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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ANDREA GOLLOHER, MARISA FREEMAN, ROBERTA CHASE, JAMES HANKS, MICHAEL SHAPIRO, BRENDA BROWN, GRETCHEN SWENSON, CRYSTAL KENNY, KELLY BOTTARI, RENEE CONOVER, and SHANISHA SANDERS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

TODD CHRISTOPHER INTERNATIONAL, INC. DBA VOGUE INTERNATIONAL, a Florida Corporation, and DOES 1-100,

Defendants.

Case No. C 12-06002 RS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Date: September 26, 2013
Time: 1:30 p.m.
Location: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 26, 2013 at 1:30 p.m., or as soon thereafter as this matter may be heard in the Courtroom of the Hon. Richard Seeborg, located at the United States District Court for the Northern District of California, San Francisco Courthouse, Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs Andrea Golloher, Marisa Freeman, Roberta Chase, James Hanks, Michael Shapiro, Brenda Brown, Gretchen Swenson, Crystal Kenny, Kelly Bottari, Renee Conover and Shanisha Sanders ("Plaintiffs"), on behalf of the proposed Class (defined herein), will respectfully apply to this Court for entry of an order: (i) granting preliminary approval of the proposed settlement set forth in the class action Stipulation of Settlement (attached as Exhibit 1 to the accompanying Declaration of Mark N. Todzo ("Todzo Decl.")); (ii) conditionally certifying the Class for purposes of such settlement by way of a [Proposed] Order Granting Preliminary Approval (submitted herewith); (iii) approving Plaintiffs' selection of Class Counsel; (iv) approving the proposed notice plan; and (v) setting a hearing date for final approval of the Settlement.

This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Declaration of Mark N. Todzo and accompanying exhibits, the other papers on file in this action, and such other submissions or arguments that may be presented before or at the hearing on this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs Andrea Golloher, Marisa Freeman, Roberta Chase, James Hanks, Michael Shapiro, Brenda Brown, Gretchen Swenson, Crystal Kenny, Kelly Bottari, Renee Conover and Shanisha Sanders ("Plaintiffs") on behalf of the proposed Class (defined herein), respectfully apply to this Court for entry of an order (i) granting preliminary approval of the proposed settlement set forth in the class action Stipulation of Settlement (the "Settlement") (Todzo Decl. Exh. 1); (ii) conditionally certifying the Class for purposes of such settlement by way of a [Proposed] Order Granting Preliminary Approval (the "Preliminary Approval Order") (submitted herewith); (iii) approving Plaintiffs' selection of Class Counsel; (iv) approving the proposed notice plan; and (v) setting a hearing date for final approval thereof (the "Final Approval Hearing").

The Settlement resolves the claims in the First Amended Complaint in the above-captioned case, which concerns Todd Christopher International, Inc. d/b/a Vogue International's ("Vogue") allegedly false and misleading marketing, advertising and labeling of its Organix brand hair care and skin care products as organic. Specifically, Plaintiffs allege that Vogue misleadingly used the name "Organix" and the word "organic" on the labeling and advertising of the Organix products. Plaintiffs allege that all of the Organix products are, in fact, composed almost entirely of ingredients that are not organic. The Settlement remedies Plaintiffs' concerns on behalf of purchasers of Organix products nationwide, who allegedly paid a premium for these products over comparable products that did not purport to be organic.

The Settlement is fair, reasonable and adequate, falling well within the range of class action settlements that merit preliminary approval. First, the Settlement will prevent future alleged violations of state consumer protection and false advertising laws by prohibiting Vogue from manufacturing any hair care and skin care products under the Organix brand name and from using the word "organic" to promote the sale of any hair care and skin care product unless such products contain at least 70% organically produced ingredients. Second, the Settlement will

1 compensate Class members who purchased Organix hair care and skin care products under the
2 belief that the products are organic by requiring Vogue to pay a total of $6,500,000 million into a
3 claim fund ("Claim Fund") for the benefit of Class members. The Claim Fund will primarily be
4 used to compensate Class Members who submit valid claims. In addition, Vogue will also not
5 oppose an application by Plaintiffs to this Court for a partial reimbursement of Plaintiffs'
6 attorneys' fees and costs, not to exceed a total of 25% of the Claim Fund or $1,625,000. In turn,
7 Vogue will receive a release of all claims relating to the challenged marketing and advertising
8 practices. These settlement stipulations were reached after substantial discovery and rigorous,
9 informed negotiations between the Parties and their experienced class action counsel, in a process
10 that was overseen by a seasoned, neutral mediator. Because the Settlement is fair to all Parties and
11 because it adequately addresses the grievances of Plaintiffs and the Class, it should be
12 preliminarily approved.

13 **STATEMENT OF FACTS**

14 **I. PROCEDURAL AND FACTUAL BACKGROUND**

15 Defendant Vogue is a manufacturer, seller and distributor of the Organix line of hair care
16 and skin care products (the "Products"), which are sold through third party retailers to thousands
17 of consumers in all 50 states and the District of Columbia. Plaintiffs allege that they were induced
18 to purchase the Products by Vogue's representations and claims that the Products are organic; in
19 fact, Plaintiffs allege, the Products contain only *de minimis* amounts of organic ingredients.
20 Indeed, none of the Products contain more than 10% organic ingredients. Plaintiffs further allege
21 that Vogue's marketing materials for the Products include representations that the Products are
22 organic, and the front and back labels of some of the Products state that the Products contain
23 organic ingredients.

