Preliminary Approval of Class Action Settlement
Department SSC-9
Hon. Amy Hogue

Martin Shalikar et al. v. Asahi Beer USA, Inc.
Case No. BC702360
Hearing: December 20, 2018 c/f October 30, 2018 c/f July 10, 2018

RULING

Grant Preliminary Approval. Reserve July 16, 2019, 10:00 a.m. for Final Approval Motion.

BACKGROUND

In this consumer class action case, Plaintiffs allege that Defendant Asahi Beer, USA, Inc. ("Asahi") falsely and deceptively labeled, packaged, and advertised its Asahi Super Dry beer ("Asahi Beer" or "Products") in a manner indicating that the Products are brewed in Japan, when the Products are actually brewed in Canada. Specifically, Plaintiffs allege that Defendant's use of Japanese script and characters on the labeling and packaging lead reasonable purchasers of the Product to believe that the Product is brewed in Japan.

On April 5, 2017, Plaintiff Alexander Panvini filed a consumer fraud class action complaint against Defendant in the United States District Court for the Northern District of California, captioned *Panvini v. Asahi Beer U.S.A., Inc.,* No. 4:17-cv-01896 (N.D. Cal.). (Declaration of Benjamin Heikali ("Heikali Decl."), ¶ 5, Ex. 2.) On April 10, 2017, Plaintiff Matin Shalikar filed a substantially similar consumer fraud class action against Defendant in in the United States District Court for the Central District of California, captioned *Shalikar v. Asahi Beer U.S.A., Inc.,* No. 2:17-cv-02713 (C.D. Cal.). (*Id.* at ¶ 6, Ex. 3.) Both actions, which were eventually merged into one action in the Central District, alleged that Defendant engages in deceptive and unfair business practices by labeling, packaging, and marketing the Products in a manner indicating that the Products are brewed in Japan, when the Products are brewed in Canada. (*Id.* at ¶ 7.)

After defeating Defendant's motion to dismiss, the Parties exchanged and reviewed discovery and eventually participated in a fruitful 11-hour mediation session facilitated by John B. Bates, Jr., Esq. of JAMS in Los Angeles, California, which set the foundation for and principle terms of the Settlement Agreement. (*Id.* at ¶ 8.) Subsequently, the Parties engaged in over six months of arms-length negotiations, with the aid of Mr. Bates, to reach the final settlement terms now set forth in the Settlement Agreement. (*Id.* at ¶ 9.)

After exchanging and reviewing relevant discovery, the Plaintiffs decided that because Defendant's headquarters are in Los Angeles County, and because this matter contemplates Settlement of a California class, the appropriate venue for this action is the Superior Court of California, County of Los Angeles. Defendant had no objection to the change in forum for settlement purposes. (*Id.* at ¶ 10.) Therefore, on April 12, 2018, Plaintiffs voluntarily dismissed their individual claims in the *Shalikar* Action in the Central District, and, on April 16, 2018 filed a Class Action Complaint ("CAC") in this Court. The CAC alleges the following causes of action: (1) Violation of California's Consumers Legal Remedies Act ("CLRA") California Civil Code §1750, *et*

seq. (for the California Consumer Subclass) and (2) Quasi Contract/ Unjust Enrichment/ Restitution (for the Nationwide Class).

In November 2017, following investigation and discovery, the Parties commenced with settlement negotiations. The arms'-length negotiations included mediation, which set the foundation for and principle terms of the Settlement Agreement, as to both the California and Nationwide classes. After further negotiations, the Parties executed their Settlement Agreement and Release ("Settlement Agreement"), a signed copy of which is attached to the Declaration of Benjamin Heikali ("Heikali Decl.") as Exhibit 1.

On July 10, 2018, the Court ordered the parties to file a revised settlement agreement, with revisions, including a cap on attorney's fees and costs that Class Counsel may seek, in addition to any fee splitting agreements class counsel may have.

On September 28, 2018, the Parties engaged in a settlement conference with the Honorable James R. Dunn to negotiate a cap on attorney's fees and costs, and were able ultimately to come to an agreement. A copy of the fully executed Amended Settlement Agreement is attached to the Declaration of Benjamin Heikali in Further Support of Plaintiff's Unopposed Motion for Preliminary Approval ("Heikali Supp. Decl.") as Exhibit 1.

