UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

WILLIAM GRIVAS, individually and on behalf of all others similarly situated, **Plaintiff,** **v.** **METAGENICS, INC.,** **Defendant.**	**Case No.: SACV 15-01838-CJC-DFM** **ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [Dkt. 74]**

I. INTRODUCTION & BACKGROUND

Plaintiff William Grivas brings this putative class action challenging Defendant Metagenics, Inc.'s purportedly deceptive marketing of four non-prescription products that allegedly treat a number of chronic health conditions. (Dkt. 1 [Complaint]; Dkt. 47 [Operative First Amended Complaint, hereinafter "FAC"].) After years of investigation

and litigation, Plaintiff now seeks preliminary approval of a $1.3 million non-reversionary class action settlement. (Dkt. 74.)

Defendant Metagenics, Inc. ("Metagenics") manufactures and sells non-prescription, consumable products. At issue are four products (the "Products") that Metagenics marketed as "Medical Foods."[1] (FAC ¶ 1.) California's Sherman Food, Drug, and Cosmetic Act defines the term "Medical Food" by incorporating the pertinent federal statutes and U.S. Food and Drug Administration ("FDA") regulations. Cal. Health & Safety Code § 110100 (incorporating 21 U.S.C. § 360ee(b)(3)). Under federal and California state law, a "Medical Food" is "a food which is formulated to be consumed or administered internally under the supervision of a physician and which is intended for the dietary management of a specific disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation." 21 U.S.C. § 360ee(b)(3).

According to Plaintiff, Metagenics engaged in "false and misleading advertising, unfair competition, and deceptive conduct towards consumers" when it labeled the Products as "Medical Foods" because they do not constitute "Medical Foods" under the relevant statutes. (FAC ¶ 56.) On November 9, 2015, Plaintiff brought the instant action on behalf of himself and a nationwide class of persons who purchased the Products, asserting one claim for unlawful business acts and practices in violation of California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq*. (*See generally* Dkt. 1.) The "Medical Food" label, Plaintiff contends, enabled Metagenics to sell the Products at a higher price point when compared to ordinary foods or dietary supplements. (*See generally* FAC.)

[1] The four varieties that Mr. Grvas purchased, and which Metagenics no longer sells, are *UltraMeal Plus*, *UltraMeal Plus 360*, *UltraGlycemX*, and *UltraClear*. (FAC ¶ 13.)

The parties have engaged in substantial discovery and conducted a mediation before a retired judge. After surviving two motions to dismiss, Plaintiff continued his investigation by gathering and analyzing publicly-available data, Food and Drug Administration records, Defendant's sales information, and information obtained through several Freedom of Information Act Requests. (Dkt. 74-2 [Declaration of Alex Tomasevic, hereinafter "Tomasevic Decl."] ¶ 16.) Plaintiff also hired and consulted with renowned nutritional, biochemical, and physiological expert, Dr. Edward R. Blonz, PhD, to assist Plaintiff's counsel in understanding the relevant science and scope of potential claims. (*Id.*) On August 14, 2018, the parties attended a full-day mediation before the Honorable Peter D. Lichtman of JAMS, one of the founders of the Los Angeles Superior Court's Complex Civil Litigation program. (*Id.* ¶¶ 17–18.) Before the mediation, the parties exchanged and analyzed additional information, including Metagenics' detailed nationwide sales data. (*Id.*) Although the parties did not resolve the case at the mediation, they later accepted Mr. Lichtman's written proposal in September 2018. (*Id.*)

Under the parties' Settlement Agreement, Metagenics will pay $1.3 million into a common fund. (Dkt. 74-3 [Settlement Agreement] at III.A.) After providing settlement administrator costs, attorneys' fees and costs, and a lead plaintiff award for Mr. Grivas, the remaining money will be distributed to consumers who purchased any of the four Metagenics products that Mr. Grivas purchased. (*Id.* at II.E.) Before the Court is Plaintiff's unopposed motion for preliminary approval of its $1.3 million non-reversionary class action settlement. (Dkt. 74-1 [hereinafter "Mot."].) For the following reasons, Plaintiff's motion is **GRANTED**.[2]

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[2] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for January 14, 2019, at 1:30 p.m. is hereby vacated and off calendar.

II. ANALYSIS

A. Class Certification Requirements

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks provisional certification of a class for settlement purposes only. The proposed class is defined as

> [A]ll persons who at any time since November 9, 2011 to the present purchased one or more of the following [Metagenics] products labelled as "Medical Foods" and who do not file a valid and timely request to opt-out of the Lawsuit: *UltraMeal Plus*, *UltraMeal Plus 360*, *UltraGlycemX*, and *UltraClear*.