24 Plaintiffs seek to represent a class of persons throughout the United States who, like
25 themselves, purchased the Products under the erroneous belief that the Products are organic based
26 on Vogue's representations. The primary goals of Plaintiffs' case are to require Vogue to: (i) halt
27 its allegedly deceptive marketing and advertising of the Products as organic (thereby protecting
28

consumers in the future); and (2) disgorge any premiums Vogue obtained as a result of its alleged misrepresentations (thereby compensating consumers for past wrongdoings). The Settlement accomplishes both of these objectives.

Before commencing this action, Class Counsel conducted an examination and evaluation of the relevant law and facts to assess the merits of the claims and to determine how to best serve the interests of the members of the Class. On October 25, 2012, Plaintiffs Andrea Golloher, Marisa Freeman, Roberta Chase, Michael Shapiro and Brenda Brown, on behalf of themselves and all other similarly situated persons, filed their initial complaint in the Superior Court of California, Alameda County, *Gollogher v. Todd Christopher International, Inc.*, Alameda County Superior Court Case No. RG 12-653621. On November 28, 2012, Defendant filed the Notice of Removal to Federal Court, based on this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005. Plaintiffs' original complaint sought relief on behalf of a proposed Class of purchasers of the Products in California, New York, Hawaii and Washington pursuant to the consumer protection and false advertising laws of those states. *See* Cal. Bus. & Prof. Code § 17200, *et seq.*; Cal. Civil Code § 1750, *et seq.*; N.Y. Gen. Bus. Law § 349; Haw. Rev. Stat. §§ 480-2, 480-13(b) and (c); and Revised Washington Code §§ 19.86.020, 19.86.023 and 19.86.090. Plaintiffs also sought relief on behalf of a proposed Class of purchasers of the Products in California, New York, Florida, New Jersey, Ohio, Washington, Texas and Hawaii pursuant to the express warranty laws of those states. Plaintiffs' claims under California law included a claim that Defendant violated the unlawful prong of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, by allegedly violating the California Organic Products Act's ("COPA's") restrictions on selling, labeling, or representing cosmetic products "as organic or made with organic ingredients" unless the products contain a minimum of 70% organically produced ingredients, Cal. Health & Safety Code §§ 110838 *et seq.*[1]

On December 12, 2012, Vogue filed a motion in the instant action to transfer venue

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[1] California is the only state that regulates organic labeling of cosmetic products.

1 pursuant to 28 U.S.C. § 1404(a) to the Middle District of Florida. ECF No. 9. On February 8,
2 2013, the Court denied Vogue's motion. ECF No. 27.

3 On March 1, 2013, Vogue filed motions in the instant action to: (1) dismiss Plaintiffs'
4 claims for breach of express warranty under the laws of the four states in which the named
5 Plaintiffs neither lived nor purchased Vogue's products; (2) dismiss the Plaintiffs' claims for
6 injunctive relief in California under the doctrine of res judicata in light of a Consent Judgment in a
7 prior action;[2] and (3) stay the case under the doctrine of primary jurisdiction pending federal
8 regulatory action for organic cosmetics. ECF No. 33. These motions were still under submission
9 at the time the Parties reached an agreement in principle as to the terms of the Settlement.

10 On July 22, 2013, Plaintiffs Kelly Bottari, Renee Conover, James Hanks, Crystal Kenny,
11 Shanisha Sanders and Gretchen Swenson sent a letter notifying Vogue of their intent to pursue
12 consumer protection and express warranty claims on behalf of themselves and a nationwide class
13 of purchasers of the Organix products throughout the United States based on Plaintiffs' allegations
14 that Vogue misrepresented the organic composition of the products. On August 9, 2013, upon
15 stipulation of the Parties wherein Vogue reserved all rights and objections, Plaintiffs filed a First
16 Amended Complaint adding Kelly Bottari, Renee Conover, James Hanks, Crystal Kenny,
17 Shanisha Sanders and Gretchen Swenson as class representatives, and alleging claims on behalf of
18 a nationwide class under the consumer protection, express warranty and unjust enrichment laws of
19 all 50 states and the District of Columbia. ECF Nos. 54 & 55.

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22 [2] Before Plaintiffs filed the instant action, on June 16, 2011, Vogue was named in an action brought by the Center for Environmental Health ("CEH") entitled *Center for Environmental*
23 *Health v. Advantage Research Laboratories, Inc.*, Case No. RG 11-580876, Superior Court of the State of California, County of Alameda. That action was filed by CEH pursuant to COPA's
24 private attorney general provision, Cal. Health & Safety Code §§ 111910(a), which authorizes any person to sue to enjoin alleged violations of COPA. On September 13, 2012, the Hon. Steven A.
25 Brick approved a Consent Judgment between CEH and Vogue resolving the action. The Consent
26 Judgment includes injunctive relief placing restrictions on Vogue's use of the Organix brand name and the word "organic" on the Products' labeling, advertising and marketing materials in
27 California.

28

The Parties have engaged in lengthy and comprehensive settlement discussions, culminating in an all-day in person mediation before mediator Randall W. Wulff in Oakland, California on July 30, 2013. Through these discussions and substantial written discovery and documentary production, Vogue has provided Plaintiffs with extensive information about the facts at issue. Based upon Plaintiffs' investigation and evaluation of the facts and law relating to the matters alleged in the pleadings, Plaintiffs and Class Counsel agreed to settle this action pursuant to the provisions of the Settlement after considering, among other things: (1) the substantial benefits available to the Class under the terms of the Settlement; (2) the attendant risks and uncertainty of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; and (3) the desirability of consummating the Settlement promptly to provide effective relief to Plaintiffs and the Class.