On October 30, 2018, the court conditionally granted preliminary approval for counsel to address remaining issues flagged by the Court no later than December 2, 2018, and ordered a renewed hearing on preliminary approval.

In response, Class Counsel filed under seal *Plaintiff's Response to October 30, 2018 Tentative Ruling* ("Supp. Brief."), with a redacted version filed with the Court as well. On December 3, 2018, Class Counsel also filed a Second Amended Settlement Agreement attached to the Declaration of Benjamin Heikali in Support of Plaintiff's Response to October 30, 2018 Tentative Ruling ("Heikali Second Supp. Decl.") as Exhibit 1. On December 3, 2018 Defendant filed a Reply to Plaintiff's Response to October 30, 2018 Tentative Ruling ("Defendant's Reply") wherein it stated that it does not oppose Plaintiff's Response to October 30, 2018 Tentative Ruling, however it does not "join the specifics of Plaintiff's valuation of this case and reserves its right to challenge all of Plaintiff's valuation methodologies during the attorney's fee phase of the Settlement Approval process." (Defendant's Reply, 1:1-5.)

Now before the Court is Plaintiff's motion for preliminary approval of the settlement agreement.

SETTLEMENT CLASS DEFINITION

- **Class Definition:**
  - **Settlement Class" means**: All consumers who purchased Asahi Beer in the United States, its territories, or at any United States military facility or exchange, for personal, family, or household purposes and not for re-sale, during the Class Period. (¶ II.W.)
  - **"California Settlement Class" means:** All consumers who purchased Asahi Beer in California, for personal, family, or household purposes and not for re-sale, during the Class Period. (¶ II.X.)
  - Excluded from the Settlement Class and the California Settlement Class are all persons who validly opt out of the settlement in a timely manner (for purposes of damages claims only); counsel of record (and their respective law firms) for

the Parties; Defendant and any of its parents, affiliates, subsidiaries, and all of its respective employees, officers, and directors; and the presiding judge in the Action or judicial officer presiding over the matter, and all of their immediate families and judicial staff. (¶¶ II.W-X.)

- **"Settlement Class Household"** For purposes of the Claims Process, a Class Member shall be treated as a "Settlement Class Household," together with any family members or extended family members living under the same roof as the Class Member. (¶ II.Y.)
- **"Class Period"** means April 5, 2013 through the date of Preliminary Approval of Class Settlement. (¶ II.L.)
- The parties stipulate to class certification for settlement purposes only. (¶ IX.)
  - The Parties intend for the Court to give final approval to the certification of both of the Settlement Classes. If the Court gives final approval to only one of the classes, the Agreement shall be final and binding only as to the class certified, and the Parties' and Class Administrator's obligations shall be limited to the scope of the certified class. If the Court fails to certify both the Settlement Class and the California Settlement Class, then the Agreement shall be null and void, and the Parties shall revert to the position they were in prior to seeking approval for the Agreement. (¶ IV.A.)

TERMS OF SETTLEMENT AGREEMENT

The Settlement Agreement's essential terms are:

- Defendant is to pay up to **$765,000** for attorney fees and costs (¶VII);
- Defendant is to pay up to **$5,500** ($2,750 x2) for Service Awards to the Class Representatives (¶VII); and
- Defendant is to pay an estimated **$300,000** for Administration Expenses (¶XI.A.9).
- Defendant agrees to monetary and injunctive relief as discussed further below.

- **Injunctive Relief:** As part of the Settlement Agreement, Defendant has agreed to bold the term "Product of Canada" on the neck of the label of the Product bottles for three years. (¶ V.A.)
- **Monetary Relief:** Class Members who submit timely and valid Claim Forms will receive a cash payment in the based on the number and type of Products purchased during the Class Period as follows: $.50 per 6-pack of the Products; $0.10 per Big Bottle of the Products; $1.00 per 12-pack of cans of the Products; and $2.00 per 24-pack of cans of the Products. (¶ V.B.9.)
  - The amount of cash recovery is subject to a $10 maximum refund per Settlement Class Household. (*Ibid*)
  - Cash payments will be paid by the Settlement Administrator via check or an electronic payment process (such as PayPal), at the Class Member's election. (*Ibid*)