(Settlement Agreement at 3.)

When a plaintiff seeks conditional class certification for purposes of settlement, the Court must ensure that the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Staton v. Boeing Co.*, 327 F.3d 938, 952–53 (9th Cir. 2003). Under Rule 23(a), the plaintiff must show the class is sufficiently numerous, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of those of the class, and that the representative parties will fairly and adequately protect the class's interests. Under Rule 23(b), the plaintiff must show that the action falls within one of the three "types" of classes. Here, Plaintiff seeks certification pursuant to Rule 23(b)(3). Rule 23(b)(3) allows certification where (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.

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1. Rule 23(a) Requirements

i. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." "No exact numerical cut-off is required; rather, the specific facts of each case must be considered." *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009) (citing *Gen. Tel. Co. of Nw., Inc. v. E.E.O.C.*, 446 U.S. 318, 330 (1980)). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members." *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 602–03 (C.D. Cal. 2015); *see Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 473–74 (C.D. Cal. 2012). According to Metagenics' own sales data, the class consists of thousands of purchasers of the four Products at issue here. (Mot. at 14.) Accordingly, numerosity is satisfied.

ii. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." The plaintiff must "demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Rather, the plaintiff's claim must depend on a "common contention" that is capable of classwide resolution. *Id.* This means "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Here, Plaintiff's sole claim presents the common question of whether the Products constitute "Medical Foods" under federal and state law. That question is central to each class member's claim and its resolution

will determine, "in one stroke," whether Metagenics inaccurately marketed the Products as "Medical Foods."

iii. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Representative claims are "typical" if they are "reasonably coextensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Here, the Plaintiff and class members' claims arise from the same alleged course of conduct: that Metagenics mislabeled the Products as "Medical Foods" and misled its customers. Accordingly, Plaintiff's claims are "reasonably coextensive" with those of the class members.

iv. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This factor requires (1) a lack of conflicts of interest between the proposed class and the proposed representative plaintiff, and (2) representation by qualified and competent counsel that will prosecute the action vigorously on behalf of the class. *Staton*, 327 F.3d at 957. The concern in the context of a class action settlement is to ensure that there is no collusion between the defendant, class counsel, and class representatives to pursue their own interests at the expense of the interests of the rest of the members of the class. *Id*. at 958 n.12. Here, there is no conflict of interest between Plaintiff and the class because they share a common interest in holding Metagenics accountable for selling mislabeled or falsely-advertised products. Further, counsel for Plaintiff—Hulett Harper Stewart LLP, Nicholas & Tomasevic, LLP, and McColloch Law Firm—are experienced in prosecuting consumer class action

matters. (Mot. at 16; Tomasevic Decl. ¶¶ 2–13; Dkt. 74-6.) Counsel have vigorously prosecuted this action, leading to the present Settlement Agreement. The record indicates that they have done so capably and adequately.

2. Rule 23(b)(3) Requirements

In addition to the requirements of Rule 23(a), Plaintiff must satisfy the requirements of Rule 23(b)(3). Under Rule 23(b)(3), a plaintiff must demonstrate that common questions "predominate over any questions affecting only individual members." The predominance requirement overlaps with Rule 23(a)(2)'s commonality requirement, but is a more demanding inquiry. *Hanlon*, 150 F.3d at 1019. The "main concern in the predominance inquiry . . . [is] the balance between individual and common issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 959 (9th Cir. 2009). The plaintiff must show that "questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1191 (2013).

Questions common to the class predominate over any questions affecting only individual members. Here, the pivotal question is whether the Products fall within the "Medical Foods" definition supplied by federal and state law. Resolution of that question will determine whether Metagenics deceptively marketed the Products and misled its customers. Although damage calculations will necessarily involve purchaser-specific determinations, that alone does not defeat Rule 23(b)(3) certification. *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) ("Under . . . our precedent, the need for individual damage calculations does not, alone, defeat class certification.").

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In determining whether to grant provisional certification of a nationwide class, courts also consider whether the interests of other states outweigh California's interest in having its laws applied. *See Mazza v. Am Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012) (holding that the court may certify a nationwide class if "the interests of other states are not found to outweigh California's interest in having its law applied" (citation omitted)). Here, there is no indication that other states' interests outweigh California's interest in having its law applied. Metagenics is a California-based company with its headquarters in Orange County, California. California has a compelling interest in ensuring that corporations within its borders do not promulgate materially false and misleading product labeling. Further, because the Court need not consider at the "settlement-only class certification stage" whether a case "would present intractable management problems" if it went to trial, *Amchem*, 521 U.S. at 620, potential variations in state law remedies do not defeat predominance here. *See Hanlon*, 150 F.3d at 1022–23 ("[G]iven the limited focus of the action, the shared factual predicate and the reasonably inconsequential differences in state law remedies, the proposed class was sufficiently cohesive to survive Rule 23(b)(3) scrutiny."). Accordingly, Plaintiff's proposed class is appropriate for provisional certification under Rules 23(a) and 23(b)(3).