Vogue has denied and continues to deny each and all of the claims and contentions alleged by Plaintiffs in the Complaints and otherwise. Vogue contends that its advertising and marketing of the Products was not false or misleading, and that Class members did not suffer any damages as a result of the conduct at issue.

II. THE PROPOSED SETTLEMENT

The Settlement remedies Vogue's alleged misconduct and compensates the Class for a significant portion of their alleged damages. In exchange for a release of Plaintiffs' and the Class's claims, Vogue has agreed to undertake several important remedial measures. First, to remedy the alleged misrepresentations on the Product labels, Vogue has agreed to cease using the Organix brand name and the word "organic" in its marketing of its hair care and skin care products unless the products contain at least 70% organically produced ingredients. Second, Vogue will contribute $6,500,000 into an independently-administered Claim Fund, which will be used chiefly to compensate users of the Products who were misled by Vogue's past labeling and marketing practices. The Claim Fund will also be used to disseminate notice to the Class, such that affected persons may avail themselves of this remedial monetary payment, to pay for attorneys' fees and costs of up to $1,625,000 (25% of the Claim Fund), and to pay modest service awards to the class

representatives for their time and efforts on behalf of the Class.

A. Vogue Must Change The Labeling And Packaging Of Its Products.

In settlement of Plaintiffs' and the Class's claims, Vogue has agreed not to manufacture or cause to be manufactured any hair care and skin care products under the Organix brand name unless such products contain at least 70% organically produced ingredients (excluding water and salt). In addition, Vogue has agreed not to use the word "organic" to promote the sale of any hair care and skin care products unless such products contain at least 70% percent organically produced ingredients (excluding water and salt). Todzo Decl. Exh. 1, ¶ III.A; *see also id.*, Exh. 1-H.

B. Vogue Must Contribute Substantial Sums To A Claim Fund To Compensate Those Persons Allegedly Harmed By Its Allegedly Deceptive Labeling And Marketing Practices.

The Settlement also provides that Vogue will pay $6,500,000 to establish the Claim Fund for payment of Class member claims, and for the payment of certain notice and administration costs and expenses. Todzo Decl. Exh. 1, ¶ III.B. The Claim Fund will be administered by Heffler Claims Group an independent, highly qualified company (the "Claim Administrator"). The Claim Administrator shall approve claims submitted by affected Class members in accordance with a specified procedure and subject to verification by the Parties. *Id.*, Exh. 1, ¶¶ III.B.5-B.10; *see also id.*, Exh. 1-A. The Products typically retail for $7.99, although Vogue often offers discounts such as "buy one, get one free" that result in lower costs to consumers. Class members who submit valid claims are eligible to recover $4 for each Product they purchased up to $28 per Class member. Todzo Decl. Exh. 1, ¶ III.B.5.

Notice to the Class will be provided shortly after the Court's preliminary approval and will be achieved by several means, which the parties have selected as the most effective means of reaching the proposed Class members. *Id.*, Exh. 1, ¶ VI.B. First, the Claim Administrator will publish a half page insertion in the form of the Publication Notice in *People*, *Us Weekly* and *Life And Style* magazines – publications which are widely read among the Products' target demographic. *Id.*, Exh. 1-C and Exh. 1-D, ¶ 4. Second, the Claim Administrator will provide

notice pursuant to California Government Code § 6064 by a 1/6 page advertisement in the form of the Publication Notice, which will be published for four consecutive weeks in the San Francisco Chronicle. *Ibid.* Third, a press release in both English and Spanish targeting all 50 states will be sent via the PR Newswire's U.S.1 National and Hispanic newslines within 10 days of the Court's entry of the Preliminary Approval Order. *Id.*, Exh. 1-D, ¶ 5. Fourth, the Claim Administrator will run internet and mobile advertisements in both English and Spanish targeting potential Class Members through services provided by Facebook, People.com & PeopleStyleWatch, Yahoo!, Yahoo! Mobile, Yahoo! Omg!, Yahoo! Shine, Batanga and Univision. Advertisements on each of these services shall run for approximately one month. *Id.*, Exh. 1-D, ¶ 6. All notices will direct Class members to a settlement website and toll-free telephone support system, which are to be set up by the Claim Administrator using the Claim Fund. *Id.*, Exh. 1-D, ¶¶ 1-2. The website will include a more detailed notice fully explaining the terms of the Settlement and all attendant Class member rights in both English and Spanish.[3] *Id.*, Exh. 1, ¶ VI.B; *see also id.*, Exh. 1-C & 1-E. No more than $650,000 of the Claim Fund may be used to reimburse those costs reasonably and actually incurred by the Claim Administrator in connection with providing notice and administering claims. *Id.*, Exh. 1, ¶ III.B.2(a).

The Settlement allows no possibility of any Claim Fund monies reverting to Vogue. If the amounts ultimately paid for claims, claims administration expenses, notice and attorneys' fees and costs do not equal or exceed the Claim Fund, the remainder of the Claim Fund shall be distributed in equal amounts to the Center for Food Safety and Consumers Union, two non-profit entities that serve the interest and needs of the Class. *Id.*, Exh. 1, ¶ III.B.3.

C. The Parties Stipulate To Class Certification For Settlement Purposes.

Plaintiffs seek certification pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3), and Vogue has agreed to stipulate to class certification solely for purposes of achieving

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[3] This detailed Class notice will also be available to Class members via U.S. Mail, upon request. *Id.*, Exh. 1, ¶ VI.B.

settlement. Todzo Decl. Exh. 1, ¶ V. The putative settlement Class will comprise all individuals in the United States who purchased at least one of Vogue's Organix brand hair care and/or skin care products from October 25, 2008 to the date notice to the Class is first published. *Id.*

Class members will have until fifty days prior to the Final Approval Hearing to file any objections to the Settlement, to seek exclusions from the Class, or to file notices of intent to appear at the hearing. Todzo Decl. Exh. 1, ¶ VI.B.3. The Claim Administrator and the Parties will monitor and track those Class members seeking exclusion or objecting to the Settlement. *Id.*, Exh. 1, ¶ VI.D.