- **Claims Process:** To be eligible for a cash payment, a Settlement Class Member and/or a California Settlement Class Member must submit a timely and valid Claim Form, which will be evaluated by the Class Action Settlement Administrator. (¶ V.B.) A copy of the Parties' proposed Claim Form is attached to the Heikali Declaration as Exhibit A.
    - **"Claim Period"** means the time period in which Settlement Class Members and/or California Settlement Class Members may submit a Claim Form for review to the Class Action Settlement Administrator. The Claims Period shall run for 120 days from the date that Class Notice is initially disseminated. (¶ II.F.)
    - The Claim Form will be: (i) included on the Settlement Website to be designed and administered by the Settlement Administrator, and Class Members shall be allowed to complete and submit the Claim Form online; (ii) made readily available from the Settlement Administrator, including by requesting a Claim Form from the Settlement Administrator by mail, e-mail, or calling a toll-free number provided by the Settlement Administrator; and (iii) mailed to those individuals for whom Defendant has addresses. (¶ V.B.1.)
    - Claim Forms must be postmarked or submitted online before or on the last day of the Claim Period, the specific date of which will be prominently displayed on the Claim Form and Class Notice. (¶ V.B.2.)
    - **Validity of Claim Forms.** Valid Claim Forms must contain the Settlement Class Member's name and mailing address, attestation of purchase(s), and type(s) and number of Products purchased. Claim Forms that do not meet the requirements set forth in this Agreement and in the Claim Form instructions may be rejected. The Settlement Administrator will determine a Claim Form's validity.
        - Where a good faith basis exists, the Settlement Administrator may reject a Settlement Class Member's Claim Form for, among other reasons, the following: (a) Failure to attest to the purchase of the Products, or purchase of products that are not covered by the terms of this Settlement Agreement; (b) Failure to provide adequate verification or additional information of the Claim pursuant to a request of the Class Action Settlement Administrator; (c) Failure to fully complete and/or sign the Claim Form; (d) Failure to submit a legible Claim Form; (e) Submission of a fraudulent Claim Form; (f) Submission of more than one Claim Form per Settlement Class Household; (g) Submission of Claim Form that is duplicative of another Claim Form; (h) Submission of Claim Form by a person who is not a Settlement Class Member or a California Settlement Class Member; (i) Request by person submitting the Claim Form to pay funds to a person or entity that is not the Settlement Class Member or California Settlement Class Member for whom the Claim Form is submitted; (j) Failure to submit a Claim Form by the end of the Claim Period; or (k) Failure to otherwise meet the requirements of this Agreement. (¶ V.B.3.)
    - **Attestation of Purchase Under Penalty of Perjury Required.** Each Class Member shall sign and submit a Claim Form that states to the best of his or her knowledge the total number and type of purchased Products. The Claim Form

shall be signed under an affirmation stating the following or substantially similar language: "I declare, under penalty of perjury, that the information in this Claim Form is true and correct to the best of my knowledge, and that I purchased the Product(s) claimed above during the Class Period for personal or household use and not for resale. I understand that my Claim Form may be subject to audit, verification, and Court review." (¶ V.B.4.)

- **Verification of Purchase May Be Required.** The Claim Form shall advise Class Members that while proof of purchase is not required to submit a Claim, the Settlement Administrator has the right to request verification or more information regarding the purchase of the Products for the purpose of preventing fraud. If the Class Member does not timely comply or is unable to produce documents or additional information to substantiate the information on the Claim Form and the Claim is otherwise not approved, the Settlement Administrator may disqualify the Claim. The Parties shall have the ability to review any Claim Forms rejected by the Settlement Administrator. (¶ V.B.5.)
- **Claim Form Deficiencies.** The Settlement Administrator will take all reasonable and customary steps to attempt to cure defectively submitted claims and to determine the Class Member's eligibility for payment and the amount of payment. (¶ V.B.7.)
- **Failure to Submit Claim Form.** Unless a Class Member opts out pursuant to Section XII, any Class Member who fails to submit a timely and valid Claim Form shall be forever barred from receiving any payment pursuant to this Agreement, and shall in all other respects be bound by all of the terms of this Agreement and the terms of the Final Judgment and Order Approving Settlement to be entered in the Action. Based on the Release contained in the Agreement, any Class Member who does not opt out will be barred from bringing any action in any forum (state or federal) against any of the Discharged Parties concerning any of the matters subject to the Release. (¶ V.B.8.)

