopco, Inc., d/b/a Unilever ("Defendant") labeled "TRESemmé Naturals" even though they contain numerous synthetic ingredients. Plaintiffs sought injunctive relief and damages for purchasers of the Products. In December of last year, in response to this litigation, Defendant discontinued the sale of the Products. In February of this year, the Parties reached agreement to settle the damages claims on behalf of all purchasers of the Products in the United States for $3.25 million. As set forth more fully below, this is a very good result for the Class and merits court approval.

Plaintiffs and their counsel believe that the Settlement is the best way to resolve all claims concerning Defendant's nationwide labeling and sale of the Products as "naturals." Accordingly, Plaintiffs request that the Court certify the class, confirm the appointments of class representatives and counsel, and approve both the Settlement and the Plan of Allocation.

II. BACKGROUND FACTS AND DETAILS OF SETTLEMENT

A. Litigation History

Defendant manufactured and sold the Products across the United States. On October 22, 2013, Plaintiffs filed their Complaint alleging violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq. and Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq.*, Massachusetts' Consumer Protection Act, Mass. Gen. Laws Ann. ch. 93A, and various other state consumer protection laws. *See* ECF No. 1. On December 3, 2013, Plaintiffs filed their First Amended Complaint, alleging the same causes of action with minor changes to the various other state consumer protection laws. *See* ECF No. 8. Defendant moved to dismiss on January 14, 2014. *See* ECF No. 14.

On April 9, 2014, the Court granted in part and denied in part Defendant's Motion to Dismiss, upholding Plaintiffs' claims under the laws of California and Massachusetts, and dismissing Plaintiffs' claims under the laws of states for which there was no representative named plaintiff. *See*

ECF No. 27. On April 30, 2014, Plaintiffs filed their Second Amended Complaint, which added Linda Clayman and Kenneth Drew as Plaintiffs and added claims under the Florida Deceptive and Unfair Trade Practices Act, F.S.A. § 501.201, *et seq.* and the New York General Business Law § 349. *See* ECF No. 31. Defendant filed its answer to Plaintiffs' Second Amended Complaint on May 29, 2014. *See* ECF No. 37.

From June 2014 until May 2015, the Parties engaged in extensive discovery. This included Plaintiffs' counsel's review and analysis of nearly a quarter million pages of documents produced by the Defendant, the depositions of several key witnesses concerning Defendant's marketing and the Products' ingredients, and Defendant's depositions of Mr. Drew, Ms. Cohen and Ms. Morales. *See* Kindall Decl. at ¶¶ 6-7. Plaintiffs also retained an expert to develop their damages model. *Id*. at ¶ 9.

On June 15, 2015, the Parties participated in a mediation before Jonathan Marks, a nationally renowned and respected mediator based in Bethesda, Maryland. The Parties were not able to reach an agreement during the first mediation session or during follow-up discussions, and thereafter continued to litigate the case. The Parties recommenced settlement discussions in January of 2016 with Mr. Marks again serving as a mediator. After a month of back-and-forth proposals and counter-proposals, Mr. Marks made a mediator's proposal: a $3.25 million settlement to the Class. Both sides accepted Mr. Marks' recommendation on February 5, 2016. *Id*. at ¶¶ 9-11.

Negotiation of the final terms of the Settlement Agreement, and reducing those terms to writing, took almost three months after agreement had been reached in principle. The Parties signed the Settlement Agreement on May 27, 2016, and submitted it to the Court for Preliminary Approval on the same day. ECF No. 57. The Court held a hearing on the Motion for Preliminary Approval on July 11, 2016 and granted the motion by Order the next day. Preliminary Approval Order, ECF No. 63. On July 12, 2016, the Parties requested certain modifications to the schedule set out in the Order (ECF No. 64), which the Court granted on July 14, 2016. ECF No. 65.

B. The Proposed Settlement

For purposes of the Settlement only, Defendant has stipulated to certification of a nationwide class.[1] *See* Settlement Agreement ("SA"), ¶¶ 1(j) and 44, attached to the Kindall Declaration as Exhibit 1. The Settlement defines the Class as:

> All individuals in the United States who purchased the following TRESemmé Naturals products: (a) Nourishing Moisture Shampoo; (b) Nourishing Moisture Conditioner; (c) Radiant Volume Shampoo; (d) Radiant Volume Conditioner (e) Vibrantly Smooth Shampoo; and (f) Vibrantly Smooth Conditioner (collectively, the "Products"). Specifically excluded from the Class are (1) Defendant, (2) the officers, directors, or employees of Defendant and their immediate family members, (3) any entity in which Defendant has a controlling interest, (4) any affiliate, legal representative, heir, or assign of Defendant, (5) all federal court judges who have presided over this Action and their immediate family members (6) all persons who submit a valid request for exclusion from the Class and (7) those who purchased the Products for the purpose of resale.

Id., ¶1(j).

Under the Settlement, Defendant will contribute $3.25 million to a "Settlement Fund" which will be used to settle the Class claims. After payment of notice and administration costs and attorneys' fees and expenses in an amount to be determined by the Court, this common Settlement Fund will be used to compensate Class Members for each of the Products they purchased during the Class Period. Class Members who properly and timely submit the Claim Form may recover for purchases of up to ten (10) bottles of the Products per household without the need to submit additional proof of purchase, and for more than ten bottles if they submit adequate proofs of purchase. In exchange for these benefits, Class Members will release Defendant from any and all claims "arising out of related to the product representations complained of in this Action." *Id.*, ¶ 16. Any amounts remaining in the Settlement Fund after all claims have been paid will be distributed to an appropriate non-profit or civic entity for use in a manner that the Court determines to be an appropriate vehicle to provide the next best use of compensation to Class Members. *Id.*, ¶ 25(f) and 43. No funds will be returned to Defendant.

[1] If the Settlement does not receive Court approval, this stipulation is void and the Parties will continue to litigate the case. *See* SA, ¶ 44.