D. Plaintiffs Will Submit An Application To The Court For Payment Of Plaintiffs' Reasonable Attorneys' Fees And Litigation Costs, And Service Awards To The Plaintiffs From The Claim Fund.

Pursuant to the Settlement Agreement and following the Court's preliminary approval of the Settlement, Class Counsel will submit an application to the Court for an award of attorneys' fees and expenses not to exceed 25% of Claim Fund, or $1,625,000. Todzo Decl. Exh. 1, ¶ VIII.A. Vogue has agreed not to oppose this application. *Id.* Plaintiffs will also seek modest awards to compensate the named Plaintiffs for their service as Class representatives, the application for which Vogue agrees not to oppose. *Id.*, Exh. 1, ¶ VIII.B. The amount of these awards is not to exceed $1,500 each for Plaintiffs Golloher, Freeman, Chase, Shapiro and Brown (who filed the original complaint in October 2012 and have responded to several rounds of discovery) and $250 each for Plaintiffs Kenny, Bottari, Conover, Hanks, Swenson and Sanders (who were just recently added as Plaintiffs in the case). *Id.*

ARGUMENT

I. THE COURT SHOULD GRANT PRELIMINARY APPROVAL OF THE SETTLEMENT.

The Settlement is fair and reasonable. The Settlement provides substantial benefits to the Class by requiring changes in Vogue's labeling and marketing practices, and by securing just compensation for past purchases of the Products. The Settlement accomplishes this while avoiding both the uncertainty and the delay that would be associated with further litigation. It

1 represents a fair compromise of the Parties' respective positions in the litigation, and enables each
2 Party to end the litigation, thus avoiding its costs and risks. Finally, the Settlement was reached
3 through arm's length negotiations as part of a supervised mediation process. Plaintiffs' counsel,
4 which has significant experience in litigating class actions, supports the resulting Settlement as
5 fair and as providing reasonable relief to the members of the Class.

6 **A. The Applicable Legal Standard.**

7 A proposed settlement may be approved by the trial court if it is determined to be
8 "fundamentally fair, adequate, and reasonable." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,
9 458 (9th Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).
10 Given that the full fairness and adequacy of a class settlement can only be assessed at the final
11 approval hearing, at the preliminary approval stage the Court "need only review the parties'
12 proposed settlement to determine whether it is within the permissible 'range of possible judicial
13 approval' and thus, whether the notice to the class and the scheduling of the formal fairness
14 hearing is appropriate." *Williams v. Costco Wholesale Corp.*, No. O2-cv-2003, 2010 WL 761122,
15 at *5 (S.D. Cal. Mar. 4, 2010) (citing William B. Rubenstein, et al., NEWBERG ON CLASS ACTIONS
16 § 11:25 (4th ed. 2002)); *see also Wright v. Lucas Enters.*, 259 F.R.D. 468, 472 (E.D. Cal. 2009);
17 *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. 2008).

18 Specifically, preliminary approval of a settlement and notice to the proposed class is
19 appropriate if "[1] the proposed settlement appears to be the product of serious, informed,
20 noncollusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant
21 preferential treatment to class representatives or segments of the class, and [4] falls with the range
22 of possible approval . . . ." *Williams*, 2010 WL 761122, at *5 (brackets and ellipses in original)
23 (quoting *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009)).
24 This Settlement meets all of the above criteria.

25 **B. This Settlement Is The Product of Serious, Informed And**
26 **Arm's-Length Negotiations.**

27 Arm's-length negotiations conducted by competent counsel after meaningful discovery
28 constitute prima facie evidence of fair settlements. *See Cicero v. DirecTV, Inc.*, No. EDCV 07-

1182, 2010 WL 2991486, at *3 (C.D. Cal. July 27, 2010) ("where a class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair.") (internal quotations omitted). Here, the Parties' negotiations were adversarial and at arm's length. *See* Todzo Decl. ¶ 3. Counsel for Plaintiffs have considerable experience in class action litigation in general, and with the legal and factual issues of this case in particular. *See id.*, ¶¶ 3-4, 11. Through the Parties' lengthy and comprehensive settlement discussions, and through substantial written discovery and documentary production, Vogue and third party witnesses (such as Vogue's retailers and sales brokers) provided Plaintiffs with vital information pertaining to the legitimacy and scope of Plaintiffs' claims – including information regarding the Products' composition, labeling, advertising and sales. *See id.* ¶¶ 3, 5. This sharing of information ensured sophisticated and meaningful settlement negotiations, which were conducted over several months, including a mediation with Randall W. Wulff, one of the most respected mediators in California if not the entire nation. *See id.* In short, the Parties were fully informed of all relevant facts at the time the Settlement was reached.

C. The Settlement Has No "Obvious Deficiencies" And Treats No Members Of The Class Preferentially.

The Settlement is fair and treats all Class members equitably.[4] All potential future purchasers of the Products, including members of the Class, will receive the benefit of the injunctive relief provided for in the settlement. In addition, all Class members who purchased the Products dating back to October 2008 will receive the benefit of the monetary relief provided for therein. The Settlement's notice provisions, which are detailed and comprehensive and which will be administered by a qualified third party, will help to ensure that such purchasers will actually recoup their monetary losses. *See Alberto*, 252 F.R.D. 652, 666-667 (satisfactory notice provisions weigh in favor of preliminary approval). Moreover, the substantial injunctive and

[4] The service awards to the Plaintiff Class representatives are far less than service awards approved by other courts. *See, e.g.*, *Williams*, 2010 WL 761122, at **2, 6 ($5,000 service award to single named plaintiff "does not appear facially unreasonable"); *see also* Todzo Decl. ¶ 9 (detailing the services provided).