- **"Opt-Out Date"** means the date 21 days prior to the Final Approval Hearing. (¶ II.R, as amended)
  - **Objections:** Any Class Member who intends to object to the fairness of the Settlement may do so in writing prior to the Final Approval Hearing or in person at the Final Approval Hearing. Any written objection must be in writing; signed by the Class Member (and his or her attorney, if individually represented); and submitted to the Settlement Administrator, with a copy delivered to Class Counsel and Defendant's Counsel at the addresses set forth in the Class Notice. (¶ XII.A.1.)
- KCC Class Action Services will perform settlement administration. (¶ II.H.)
- Participating class members and the named Plaintiff will release certain claims against Defendants. (See further discussion below)

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ANALYSIS OF SETTLEMENT AGREEMENT

1. Does a presumption of fairness exist?

1. Was the settlement reached through arm's-length bargaining? Yes. The Parties participated in a mediation session facilitated by John B. Bates Jr., Esq. of JAMS, which set the foundation for and principle terms of settlement. (Heikali Decl. ¶ 8.) Subsequent to the mediation, the Parties engaged in over six months of arms' length negotiations, with the aid of Mr. Bates, to finalize settlement terms. (*Id.* at ¶ 9.)

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. Class Counsel began investigating Defendants labeling, packaging, and advertising of products in or around July 2016. Investigation included Obtaining and reviewing the Products, including their labeling, packaging, and all other advertisements and promotions for the Products; Obtaining and reviewing electronic images of Defendant's website and other electronic marketing platforms; Obtaining and reviewing relevant legal precedent regarding similar false and misleading representations on products, including other beer products; Obtaining and reviewing relevant filings and applications made for the Products with the Alcohol and Tobacco Tax and Trade Bureau; and Obtaining and reviewing financial information regarding the Products and Defendant. (Motion at 3:21-4:8.) The extensive negotiations came only after Plaintiffs defeated Defendant's motion to dismiss and Class Counsel had an opportunity to obtain and review discovery, review and assess relevant law and facts to assess the merits of the claims and determine how to best serve the interests of the members of the putative classes. (Heikali Decl. at ¶ 8.)

3. Is counsel experienced in similar litigation? Yes. As outlined in their respective firm resumes, each of the Class Counsel firms has experience litigating and resolving national consumer class actions, particularly in the field of food and beverage labeling. (Heikali Decl. at ¶ 18, Exhibits 4-6.)

4. What percentage of the class has objected? This cannot be determined until the fairness hearing. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) § 14:139.18, ["Should the court receive objections to the proposed settlement, it will consider and either sustain or overrule them at the fairness hearing."].)

CONCLUSION: The settlement is entitled to a presumption of fairness.

2. Is the settlement fair, adequate, and reasonable?

1. Strength of Plaintiff's case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.) Counsel contends that while Plaintiffs have conducted a survey demonstrating that Defendant's labeling and packaging deceives a majority of consumers and were ready to retain experts to demonstrate the same, Defendant was also prepared to submit expert testimony rebutting Plaintiffs' position and experts. (Motion, 12: 17-20.) Thus, the case would likely have been reduced to a financially costly "battle of the experts" in which both sides would fight over whether the Products' labeling and packaging is likely to deceive a reasonable consumer and the materiality of such representations. (Motion, 12: 25-26.)

In the event the Defendant would prevail, the Settlement Classes would be left with nothing. (Motion, 12: 20-23.)

Counsel contends that the proper measure of damages in a deceptive labeling case is the excess money paid by consumers for a product based on the challenged representation ("the price premium") commanded by the products. (*See Brazil v. Dole Packaged Foods, LLC,* No. 12-cv-01831-LHK, 2014WL 5794873, at *5 (N.D. Cal. Nov. 6, 2014) ("The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between the product as labeled and the product as received.") Counsel contends that at issue is the amount a consumer overpaid based on the belief the products were imported from Japan, when they were actually brewed in Canada. (Supp. Brief, 3:20-27.)

As the case settled before trial experts were employed to provide an evaluation of damages, counsel used a comparison of the Products at issue with similar beer products marked and sold without the Challenged representations to provide a reasonable estimate as to damages. (Supp. Brief, 3:27-4:9.)

Based on those comparisons (Supp. Brief, 4:10-6:19), counsel contends that it appears that consumers pay approximately $1.00 to $1.50 more, or approximately 11.2%-16.6% more per 6-pack of the Products that comparable lager style beers without the deceptive representations. Accordingly, counsel contends that if an expert conducted a damage analysis of the price premium commanded by the Products, it would have been found this premium associated with each 6-pack of the Products, which would be the amount of damages consumers are entitled to at trial. (Supp. Brief, 6:20-7:2.)