The Settlement also provides that Plaintiffs' counsel, upon being appointed by this Court as counsel for the Class, may submit an application to the Court for an award of attorneys' fees, not to exceed thirty percent (30%) of the Settlement Fund, as well as reimbursement of costs and expenses incurred in litigating the case. *Id.*, ¶ 56. Furthermore, Defendant agreed not to oppose application of an award to compensate each of the Plaintiffs for their service as a Class Representative in an amount not to exceed $15,000 collectively, to be determined by the Court. Any amount paid to the Plaintiffs for their service will be paid by the Defendant directly and will be not be paid from the $3.25 million Settlement Fund. *Id.*, ¶ 60.

C. Notice and Reaction of the Class

Because Defendant does not have any records that would identify consumers who bought the Products, Plaintiffs proposed several different methods to ensure that the Class received the best notice of the Settlement that was practicable under the circumstances. Plaintiffs retained KCC Class Action Services ("KCC") to assist in the crafting and – with the Court's approval – execution of a robust notice plan. KCC's plan was described in the Declaration of Daniel Burke and submitted in support of the Motion for Preliminary Approval (ECF No.57-3), and was approved by the Court in the Preliminary Approval Order. ECF No. 63, at 13-15.

In accordance with the Notice Plan approved by the Court, KCC worked with Class Counsel to create a dedicated settlement website containing all pertinent information about the Settlement, where class members could obtain key documents (including the Complaint, the Court's ruling on the Motion to Dismiss, the Settlement Agreement, the Plan of Allocation, the Notice of Settlement and the Preliminary Approval Order), as well as having the ability to submit an on-line claim form. KCC also established a toll-free line for class members to obtain additional information. Both the website and the toll-free number were launched on July 25, 2016. Declaration of Jay Geraci ("Geraci Decl."), attached to the Kindall Declaration as Exhibit 2, at ¶ 5.

Next, KCC launched an internet advertising campaign using over 150 million "banner" impressions that appeared on websites over a period of approximately one month. The impressions were targeted to adults over the age of 18 and – consistent with the demographic data KCC gathered

on customers for the Products – approximately two thirds of the impressions were targeted to women over 18. *Id.*, ¶ 6. The internet media campaign launched on July 28, 2016 and only recently concluded. *Id.* at ¶¶ 6-8. Additionally, KCC placed a class notice in the August 22, 2016 edition of *People's Magazine,* and in the July 26, August 2, August 9 and August 16 editions of the Sacramento *Bee*. *Id.* at ¶¶ 7-8.

Response to date has been substantial. Over 137,000 claims have been filed as of the date of this notice, with the total aggregate value of $5.6 million. *Id.* at ¶¶ 11, 16. Class members have until September 29, 2016 to opt out of the Settlement or file an objection to it. As of the date of this filing, only one class member has opted out of the Settlement (*Id.* at ¶ 13), which, as discussed below, may have been because he initially filed a claim in error before realizing that he had not purchased any of the subject Products. Furthermore, the court docket indicates that no Class Members have objected as of the date of this filing.

III. ARGUMENT

A. The Court Should Certify the Class

Plaintiffs request certification of a nationwide class of consumers – people who purchased the Products for their own use rather than resale.[2] A class action will only be certified if it meets the four requirements in Rule 23(a) and also fits within one of the three subdivisions in Rule 23(b). *See Omtiveros v. Zamora*, Case No. 2:08-CV-567 WBS, 2014 WL 3057506, at *4 (E.D. Cal. July 7, 2014) (Shubb, J.); Fed. R. Civ. P. 23(a)-(b). While a court has discretion in determining if the

[2] As discussed more fully in Plaintiffs' Preliminary Approval Brief, certification of a nationwide class is appropriate under the Supreme Court's decision in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985) ("*Shutts"*), because the class was provided with notice and opportunity to be heard or to opt out of the settlement altogether. Moreover, California has the contacts or aggregation of contacts with the claims asserted by the class. *Id.* at 818; *see also Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 589 (9th Cir. 2012) (quoting *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1080 (Cal. 2001). During the Class Period, Defendant manufactured TRESemmé products in California and a substantial portion of the products were sold in California. Kindall Decl. at ¶¶ 20, 21. In the most recent full year for which data are available, 2015, approximately nine percent of Defendant's nationwide sales of the Products were in the San Francisco and Los Angeles markets alone, and more than seventeen percent of Defendant's nationwide sales of the Products were in the California, Oregon and Washington markets. *Id.* at ¶ 21.

moving party has satisfied each Rule 23 requirements, the court must conduct a rigorous inquiry before certifying the class. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

1. Rule 23(a) Requirements are Met

a. Numerosity

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Often, a large number of class members by itself establishes the impracticability of joining them as plaintiffs. *See Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982). "A proposed class of at least forty members presumptively satisfies the numerosity requirement." *Avilez v. Pinkerton Gov't Services*, 286 F.R.D. 450, 456 (C.D. Cal. 2012); *see also Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 300 (E.D. Cal. 2011) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members.").

The numerosity requirement is easily met here. With over 20 million Products sold, the number of class members is easily in the hundreds of thousands. *See* Kindall Decl. at ¶ 21. Joinder of everyone who purchased the Products is impractical if not impossible. *See, e.g., Kirchner v. Shred-It USA, Inc.*, Case No. 2:14-1437 WBS, 2015 WL 1499115, *3 (E.D. Cal. March 31, 2015) (Shubb, J.).

b. Commonality

Commonality requires that there be common questions of law or fact. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). This requirement is construed permissively and is "less rigorous than the companion requirements of Rule 23(b)(3)." *Id.* For there to commonality, there does not have to be "complete congruence" of common issues – even one is sufficient. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010); *see also* 4 Albert Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS, ("Newberg") § 3.10 (4th ed. 2002) (the commonality standard is "easily met" for most settlement classes).

There are many common issues to satisfy this requirement. They include: (1) whether the Products labels were likely to deceive reasonable consumers; (2) whether Defendant engaged in

unfair, deceptive or lawful business practices when marketing the Products; (3) the amount of revenue and profit Defendant received as a result of such alleged wrongdoing; (4) the amount of the price premium associated with Defendant's allegedly false advertising; and (5) whether Class Members are entitled to damages. *See* ECF No. 31 and Kindall Decl., generally.

Courts in the Ninth Circuit have repeatedly found commonality in cases in which deceptive advertising on product labels is alleged. *See, e.g., Zeisel v. Diamond Foods, Inc.*, Case No. CV-10-01192 JSW, 2011 WL 2221113, at *7 (N.D. Cal. June 7, 2011) (commonality requirement met where "class was exposed to the same misleading and misbranded labels"); *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) (commonality where the issue was "whether the [product] packaging and marketing materials are unlawful, unfair, deceptive or misleading to a reasonable consumer"); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 589 (C.D. Cal. 2011) (commonality where "Plaintiff alleges a single misrepresentation [on a product's packaging] that was made identically to all potential class members"). Like the class members in *Zeisel*, *Chavez* and *Delarosa*, the Class was subject to the same allegedly misleading representations concerning a consumer product. The Defendant's advertisements and Products' labels create common issues among members of the Class to satisfy Rule 23(a)(2).

c. Typicality

Typicality requires that named plaintiffs have claims "reasonable coextensive with those of absent class members, but their claims do not have to be "substantially identical." *Hanlon*, 150 F.3d at 1020. The test for 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 v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Plaintiffs' allegations in their Second Amended Complaint are equally applicable to all Class Members. Plaintiffs allege that they paid a premium for the Products over comparable shampoos and conditioners that did not purport to be "natural." *See* ECF No. 31 at ¶¶ 6-9. Other Class Members would have paid the same alleged premium. This weighs in favor of the typicality

requirement being met. *See, e.g., Ebarle v. Lifelock, Inc.*, Case No. 15-CV-00258 HSG, 2016 WL 234364 (C.D. Cal. Jan. 20, 2016) (finding named plaintiffs' claims were typical to those of proposed class because they all purchased defendant's products and subject to the same allegedly false advertising).

d. Adequacy of Representation

The court makes two inquires to resolve the question of 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. These questions involve consideration of a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees and the unlikelihood that the suit is collusive." *Brown v. Ticor Title Ins.*, 982 F.2d 386, 390 (9th Cir. 1992).

Under the first inquiry, Plaintiffs' interests are aligned with those of the Class. The Class includes all individuals in the United States who purchased the Products during a defined period and who, therefore, suffered the same alleged injury as the Plaintiffs. *See* SA, ¶ 1(j). There is no discrimination among members of the Class in the Settlement. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-6 (1997) ("[A] class representative must be part of the class and possess the same interest and suffer the same alleged injury as the class members."). Under the Settlement, payments to members of the Class will be based on how many bottles of the Products they purchased. *See* SA, ¶ 29 and Plan of Allocation, attached to the SA as Exh. A.[3]

[3] The proposed incentive payments to the Plaintiffs do not create any sort of conflict. First and foremost, they are entirely discretionary with the Court and the settlement is in no way contingent upon Plaintiffs receiving anything. *See* SA, ¶ 61. Moreover, the requests are tailored to the amount of time and effort required of each Plaintiff over the course of the three-year litigation. All of the Plaintiffs reviewed Court filings, responded to discovery requests, consulted regularly with counsel, and discussed and approved settlement proposals with counsel. In addition, Plaintiffs Kenneth Drew and Lainie Cohen were each deposed relatively close to their homes, while Plaintiff Alba Morales had to fly across country to be deposed in New York City, ultimately losing three days of work. Plaintiffs' requests – $1000 for Ms. Clayman, $6000 for Ms. Morales, and $4000 each for Mr. Drew and Ms. Cohen – reflect these differences. Courts have found larger awards to be entirely reasonable and no impediment to approval of a settlement or certification of a settlement class. *See e.g., Hopson v. Hanesbrands, Inc.*, Civ. No. 08-08444 EDL, 2009 WL 928133 at *10 (N.D. Cal. Apr. 3, 2009) ("In general, courts have found that $5,000 incentive payments are reasonable."); *see also Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 300 (N.D. Cal. 1995) (incentive award of $50,000 to

In the second prong of the adequacy inquiry, the court examines the vigor in which the named plaintiff and her counsel have pursued the common claims. *Hanlon*, 150 F.3d at 1021. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include the competency of counsel and, in the context of a settlement-only class, an assessment of not pursuing further litigation." *Id.*

Plaintiffs selected experienced counsel who have aggressively litigated the case. *See, e.g.*, ECF No. 19 (Opposition to Defendant's Motion to Dismiss) and Kindall Decl. at ¶¶ 2-14 (detailing the motions practice, discovery, depositions and mediation). There are no adequacy concerns in this case.

2. Rule 23(b)'s Predominance and Superiority Requirements Are Met

An action that meets the prerequisites of Rule 23(a) may only be certified as a class action if it also satisfies the requirements of one of the three subdivisions in Rule 23(b). *Levya v. Medline Indus., Inc.*, 716 F.3d 510, 512 (9th Cir. 2013). As set forth below, Plaintiffs satisfy Rule 23(b)'s predominance and superiority requirements.

a. Predominance

"Because Rule 23(a)(3) already considers commonality, the focus of Rule 23(b)(3) is on the balance between individual and common issues." *Murrillo v. Pac. Gas & Elec. Co.*, 266 F.R.D. 468, 476 (E.D. Cal. 2010) (Shubb, J.) (citing *Hanlon*, 150 F.3d at 1022). The Ninth Circuit has explained that "a central concern of the Rule 23(b)(3) predominance test is whether 'adjudication of common issues will achieve judicial economy.'" *Vinole v. Countrywide Home Loans*, 571 F.3d 935, 944 (9th Cir. 2009).

The predominance requirement does not demand that the common issues be identical. There only needs to be an essential common factual link between all class members and the defendant for which the law provides a remedy. *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527

each plaintiff was found reasonable); *Glass v. UBS Fin. Servs., Inc.*, Civ. No. 04-4068 MMC, 2007 WL 221862 at *16 (N.D. Cal. Jan. 26, 2007) (approving $25,000 incentive award for each named plaintiff). Moreover, the amounts are to be paid by Defendant and will not reduce the amount of the common Settlement Fund. *Id.* at ¶ 60. Thus, nothing in the proposed incentive awards undermines Plaintiffs' adequacy as class representatives in any way.

F. Supp. 2d 1053, 1065 (N.D. Cal. 2007). Predominance is often readily met in consumer cases (*see*, e.g., *Bruno v. Quten Research Inst.*, LLC, 280 F.R.D. 524, 537 (C.D. Cal. 2011)) where there is a common representation made to all members of the class, and is likewise the case here. Issues that predominate across the Class include: (a) whether Defendant misrepresented that the Products were "Naturals;" (b) whether Defendant's labeling of the products is likely to deceive a reasonable consumer; (c) whether Defendant's labeling of the Products constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under California law; (d) whether Plaintiffs and members of the Class are entitled to damages.

b. Superiority

In addition to there being predominant issues across the Class, a class action is the best method to fairly and efficiently adjudicate this case. Rule 23 sets forth four non-exhaustive factors for a district court to consider when determining if the "superiority" requirement is met: (A) the class members' interest 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 claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A) – (D). The fact that the Parties entered into the Settlement prior to class certification makes factors (C) and (D) inapplicable. *See Murillo*, 266 F.R.D. at 476 (citing *Amchem Products, Inc.*, 521 U.S. at 620).

Factor (A) (Class Members' interest in controlling prosecution) weighs in favor of certifying the Class. "Class certifications to enforce compliance with consumer protection laws are 'desirable and should be encouraged.'" *Ballard v. Equifax Check Servs. Inc.*, 186 F.R.D. 589, 600 (E.D. Cal. 1999). This is particularly true when the amount in dispute for each class member is small and may not provide an incentive to pursue individual actions. *Id*.

Here, Plaintiffs allege that they paid a price premium due to Defendant's "naturals" labeling on the Products. *See* ECF No. 31 at ¶¶ 6-9. Given that average price for the Products was less than five dollars per bottle throughout the class period and the alleged premium for the "naturals"

representation was approximately sixty-eight cents per bottle, damages for each individual class member will be small, especially compared to the cost of litigation. In these circumstances, "class treatment is not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the action." *Bruno*, 280 F.R.D. at 537 (certifying class where each class member only suffered a nominal amount of damages because it was the best way to adjudicate the controversy).

Indeed, "[w]here it is not economically feasible to obtain relief with the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they employ the class action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see also Ballard*, 186 F.R.D. at 600. Furthermore, each member of the Class pursuing a claim individually would burden the judiciary, which is contrary to the goals of efficiency and judicial economy advanced by Rule 23. *See Vinole*, 571 F.3d at 946; *see also Delarosa*, 275 F.R.D. at 594-595.

Factor (B) (if there is other litigation) also favors certification of the Class. Plaintiffs are unaware of any other action or potential action that raises allegations similar to those in this case. *See* SA, ¶ 64. Nor have any class members brought such actions to the attention of counsel or the Court. *See Alberto v. GMRI, Inc.*, 252 F.R.D. 652 (E.D. Cal. 2008) (Shubb, J.).

This case – and the Settlement – is the best opportunity for members of the Class to receive redress for the injuries alleged in the Complaint. Thus, the proposed Settlement and proposed Class satisfy both the predominance and superiority requirements of Rule 23(b)(3), as well as all requirements of Rule 23(a). Certification of the class is therefore appropriate.

B. The Court Should Confirm the Appointment of Class Representatives and Counsel

The Court should confirm the appointment of plaintiffs Lainie Cohen, Alba Morales, Linda Clayman and Kenneth Drew as Class Representatives. They have prosecuted the claims in the Complaint for over 2 years and have represented the Class diligently and well. *See* Kindall Decl., ¶¶ 37-38, ; *see also* Declarations of Lainie Cohen, Alba Morales, Linda Clayman and Kenneth Drew, attached to the Kindall Declaration as Exhibits 4-7.

The Court should also confirm the appointment of Izard, Kindall & Raabe, LLP as Class Counsel, and BPM&B as Liaison Counsel. In determining whether the proposed Class Counsel will adequately represent the Class, the Court should consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

Izard, Kindall & Raabe and BPM&B meet all of these criteria. Izard, Kindall & Raabe has done substantial work identifying, prosecuting and settling the claims. *See* ECF Nos. 1 (Complaint), 8 (Amended Complaint), 19 (Opposition to Defendant's Motion to Dismiss) and 31 (Second Amended Complaint); *see also* Kindall Decl. at ¶¶ 6-12 (describing discovery and settlement efforts), and BPM&B has served as liaison counsel throughout the litigation, providing invaluable assistance at every step. Plaintiffs' counsel are well-versed in class actions and consumer litigation. *See* Kindall Decl., Exhs. 3 and Declaration of Alan R. Plutzik, Exh. 1. Izard, Kindall & Raabe and BPM&B have expended the necessary resources to represent the Class through motions practice, discovery and mediation, and should be approved as Class Counsel pursuant to Rule 23(g).

C. The Settlement Is Fair, Reasonable and Adequate

Fed. R. Civ. P. 23(e) provides that "[t]he claims, issues, or defense of a certified class may be settled . . . only with the Court's approval." Fed. R. Civ. P. 23(e). Strong judicial policy favors settlement of class actions. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). A settlement that is the product of arms-length, non-collusive, negotiated resolution is entitled to a presumption that it is fair and reasonable. *See, e.g., Spann v. J.C. Penney Corp.*, Case No. SACV-12-0215 FMO, 2016 WL 297399, *8 (C.D. Cal. Jan. 25, 2016); *McCrary v. Elations Co.*, Case No. 13-CV-0242 JGB, 2016 WL 769703 (C.D. Cal. Feb. 25, 2016). Where, as here, settlement comes only after years of litigation, a hotly contested motion to dismiss, lengthy discovery,

depositions, and months of negotiations under the supervision of a highly-regarded mediator, there can be no question of collusion or doubt as to the proper adversarial nature of the proceedings.[4]

The standard for approving a class action settlement is whether it is fair, reasonable and adequate. Fed. R. Civ. P. 23(e)(2); *Hanlon*, 150 F.3d at 1026. This determination requires consideration of a number of factors, including:

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

Id. Consideration of these factors demonstrates that the proposed Settlement is fair, reasonable and adequate.

1. Strength of Plaintiffs' Case and Risk, Expense, Complexity and Likely Duration of Further Litigation Favor Settlement

Plaintiffs each bought the Products and paid a premium price, believing that they were buying hair care products that did not contain man-made chemicals. They strongly believe that the Product labels were deceptive, and that reasonable consumers would be deceived by them. The individual experiences of plaintiffs, however, are generally insufficient to demonstrate that reasonable consumers are likely to be deceived. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008) (summary judgment appropriate where plaintiffs' testimony was only evidence to show likelihood of deception). Accordingly, surveys and expert testimony would almost certainly be required to establish this key liability element, leading to a battle of experts which a jury would need to decide. "The fact that this issue, which is at the heart of plaintiffs' case, would have been the

[4] The assistance of a mediator is further evidence the Settlement was reached in a procedurally sound manner and without collusion. *See, e.g.*, *Morales v. Conopco, Inc.*, No. 2:13-2213 WBS EFB, 2016 WL 3688407, at *7 (E.D. Cal. July 12, 2016) (citing *La Fleur v. Med. Mgmt. Int'l, Inc.*, Civ. No. 5:13-00398, 2014 WL 2967475, at *4 (N.D. Cal. June 25, 2014)); *see also Satchell v. Fed Ex Corp.*, Case Nos. C03-2659 SI, C03-2878 SI, 2007 WL 1114010, *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) (same). The Parties employed Jonathan Marks, a well-respected mediator in Bethesda, Maryland, to help them reach a resolution. In fact, it was only after Mr. Marks made a mediator's proposal of $3.25 million that the Parties were able to reach the Settlement. *See* Kindall Decl. at ¶ 11.

subject of competing expert testimony suggests that plaintiffs' ability to prove liability was somewhat unclear; this favors a finding that the settlement is fair." *Weeks v. Kellogg Co.*, No. CV 09-08102 MMM RZX, 2013 WL 6531177, at *13 (C.D. Cal. Nov. 23, 2013).

With respect to the intertwined issues of establishing injury and damages, Plaintiffs had a very strong case for showing that the Products sold at a price premium, since Defendant sold very similar TRESemmé shampoos and conditioners that were *not* part of the "naturals" product line for less. However, Plaintiffs would also have had to establish that the degree to which this price premium was attributable to the "Naturals" labeling as opposed to other differentiated product attributes, which would also require surveys and/or expert analysis and testimony.

Thus, key issues of liability and damages are not simple. They would require expert testimony, setting up a battle of experts that would need to be moderated by the Court and sorted out by a jury. This is a high-risk scenario. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 322 (3d Cir. 2011) ("uncertainty attendant to such a battle" supports settlement).

In addition, while Plaintiffs also believe that they would be able to certify a class and maintain it throughout the litigation, there has been more than sufficient uncertainty in the area of class certifications for consumer class actions to justify caution. *See, e.g., Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217 (N.D. Cal. 2015) (denying class certification); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *1 (N.D. Cal. June 13, 2014) (same). Thus, as with liability and damages, class certification poses risks for Plaintiffs and the class.

Navigating the complexity of the litigation with respect to class certification, liability and damages, would consume substantial time and resources on top of the three years that the parties and the Court have already devoted to the case to date. While fact discovery is close to complete, expert discovery has not even begun. Completion of discovery would be followed by a motion for class certification and, probably, dispositive motions practice. In the event that Plaintiffs were successful in certifying the class and defeating a motion for summary judgment, they would then face a multi-week trial and near-certain appeals.

In summary, the litigation is complex and would be time-consuming, expensive, and above all, risky for all parties. Thus, these elements of the *Hanlon* test all weigh strongly in favor of approving the Settlement. *See, e.g., Jaffe v. Morgan Stanley*, No. 06-CV-3902 TEH, 2008 WL 346417, at *9 (N.D. Cal. Feb. 7, 2008) ("The settlement amount could undoubtedly be greater, but it is not obviously deficient, and a sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that come with litigating a case to trial.")

2. The Monetary Value of the Settlement is Fair Given the Risks Involved in the Litigation

In determining whether a settlement agreement is fair, reasonable and adequate, the court must balance the value of expected recovery against the value of the settlement offer. *See In re Tableware Antitrust Litig.,*484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). This inquiry is informed by consideration of the uncertainty class members would face if the case were to go to trial. *See Omtiveros*, 2014 WL 3057506, at *14; *see also Weeks*, 2013 WL 6531177, at *15 ("Estimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)").

Plaintiffs brought this case to accomplish two goals: stopping the challenged practice and obtaining compensation for the Class. The litigation itself achieved the first goal: discontinuance of Defendant's "Naturals" line of products, effectively rendering moot Plaintiffs' request for injunctive relief. Kindall Decl., at ¶ 16. This result itself provides real value to the Class, including economic value, since Defendant will no longer be able to charge any sort of a "naturals" label-based price premium for TRESemmé shampoos and conditioners. This positive economic impact was recognized in *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936-LB, 2015 WL 758094, at *1 (N.D. Cal. Feb. 20, 2015), where the Court considered both the amount of damages obtained for the class and the economic value of the changed labeling practices.

The Settlement also achieved a very positive result with respect to the goal of compensating class members for historical damages. Documents obtained through discovery, coupled with analysis by a marketing expert Plaintiffs retained, permitted Plaintiffs to estimate consumers paid a premium of approximately 16.65% attributable to the "naturals" representation – approximately

sixty-eight cents on a product sold for around $4.75 – leading to class-wide damages of approximately $12.65 million. Kindall Decl., ¶ 17.

The settlement amount of $3.25 million represents approximately 25.7% of the amount that Plaintiffs might have obtained in damages if they had prevailed completely with respect to both liability and their theory of damages. As discussed above, Defendants strongly contested both. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 628 (9th Cir. 1982). While anything less than a complete recovery is "a fraction," a settlement equal to a quarter of Plaintiffs' best-case recovery is not small given the risks and complexities of a nationwide consumer class action. Courts in the Ninth Circuit have frequently approved settlements reflecting similar, or sometimes smaller, percentages. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000), as amended (June 19, 2000) (approving settlement amount equal to roughly 16.7% of a best-case damages award as "fair and adequate" when taking into account the difficulties plaintiff faced in proving the case); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (approving settlement representing between 11 and 27 percent of the total potential recovery); *Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH BLM, 2014 WL 109194, at *7 (S.D. Cal. Jan. 9, 2014) (approving $1 million settlement of case where the maximum statutory award could have been $23.88 million).

In addition to examining the aggregate amount of the Settlement, this Court has assessed the amount offered in Settlement by looking at the amount that each Plaintiff who filed a claim will receive from the Settlement if it is approved, relative to what they might have recovered had they prevailed in a trial. *See, e.g., Anderson-Butler v. Charming Charlie Inc.*, No. CV 2:14-01921 WBS AC, 2015 WL 6703805, at *6 (E.D. Cal. Nov. 3, 2015). As of the time of this filing, Plaintiffs still have over a month to file claims, and given the nature of the Plan of Allocation, the total value of the claims will drive the amount each class member will receive. With that said, as of the date of this filing, over 137,000 claims have been filed, with a total value of $5.6 million. Geraci Decl., ¶¶ 11,

16. Taking into account the likely cost of claims administration,[5] if the Court grants Plaintiff's requests for payment of expenses and reimbursement of costs, with the current number of claims, the amount that each claimant receives would be approximately $1.55 per product for up to ten products (or more, for those who are able to provides proofs of purchase). Kindall Decl., at ¶ 29. Given that, by Plaintiffs' own estimates, per-product damages were approximately sixty-eight cents, the amount that each Plaintiff would recover with the current volume of claims is more than twice what they would recover if they litigated their cases through trial and prevailed – assuming, of course, that they were willing to spend several years litigating over such small amounts in the first place.[6] Plaintiffs will update these figures in advance of the Final Approval Hearing, but unless the value of all claims filed more than doubles, which currently seems unlikely, class members who file claims should receive an amount equal to or greater than their damages per bottle claimed. *Id.* This is a favorable result. *Anderson-Butler*, 2015 WL 6703805, at *6 (settlement fair and reasonable where class members that filed claims would recover amounts comparable to their injuries);[7] *Alberto*, 2008 WL 4891201, at *9 (same).

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[5] Higher volumes of claims are clearly the desirable outcome. However, a higher volume *does* increase the costs associated with Claims Administration, as each claim must be processed and payment must be made, generally by check delivered by the U.S. Postal Service.

[6] While the absolute dollar amount is small, that is a reflection of the value of the products, not the strength of the Settlement. *See, e.g.*, *Weeks*, 2013 WL 6531177, at *15 (court noted that, while amount of compensation class members would receive was small, it was not disproportionately so "[g]iven the relatively low cost of a box of cereal, moreover, and the likelihood that few, if any, class members possess documentation verifying the number of boxes of Krispies cereals they bought during the class period"); *see also Shames v. Hertz Corp.*, No. 07-CV-2174-MMA WMC, 2012 WL 5392159, at *9 (S.D. Cal. Nov. 5, 2012) ($2 per-day settlement allocation was fair "when compared to [plaintiffs'] estimated $3 in actual damages"). Companies can and do unfairly generate substantial profits through unfair trade practices that create very small individual harms, but to very large numbers of people. Indeed, facilitating such small claims is "[t]he policy at the very core of the class action mechanism," *Amchem*, 521 U.S. at 617.

[7] The preliminary approval ruling in *Anderson Butler*, like the Preliminary Approval Order in this case, raised the potential unfairness of requiring class members to file claims in order to recover money under the Settlement, while requiring a specific opt-out request in order to avoid being covered by the release of claims. Preliminary Approval Order, ECF No. 63, at 17-18; *Anderson-Butler v. Charming Charlie, Inc.*, No. 2:14–01921 WBS AC, 2015 WL 4599420, at * 9 (E.D. Cal. July 29, 2015). In a consumer products class action where defendant does not sell directly to consumers, however, the problem is essentially unavoidable. Because the Defendant sells the products to wholesale and retail distribution chains, it has no way to identify members of the class. The only way that class members *can* obtain money from the Settlement is to file claims. On the other hand, a class-wide release, covering everyone who does not affirmatively opt out of the Settlement, is the only real benefit Defendant obtains by settling the case. What can be done is what

In light of the total amounts recovered for the Class, and the amounts that are likely to be recovered by the class members who have filed claims, the amount offered in Settlement is fair and reasonable and supports approval.

3. The Settlement Occurred After Plaintiffs Conducted a Full Investigation and Substantial Discovery, As Well As Briefing and Arguing Key Issues

"A settlement that occurs in an advanced stage of the proceeding indicates the parties carefully investigated the claims before reaching a resolution." *Anderson-Butler*, 2015 WL 6703805, *6 (citing *Alberto*, 2008 WL 4891201, *9). The Parties litigated the case for nearly two years before signing the Settlement, with both sides zealously representing their clients' interests. *See, e.g.*, ECF No. 31 (Motion to Dismiss) and Kindall Decl. at ¶ 15. The Parties also conducted extensive discovery before the Settlement, with each side serving and responding to written discovery and conducting multiple depositions. *See Id.*, ¶¶ 6, 7. The key issues in the case with respect to liability were briefed through the motion to dismiss, and issues related to both liability and damages were thoroughly addressed in written submissions made to mediator. Plaintiffs and Plaintiffs' Counsel were fully informed of all relevant facts when the Settlement reached. *Id*. at ¶¶ 6-12, 15; *see, e.g., Lewis v. Starbucks Corp.*, Case No. 2:07-CV-00490 MCE, 2008 WL 4196690, *6 (E.D. Cal. Sept. 11, 2008) ("approval of a class action settlement as long as discovery allowed the parties to form a clear view of the strengths and weaknesses of their cases."). Accordingly, this factor strongly supports approval of the Settlement.

4. Plaintiffs' Counsel Strongly Support the Settlement

Where Plaintiffs have retained experienced class action counsel, the views of their counsel are entitled to considerable weight in determining whether a settlement should be approved. *See, e.g., Anderson-Butler*, 2015 WL 6703805, at *6; *Alberto*, 2008 WL 4891201, at *10; *Clesceri v.*

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has been done here: publish the Settlement as widely as possible in places and ways calculated to draw the attention of Class Members, and make the process of submitting Claims as simple and painless as possible. It is worth noting, moreover, that all Class Members – indeed, all consumers – receive the benefit of the challenged representation being removed from the marketplace. While many companies will sell products that make false and misleading "natural" claims, purchasers of TRESemmé shampoos and conditioners will no longer pay price premiums based on such claims.

Beach City Investigations & Protective Servs., Inc., No. CV-10-3873-JST RZX, 2011 WL 320998, at *10 (C.D. Cal. Jan. 27, 2011).

Here, interim Class Counsel has both extensive experience in class action litigation and an extensive knowledge of the strengths and weaknesses of this particular case. As the Court recognized in its preliminary approval order, Izard, Kindall & Raabe, LLP and Bramson, Plutzik, Mahler & Birkhaeuser, LLP have been appointed as lead counsel or co-counsel in scores of class actions, and have recovered hundreds of millions of dollars for their clients in class action settlements. 2016 WL 3688407, at *4 (citing the firm resumes of lead and liaison counsel). As noted above, settlement in this case was preceded by years of litigation, briefing, discovery and depositions. The attorneys at both Izard, Kindall & Raabe and Bramson, Plutzik, Mahler & Birkhaeuser strongly support the Settlement, based on their considerable experience of the field and hard-won knowledge of the facts in this case. Accordingly, this factor weighs in favor of approving the settlement.

5. Reaction of the Settlement Class to Date

The lack of large numbers of objectors "raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Anderson-Butler,* 2015 WL 6703805, at *6; *see also Alberto,* 2008 WL 4891201, at *10 (same) (citing *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) and *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004) (internal quotations omitted).

The notice plan crafted by KCC and approved by the Court was designed to reach over seventy percent of the Class through a dedicated website and telephone hotline, newspaper and magazine ads, and an internet campaign including over 150 million impressions of banner ads. *Morales v. Conopco, Inc.,* 2016 WL 3688407, at *7. KCC has executed this notice plan in accordance with the Preliminary Approval Order. Geraci Decl., ¶¶ 3-9. The dedicated Settlement Website launched on July 25, 2016, as well as the toll-free hotline. *Id.* at ¶ 5. The website included the complete Settlement Notice approved by the Court, key court documents (including the Complaint, the Settlement Agreement, the Plan of Allocation, and the Court's Preliminary Approval

Order), and a page for class members to either file claims online or print out claim forms to submit by mail. *Id.*. KCC began its internet media campaign, as described in the Notice Plan, on July 26, 2016, and over the course of the following five weeks, over 150 million banner impressions appeared on websites targeted to adults 18 years of age or older, and of those impressions, 105 million were targeted to women 18 years of age or older. The banners impressions included an embedded link to the dedicated Settlement website where the full notice and all other important documents were easily available. *Id.* at ¶ 6. Finally, summary notice was published in *People* magazine during the week of August 19, 2016, and in the Sacramento *Bee* on July 26, 2016, and on August 2, 9, and 16, 2016. *Id.* at ¶¶ 7-8.

As of September 6, 2016, there have been 249,742 website visitor sessions during which 411,327 website pages were viewed, and an additional 253 people have called the toll-free number. *Id.* at ¶ 10. KCC received 13,776 claims, of which 137,385 were submitted via the website platform and the remainder were submitted by mail. *Id.* at ¶ 11. Thus, the Class has received the best notice available under the circumstances.

The response of the Settlement Class has been positive. While the date for objecting and/or opting out of the Settlement was deliberately set several weeks later than the filing date for this submission, to give Class Members an opportunity to review it prior to deciding whether to oppose or opt out of the settlement, KCC launched the website and began the media campaign over six weeks ago. To date, the docket does not indicate that any objections have been filed. In addition, the only person who requested to opt-out does not appear to have done so because he was dissatisfied with the Settlement, but rather, because he realized that he had not, in fact, purchased any of the subject Products *after* he had already filed a claim form. *See* Geraci Decl., ¶ 13 & Exh. 1; Kindall Decl., ¶ 26. On the other hand, over 137,000 class members have filed claims. This provides further evidence that the settlement is fair, reasonable and adequate.

6. Additional Considerations

As the Ninth Circuit has recognized, approval of a settlement is ultimately based on a Court's "'delicate balancing, gross approximations and rough justice.'" *Officers for Justice*, 688 F.2d at 625

(quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974)). The importance of any particular factor depends on the unique facts of the case. *Officers for Justice*, 688 F.2d at 625. Here, for example, the absence of any governmental participant appears to render that potential factor irrelevant. *See, e.g., Anderson-Butler*, 2015 WL 6703805, at *6; *Alberto*, 2008 WL 4891201, at *10. One factor worth emphasizing in this case which is not well covered by the factors discussed above is the importance of having achieved one of the key goals of this litigation: stopping the continued sale of TRESemmé "naturals" shampoos and conditioners that contained synthetic chemical ingredients. While this has already been accomplished and thus does not depend upon approval of the settlement, it is nonetheless true that the Product line was discontinued *because* Plaintiffs brought this suit and aggressively litigated it for years. Achieving this objective means that members of the class, and consumers generally, will no longer pay the premiums alleged in the Complaint.

Had Plaintiffs litigated the case to judgment, they might well have won more than the amount that has been offered in Settlement, but it is equally if not more possible, given the risks involved, that they would have recovered less, or quite possible nothing at all. Moreover, even a compelling victory would have required even more years of litigation before this Court and possibly the Court of Appeals. With sales of the Products now stopped, memories would inevitably fade, making the process of claims administration even harder. This is the right time to settle this case, and, in light of both the strengths and weaknesses of the case, the amount is fair and reasonable. Accordingly, interim class representatives and counsel respectfully request that the Court approve the Settlement.

D. The Court Should Approve the Plan of Allocation

As with the settlement itself, the standard for approving a proposed plan of allocation is that it be "fair, reasonable and adequate." *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 3648478, at *11 (N.D. Cal. July 7, 2016) (*"CRT"*) (quoting *Omnivision*, 559 F. Supp. 2d at 1045); *see also Hendricks v. StarKist Co*, No. 13-CV-00729-HSG, 2015 WL 4498083, at *7 (N.D. Cal. July 23, 2015) (same). Courts have recognized that "[A]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and

competent counsel." *CRT*, 2016 WL 3648478, at *11 (quoting *Vinh Nguyen v. Radient Pharms. Corp.*, No. 11-cv-00406, 2014 WL 1802293, at *5 (C.D. Cal. May 6, 2014); *accord*, *In re Zynga Inc. Sec. Litig.*, No. 12-CV-04007-JSC, 2015 WL 6471171, at *12 (N.D. Cal. Oct. 27, 2015).

The proposed Plan of Allocation here is fair, reasonable and adequate. In crafting the Plan of Allocation, Interim Class Counsel endeavored to balance several competing goals. First, it is preferable for an allocation formula to take into account differences in the amount of damages suffered by each class member. *See, e.g.*, *CRT*, 2016 WL 3648478, at *11 ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries") (quoting *Zynga*, 2015 WL 6471171, at *12). Second, it is important for the claim form and the claims process to be reasonably simple and straightforward, so as not to create barriers to class members who want to file claims. *See* NEWBERG ON CLASS ACTIONS § 12:15 (5th ed. 2014) ("The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible."). Finally, with relatively low-cost consumable products such as the shampoos and conditioners at issue in the case, it is unreasonable to expect that many class members will have retained proofs of purchase. Requiring *no* proof of purchase, on the other hand, might provide an unwelcome incentive for inflating claims.

To balance these competing goals, Interim Class Counsel worked with the Notice and Claims Administrator to devise a simple claim form that allowed Class Members to file claims online (or by mail) for up to ten purchases of any combination of the products per household without submitting any proofs of purchase. Class Members could recover for more than ten products for a household so long as they submitted adequate proofs of purchase such as receipts or print-outs from a store loyalty program. The total amount of each claim will be reduced *pro rata* by the percentage that the value of all claims filed exceeds the value of the net settlement fund. In view of Interim Class Counsel, this is a reasonable and rationale methodology in light of the facts of the case.

In approving a plan of allocation that made no effort, as the Plan of Allocation does here, to differentiate between class members based on the number of subject products that they purchased, the *Hendricks* Court observed:

> [T]he Court agrees that many class members will have difficulty providing even rough estimates of how many cans of StarKist tuna they purchased during the class period. Asking class members to search back years in their memories and then attest, under penalty of perjury, to the number of StarKist tuna cans they purchased may dissuade many from claiming the $5, $10, or $25 to which their particular level of purchasing would entitle them. At some point, the paperwork overwhelms the benefit. Where the settlement payout is relatively modest, that point comes quickly.

Hendricks, 2015 WL 4498083, at *8. The same logic applies here, where the Plan of Allocation does provide an opportunity for at least some class members to obtain a greater share of the settlement based on proof that they purchased more than ten of the Products.[8] Accordingly, Plaintiffs respectfully request that the Court give final approval to the Plan of Allocation.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs ask the Court to: (1) certify the Class; (2) confirm Plaintiffs' appointment as Class Representatives; (3) confirm the appointment of Izard, Kindall & Raabe, LLP as Class Counsel and Bramson, Plutzik, Mahler & Birkhaeuser as Liaison Counsel for the Class; and (4) Approve the Settlement and the Plan of Allocation.

Dated: September 12, 2016

Respectfully submitted,

By: /s/ Mark P. Kindall
Mark P. Kindall (State Bar No. 138703)
Robert A. Izard (Admitted *pro hac vice*)
IZARD, KINDALL & RAABE, LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Telephone: (860) 493-6292
Facsimile: (860) 493-6290
mkindall@ikrlaw.com
rizard@ikrlaw.com

[8] To the extent that this creates a distinction between the amount that class members might receive based not on the number of products that they purchased but on their ability to provide receipts or other proofs of purchase, the distinction is fair and reasonable. *See, e.g., CRT,* 2016 WL 3648478, at *11 (reasonable to allocate settlement funds among class members based on "the strength of their claims on the merits") (quoting *Omnivision,* 559 F. Supp. 2d at 1045). Class members who have extrinsic proofs of purchase would be more likely to be able to demonstrate both injury and damages at trial than those who were unable to produce such evidence.

Alan R. Plutzik (State Bar No. 77785)
BRAMSON, PLUTZIK, MAHLER & BIRKHAEUSER LLP
2125 Oak Grove Road
Walnut Creek, CA 94598
Telephone: (925) 945-0200
Facsimile: (925) 945-8792
aplutzik@bramsonplutzik.com

Joseph J. DePalma (admitted *pro hac vice)*
Katrina Carroll (*pro hac vice* forthcoming)
LITE DEPALMA GREENBERG, LLC
Two Gateway Center, 12th Floor
Newark, New Jersey 07102
Telephone: (973) 623-3000
Facsimile: (973) 623-0858
jdepalma@litedepalma.com
kcarroll@litedepalma.com

Nicole A. Veno (admitted *pro hac vice)*
LAW OFFICE OF NICOLE VENO
573 Hopmeadow Street
Simsbury, CT 06070
Telephone: (860) 474-4024
Facsimile: (860) 717-3207
nveno@venolaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being served with a copy of the attached **Notice of Motion and Motion for Preliminary Approval** via the CM/ECF system on September 12, 2016.

DATED: September 12, 2016

/s/ Mark P. Kindall
Mark P. Kindall