1 monetary relief secured by the settlement is fundamentally fair in light of the significant hurdles
2 faced by Plaintiffs and the Class going forward: Vogue vigorously disputes that the Class would
3 be able to prove liability, certify a class, or be entitled to injunctive relief or monetary damages.
4 Although Plaintiffs believe that they could establish liability were the case to go to trial,
5 this is hardly an easy win. For example, at the time the Parties reached the Settlement, Vogue's
6 motions to dismiss and stay the case were under submission. As noted above, Vogue's motions
7 asked the Court to: (1) dismiss Plaintiffs' claims for breach of express warranty under the laws of
8 the four states in which the named Plaintiffs neither lived nor purchased Vogue's products; (2)
9 dismiss the Plaintiffs' claims for injunctive relief in California under the doctrine of res judicata in
10 light of the CEH Consent Judgment and (3) stay the case under the doctrine of primary jurisdiction
11 pending federal regulatory action for organic cosmetics. *See generally* ECF No. 33. At oral
12 argument on April 18, 2013, the Court stated its inclination to grant the motions to dismiss but not
13 the motion to stay. Thus, Plaintiffs faced the probability that several of their claims would be
14 dismissed if the Parties had not settled.
15 By settling now, Class members secure meaningful monetary compensation, plus the
16 certainty of knowing that Vogue's alleged offending labeling and marketing practices will cease
17 on a nationwide basis hereinafter. These benefits will accrue equally to all Class members. Given
18 the vagaries of pressing forward with litigation, the Settlement has no "obvious deficiencies" and
19 treats all Class members fairly. *See* Todzo Decl. ¶¶ 6-8.
20 **D. The Settlement Falls Within The Range Of Possible Approval.**
21 The Settlement easily falls within the bounds of reasonableness. Plaintiffs have secured a
22 commitment from Vogue to implement injunctive relief that fully cures the alleged
23 misrepresentations at the heart of this case, including a commitment to change the brand name of
24 Vogue's marquis Products on a national basis. Additionally, the $6,500,000 class settlement fund
25 represents a substantial portion of the damages Plaintiffs believe they could establish at trial. In
26 preparing the case for class certification and trial, Plaintiffs developed a damages model with their
27 experts that looked to the premiums generally paid by consumers for "organic" personal care
28

1 products sold nationwide over and above the prices paid by consumers for seemingly comparable
2 products that do not claim to be organic. *See* Todzo Decl. ¶ 8. Although Vogue disputes that it
3 charged any "organic" premium for the Products, Plaintiffs contend that they could use their
4 damages model to reasonably recover Class-wide damages at trial of approximately $25 million.
5 *Id.*

6 However, one potential problem with Plaintiffs' damages model is the difficulty of
7 assessing what baseline products are to be deemed "comparable," given differences in ingredients,
8 function and so forth – this issue, no doubt, would form a central dispute in any damages
9 calculation at trial. *See* Todzo Decl. ¶ 8. Indeed, Vogue disputes that it charged any organic
10 premium for the Products, and contends that the Products are actually priced lower than its
11 competitors' products. Thus, in addition to the risks of not certifying a class and not prevailing on
12 liability, Plaintiffs also faced risks that they would not be able to prove their damages at trial.
13 Given this litigation risk, the $6,500,000 monetary recovery represents a substantial percentage of
14 what Plaintiffs believe to be their best case scenario for recovery at trial. *Id.* Furthermore, since
15 the Products typically retail for $7.99, and are often sold for much lower, the Settlement's
16 allowance of $4 per Product purchased (up to $28) will provide Class members with a substantial
17 portion of the money paid for the Products. The injunctive relief component of the Settlement –
18 which cannot be readily monetized, but which has tremendous value to consumers across the
19 United States – only enhances the legitimacy of this recovery. *Id.*

20 The reasonableness of the Settlement is further underscored by the fact that it was reached
21 only after participation in formal mediation before a qualified, neutral mediator. *See Alberto*, 252
22 F.R.D. at 666 (brokering of settlement by qualified mediator weighs in favor of preliminary
23 approval of settlement by court). Here, the Parties employed Randall W. Wulff, a former trial
24 lawyer at Farella Braun & Martel LLP with decades of experience in the resolution of complex
25 business litigation, including class actions and products liability cases, as a mediator. *See* Todzo
26 Decl. ¶ 3 & Exh. 2.

27 Moreover, the fee award sought by Plaintiffs, which will be subject to further review by
28

1 this Court at the final settlement approval stage, is well within the range of possible approval. *See*
2 Todzo Decl. ¶ 11. Indeed, the fee award sought conforms with the Ninth Circuit's percentage of
3 the fund benchmark award of 25% for attorneys' fees. *See Hanlon*, 150 F.3d at 1029 ("This
4 circuit has established 25% of the common fund as a benchmark award for attorney fees."). The
5 fee award is especially appropriate given the meaningful injunctive relief achieved by the
6 Settlement. *See generally* Committee Notes to 2003 Amendments to Fed. R. Civ. P. 23(h) ("[I]t is
7 important to recognize that in some class actions the monetary relief obtained is not the sole
8 determinant of an appropriate attorney fees award.") (citing *Blanchard v. Bergeron*, 489 U.S. 87,
9 95 (1989) (cautioning against an "undesirable emphasis" on "the importance of the recovery of
10 damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or
11 declaratory relief")). For all of these reasons, preliminary approval of the Settlement should be
12 granted.

13 **II. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS**
14 **IS APPROPRIATE.**

15 For settlement purposes only, Plaintiffs request that the Court provisionally certify the
16 settlement Class proposed below pursuant to Rule 23 of the Federal Rules of Civil Procedure.
17 Provisional class certification is appropriate in part because Vogue consents to Class certification
18 for purposes of this Settlement. *See* Todzo Decl. Exh. 1, ¶ V; *see also generally* The Rutter
19 Group, CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (2012), Ch. 10-
20 C at § 10:787 (noting that courts generally permit parties to stipulate that a defined class be
21 conditionally certified for settlement purposes because it facilitates settlement).

22 Because the Parties have reached agreement regarding class certification in the context of
23 this Settlement, the Court may enter an order provisionally certifying the Class for settlement
24 purposes. *See In re Wireless Facilities, Inc. Securities Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal.
25 2008); *see also Alvarado Partners, L.P. v. Mehta*, 723 F. Supp. 540, 546 (D.C. Colo. 1989). This
26 will allow notice of the proposed settlement to issue, so Class members can be informed of the
27 existence and terms of the proposed settlement, of their right to be heard on its fairness, of their
28 right to opt out, and of the date, time and place of the fairness hearing. *See* Federal Judicial

Center, *Manual for Complex Litigation* (4th ed. 2004) at §§ 21.632, 21.633.

Plaintiffs seek certification of a settlement Class defined as follows:

> All individuals in the United States who purchased Organix® brand hair care and skin care products from October 25, 2008 to the date notice to the Class is first published.

A. The Criteria For Class Certification Under Rule 23(a) Are Satisfied.

To merit class certification under Rule 23(a), Plaintiffs must show that: (1) the class is so numerous that joinder is impracticable; (2) questions of law or fact are common to the class; (3) the claims of the representative Plaintiffs are typical of the claims of the class; and (4) the class representatives will fairly and adequately protect the interests of the class. Each of these criteria is met here.

1. Joinder Of All Members Is Impracticable.

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). Impracticability does not mean impossibility. *See, e.g.*, *Immigrant Assistance Project of Los Angeles County Fed'n of Labor v. I.N.S.*, 306 F.3d 842, 869 (9th Cir. 2002) (noting that classes numbering 39, 64, and 71 met numerosity criterion); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 587 (C.D. Cal. 2011) ("[A]s a general rule, classes of forty or more are considered sufficiently numerous.") (citation omitted).

Vogue has admitted that more than eight hundred individuals purchased the Products during the class period. *See* Todzo Decl., ¶ 10. Because joinder of all of these individuals is impractical, if not entirely impossible, the numerosity requirement is satisfied.

2. Common Issues Of Law And Fact Exist.

The Ninth Circuit construes Rule 23(a)(2)'s commonality requirement permissively. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The commonality requirement is less rigorous than the "companion requirements" of Rule 23(b)(3). *Id.* "All questions of fact and law need not be common to satisfy the [commonality] rule. The existence of shared legal issues

with divergent factual predicates is sufficient . . . ." *Id.* Indeed, "even a single common question will do," so long as that question has the capacity to generate a common answer "apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2551 (2011) (citations and internal quotations omitted).

Here, "the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable." *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975). Vogue utilizes advertisements and packaging that include uniform representations, including its brand name Organix and use of the word "organic," which are allegedly false and misleading in violation of the UCL and CLRA and other similar state consumer protection statutes. Plaintiffs allege that these representations misled Plaintiffs and the other members of the Class, and that Vogue breached uniform warranties that were made to Plaintiffs and the other members of the Class. Thus, the commonality requirement is satisfied. *See Zeisel v. Diamond Foods, Inc.*, No. C 10-01192, 2011 WL 2221113, at *7 (N.D. Cal. June 7, 2011) (commonality met where "class was exposed to the same misleading and misbranded labels"); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 377 (N.D. Cal. 2010) (commonality met where common issue was "whether the [product] packaging and marketing materials are unlawful, unfair, deceptive or misleading to a reasonable consumer"); *Delarosa*, 275 F.R.D. at 589 (commonality met where "Plaintiff alleges a single misrepresentation [on a product's packaging] that was made identically to all potential class members").

3. The Named Plaintiffs' Claims Are Typical Of Class Claims.

Rule 23(a)(3) requires "the claims and defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Representative claims are typical if they are "reasonably coextensive with those of the absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Where the class representatives' interests align with the interests of the class, then the pursuit of the class representatives' individual interests necessarily advances those interests of the class. "[A] named plaintiff's claim is typical if it stems from the same event, practice or course of conduct . . . and is based upon the same legal or

1 remedial theory." *Jordan*, 669 F.2d at 1321; *see also Hanlon*, 150 F.3d at 1019-1020 ("[t]he
2 existence of shared legal issues with divergent factual predicates is sufficient, as is a common core
3 of salient facts coupled with disparate legal remedies within the class"); *Lozano v. AT & T*
4 *Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir. 2007) ("Under Rule 23(a)(3), it is not necessary
5 that all class members suffer the same injury as the class representative.").

6 Here, Plaintiffs' and Class members' claims stem from the same underlying wrongful
7 conduct – namely, they purchased the Products based on the false and misleading representations
8 that the Products are organic. Accordingly, there is a "sufficient nexus" between Plaintiffs' claims
9 and those of the Class members to satisfy the typicality requirement. *See O'Donovan v. CashCall,*
10 *Inc.*, 278 F.R.D. 479, 491-492 (N.D. Cal. 2011); *Zeisel*, 2011 WL 2221113, at *8 (typicality met
11 where plaintiff's claims relating to allegedly false health-related statements on product labels were
12 "reasonably co-extensive with those of absent class members," notwithstanding particularities of
13 class representative's "specific medical condition"); *Chavez*, 268 F.R.D. at 378 (typicality met
14 where defendant made "substantially the same misrepresentation" on several different beverage
15 products, even where allegedly false statements were "worded in several variations" and where
16 "plaintiff did not buy each product in [defendant's] beverage line").

17
18 **4. The Named Plaintiffs And Their Counsel Adequately Represent The Proposed Class.**

19 The adequacy of representation requirement is satisfied if (1) the proposed representative
20 plaintiffs do not have conflicts with the proposed class, and (2) the plaintiff is represented by
21 qualified and competent counsel who will vigorously prosecute the action on behalf of the class.
22 *See Hanlon,* 150 F.3d at 1020.

23 There is no conflict between Plaintiffs and the members of the Class. All proposed Class
24 members purchased the Products, as did Plaintiffs. Because Plaintiffs and Class members have
25 been allegedly injured in the same manner and seek relief for the same claims, their interests are
26 coextensive. *See O'Donovan*, 278 F.R.D. at 492 (class representative fairly and adequately
27 represents class where "their claims are reflective of those of the putative class members' and the
28 relief they seek is identical to that sought for the Classes.").

1 Plaintiffs' counsel are qualified and experienced in certifying, litigating, settling and
2 administering nationwide class actions similar to this case. *See* Todzo Decl. ¶¶ 12 & Exh. 3.
3 Plaintiffs' counsel are committed to the vigorous prosecution of this action. To date, Plaintiffs'
4 counsel has demonstrated an understanding of the issues in this case and competence to conduct
5 this litigation. Further, in addition to counsels' experience, the Lexington Law Group possesses
6 the resources to efficiently prosecute this class action lawsuit to its final conclusion. *See id.*
7 Plaintiffs and their counsel readily satisfy the requirements of Rule 23(a)(4).

8 **B. The Proposed Settlement Class Meets The Requirements Of**
9 **Rule 23(b)(2) and 23(b)(3).**

10 Class certification is appropriate under Rule 23(b)(2). Vogue has acted on grounds that
11 apply generally to the Class, such that final injunctive relief is appropriate respecting the Class as
12 a whole. Plaintiffs allege that Vogue utilizes product packaging and advertising campaigns which
13 include uniform misrepresentations that the Products are organic, which allegedly misled Plaintiffs
14 and the other members of the Class. Plaintiffs seek to enjoin Defendant's alleged
15 misrepresentations, and injunctive relief will benefit them, the Class, and future purchasers of
16 Vogue's products. *See Delarosa*, 275 F.R.D. at 592 (certification under Rule 23(b)(2) appropriate
17 where "an injunction prohibiting Defendant from selling [product] with the misleading
18 information would 'provide relief to each member of the class.'").

19 In addition, class certification is appropriate under Rule 23(b)(3) because common
20 questions of law and fact substantially predominate over any questions that may affect only
21 individual members of the Class. Predominance is often readily met in cases alleging consumer
22 fraud. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Bruno v. Quten Research*
23 *Inst., LLC,* 280 F.R.D. 524, 537 (C.D. Cal. 2011). The predominance requirement does not
24 demand that the common issues be identical so long as there is an essential common factual link
25 between all class members and the defendant for which the law provides a remedy. *In re Wells*
26 *Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1065 (N.D. Cal. 2007).
27 Questions that are common to the class predominate over individual questions where a plaintiff
28 alleges a common course of conduct of misrepresentations that affected all the class members in

1 the same or similar manner. *See Blackie v. Barrack*, 524 F.2d 891, 905-908 (9th Cir. 1975).
2 For example, the overarching legal and factual questions in this case – which do not vary
3 among Class members and which may be determined without reference to the individual
4 circumstances of any Class member – include, but are not limited to:

5
6
- whether Vogue labels, advertises, markets and sells the Products by representing that the Products are organic;

7
- whether Plaintiffs and the other members of the Class are likely to be misled by Vogue's use of the Organix brand name on the Products;

8
- whether the Products are predominantly composed of organic ingredients;

9
10
- whether Vogue's conduct of selling the Products as organic when such Products are not composed predominantly of organic ingredients is likely to deceive the members of the Class;

11
12
- whether Vogue's conduct in advertising and marketing the Products constitutes an unfair or deceptive act or practice in the conduct of trade or commerce;

13
14
- whether Plaintiffs and the other members of the Class are entitled to injunctive and other equitable relief based on Vogue's violations of state and District of Columbia consumer protection laws;

15
16
- whether Vogue's representations concerning the Products constitute express warranties with regard to the Products pursuant to the laws of every state and the District of Columbia;

17
- whether Vogue breached the express warranties it has made with regard to the Products;

18
19
- whether Plaintiffs and the other members of the Class are entitled to damages resulting from Vogue's breach of the express warranties made regarding the Products in every state and the District of Columbia;

20
21
- whether Vogue unjustly enriched itself to the detriment of the Plaintiffs and the members of the Class, thereby entitling Plaintiffs and the members of the Class to restitution or disgorgement of all benefits derived by Vogue.

22 As this list demonstrates, each of Plaintiffs' contentions can be proven with "generalized
23 evidence . . . on a class-wide basis." *O'Donovan*, 278 F.R.D. at 493. In other words, a
24 determination that Vogue misrepresented the Products as organic to Plaintiffs will necessarily
25 determine whether Vogue similarly misrepresented the Products to all Class members. *See*
26 *Delarosa*, 275 F.R.D. at 594. Indeed, each of these "common question[s]" has the capacity to
27 generate a common answer "apt to drive the resolution of the litigation." *Dukes,* 131 S.Ct. 2541,
28

2551 (2011) (citations and internal quotations omitted). Because "[a] common nucleus of facts and potential legal remedies dominates this litigation," Rule 23(b)(3) is satisfied here. *Hanlon*, 150 F.3d at 1022.

III. THE PROPOSED CLASS NOTICE SATISFIES THE REQUIREMENTS OF DUE PROCESS.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." *Manual for Complex Litig.* at § 21.312 (internal quotations omitted). The Settlement Agreement provides for notice that easily satisfies Rule 23 and due process considerations.

A. The Proposed Method Of Notice Is Appropriate.

Rule 23 requires that notice of a settlement be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The method proposed for providing notice to Class members is reasonable and should be approved. Notice to the Class will be achieved shortly after entry of the Preliminary Approval Order, in at least four ways. First, the Claim Administrator will publish a 1/2 page insertion in the form of the Publication Notice in *People*, *Us Weekly* and *Life And Style* magazines – which are magazines popular among the Products' target demographic. Second, notice will be provided pursuant to California Government Code § 6064 by a 1/6 page advertisement in the form of the Publication Notice, which will be published for four consecutive weeks in the San Francisco Chronicle. Third, a press release in both English and Spanish targeting all 50 states will be sent via the PR Newswire's U.S.1 National and Hispanic newslines. Fourth, internet and mobile advertisements in both English and Spanish targeting potential Class Members through services provided by Facebook, People.com, Yahoo!, Univision and others will run for approximately one month. Each of these notices will direct Class members to a settlement website and toll-free telephone support system, which will include a more detailed notice fully explaining the terms of the Settlement and all attendant Class member rights both in English and Spanish. Courts routinely find that similarly comprehensive notice programs meet the requirements of due process and Rule 23. *See, e.g.*, *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-

1 02134-H-DHB, 2013 WL 1748729, at *3-4 (S.D. Cal. January 7, 2013) (approving notice plan
2 involving publication in magazines targeting product users and internet advertisements directing
3 class members to settlement website); *Nigh v. Humphreys Pharmacal, Inc.*, No. 12-CV-2714-
4 MMA DHB, 2013 WL 399179 (S.D. Cal. January 29, 2013) (approving notice plan involving
5 publication in magazines targeting product users and newspapers directing class members to
6 settlement website).

7 **B. The Contents Of The Proposed Notice Are Adequate.**

8 The content of the notice to class members "is satisfactory if it 'generally describes the
9 terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and
10 to come forward and be heard.'" *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir.
11 2009) (quoting *Churchill Vill., LLC v. General Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). Here,
12 the proposed notice forms provide this "sufficient detail." *See* Todzo Decl. Exh. 1-C & 1-E.
13 Together, the proposed notices define the Class, explain all Class member rights, releases and
14 applicable deadlines, and describe in detail the injunctive and monetary terms of the settlement,
15 including the procedures for allocating and distributing settlement funds. The notices plainly
16 indicate the time and place of the hearing to consider approval of the settlement, and the method
17 for objecting to or opting out of the settlement. The notices detail the provisions for payment of
18 attorneys' fees and service awards to the class representatives, and provide contact information for
19 the putative Class Counsel. This content comports with settlement notices upheld in other cases.
20 *See, e.g.*, *In re Wells Fargo Loan Processor Overtime Pay Litig.*, No. C-07-1841, 2011 WL
21 3352460, at *4 (N.D. Cal. Aug. 2, 2011) (notice adequate where "[i]t disclosed all material
22 elements of the settlement, including class members' release of claims, their ability to opt out or
23 object to the settlement, the amount of incentive awards and attorneys' fees sought, and estimates
24 of the award members could expect to receive."); *see also Rodriguez*, 563 F.3d at 962-963
25 (because "[s]ettlement notices are supposed to present information about a proposed settlement
26 neutrally, simply, and understandably," they need not "detail the content of objections, or analyze
27 the expected value" of fully litigating the case).
28

1
IV. SCHEDULING A FINAL APPROVAL HEARING IS APPROPRIATE.

2 The last step in the settlement approval process is a final fairness hearing at which the
3 Court may hear all evidence and argument necessary to evaluate the Settlement. Proponents of the
4 Settlement may explain the terms and conditions of the settlement and offer argument in support
5 of final approval. In addition, Class members, or their counsel, may be heard in support of or in
6 opposition to the Settlement. The Court will determine after the Final Approval Hearing whether
7 the Settlement should be approved, and whether to enter a final order and judgment under
8 Rule 23(e). Plaintiffs request that the Court set a date for the final fairness hearing approximately
9 one hundred and forty (140) days after entry of the Preliminary Approval Order.

10
CONCLUSION

11 For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant
12 preliminary approval of the Settlement, provisionally certify the Settlement Class, appoint
13 Lexington Law Group as "Class Counsel," approve the proposed notice plan, and schedule a
14 formal fairness hearing on final settlement approval approximately one hundred and forty (140)
15 days after entry of the Preliminary Approval Order.

16
17 DATED: August 22, 2013

Respectfully submitted,

18 LEXINGTON LAW GROUP

19
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25
26
27
28