Counsel further contends this estimated price premium is consistent with the price premium commanded by another Japanese marketed beer not actually brewed in Japan, and consistent with the price prelim measure by experts in another beer labeling case. (Supp. Brief, 7:3-12; Heikali Second Supp. Decl., Exhibits 3-4.)

Therefore class Counsel estimated that if the maximum damages per 6-pack of the Products is **$1.00-$1.50, then the $.50** per 6-pack negotiated for the Settlement Class Members is approximately **33%-50%** of the potential recovery had Plaintiff prevailed at trial. (Supp. Brief, 7:13-15.) These estimates are within the "ballpark" of reasonableness.

2. Risk, expense, complexity and likely duration of further litigation. Given the nature of the class claims, the case is likely to be expensive and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also likely to prolong the litigation as well as any recovery by the class members.

3. Risk of maintaining class action status through trial. Even if a class is certified, there is always a risk of decertification. (See *Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226 ["Our Supreme Court has recognized that trial courts should retain some flexibility in conducting class actions, which means, under suitable circumstances, entertaining successive motions on certification if the court subsequently discovers that the propriety of a class action is not appropriate."].)

4. Amount offered in settlement.

Monetary Relief: Class Counsel contends that because there is no cap to the amount that Settlement Members may recover (meaning that Defendant will be labile for any and all valid and timely claim forms submitted by Settlement Class Members), it is difficult to provide a definite value of the settlement recovery. However, class counsel contends that one way to

estimate the total potential recovery for settlement Class Members would be by using the sales information provided by Defendant in discovery. Based on the total units sold during the class period and the recovery per unit for each of the products under the Settlement Agreement, counsel have provided a reasonable estimate of the total potential recovery for class members sufficient to justify this settlement. (Supp. Brief, 2:1-20.)

Injunctive Relief: As part of the Settlement Agreement, Defendant has agreed to bold the term "Product of Canada" on the neck of the label of the Product bottles for three years. (¶ V.A.) Counsel contends that theoretically as a result of this relief, the Products are no longer deceptively advertised and can no longer garner the price premium attributed to the misleading representations. Therefore, although it is difficult to precisely value the injunctive relief, a reasoned estimate can be derived by looking at the economics of the matter. (Supp. Brief, 8:22-27.)

Counsel contends that going forward, the market price of the Products should decrease to reflect the price without the price premium, and consumers will benefit from the difference in the price they would have paid with the price premium versus the adjusted lower price they will pay going forward. Thus, assuming sales figures in the next three years remain consistent with historical sales figures, counsel contends that a reasonable estimate of the value of injunctive relief can be calculated by multiplying the estimated number of units that will be sold over the next three years by the estimated priced premium consumers will save per units for a total value that, as established in the sales figures received by the court under seal, adds substantial value to the injunction. (Supp. Brief, 9:1-16.)

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Class Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Class Counsel who, as indicated above, is experienced in class action litigation, including consumer class actions.

7. Presence of a governmental participant. This factor is not applicable here.

8. Reaction of the class members to the proposed settlement. The class members' reactions will not be known until they receive notice and are afforded an opportunity to object, opt-out and/or submit claim forms. This factor becomes relevant during the fairness hearing.

CONCLUSION: The settlement can be preliminarily deemed "fair, adequate, and reasonable."

3. Scope of the release

Upon the Effective Date, and except as to such rights or claims as may be created by this Agreement, and in consideration for the settlement benefits described in this Agreement, Plaintiffs and each member of the Settlement Class and/or California Settlement Class who has not validly excluded himself or herself from the Settlement pursuant to shall be deemed to fully release and discharge Defendant and all its present and former parent companies, subsidiaries, shareholders, officers, directors, employees, agents, servants, registered representatives, attorneys, insurers, affiliates, and successors, personal representatives, heirs and assigns, retailers, suppliers, distributors, endorsers, consultants, and any and all other entities or persons upstream and downstream in the production/distribution channels (together, the