B. Fairness of the Proposed Settlement

Plaintiff also seeks preliminary approval of the Settlement Agreement. Rule 23(e) "requires the district court to determine whether a proposed settlement is fundamentally fair, reasonable, and accurate." *Staton*, 327 F.3d at 959 (quoting *Hanlon*, 150 F.3d at 1026). To determine whether this standard is met, a district court must consider a number of factors, including "the strength of the plaintiffs' 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; . . . and

the reaction of the class members to the proposed settlement." *Id.* (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). At the preliminary approval stage, a full "fairness hearing" is not required. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Rather, the inquiry is whether the 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." *Id.*

Having reviewed the arms-length negotiation process and substantive terms of the Settlement Agreement, the Court finds no obvious deficiencies or grounds to doubt its fairness. The parties did not settle until after multiple attacks on the pleadings, substantial discovery, and a full-day mediation before a neutral and experienced mediator. *See In re Heritage Bond Litig.*, 2005 WL 1594403, at *9 (C.D. Cal. June 10, 2005) ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." (internal quotation and citations omitted)). There is no evidence of collusion during the parties' settlement negotiations. Indeed, "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007).

The Settlement Agreement also presents a fair compromise in light of the risks and expense of continued litigation. Metagenics has challenged Plaintiff's case at every turn. When Plaintiff filed the action in November 2015, Metagenics responded with a motion to dismiss and motion to strike. (Dkt. 22.) Metagenics argued, among other things, that the Court did not have jurisdiction to decide matters related to "Medical Food" labelling, which should be left to the Food and Drug Administration. While the Court denied Metagenics' motion to dismiss and motion to strike, it granted Metagenics' motion to stay the case pending resolution of appeals in three other consumer class actions that

were before the Ninth Circuit. (Dkt. 33.) Once the stay was lifted, Metagenics then filed a motion for reconsideration of the Court's order denying its motion to dismiss. (Dkt. 41.) Metagenics argued that Plaintiff failed to allege standing to challenge Metagenics' entire product line, with which the Court agreed. (Dkt. 46.) When Plaintiff filed his First Amended Complaint, Metagenics filed another motion to dismiss, which the Court granted in part. (*See* Dkts. 52, 56.)

The parties then met and conferred about discovery and drafted a detailed joint discovery plan. (Tomasevic Decl. ¶ 15.) Plaintiff retained an expert to assist in understanding the relevant science, ingredients, and medical conditions at issue. (*Id.* ¶ 16.) Plaintiff also continued to conduct his own investigation by analyzing publicly-available data and making several Freedom of Information Act requests. (*Id.*) The parties, after discovery, substantive briefing, and a full-day mediation, were able to realistically value Metagenics' liability and assess the risk of moving forward with class certification, motions for summary judgment, and potentially trial. Litigation had reached a stage where the parties had a clear view of the strengths and weaknesses of their positions to reach a fair and reasonable settlement. The $1.3 million settlement proposed by the mediator and adopted by the parties represents a significant award for the class in light of the likely prolonged and contested litigation ahead of them.

C. Attorneys' Fees and Incentive Award

Plaintiff's counsel seek attorneys' fees, but they do not specify the amount in their moving papers. (*See* Mot. at 5 [describing the total settlement amount as including attorneys' fees].) The notice that Plaintiff intends to send to the class members states that attorneys' fees will not exceed $455,000. (Dkt. 75-4.) A $455,000 award would constitute 35% of the settlement, which exceeds the 25% benchmark the Ninth Circuit has set for common fund cases. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376

(9th Cir. 1993). To justify a departure from the 25% benchmark, courts must provide adequate explanation in the record of any "special circumstances." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 942–43 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) ("We note with approval that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent. That percentage amount can then be adjusted upward or downward to account for any unusual circumstances involved in this case." (internal citation omitted)). Plaintiff, however, provides no analysis, let alone compelling circumstances, to justify a departure from the 25% benchmark.

