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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOREAN BARRERA, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

PHARMAVITE LLC, a California limited liability company,

Defendant.

Case No.: 2:11-cv-04153-CAS (AGrx)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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Pursuant to Fed. R. Civ. P. 23, Plaintiff Lorean Barrera, by her counsel Bonnett, Fairbourn, Friedman & Balint, P.C. and Siprut, PC, respectfully submit the following Memorandum in Support of her Unopposed Motion for Preliminary Approval of Settlement and moves for an Order: (1) preliminarily approving the Settlement Agreement as being fair, reasonable, and adequate; (2) approving the notice plan ("Notice Plan") as set forth in the Declaration of Daniel Rosenthal ("Rosenthal Decl.") (Exhibit F to the Settlement Agreement hereto); (3) setting the date and time of the Fairness Hearing; (4) provisionally certifying the Settlement Class under Rule 23 of the Federal Rules of Civil Procedure for settlement purposes only; (5) provisionally appointing Plaintiff as representative of the Settlement Class; and (6) provisionally appointing Elaine A. Ryan (Bonnett, Fairbourn, Friedman & Balint, P.C.) and Stewart M. Weltman (Siprut, PC)[1] as "Lead Settlement Class Counsel," and Boodell & Domanskis, LLC, Levin Sedran & Berman and Westerman Law Corp. as "Settlement Class Counsel."[2]

I. INTRODUCTION

With substantial assistance and direction from Magistrate Judge Jay S. Gandhi, Plaintiff and Defendant Pharmavite LLC (collectively, the "Parties") have entered into a Settlement Agreement in the above-referenced matter. (*See* Declaration of Patricia N. Syverson, Exhibit 1). Although both sides believe their respective positions in the action are meritorious, Plaintiff has concluded that, due to the uncertainties and expense of protracted litigation, it is in the best interest of Plaintiff, and the best

[1] Effective February 1, 2017 Stewart M. Weltman became Of Counsel to the law firm of Siprut, PC, 17 N. State Street, Suite 1600, Chicago, IL 60602.

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement (Exhibit 1 hereto). To the extent there is any conflict between the definitions of those terms, the definitions in the Settlement Agreement will control.

interests of the putative Settlement Class, to resolve this action on the terms provided in the Settlement Agreement.

II. PROCEDURAL HISTORY

Pharmavite manufactures, markets, sells, and distributes glucosamine and/or chondroitin formulated products sold under the "Nature Made®" brand name, as well as under various brand names of unaffiliated retailers.[3] On May 13, 2011, Plaintiff filed this putative class action alleging that certain claims made on the Nature Made TripleFlex products are false, deceptive, and/or misleading. These claims were brought under California consumer protection laws. Plaintiff did not allege that any of the Covered Products were unsafe or presented a safety hazard to consumers. On October 11, 2011, Plaintiff filed a Second Amended Class Action Complaint on behalf of a nationwide – or California only class. On November 19, 2014, this Court granted, in part, Plaintiff's Motion for Class Certification, certifying California-only consumer classes seeking monetary damages. Over the course of the next two years, the Parties completed document and expert discovery, filed and respectively defeated competing summary judgment motions and motions to strike each other's experts, Plaintiff defeated motions for judicial estoppel and to decertify the Classes, and both Parties had begun preparing the case for trial, providing a fulsome record upon which to base their settlement negotiations.

The Settlement Agreement was reached after ten months of vigorous arms'-length negotiations, including an in-person meeting of Plaintiff's and Pharmavite's counsel on June 25, 2016, followed by an all-day mediation on July 26, 2016 before a neutral mediator, the Honorable Jay C. Gandhi, Magistrate Judge, and numerous subsequent telephone calls, texts, and email exchanges involving Judge Gandhi and the Parties' counsel.

[3] A complete list of the products covered by the Settlement Agreement (the "Covered Products") is attached as Syverson Decl., Ex. 1-B.

III. THE PROPOSED SETTLEMENT

The proposed settlement provides the following:

A. Certification of the Proposed Settlement Class

Plaintiff requests that the Court, for the purposes of settlement only, certify a Settlement Class defined as:

> All residents of the United States who purchased for personal use, and not resale or distribution, a Covered Product between May 1, 2007 and the Preliminary Approval Date (the "Class Period").
>
> Specifically excluded from the Settlement Class are the following Persons:
>
> i. Pharmavite and its respective affiliates, employees, officers, directors, agents, and representatives, and their immediate family members;
>
> ii. Settlement Class Counsel and partners, attorneys, and employees of their law firms; and
>
> iii. The judges who have presided over the Litigation or mediated the settlement and their immediate family members.

B. Class Relief

1. Monetary Relief - Cash Paid To Settlement Class Members

Each Settlement Class Member shall be entitled to seek a monetary benefit or free Offered Product Benefits. Pharmavite shall pay $1 million to be distributed to Settlement Class Members with valid claims who elect cash compensation. Settlement Class Members who have Adequate Proof of Purchase (*e.g.*, receipts, boxes or bottles, credit card statements, or similar documentation that identifies the Covered Product) for purchases made during the Class Period may request $25 for each Covered Product purchased during the Class Period, up to four (4) Covered Products or $100, per household. Settlement Class Members who elect cash compensation but do not have adequate proof of purchase may request $12.50 for each Covered Product purchased during the Class Period, up to a maximum of four (4)

Products or $50, per household. Each Class Member seeking monetary compensation must submit a Claim Form which will require a sworn declaration but no notarization. Any excess cash which is not used to pay validated cash claims will be distributed with *pro rata* increases to all claimants with validated cash claims until all cash is distributed. Any shortfall will result in *pro rata* reductions of all validated cash claims. If there is insufficient cash to fulfill all valid claims, such claimants can receive Offered Product Benefits, as described below.

2. **Free Offered Product Benefits to Settlement Class Members**

Pharmavite shall provide Settlement Class Members with $5.9 million in product and fulfillment costs ("Offered Product Benefits") (based on Pharmavite's MSRP and actual fulfillment costs) to be distributed to Settlement Class Members with valid claims who do not make a cash claim and/or whose cash claim is not wholly fulfilled from available funds. Settlement Class Members, regardless of whether they possess adequate proof of purchase, may request up to $25 worth of Offered Product Benefits for each Covered Product they purchased during the Class Period, up to a maximum of six (6) Covered Products or $150 worth of Offered Product Benefits, per household. The Offered Product Benefits include the following current Pharmavite products: (1) Balanced B-100 Timed Release; (2) Super B Complex, Mega Size; (3) Multi Complete Value Size; (4) Multi Prenatal Value Size; (5) Prenatal + DHA; (6) Prenatal + DHA Value Size; (7) Postnatal Multi + DHA; (8) Fish Oil 1200 mg. Burp-less Value Size; (9) Krill Oil 300 mg; (10) Triple Omega 3-6-9 Value Size; (11) Digestive Probiotics Daily Balance; (12) TripleFlex® Triple Strength Value Size; (13) TripleFlex® Triple Strength 50+ Value Size; (14) CholestOff® Plus; (15) Multi Adult Gummies; (16) Triple Omega 3-6-9; and (17) Super Omega-3 Fish Oil Full Strength Mini. (*See* Ex. 1-D.) Any excess Offered Product Benefits which is not needed to fulfill validated claims will be distributed with *pro rata* increases to claimants (whether requesting solely Offered Product

Benefits or a Cash Award reduced *pro rata*) with validated claims up to $300 of Offered Product Benefits.

If excess product remains after all validated claims and *pro rata* increases up to $300 per household of Offered Product Benefits have been fulfilled, any remaining product shall be donated to the following *cy pres* charity: Feed The Children, http://www.feedthechildren.org/. This *cy pres* charity recipient is a nationwide organization which implements programs for children and adults throughout the country, including, among others, food programs and education programs regarding general health, consumption of vitamins/minerals and proper utilization of dietary supplements – all of which have a significant bearing on the issues involved in this case. Further, Pharmavite represents that any *cy pres* distribution pursuant to the terms of the Settlement Agreement will not be taken as a charitable contribution for tax purposes, will not be used to fulfill previously budgeted charitable giving, and that Feed the Children is not a charity to which Pharmavite is currently obligated to donate. (*See* Ex. 1-E.) Any shortfall in Offered Product Benefits will result in *pro rata* reductions of validated claims.

3. Injunctive Relief - Labeling Changes

Beginning 180 days after the Effective Date, Pharmavite will not use the following terms, or any substantially identical variation of the proscribed terms, on product labels to describe the effect of glucosamine and/or chondroitin on cartilage: “rebuild”, “rebuilds”, “rebuilding”, “renew”, “renewing”, “renewal”, “rejuvenate”, “rejuvenates”, “rejuvenation”, or “rejuvenating”.

Pharmavite may petition this Court to dissolve this injunctive relief and allow Pharmavite to make some or all of the statements identified above if, subsequent to the Effective Date, Pharmavite possesses and relies upon an independent, well-conducted, published clinical trial that substantiates the statements.

C. Incentive Award to Class Representative

The Settlement Agreement provides that Plaintiff will apply for an Incentive Award of up to $10,000 as compensation for bringing this action, serving as the Court appointed class representative, providing documents and deposition testimony, actively monitoring and assisting Plaintiff's counsel to ready this action for trial and participating in person in an all-day mediation ultimately resulting in the resolution of this case. Pharmavite agrees not to object to Plaintiff's application for such Incentive Award and to pay any Incentive Award (not to exceed $10,000) that is awarded by the Court. The payment of this Incentive Award will be separate and apart from, and will not diminish or erode, the payment of claims to Settlement Class Members as set forth above.

D. Attorneys' Fees and Expenses

The Settlement Agreement provides that Pharmavite will not object to the Court awarding the firms of Bonnett, Fairbourn, Friedman & Balint, P.C., Siprut, PC, Boodell & Domanskis, LLC, Levin Sedran & Berman, and Westerman Law Corp. up to $600,000 in cost reimbursements and an aggregate fee award of up to $3.475 million. Up to those amounts, respectively, as ordered by the Court, Pharmavite will pay attorneys' fees and expenses separate and apart from, and will not diminish or erode, the payment of claims to Settlement Class Members as set forth above.

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IV. THE SETTLEMENT CLASS SHOULD BE PROVISIONALLY CERTIFIED; THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED; THE FORM AND METHOD OF NOTICE TO THE CLASS MEMBERS SHOULD BE APPROVED; AND A HEARING REGARDING FINAL APPROVAL OF THE SETTLEMENT SHOULD BE SCHEDULED[4]

The Ninth Circuit recognizes the propriety of certifying a settlement Class to resolve consumer lawsuits. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23. *Id*. However, where a court is evaluating the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes are not considered. *Wright v. Linkus Enterps., Inc.*, 259 F.R.D. 468, 474 (E.D. Cal. 2009) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("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.")). Here, the provisional certification of the Settlement Class is appropriate for purposes of settlement because all the requirements of Rule 23 have been met.

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[4] It is Pharmavite's position, as it has informed Settlement Class Counsel (and Settlement Class Counsel hereby so informs the Court), that Pharmavite still maintains its positions as set forth in the parties' vigorously litigated class certification motion practice. *See, e.g.*, Docs. D.E. 82 (Pltf's class cert motion); D.E. 123 (Def's opposition); D.E. 136 (Pltf's reply); D.E. 149 (Def's objections to expert rebuttal report of TJS filed with Plaintiff's reply); D.E. 171 (Def's notice of supplemental authority in opposition to class cert motion); D.E. 172 (Def's request for judicial notice in support of opposition to class cert motion); D.E. 173 (Pl's response to Def's notice of supplemental authority); D.E. 174 (Pl's objections to request for judicial notice); D.E. 181 (Def's application to file supplemental declaration of Poswillo in support of opp to class cert). However, with that reservation, and because Pharmavite recognizes that certifying a class in a non-settlement context differs from doing so in a settlement context, Pharmavite will not burden the record by recapitulating its prior submissions on class certification in a non-settlement context. Plaintiff maintains that the Court properly certified the Classes.

A. The Settlement Class Satisfies Federal Rule of Civil Procedure 23(a)

Rule 23(a) enumerates four prerequisites for class certification, referred to as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. In light of the settlement, each of these requirements is met for the Settlement Class.

1. **Numerosity**

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a); *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 664 (C.D. Cal. 2009). Pharmavite is a nationwide manufacturer of the Covered Products and has sold an estimated 14.8 million of these products nationwide during the Class Period. (D.E. 241-3 (Expert Report of Joseph J. Gardemal III), at ¶ 25.) Accordingly, the numerosity requirement is readily met because it is difficult or inconvenient to join all members of the proposed Settlement Class. *See Reynoso v. S. County Concepts*, No. 07-373, 2007 WL 4592119, at *2 (C.D. Cal. Oct. 15, 2007) ("The sheer number of potential class members justifies the Court's finding that the class in this case meets the numerosity requirement."); *Wiener*, 255 F.R.D. at 664; *Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422, 2009 WL 2169883, at *4 (C.D. Cal. July 16, 2009) (citing *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)).

2. **Commonality**

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury . . . Their claims must depend upon a common contention . . . That common contention, moreover, must be of such a nature that it is capable of class-wide 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." *Walmart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Still, "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to satisfy commonality], as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019; *In re First Alliance Mortg. Co.*,

471 F.3d 977, 990-91 (9th Cir. 2006). The commonality requirement is construed "permissively." *Hanlon*, 150 F.3d at 1019; *Wiener*, 255 F.R.D. at 664.

This prerequisite is readily met with respect to the Settlement Class. To quote *Wiener*: "The proposed class members clearly share common legal issues regarding [Defendant's] alleged deception and misrepresentations in its advertising and promotion of the Products." 255 F.R.D. at 664-65; *see also Johnson v. General Mills, Inc.*, 275 F.R.D. 282, 287 (C.D. Cal. 2011) (plaintiff's claims presented common, core issues of law and fact, including "whether General Mills communicated a representation [] that YoPlus promoted digestive health" and "whether YoPlus does confer a digestive health benefit that ordinary yogurt does not"); *Fine v. ConAgra Foods, Inc.*, NO. 10-01848, 2010 WL 3632469 at *3 (C.D. Cal. Aug. 26, 2010) ("Since Plaintiff's claims and the proposed class are based on the same misleading label on the boxes of popcorn, the Court finds that Plaintiff has sufficiently demonstrated commonality pursuant to Rule 23(a)(2)."). Here, as well, the core issue for each Settlement Class Member's claim is whether the Covered Products provide the benefits stated on the labeling. D.E. 32, Second Amended Complaint, ¶¶ 25-45; *see also* Syverson Decl., Ex. 2 (exemplar collection of Product labeling); D.E. Nos. 249-65, 249-66, 249-67, 249-68 (Label Exemplars); Syverson Decl., Ex. 3, Report of Thomas J. Schnitzer MD, PhD.

The common factual and legal issues include:

- Whether the statements that Pharmavite made on the labels of the Covered Products were or are misleading, or likely to deceive;
- Whether Plaintiff and the Settlement Class were deceived in some manner by Pharmavite's label statements;
- Whether the alleged conduct constitutes violations of the laws asserted herein;
- Whether Plaintiff and Settlement Class have been injured and the proper measure of their losses as a result of those injuries;

- Whether Plaintiff and Settlement Class are entitled to an award of compensatory/actual damages; and
- Whether Plaintiff and the Settlement Class are entitled to any other form of relief.

Thus, the determination of the truth, or falsity, or capability to mislead or deceive of Pharmavite's labeling statements will resolve this central issue in one stroke. Accordingly, the commonality requirement is satisfied.

3. **Typicality**

Rule 23(a)(3) typicality is satisfied where the plaintiff's claims are "reasonably co-extensive" with absent class members' claims; they need not be "substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Wiener*, 255 F.R.D. at 665. 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). Thus, "[t]he purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Id*. For example, in *Johns v. Bayer Corp.*, 280 F.R.D. 551 (S.D. Cal. 2012), in certifying UCL and CLRA claims the court found the typicality requirement was satisfied because: "Plaintiffs and class members thus were all exposed to the same alleged misrepresentations on the packages and advertisements." *Id.* at 557.

Typicality is met here as Plaintiff and the proposed Settlement Class assert the same claims, arising from the same course of conduct – Pharmavite's allegedly false and deceptive Covered Product labels. Plaintiff alleges that the labeling of the Covered Products all misrepresented the products' benefits. Plaintiff further alleges that she and all members of the Settlement Class were injured when they paid money to purchase the Covered Products. *See, e.g.*, *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 344 (2011) ("[I]n the eyes of the law, a buyer forced to pay more than he or she

would have is harmed at the moment of purchase, and further inquiry into such subsequent transactions, actual or hypothesized, ordinarily is unnecessary.").[5] Plaintiff and the Settlement Class also seek the same relief for the same alleged wrongful conduct, *i.e.*, misrepresenting the effectiveness of the Covered Products. Since Plaintiff and the Settlement Class' claims arise from the same alleged misrepresentations that purportedly injured them all alike, typicality is satisfied. *Johns v. Bayer Corp.*, 280 F.R.D. at 557; *see also Weeks v. Kellogg Co.*, No. 09-08102, 2013 WL 6531177, at *7 (C.D. Cal. Nov. 23, 2013) (case involved false and misleading statements on cereal packages wherein the court held "the named plaintiffs, like all class members, contend they were injured by defendants' false and misleading immunity claims. Consequently, the typicality requirement is met.").

4. **Adequacy of Representation**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In the Ninth Circuit, adequacy is satisfied where: (i) counsel for the class is qualified and competent to vigorously prosecute the action, and (ii) the interests of the proposed class representatives are not antagonistic to the interests of the class. *See, e.g.*, *Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020; *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003), *overruled on other grounds in Dukes v. Wal Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *Wiener*, 255 F.R.D. at 667.

The adequacy requirement is met here with respect to the Settlement Class. First, the interests of Plaintiff and members of the Settlement Class are fully aligned and conflict free: Plaintiff and members of the Settlement Class are seeking redress from what is essentially the same alleged injury and there are no disabling conflicts of

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[5] *Accord Johns v. Bayer Corp.*, 280 F.R.D. 551, 557 (S.D. Cal. 2012) ("[This litigation] is about point-of-purchase loss. Plaintiffs and class members were allegedly injured when they paid money to purchase the Men's Vitamins."); *Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 482 (C.D. Cal. 2012) (same).

interest. Second, Class Counsel for the Settlement Class are qualified and experienced in class action litigation, and meet the requirements of Fed. R. Civ. P. 23(g). *See* Syverson Decl., Ex. 4 (firm resumes). Through qualified Class Counsel, Plaintiff has performed extensive work to date in identifying and investigating potential claims in this action, establishing the factual basis for the claims sufficient to prepare a detailed class action complaint, pursuing and reviewing document discovery, engaging and submitting expert reports, engaging in extensive motion practice, obtaining certification of California Classes, defeating Pharmavite's summary judgment motion, motion to decertify, and *Daubert* motions, and in successfully mediating and negotiating the proposed settlement. *See In re Emulex Corp.*, 210 F.R.D. 717, 720 (C.D. Cal. 2002) (court evaluating adequacy of counsel's representation may examine "the attorneys' professional qualifications, skill, experience, and resources . . . [and] the attorneys' demonstrated performance in the suit itself").

B. The Settlement Class Should Be Provisionally Certified Under Federal Rule of Civil Procedure 23(b)(3)

Plaintiff seeks certification of a Settlement Class under Rule 23(b)(3). Certification under Rule 23(b)(3) is appropriate "whenever the actual interests of the parties can be served best by settling their difference in a single action." *Hanlon*, 150 F.3d at 1022 (*quoting* 7A C.A. Wright, A.R. Miller, & M. Kane, *Federal Practice & Procedure* §1777 (2d ed. 1986)). There are two fundamental conditions to certification under Rule 23(b)(3): (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1022; *Wiener*, 255 F.R.D. at 668. As such, Rule 23(b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons

similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615; *Wiener*, 255 F.R.D. at 668.

1. Common Questions Predominate Over Individual Issues

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; *Hartless v. Clorox Co.*, 273 F.R.D. 630, 638 (S.D. Cal. 2011). "Predominance is a test readily met in certain cases alleging consumer . . . fraud . . . ." *Amchem*, 521 U.S. at 623. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Fed. Prac. & Proc.*, §1778; *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13 (1982) (noting that commonality and typicality tend to merge).

The predominance requirement is satisfied here with respect to the Settlement Class. As discussed above, Plaintiff alleges that the Settlement Class is entitled to the same legal remedies premised on the same alleged wrongdoing. Plaintiff alleges that all of the packaging conveys the same message regarding the benefits of the Covered Products. *See* Ex. 2 (exemplars of the Covered Products' labeling). Thus, the central issues for every Person in the Settlement Class are whether Pharmavite's claims that the Covered Products provided the benefits stated on the labels were false or deceptive and whether Pharmavite's alleged misrepresentations regarding the Covered Products was likely to deceive a reasonable consumer. *See Johns*, 280 F.R.D. at 557 ("the predominating common issues include whether Bayer misrepresented that the Men's Vitamins 'support prostate health' and whether the misrepresentations were likely to deceive a reasonable consumer"). With respect to the Settlement Class, these issues predominate and are together the "heart of the litigation" because they would be decided in every trial brought by individual members of the Settlement Class and can be proven or disproven with the same class-wide evidence.

Under these circumstances, predominance under Rule 23(b)(3) is satisfied with respect to the Settlement Class. *Hartless*, 273 F.R.D. at 638-39 (predominance established where all class members were exposed to the same alleged misrepresentations); *Wiener*, 255 F.R.D. at 669 (predominance satisfied when alleged misrepresentation of product's health benefits were displayed on every package).[6] Indeed, over Pharmavite's opposition, the Court already determined that common issues predominated in certifying the California classes. (D.E. 192 (Order re Motion to Certify Class), at 28-29) ("The Court finds that common questions predominate with regard to the California-only classes. … [W]hether Pharmavite misrepresented that TripleFlex improves joint 'comfort, mobility, and flexibility' will be determined through the presentation of expert, scientific testimony. … Second … common questions will predominate regarding whether these misrepresentations are likely to deceive a reasonable consumer. … Similarly, common issues predominate regarding reliance and causation because none of the California consumer protection statutes requires individualized proof of these elements.")

2. A Class Action Is The Superior Method to Settle This Controversy

Rule 23(b)(3) sets forth the relevant factors for determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These factors include: (i) the interest of members of the Settlement Class in individually controlling separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against members of the Settlement Class; (iii) the desirability or undesirability of concentrating the litigation

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[6] *See also, e.g., In re POM Wonderful LLC Mktg. and Sales Practices*, No. ML 10-02199, 2012 WL 4490860, *1 (C.D. Cal. Sept. 28, 2012) (certifying labeling claims); *Johns*, 280 F.R.D. 551 (same); *In re Ferrero*, 278 F.R.D. 552, 556 (S.D. Cal. 2011) (same); *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 521 (C.D.Cal.2011) (same); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192, 2011 WL 2221113, *1 (N.D. Cal. June 7, 2011) (same); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 380 (N.D. Cal. 2010) (same).

of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3); *see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92 (9th Cir. 2001). "[C]onsideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (citations omitted); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (finding the superiority requirement satisfied where granting class certification "will reduce litigation costs and promote greater efficiency").

Application of the Rule 23(b)(3) "superiority" factors show that a class action is the preferred procedure for this settlement. The damages at issue for each member of the Settlement Class are not large. *Zinser*, 253 F.3d at 1191; *Wiener* 255 F.R.D. at 671. It is neither economically feasible, nor judicially efficient, for members of the settlement Class to pursue their claims against Pharmavite on an individual basis. *Hanlon*, 150 F.3d at 1023; *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 808 (1971); *Amchem*, 521 U.S. at 617 ("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 prosecuting his or her rights"). Additionally, the fact of settlement eliminates any potential difficulties in managing the trial of this action as a class action. *See Amchem*, 521 U.S. at 620 (when "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"). As such, under the circumstances presented here, a class action is clearly superior to any other mechanism for adjudicating the claims of the Settlement Class. The requirements of Rule 23(b)(3) are satisfied with respect to the Settlement Class.

C. Plaintiff Should Be Appointed Settlement Class Representative And Class Counsel Should Be Appointed For The Settlement Class

The Court is requested to designate Plaintiff Lorean Barrera as Class Representative for the Settlement Class. As discussed above, Plaintiff will fairly and adequately protect the interests of the Settlement Class.

Additionally, Rule 23(g)(1) requires the Court to appoint class counsel to represent the interests of the Settlement Class. *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 355 (N.D. Cal. 2005). As set forth above, Bonnett, Fairbourn, Friedman & Balint, P.C., Siprut, PC, Boodell & Domanskis, LLC, Levin Sedran & Berman, and Westerman Law Corp. are experienced and well equipped to vigorously, competently and efficiently represent the proposed Settlement Class. Accordingly, the Court is requested to appoint Elaine A. Ryan (Bonnett, Fairbourn, Friedman & Balint, P.C.), and Stewart M. Weltman (Siprut, PC), as Lead Settlement Class Counsel for the Settlement Class and Boodell & Domanskis, LLC, Levin Sedran & Berman and Westerman Law Corp. as Settlement Class Counsel.

D. The Settlement Should Be Preliminarily Approved

At the preliminary approval stage, the Court need only "make a preliminary determination of the fairness, reasonableness and adequacy of the settlement" so that notice of the settlement may be given to the Settlement Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the settlement. *See* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, §11.25 (4th ed. 2002); David F. Herr, *Annotated Manual for Complex Litigation* ("*Manual*") §21.632 (4th ed. 2008). In so doing, the Court reviews the settlement to determine that it is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm.*, 688 F.2d 615, 625 (9th Cir. 1982); *see also Rodriguez v. West Publ'g Co.*, 563 F.3d 948, 965 (9th Cir. 2009).

Settlements of class actions are strongly favored. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 2004) (noting "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *see also Churchill Village, LLC v. Gen. Elec. Co*., 361 F.3d 566, 576 (9th Cir. 2004); *In re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). By their very nature, because of the uncertainties of outcome, difficulties of proof, and lengthy duration, class actions readily lend themselves to compromise. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (public interest in settling litigation is "particularly true in class action suits…which frequently present serious problems of management and expense"). Moreover, the Court may give a presumption of fairness to arm's-length settlements reached by experienced counsel with the assistance of a mediator. *Rodriguez*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."). Rule 23(e) sets forth a "two-step process in which the court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop v. DlRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

On preliminary approval, the Court does not make a full and final determination regarding fairness. "Because class members will subsequently receive notice and have an opportunity to be heard," the court "need not review the settlement in detail at this juncture." *In re M.L. Stern Overtime Litig.*, No. 07-CV-0118, 2009 WL 995864, at *3 (S.D. Cal. Apr. 13, 2009). "[I]nstead, preliminary approval is appropriate so long as the proposed settlement falls 'within the range of possible judicial approval.'" *Id*. (quoting *Newberg on Class Actions*, §11.25 (4th ed. 2002)); *see also Manual for Complex Litigation* (4th ed. 2009) §§ 2l.632, 21.633. At this stage, the Court need only conduct a *prima facie* review of the relief provided by the Settlement Agreement to determine whether notice should be sent to the Settlement Class Members. *In re M.L. Stern*, 2009 WL 995864, at *3.

The Court's review is "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." *Officers for Justice*, 688 F.2d at 625; *accord Hanlon*, 150 F.3d at 1027. This is a minimal threshold:

> [I]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and ***falls within the range of possible approval***, then the court should direct that the notice be given to the Class members of a formal fairness hearing . . . .

Young v. Polo Retail, LLC, No. C-02-4546, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (emphasis added and citations omitted).

The Ninth Circuit has articulated six factors to use in evaluating the fairness of a class action settlement at the preliminary approval stage: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the consideration offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; and (6) the experience and views of counsel. *McCrary v. Elations Co.*, LLC, No. EDCV 13-0242 JGB (SPx), 2015 WL 12746707, at *4 (C.D. Cal. Aug. 31, 2015); *Katz v. China Century Dragon Media, Inc.*, No. LA CV11-02769 JAK (SSx), 2013 WL 12138673, at *2-3 (C.D. Cal. June 19, 2013).

Here, the proposed settlement satisfies the standard for preliminary approval on the relevant parameters of fairness, reasonableness, and adequacy, placing it squarely within the range of possible approval.

1. The Strengths of Plaintiff's Case and Risks Inherent in Continued Litigation Favor Preliminary Approval

Settlements resolve the inherent uncertainty on the merits, and are therefore strongly favored by the courts, particularly in class actions. *See Van Bronkhorst*, 529 F.2d at 950; *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977). This action

is not unique in this regard – the Parties and their respective experts disagree diametrically about the merits, and there is substantial uncertainty about the ultimate outcome of this litigation. While Plaintiff feels that her substantive claims are meritorious, Pharmavite heavily contests the merits of Plaintiff's claims, and there is at least a possibility that a fact finder could find otherwise as to all or a part of Plaintiff's claims.

2. **The Risk, Complexity, Expense, and Duration of the Litigation Favor Preliminary Approval**

In addition to the substantial risks and uncertainty inherent in continued litigation, there is the certainty that further litigation would be expensive, complex, and time consuming for the Parties. The Court would be required to resolve difficult and complicated issues of statutory interpretation and state law raised by the currently pending motions filed by both Parties.

Here, the proposed settlement specifically addresses the alleged deceptive conduct by providing economic benefits to Settlement Class Members who submit Valid Claims. The proposed settlement is able to provide these benefits without the risk and delays of continued litigation, trial, and appeal. As important, the settlement enjoins Pharmavite from making the following statements in the packaging of the Covered Products to describe the effect of glucosamine and/or chondroitin on cartilage: "rebuild", "rebuilds", "rebuilding", "renew", "renewing", "renewal", "rejuvenate", "rejuvenates", "rejuvenation", or "rejuvenating". The expense, complexity, and duration of litigation, including satisfying any judgment, are significant factors considered in evaluating the reasonableness of a settlement. Litigating this class action through trial would undoubtedly be time-consuming and expensive. As with most class actions, this action is complex. Indeed, to date, over 360,000 pages of documents have been produced, Plaintiff has retained three experts and Pharmavite has retained seven experts, such that the trial of this action could extend over several weeks. The expert evidence will be comprised of multiple

disciplines including epidemiology, medicine, rheumatology, microbiology, economics, statistics, scientific methodology, marketing and accounting (among others), and will likely involve reference to dozens (if not scores) of scientific authorities and studies. The question of whether Pharmavite's products fulfill the statements found on the labeling is vigorously disputed by the Parties. Thus, even if successful at trial, post-trial motions and appeals would likely continue for years before Plaintiff or the Settlement Class would see recovery, if any. That a settlement would eliminate the delay and expenses strongly weighs in favor of approval. *See Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y 1984).

By reaching this settlement, Plaintiff and the Settlement Class Members will avoid protracted litigation and will establish a means for prompt resolution of the claims of members of the Settlement Class and provide important labeling protections. The avenue of relief provided by the settlement ensures meaningful benefits to the Settlement Class and furthers important consumer protection goals through the labeling changes. Given the alternative of long and complex litigation before this Court, the risks involved in such litigation and the possibility of further appellate litigation, the availability of prompt relief under the settlement is highly beneficial to the Settlement Class.

3. The Substantial Relief Provided by the Settlement Agreement Favors Preliminary Approval

The Settlement Agreement provides real relief for the Settlement Class. Settlement Class Members who purchased the Covered Products may submit Claim Forms and choose to receive cash compensation or free products. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) (affirming final approval of settlement in antitrust action providing class members the option of receiving cash compensation or a gift card); *Shames v. Hertz Corp.*, 2012 WL 5392159 (S.D. Cal. Nov. 5, 2012) (final approval of settlement providing class members the option of receiving cash compensation or free car rental days).

Nevertheless, in evaluating the fairness of the consideration offered in settlement, it is not the role of the court to second-guess the negotiated resolution of the parties. "'[T]he 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.'" *Hanlon*, 150 F.3d at 1027 (quoting *Officers for Justice*, 688 F.2d at 625); *accord Rodriguez*, 563 F.3d at 965. The issue is not whether the settlement could have been better in some fashion, but whether it is fair: "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

4. **The Stage of the Proceedings Favors Preliminary Approval; Experience and Views of Counsel**

As for conducting relevant discovery, Plaintiff's Counsel's efforts were more than sufficient. This litigation has been pending for almost six years. During this time, the Parties have engaged in substantial formal and informal discovery necessary to facilitate and evaluate the strengths and weaknesses of the case. Pharmavite has produced over 360,000 pages of documents responsive to Plaintiff's document requests, tens of expert reports have been exchanged, competing motions for summary judgment were filed and denied, and the case was on the eve of trial. As a result of these efforts, Plaintiff's Counsel was able to fully analyze the strengths and weaknesses of the case.

Accordingly, the Parties (and the mediator, Magistrate Judge Gandhi) were able to assess the relative strengths and weaknesses of their respective positions, including the value of the potential damage claims, and to compare the benefits of the proposed settlement to further litigation. Class Counsel, who have substantial experience in

litigating class actions, and the Court are therefore adequately informed to evaluate the fairness of the proposed settlement.

5. The Settlement Was Reached After An Arm's Length Mediation Session Conducted Before a Neutral Mediator, the Honorable Jay C. Gandhi, Magistrate Judge, and Numerous Follow up Sessions Conducted Under his Supervision and With his Guidance.

The Parties' extensive arm's-length settlement negotiations extended over ten months, wherein the Parties' counsel met in person as well as exchanged dozens of emails, texts, and phone calls with Magistrate Judge Gandhi, and further participated in an initial all-day mediation session with Magistrate Judge Gandhi, a highly-regarded mediator. This course of settlement negotiations further demonstrates the fairness of the settlement that was reached, and demonstrates that the settlement is not a product of collusion. Typically, "[t]here is a presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval." *Newberg on Class Actions*, §11.41; *see also White v. Experian Info. Solutions, Inc.*, 803 F. Supp. 2d 1086, 1099 (C.D. Cal. 2011).

Here, counsel for Pharmavite and Plaintiff each zealously negotiated on behalf of their clients' best interests. From the beginning of the negotiations until the end, the parties engaged with Hon. Jay C. Gandhi, Magistrate Judge, an experienced and skilled mediator, who assisted the Parties to arrive at a settlement after ten months. Fees and expenses were not negotiated until the substantive provisions of monetary, free product, and injunctive relief were finalized. At the inception of the settlement discussions, Plaintiff's Counsel, who are experienced in prosecuting complex class action claims, had "a clear view of the strengths and weaknesses" of their case and were in a position to make an informed decision regarding the reasonableness of a potential settlement. *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985); *see also Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489-90 (E.D. Cal. 2010). After having reached a settlement with the assistance of Magistrate Judge Gandhi, the Parties began the painstaking process of negotiating the

language of the Settlement Agreement and its many details. The Parties negotiated on each and every detail of the Settlement Agreement and its exhibits, comprising 85 pages. The fact that a highly regarded and experienced mediator was heavily involved in the settlement negotiations is one factor that demonstrates the settlement was anything but collusive. *See, e.g., Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) ("The arms-length negotiations, including a day-long mediation before Judge Lynch, indicate that the settlement was reached in a procedurally sound manner."); *In re M.L. Stern*, 2009 WL 995864, at *5 (granting preliminary approval and stating that "the settlement was reached with the supervision and assistance of an experienced and well-respected independent mediator").

The proposed settlement is fair to all members of the Settlement Class because it provides them with the option of monetary or free product relief after submitting online (or by mail) a simplified claim form that requires nothing else. Furthermore, the injunctive relief related to labeling is also an additional component of this settlement. Pharmavite has agreed to not use the following terms or any substantially identical variation of the proscribed terms on product labels to describe the effect of glucosamine and/or chondroitin on cartilage: "rebuild", "rebuilds", "rebuilding", "renew", "renewing", "renewal", "rejuvenate", "rejuvenates", "rejuvenation", or "rejuvenating". Further, Plaintiff does not receive any unduly preferential treatment under the settlement. With the exception of an award of around $1,700/year for her six years of service as a class representative – $10,000 to account for her willingness to step forward and represent other consumers and to compensate her for her time and effort devoted to prosecuting the common claims over six years – Plaintiff is treated the same as every other Settlement Class Member. Such service awards are "fairly typical in class actions." *Rodriguez,* 563 F.3d at 958; *see also In re Simon v. Toshiba America*, No. C 07-06202, 2010 WL 1757956, at *5 (N.D. Cal. Apr. 30, 2010); *Williams v. Costco Wholesale Corp.*, No. 02cv2003, 2010 WL 761122, at *3 (S.D. Cal. Mar. 4, 2010) ("Although [plaintiff] seeks a $5,000 service fee for himself which

is not available to other class members, the fee appears to be reasonable in light of [plaintiff's] efforts on behalf of the class members."); *In re M.L. Stern Overtime Litig.*, No. 07-cv-0118, 2009 WL 3272872, at *4 (S.D. Cal. Oct. 9, 2009) (granting final approval and awarding class representative class enhancement awards of $15,000 per class representative).

Beyond the substantial involvement and assistance of a highly-qualified mediator, the experience of Class Counsel[7] and Pharmavite's Counsel as longstanding class action attorneys, and the fair result reached confirm that the negotiations that led to the settlement were arm's length, not collusive. *See also* Newberg, at §11.41 (The initial presumption of fairness of a class settlement may be established by showing: (1) that the settlement has been arrived at by arm's length bargaining; (2) that sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently; and (3) that the proponents of the settlement are counsel experienced in similar litigation.).

Accordingly, the settlement is well within the "range of possible approval" and should thus be preliminarily approved. The central issue facing the Court at this stage is whether the proposed settlement falls within the range of what ultimately might be approved as fair, reasonable, and adequate, so as to justify providing notice to the Class and scheduling a final approval hearing. The Court is not required at this juncture to make a final determination that the settlement is fair, reasonable, and adequate, nor will any Class members' substantive rights be prejudiced by preliminary approval. "If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies … and appears to fall within the range of possible approval," the Court should grant preliminary approval

[7] Counsel for Plaintiff are experienced complex class action and consumer fraud litigation firms, as demonstrated in the firm biographies of Class Counsel attached as Ex. 4.

and direct notice and schedule a final approval hearing. *Manual for Complex Litigation*, Third § 30.41, at 237 (1995).[8]

Here, the Settlement Agreement strikes a compromise that affords fair recompense to Settlement Class Members who submit a claim, and meaningful injunctive relief to all Settlement Class Members—even those who submit no claim. The proposed settlement provides for consumers who elect cash compensation and who have some form of proof of purchase to obtain compensation for approximately 100% of the average retail purchase price for up to four (4) purchases and consumers who have no such documentation to obtain compensation for approximately 50% of the average retail purchase price for up to four (4) purchases.[9] Settlement Class Members who elect free product may obtain 100% of their average purchase price in free product for up to six (6) purchases. The notice plan, involving the payment by Pharmavite of up to $325,000 for notice and administration costs, has an anticipated reach of close to 75% of the Settlement Class Members. *See generally*, Rosenthal Decl., Ex. 1-F hereto. If the number of valid claims received exceeds 40,000, the administration costs will be scaled up on a per claim basis. Any scaled up administration costs shall be paid by Pharmavite, with the first $25,000 of any scaled-up administration expense at Pharmavite's sole expense and any scaled-up expense in

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[8] The *Manual For Complex Litigation* sets forth the procedures for preliminary approval of settlements:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual, § 21.632.

[9] The Covered Products range in price from approximately $15.00 to $40.00. (Second Amended Complaint, ¶ 10.)

excess of $25,000 also to be paid by Pharmavite but reducing the $5.9 million product benefit by an equal amount.

Furthermore, the settlement provides for meaningful injunctive relief in the form of labeling prohibitions for dozens of different products.

Moreover, the labeling relief will provide an important consumer benefit both for members of the Settlement Class in connection with any future purchases they may make and future new purchasers. Since consumer protection is the touchstone of all consumer fraud laws (*see, e.g.*, *Asghari v. Volkswagen Grp. Of Am., Inc.*, 42 F. Supp. 3d 1306, 1314 (C.D. Cal. 2013) ("The CLRA is to be 'liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.'") (citations omitted); *Kwikset Corp.*, 51 Cal. 4th at 344 (California's UCL's "purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services'" and "[i]n service of that purpose, the Legislature framed the UCL's substantive provisions in "'broad, sweeping language'") (citations omitted)), the injunctive relief provided in the Settlement Agreement is a significant and meaningful part of this settlement.

There is an initial presumption of fairness because the settlement is the product of arm's length negotiations conducted by experienced counsel who are fully familiar with all aspects of class action litigation. *In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ("This preliminary determination establishes an initial presumption of fairness when the court finds that: (1) the negotiations occurred at arm's length…. [and] (3) the proponents of the settlement are experienced in similar litigation. . . ."); *see also Newberg on Class Actions* § 11.4; *Manual for Complex Litigation* (Third) § 30.42 (1995); *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 662 (N.D. Fla. 2011).

Based upon the foregoing, Plaintiff respectfully submits that the proposed settlement "falls within the range of what ultimately might be approved as fair, reasonable, and adequate" and that preliminary approval should be granted.

E. The Notice Plan

The threshold requirement concerning class notice is whether the means employed to distribute the notice was reasonably calculated to apprise the Class of the pendency of the action, of the proposed settlement and of the Settlement Class Members' rights to opt out or object. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The mechanics of the notice process are left to the discretion of the Court, subject only to the broad "reasonableness" standards imposed by due process. In this Circuit, it has long been the case that a notice of settlement will be adjudged "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.'" *Rodriguez*, 563 F.3d at 962 (quoting *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 2004)); *Hanlon*, 150 F.3d at 1025 (notice should provide each absent class member with the opportunity to opt-out and individually pursue any remedies that might provide a better opportunity for recovery). The notice should also present information "neutrally, simply, and understandably," including "describ[ing] the aggregate amount of the settlement fund and the plan for allocation." *Rodriguez*, 563 F.3d at 962.

The notice here is fully compliant with due process in that it informs the Settlement Class Members of their right to opt-out or exclude themselves from the settlement, appear through their own counsel, object to the terms of the settlement along with the form that the objection must take, the deadlines for opt-out/exclusion or objection, the date of the final approval hearing, the scope of the claims released if a Settlement Class Member does not opt-out and remains in the Settlement Class, and the potential amounts of Plaintiff's incentive award and Settlement Class Counsels'

attorneys' fee award. *See* Ex. 1-F, Rosenthal Decl. at Ex. 1. KCC Class Action Services, LLC ("KCC")[10] has been identified as the third-party Settlement Administrator. *Id*. The notice plan was based upon an analysis by Daniel Rosenthal, Special Consultant to KCC, who has more than 30 years of class action notice and administration experience. Rosenthal Decl. at ¶¶ 3-4. Based upon Mr. Rosenthal's analysis of publications likely to reach the proposed Settlement Class, one print publication in two national publications (Arthritis Today and People) were chosen. *Id*. at ¶¶ 11-12. Further, to fulfill the notice requirements set forth in California's Consumer Legal Remedies Act, notice will also be published once a week for four consecutive weeks in the *LA Daily News*. *Id.* at ¶14. And, KCC will cause approximately 130 million internet impressions targeting adults aged 35+ to be distributed over a variety of websites. Rosenthal Decl. at ¶ 13. Of those 130 million internet impressions, 120 million impressions will target adults 35+ at a 1x frequency gap; 5 million impressions will target adults 35+ who have shown an interest in health as well as those who have searched for the keywords "joint pain" and "glucosamine"; and 5 million impressions will target adults Facebook users aged 35+ who are categorized as anticipated purchasers of vitamins, pain relief, or health and wellness products. *Id.* at Ex. 1.

In *In re Toys R US – Delaware, Inc. – Fair & Accurate Credit Trans. Act (FACTA) Litig.*, 295 F. R.D. 438, 449 (C.D. Cal. 2014), the Court approved a publication notice for a nationwide class that consisted of publication in one publication of national circulation and the posting of the notice on a website set up by a settlement administrator. *See also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (approving notice plan consisting of publication in USA Today, on the settlement website, and a popular website related to wedding planning).

Here, the notice plan meets these threshold requirements.

[10] http://www.kccllc.com.

V. CONCLUSION

Based upon the foregoing, and because the proposed settlement is fair, reasonable, and sufficient to warrant that the notice plan be approved and a final approval hearing be held, Plaintiff respectfully requests that the Court enter the preliminary approval order that accompanies this motion and memorandum, as Ex. 1-C.

DATED: April 28, 2017

BONNETT, FAIRBOURN FRIEDMAN & BALINT, P.C.

s/*Patricia N. Syverson*

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Attornevs for Plaintiff and the Class

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic mail notice list. I hereby certify that I have mailed the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 28, 2017.

/s/Patricia N. Syverson

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