"Discharged Parties") from all claims, demands, actions, and causes of action of any kind or nature whatsoever, whether at law or equity, known or unknown, direct, indirect, or consequential, liquidated or unliquidated, foreseen or unforeseen, developed or undeveloped, arising under common law, regulatory law, statutory law, or otherwise, whether based on federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim that Plaintiffs or Settlement Class Members or California Settlement Class Members ever had, or now have, against the Discharged Parties in any other court, tribunal, arbitration panel, commission, agency, or before any governmental or administrative body, or any other adjudicatory body, on the basis of, arising from, or relating to the claims alleged or that could have been alleged based on the underlying facts asserted in the operative Complaint, including all claims related to the labeling / packaging / marketing regarding the place of origin / brewing, identity of brewer, and source of ingredients for Asahi-branded beer (the "Released Claims"). The Released Claims expressly exclude claims for personal injury against the Discharged Parties. The Released Claims expressly exclude claims for personal injury against the Discharged Parties. (¶ VIII, as amended.)

To the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of or contrary to this Agreement, or any other action or claim that arises out of the same factual predicate or same set of operative facts as this Action. (¶ VIII.C.)

4. May conditional class certification be granted?

1. Standards

A detailed analysis of the elements required for class certification is not required, but it is advisable to review each element when a class is being conditionally certified (*Amchem Products, Inc. v. Winsor* (1997) 521 U.S. 620, 622-627.) The trial court can appropriately utilize a different standard to determine the propriety of a settlement class as opposed to a litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement cases. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 fn. 19.) Finally, the Court is under no "ironclad requirement" to conduct an evidentiary hearing to consider whether the prerequisites for class certification have been satisfied. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 240.)

2. Analysis

a. Numerosity. The Settlement Class consists of thousands of members. The California Settlement Class consists of thousands of members. As alleged in the CAC and confirmed in discovery, Defendant has sold at least thousands of units of the Products to its distributors nationwide and in California, which were ultimately sold to customers through various retailers. (CAC § 44.) This element is met.

b. Ascertainability. The proposed class is defined above. The class definition is "precise, objective and presently ascertainable." (*Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 919.) The Settlement Classes are objectively defined and are limited by geography and relevant Class Period. (Motion, 17:20-21.) Because the labeling of the Products remained materially uniform throughout the Class Period, the Settlement Classes are defined in such a way that self-identification is possible. (Motion, 17:21-24.)

c. Community of interest. "The community of interest requirement involves three factors: '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

Here, common issues include whether Defendant engaged in false and misleading conduct in violation of the CLRA and was unjustly enriched as a result. (Motion, 19:10-12.) The present Action is based on uniform representations made prominently on the Products during the Class Period, capable of being seen by every Settlement Class Member. (Motion, 19:12-14.)

Further, Plaintiffs' claims are typical of those of the proposed Settlement Classes because their claims pose the same questions of law and fact as those of the Settlement Class Members and arise from the same representations on the Products' packaging and labeling. (Motion, 22:13-16.)

Finally, Plaintiffs' interests are not antagonistic to the interests of the Settlement Class Members because their claims arise from the same standardized conduct of Defendant as those of the proposed Settlement Classes, and Plaintiffs seek remedies equally applicable and beneficial to the Settlement Classes. (Motion, 22:22-25.)

d. Adequacy of class counsel. As indicated above, Class Counsel is experienced in class action litigation, including consumer class actions.

e. Superiority. Given the relatively small size of the individual claims, a class action appears to be superior to separate actions by the class members.

CONCLUSION: The class may be conditionally certified since the prerequisites of class certification have been satisfied.

5. Is the notice proper?

1. Content of class notice. The proposed Publication Notice is attached to the Settlement Agreement as Exhibit D. Its content appears to be acceptable. The Notice is one page and contains the following information: class definition, summary of the case, information regarding settlement, summary of procedures for claim submission, opting out, and submitting objections, the consequences of submitting a claim, opting out, or objecting, the time date and location of the final approval hearing, and the website for class members to view detailed information.

The proposed Full Notice, which will be available to Class Members via the settlement website, is attached to the Settlement Agreement as Exhibit E. Its content appears to be acceptable. It includes information such as: a summary of the litigation; the nature of the settlement; the terms of the settlement agreement; the proposed deductions from the gross settlement amount (attorney fees and costs, enhancement awards, and claims administration costs); the procedures and deadlines for participating in, opting out of, or objecting to, the settlement; the consequences of participating in, opting out of, or objecting to, the settlement; and the date, time, and place of the final approval hearing. (Exhibit E to Settlement Agreement.)

2. Method of class notice. A detailed Settlement Notice Plan is attached to the Heikali Declaration as Exhibit C. In summary, Defendant, at its cost, shall issue the Class Notice in accordance with the requirements of the Preliminary Approval Order, as follows:

- Subject to the approval of the Court and to begin no later than 45 days after the order of Preliminary Approval, Defendant shall cause the Publication Notice to be published in substantially the forms attached to the Settlement Agreement as Exhibits D and E and in the manner recommended by the Settlement Administrator. Publication Notice shall be published substantially according to the Notice Plan attached to the Settlement Agreement as Exhibit C. In addition, Class Notice, in substantially the form attached to the Settlement Agreement as Exhibit E shall be published on the Settlement Website. (¶ (X)(A).)
- The proposed Publication Notice to be published in the widely circulated magazines Car and Driver, ESPN The Magazine, and Time, is attached as Exhibit D to the Settlement Agreement. Publication Notice will also be made via targeted ads on Facebook, Google Display Network, and YouTube. (Motion, 7:10-13.) The proposed Summary Class Notice, which will be available on the Settlement Website or by calling a toll-free telephone number to request a copy, is attached as Exhibit E to the Settlement Agreement. (Motion, 7:13-15.) The Publication Notice and Summary Class Notice were designed in accordance with the Federal Judicial Center's ("FJC") "plain language" guidelines. (Heikali Decl. at ¶ 14.)
- The Publication Notice and Summary Class Notice will also direct consumers to a Settlement Website dedicated to the settlement and the claims process, where Settlement Class Members can review the Summary Class Notice, settlement documentation, and other relevant court documents, as well as fill out a Claim Form for payment. (Motion, 7:21-24.) The proposed Claim Form is attached as Exhibit A to the Settlement Agreement. (Motion, 7:24-25.) The Settlement Website will be designed and maintained by KCC. In addition, KCC will maintain a toll free call-in number for the settlement through which Settlement Class Members can obtain information about the Settlement Agreement and obtain a hardcopy of the Summary Class Notice or Claim Form. (Motion, 7:25- 8:2.)

3. Cost of class notice. As indicated above, claims administration costs are estimated to be **$300,000.** (Amended Settlement Agreement, ¶XI.A.9) Prior to the time of the final fairness hearing, the claims administrator must submit a declaration attesting to the total costs incurred and anticipated to be incurred to finalize the settlement for approval by the Court.

6. Attorney fees and costs

California Rule of Court, rule 3.769(b) states: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney fees or the submission of an application for the approval of attorney fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action."

Ultimately, the award of attorney fees is made by the court at the fairness hearing, using the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) Despite any agreement by the parties to the contrary, "the court ha[s] an independent right and responsibility to review

the attorney fee provision of the settlement agreement and award only so much as it determined reasonable." (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th 123, 128.)

The award for fees and expenses shall be allocated as follows: 25% to Halunen Law, 37.5% to Faruqi & Faruqi LLP, and 37.5% to Reese LLP. (Heikali Supp. Decl., ¶7.)

The question of whether Class Counsel is entitled to **$765,000** in attorney fees and costs will be addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees. Class counsel must provide the court with billing information so that it can properly apply the lodestar method, and must indicate what multiplier (if applicable) is being sought as to each counsel.

Class Counsel should also be prepared to justify the costs sought by detailing how they were incurred.

7. Incentive Award to Class Representative

The Settlement Agreement provides for enhancement awards of up to **$5,500** ($2,750 each) for the class representatives. In connection with the final fairness hearing, the named Plaintiffs must submit declarations attesting to why they should be entitled to enhancement awards in the proposed amount. The named Plaintiffs must explain why they "should be compensated for the expense or risk he has incurred in conferring a benefit on other members of the class." (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars with "nothing more than *pro forma* claims as to 'countless' hours expended, 'potential stigma' and 'potential risk.' Significantly more specificity, in the form of quantification of time and effort expended on the litigation, and in the form of reasoned explanation of financial or other risks incurred by the named plaintiffs, is required in order for the trial court to conclude that an enhancement was 'necessary to induce [the named plaintiff] to participate in the suit . . . .'" (*Id.* at 806-807, italics and ellipsis in original.)

The Court will decide the issue of the enhancement awards at the time of final approval.