Plaintiff also seeks an incentive award in the amount of $20,000 to compensate his time and efforts on behalf of the class. (Mot. at 12–13.) Plaintiff asserts that he spent a "significant amount of his time" meeting with counsel, making himself available for discovery, and putting his own medical history at issue. (*Id*. at 13.) He also attended the full-day mediation that culminated in the Settlement Agreement before the Court. While Plaintiff may have expended substantial effort on behalf of the class, his proposed $20,000 incentive award is excessive when compared to the average net recovery. *See In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014) (explaining that California district courts typically approve incentive awards between $3,000 and $5,000).

In light of the Court's concerns regarding the attorneys' fee award and incentive award to the lead plaintiff, the Court will preliminarily approve the Settlement Agreement on the condition, and with the understanding, that the final award of attorneys' fees will not exceed the 25% benchmark, and the final incentive award to the lead plaintiff will be $5,000 or less. The Court also will expect Plaintiff's counsel to provide detailed evidence to support such a reduced award of attorneys' fees and such a

reduced incentive award to the lead plaintiff in its motion for final approval of the settlement.

D. Settlement Administrator

Plaintiff asks the Court to appoint ILYM Group, Inc. ("ILYM") as settlement administrator, (Dkt. 74-8 [Pl.'s Proposed Order] at 2), but does not address ILYM's qualifications to act as administrator. The Court nevertheless takes judicial notice of other cases in which federal courts in California have approved ILYM as administrator in class action settlements. *See, e.g.*, *Barani v. Wells Fargo Bank, N.A.*, 2014 WL 1389329, at *9 (S.D. Cal. Apr. 9, 2014); *De Santos v. Jaco Oil Co.*, 2015 WL 4418188, at *10 (E.D. Cal. July 17, 2015). Accordingly, the Court appoints ILYM as Settlement Administrator here. Any award of administrator expenses will need to be substantiated with detailed evidence.

E. Notice of the Proposed Settlement

Finally, Plaintiff seeks approval of the proposed manner and form of the notice that will be sent to the class members. Rule 23(c)(2)(B) provides that for Rule 23(b)(3) classes, as here, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Plaintiff proposes a "robust publication notice protocol" in lieu of individual notice because "Metagenics does not have, and cannot get through reasonable effort, contact information for people who purchased the class products." (Mot. at 19; *see* Dkt. 74-7 [Declaration of William L Stern] ¶¶ 2–3.) The Supreme Court "has not hesitated to approve" notice through publication as a "customary substitute" when it is not reasonably

practicable to give more adequate warning. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). The proposed manner of notice outlined in the Settlement Agreement is not an exception. (*See* Settlement Agreement at IV.C.) The notice will be published in the USA Today National Edition and PR Wire. (Mot. at 19.) The administrator will also deploy, for thirty days, internet banner ads and an ad display campaign designed to garner approximately 10,000,000 views. (*Id.*) Accordingly, the manner of notice is adequate.

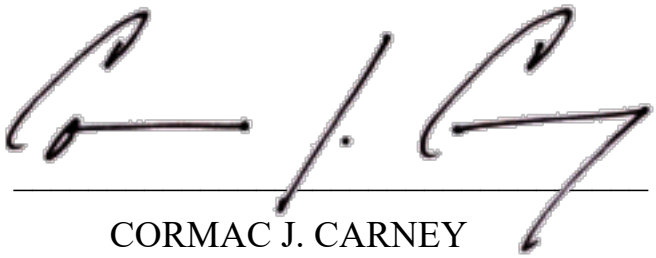
The form of notice also meets the requirements of Rule 23(c)(2)(B). Notice to class members must "clearly and concisely state, in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that the class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion, and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). Here, the proposed notice provides clear information about the definition of the class and nature of the action, a summary of the terms of the proposed settlement, the process of objecting to the settlement, and the consequences of inaction. (*See* Dkts. 74-4, 74-5.) The notice will also provide specific details regarding the date, time, and place of the Final Approval Hearing and inform class members that they may enter an appearance. (*See id.*)

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** both provisional certification of the class for settlement purposes and preliminary approval of the Settlement Agreement with modification to the award of attorneys' fees and the incentive award to the lead plaintiff. The Court hereby **APPOINTS** Plaintiff Grivas as Class Representative, Hulett Harper

Stewart LLP, Nicholas & Tomasevic LLP, and McColloch Law Firm as Class Counsel, and ILYM Group, Inc. as Settlement Administrator. The Court also **APPROVES** the proposed notice and orders that it be disseminated to the class as provided in the Settlement Agreement. The final approval hearing shall be held on **Monday, April 22, 2019, at 1:30 p.m.**

DATED: January 10, 2019



CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE