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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SKYE ASTIANA, MILAN BABIC,
TIMOTHY BOLICK, JOE CHATHAM,
JAMES COLUCCI, TAMARA DIAZ,
MARTHA ESPINOLA, TAMAR
LARSEN, MARY LITTLEHALE, and
KIMBERLY S. SETHAVANISH, on
behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

KASHI COMPANY, a California
corporation,

Defendant.

Case Number: 11-cv-1967-H (BGS)

CLASS ACTION

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT, PROVISIONAL
CERTIFICATION OF
SETTLEMENT CLASS AND
APPROVAL OF PROCEDURE FOR
AND FORM OF NOTICE**

Judge: Hon. Marilyn L. Huff

Date: May 27, 2014

Time: 4:00 p.m.

Ctrm: 15A

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PROCEDURAL BACKGROUND	6
III.	THE STANDARD FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS	11
IV.	TERMS OF THE PROPOSED SETTLEMENT.....	15
A.	Benefit To Settlement Class Members From The Settlement Fund.....	15
B.	Release And Discharge Of Claims.....	18
C.	Payment Of Attorneys’ Fees And Expenses	18
D.	Compensation For The Class Representatives.....	18
E.	Payment Of Notice And Administrative Fees.....	19
V.	THIS COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, PROVISIONALLY CERTIFY THE CLASS AND ENTER THE PRELIMINARY APPROVAL ORDER	19
A.	The Settlement Should Be Preliminarily Approved Because It Satisfies Accepted Criteria	19
B.	The Proposed Settlement Class Should Be Certified.....	22
1.	The Settlement Class Satisfies Rule 23(a).....	24
a.	Numerosity	24
b.	Commonality	24
c.	Typicality	26
d.	Adequacy	27
2.	The Settlement Class Satisfies Rule 23(b)(3)	28
a.	Common Questions Of Law And Fact Predominate.....	28
b.	A Class Action Is The Superior Mechanism For Adjudicating This Dispute.....	29

C. The Proposed Notice Program Constitutes Adequate Notice And
Should Be Approved30

VI. CONCLUSION.....32

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alaniz v. Cal. Processors, Inc.</i> , 73 F.R.D. 269 (N.D. Cal. 1976), <i>cert. denied sub nom. Beaver v. Alaniz</i> , 439 U.S. 837 (1978).....	12, 20
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	23, 28, 30
<i>Arnold v. United Artists Theatre Circuit, Inc.</i> , 158 F.R.D. 439 (N.D. Cal. 1994).....	25
<i>Astiana v. Ben & Jerry's Homemade, Inc.</i> , No. C 10-4387, 2014 U.S. Dist. LEXIS 1640 (N.D. Cal. Jan. 7, 2014).....	21
<i>Astiana v. Kashi Co.</i> , 291 F.R.D. 493 (S.D. Cal. 2013)	<i>passim</i>
<i>Boyd v. Bechtel Corp.</i> , 485 F. Supp. 610 (N.D. Cal. 1979).....	14
<i>Churchill Vill., L.L.C. v. GE</i> , 361 F.3d 566 (9th Cir. 2004)	19
<i>Class Plaintiffs v. City of Seattle</i> , 955 F.2d 1268 (9th Cir. 1992)	19
<i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013).....	9, 10
<i>Dunk v. Ford Motor Co.</i> , 48 Cal. App. 4th 1794 (1996)	12
<i>Ellis v. Naval Air Rework Facility</i> , 87 F.R.D. 15 (N.D. Cal. 1980), <i>aff'd</i> , 661 F.2d 939 (9th Cir. 1981).....	14
<i>Gen. Tel. Co. of the Sw. v. Falcon</i> , 457 U.S. 147 (1982).....	26

1	<i>Hanlon v. Chrysler Corp.</i> ,	
2	150 F.3d 1011 (9th Cir. 1998)	<i>passim</i>
3	<i>Leyva v. Medline Industries Inc.</i> ,	
4	716 F.3d 510 (9th Cir. 2013)	10
5	<i>Linney v. Cellular Alaska P'ship</i> ,	
6	No. C-96-3008 DLJ,	
7	1997 U.S. Dist. LEXIS 24300 (N.D. Cal. July 18, 1997),	
8	<i>aff'd</i> , 151 F.3d 1234 (9th Cir. 1998).....	14
9	<i>Livingston v. Toyota Motor Sales USA, Inc.</i> ,	
10	No. C-94-1377-MHP,	
11	1995 U.S. Dist. LEXIS 21757 (N.D. Cal. June 1, 1995).....	20, 22
12	<i>Morgan v. Laborers Pension Trust Fund</i> ,	
13	81 F.R.D. 669 (N.D. Cal. 1979).....	25
14	<i>Officers for Justice v. Civil Serv. Comm'n of the City and Cnty. Of S.F.</i> ,	
15	688 F.2d 615 (9th Cir. 1982),	
16	<i>cert. denied</i> , <i>Byrd v. Civil Service Com.</i> , 459 U.S. 1217 (1983).....	14
17	<i>In re Pac. Enters. Sec. Litig.</i> ,	
18	47 F.3d 373 (9th Cir. 1995)	13
19	<i>In re POM Wonderful LLC Mktg. and Sales Practices Litig.</i> ,	
20	No. 10-02199, 2014 U.S. Dist. LEXIS 40415 (C.D. Cal. Mar. 25, 2014)	21
21	<i>Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v.</i>	
22	<i>Anderson</i> ,	
23	390 U.S. 414 (1968).....	13
24	<i>Sethavanish v. ZonePerfect Nutrition Co.</i> ,	
25	No. 12-2907, 2014 U.S. Dist. LEXIS 18600 (N.D. Cal. Feb. 13, 2014).....	21
26	<i>Slaven v. BP Am., Inc.</i> ,	
27	190 F.R.D. 649 (C.D. Cal. 2000).....	24
28	<i>Staton v. Boeing Co.</i> ,	
	327 F.3d 938 (9th Cir. 2003)	27

1	<i>Sullivan v. DB Invs., Inc.</i> ,	
2	667 F.3d 273 (3d Cir. 2011)	23, 29
3	<i>In re Syncor ERISA Litig.</i> ,	
4	516 F.3d 1095 (9th Cir. 2008)	11, 12, 13
5	<i>In re Tableware Antitrust Litig.</i> ,	
6	484 F. Supp. 2d 1078 (N.D. Cal. 2007)	11, 12
7	<i>In re Veritas Software Corp. Sec. Litig.</i> ,	
8	496 F.3d 962 (9th Cir. 2007)	20
9	<i>Wal-Mart Stores, Inc. v. Dukes</i> ,	
10	131 S. Ct. 2541 (2011)	24
11	<i>Zinser v. Accufix Research Inst., Inc.</i> ,	
12	253 F.3d 1180 (9th Cir. 2001)	28
13	Statutes	
14	California Business and Professions Code § 17200, <i>et seq.</i>	7, 25
15	Cal. Com. Code § 2313	8
16	California Business & Professions Code § 17500, <i>et seq.</i>	7, 25
17	Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b)	19
18	Consumer Legal Remedies Act	8, 25
19	Plaintiffs' Magnuson-Moss Warranty Act	7
20	Other Authorities	
21	Fed. R. Civ. P. 23	<i>passim</i>
22	<i>Manual for Complex Litigation</i> (Third) § 30.41 (1995)	12, 13
23	<i>Manual for Complex Litigation</i> (Fourth) § 21.632 (2004)	20, 31
24	4 Alba Conte and Herbert Newberg, <i>Newberg on Class Actions</i>	
25	§ 11.25 (4th ed. 2002)	20, 27

1 Herbert Newberg & Alba Conte, *Newberg on Class Actions*
§ 3.10 (1992).....25

I. INTRODUCTION

Plaintiffs Skye Astiana, Milan Babic, Tamara Diaz, Tamar Larsen, and Kimberly S. Sethavanish (collectively, “Plaintiffs”), and co-lead class counsel for the Class, Feinstein Doyle Payne & Kravec, LLC and Faruqi & Faruqi, LLP (collectively, “Class Counsel”), respectfully submit this memorandum in support of Plaintiffs’ Motion for Preliminary Approval of Class Settlement (the “Motion”). As detailed below, the proposed settlement is unquestionably fair, achieves meaningful relief for the Class, and should be preliminarily approved by the Court.

This class action is brought by Plaintiffs on behalf of themselves and all others similarly situated against Defendant Kashi Company (“Kashi” or “Defendant”) for allegedly misleading consumers by labeling certain of its food products (the “Products”) “All Natural” or “Nothing Artificial,” when in fact those Products contained certain synthetic and artificial ingredients. This Court has already certified two California classes of purchasers of certain Kashi food products. *See Astiana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013) (certifying an “All Natural” class for Products containing pyridoxine hydrochloride, calcium pantothenate and/or hexane-processed soy ingredients and a “Nothing Artificial” class for Products containing pyridoxine hydrochloride, alpha-tocopherol acetate and/or hexane-processed soy ingredients). Now, after two separate full-day sessions before a mediator, the Parties have reached a comprehensive settlement that more broadly achieves relief for California purchasers of Kashi Products containing one of more of the following ingredients: pyridoxine hydrochloride, calcium pantothenate, hexane-processed soy ingredients, ascorbic acid, calcium phosphate, glycerin, monocalcium phosphate, sodium phosphate, potassium bicarbonate, potassium carbonate, sodium acid pyrophosphate, sodium citrate,

1 alpha tocopherol acetate, mixed tocopherols, tocopherol acetate, and/or xanthan
2 gum (the “Challenged Ingredients”). This expansion of the Class definition
3 reflects new evidence of the materiality of Defendant’s “All Natural” claim as to
4 **all** of the Challenged Ingredients. Thus, the Settlement Class is expanded to give
5 relief to consumers who have been similarly harmed by Defendant’s uniform
6 misrepresentations.

7 The Stipulation of Settlement (“Settlement” or “Settlement Agreement”) and
8 its exhibits were filed by Defendant on May 2, 2014. (ECF No. 219.)¹ The terms
9 of the Settlement are well-informed by over two years of litigation, during which
10 time, Plaintiffs completed merits and experts discovery, including multiple expert
11 depositions. See Declaration of Antonio Vozzolo (“Vozzolo Decl.”) ¶¶ 16-18,
12 filed herewith. As more specifically set forth in the Parties’ Settlement
13 Agreement, and as described in more detail below, the Parties to this action have
14 reached a settlement that provides a real and substantial benefit to California
15 consumers. First and foremost, under the terms of the Settlement, Kashi has
16 agreed to modify, pursuant to the timetable set forth in the Settlement Agreement,
17 its current labeling and advertising to remove “All Natural” and “Nothing
18 Artificial” from those Products that contain the following Challenged Ingredients:
19 (i) pyridoxine hydrochloride, calcium pantothenate and/or hexane-processed soy
20 ingredients in products labeled “All Natural,” and (ii) pyridoxine hydrochloride,
21 alpha-tocopheral acetate and/or hexane-processed soy ingredients in products
22 labeled “Nothing Artificial,” unless the ingredients are approved or determined as
23 acceptable for products identified as “natural” by a federal agency or controlling

24 _____
25 ¹ All capitalized terms used and not otherwise defined herein have the definitions
26 set forth in the Settlement Agreement.

1 regulatory body. *See* Settlement Agreement § IV.B. Additionally, without any
2 admission of liability, Kashi has agreed to provide meaningful monetary relief to
3 Settlement Class Members by disbursing \$5.0 million, less any costs associated
4 with the Class Action Settlement Administrator paid by Kashi prior to that time, to
5 a settlement fund to satisfy the costs of notice, claims administration, and awarded
6 attorneys' fees and expenses, and to fund cash payments to Settlement Class
7 Members who submit valid claims for Products purchased between August 24,
8 2007 and May 2, 2014, in the State of California. *See id.* § IV.A.2. From this
9 fund, Settlement Class Members are able to recover \$0.50 per package for every
10 Product purchased during the Settlement Class Period (with no limitation), for
11 which they can present written proof of purchase in the form of a receipt or a retail
12 rewards submission. Settlement Class Members without such proof of purchase
13 are entitled to \$0.50 per package, with a maximum recovery of \$25 per household,
14 for every package of Product purchased during the Settlement Class Period. *See*
15 *id.* § IV.A.1.²

16 As in any class action, the Settlement is subject initially to preliminary
17 approval and then to final approval by the Court after notice to the Class and a
18 hearing. The proposed Class for settlement purposes should be conditionally
19 certified. In its Order certifying two California classes of purchasers of certain of
20 the Products, this Court found the requirements for certification under Federal Rule
21 of Civil Procedure 23 satisfied for products containing certain Challenged
22 Ingredients. *See Astiana*, 291 F.R.D. 493 (certifying an "All Natural" class for
23

24 ² The amount of each cash payment will depend on the number and amount of
25 authorized claims submitted per the Settlement Agreement. *See* Settlement
26 Agreement § IV.A.3.

Products containing pyridoxine hydrochloride, calcium pantothenate and/or hexane-processed soy ingredients and a “Nothing Artificial” class for Products containing pyridoxine hydrochloride, alpha-tocopherol acetate and/or hexane-processed soy ingredients). Although the proposed settlement Class is more broadly defined to include Products containing *all* the Challenged Ingredients, certification of the settlement Class is warranted for reasons consistent with this Court’s previous class certification order, as detailed below. Accordingly, Plaintiffs now request this Court to enter an order in the form of the [Proposed] Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, Providing for Notice and Scheduling Order (the “Order”), which is attached to the Settlement Agreement as Exhibit F. That Order will:

- (1) grant preliminary approval of the Settlement;
- (2) conditionally certify the Class, appointing Plaintiffs Astiana, Babic, Diaz, Larsen and Sethavanish as class representatives (“Class Representatives”) for the Settlement Class, and appointing Feinstein, Doyle, Payne & Kravec, LLC and Faruqi & Faruqi, LLP, as counsel for the Settlement Class pursuant to Fed. R. Civ. P. 23(g);
- (3) establish procedures for giving notice to Members of the Settlement Class;
- (4) approve forms of notice to Settlement Class Members;
- (5) mandate procedures and deadlines for exclusion requests and objections; and
- (6) set a date, time and place for a final approval hearing.

Class certification for purposes of settlement is appropriate under Federal Rules of Civil Procedure 23(a) and (b)(3), as fully discussed below.

1 The Settlement is fair, reasonable, and undoubtedly falls within the range of
2 possible approval. Indeed, Class Counsel achieved a substantial benefit for the
3 Class and the likelihood that a greater result could be achieved at trial is remote.
4 Plaintiffs have vigorously litigated this action for over two years, engaging in
5 extensive motion practice and discovery, and have ample knowledge of the legal
6 claims and defenses, the risks presented by the case, and the value achieved by the
7 proposed settlement. *See Vozzolo Decl.*, ¶¶ 16-18. The Settlement achieves
8 injunctive relief in the form of a modification of Kashi's current labeling and
9 advertising to remove "All Natural" and "Nothing Artificial" from certain
10 Products. And the settlement fund provides a tangible and significant monetary
11 benefit to the Class in lieu of the continued risk of litigation.

12 The Settlement is the product of extended arm's-length negotiations between
13 experienced attorneys familiar with the legal and factual issues of this case and all
14 Class members are treated fairly under the terms of the Settlement. The Settlement
15 Agreement was entered into only after two full day mediation sessions before the
16 Honorable Howard B. Weiner (retired), where a tentative agreement was reached.
17 *See id.* ¶ 16. Plaintiffs, by and through their respective counsel, have conducted an
18 extensive investigation into the facts and law relating to this matter. The
19 investigation has included consulting industry personnel, extensive consultation
20 with experts, numerous interviews of witnesses and putative members of the Class,
21 as well as legal research as to the sufficiency of the claims. *See id.* Plaintiffs and
22 their counsel hereby acknowledge that in the course of their investigation they
23 received, examined, and analyzed information, documents, and materials that they
24 deem necessary and appropriate to enable them to enter into the Settlement
25 Agreement on a fully informed basis. *See id.* ¶¶ 16-18. It is an outstanding result
26

for the Parties and Settlement Class Members. The Court should enter the proposed order granting preliminary approval.

II. PROCEDURAL BACKGROUND

In 2011, the following putative class action complaints were filed against Kashi and other related defendants in the United States District Court for the Southern District of California: *Bates v. Kashi Company, et al.*, 3:11-cv-1967; *Babic v. Kashi Company*, 3:11-cv-02816; *Espinola v. Kashi Company*, 3:11-cv-02629 (initially filed in the United States District Court for the Central District of California (11-cv-8534)); *Diaz v. Kashi Company, et al.*, 11:cv-2256; *Chatham v. Kashi Company, et al.*, 11-cv-2285; *Sethavanish, et al. v. Kashi Company*, 11-cv-02356 (initially filed in the United States District Court for the Northern District of California (11-cv-4453)); and *Baisinger v. Kashi Company*, 11-cv-2367 (initially filed in the United States District Court for the Northern District of California (11-cv-4581)) (collectively “the Original Complaints”). Vozzolo Decl., ¶ 5.

On November 28, 2011, the Court ordered the consolidation of the related actions. See ECF No. 16 (naming *Bates* the lead case; ordering consolidation of *Diaz*, *Chatham*, *Sethavanish* and *Baisinger* cases); see also ECF No. 22 (ordering consolidation of *Espinola* case); ECF No. 8 in 3:11-cv-2816 (ordering consolidation of *Babic* case). On January 18, 2012, the Court appointed the law firms of Stember Feinstein Doyle & Payne, LLC and Faruqi & Faruqi, LLP as interim co-lead counsel. (ECF No. 41.)

On February 21, 2012, Plaintiffs filed a Consolidated Amended Complaint for Damages, Equitable, Declaratory and Injunctive Relief against Kashi Company, Kashi Sales LLC and Kellogg Company (Case No. 3:11-cv-01967) (the “Consolidated Amended Complaint”), which amended and superseded the Original

1 Complaints. (ECF No. 49.)

2 In the Consolidated Amended Complaint, which was filed as a putative class
3 action, Plaintiffs allege they bought certain Kashi food products based, at least in
4 part, on misleading statements printed on the products' labels that the products
5 were "All Natural" or "Nothing Artificial." Plaintiffs allege that, based on the
6 labels, they believed the products contained no synthetic or artificial ingredients
7 and therefore paid a premium price for the products. Plaintiffs further allege that
8 the products that bore the "All Natural" or "Nothing Artificial" labels contained
9 certain unnatural, synthetic or artificial ingredients. Plaintiffs further allege that
10 they either would not have purchased the products or would have paid less for the
11 products had they known at the time of purchase that they contained ingredients
12 that were unnatural, synthetic or artificial.

13 On April 6, 2012, Defendants filed a motion to dismiss the Consolidated
14 Amended Complaint. (ECF No. 61.) Plaintiffs opposed Defendants' motion to
15 dismiss. On July 16, 2012, the Court entered an Order granting in part and
16 denying in part Defendants' motion to dismiss. (ECF No. 79.) The Court rejected
17 Defendants' arguments that Plaintiffs' claims were preempted by federal law and
18 found that application of the primary jurisdiction doctrine was not appropriate.
19 The Court dismissed all of Plaintiffs' claims against Kashi Sales, LLC and Kellogg
20 Company. The Court also dismissed Plaintiffs' Magnuson-Moss Warranty Act
21 causes of action, common law fraud cause of action, and claim for unjust
22 enrichment. The Court denied the remaining portions of Defendants' motion to
23 dismiss the Consolidated Amended Complaint, namely, Plaintiffs' allegations that
24 Kashi's conduct violates the unlawful, unfair and fraudulent prongs of California's
25 Business and Professions Code § 17200, *et seq.* (the "UCL"), the California
26

1 Business & Professions Code § 17500, *et seq.* (the “FAL”), the Consumer Legal
2 Remedies Act (“CLRA”), and Cal. Com. Code § 2313 (breach of express
3 warranty) or, in the alternative, claims for restitution on the basis of quasi contract.

4 Kashi answered the Consolidated Complaint on August 15, 2012, denying
5 liability. (ECF No. 81.) Over the following year, the Parties engaged in extensive
6 discovery. Plaintiffs noticed and took a number of depositions, including of
7 Defendant’s marketing expert, served multiple sets of requests for production of
8 documents and interrogatories, and served several subpoenas to third parties,
9 which resulted in the production of thousands of pages of documents. Defendant
10 also served, and Plaintiff responded to, requests for production of documents and
11 interrogatories. Further, Defendant deposed the named Plaintiffs as well as
12 Plaintiffs’ marketing expert.

13 On April 15, 2013, Plaintiffs filed a motion for class certification (ECF
14 No. 108), which Kashi opposed. On July 30, 2013, the Court entered an Order
15 granting in part and denying in part Plaintiffs’ motion for class certification. (ECF
16 No. 148.) The Court certified the following class, representing California
17 purchasers of Kashi products marketed and labeled as containing “Nothing
18 Artificial” during the class period:

19 All California residents who purchased Kashi Company’s food
20 products on or after August 24, 2007 in the State of California that
21 were labeled “Nothing Artificial” but which contained one or more of
22 the following ingredients: Pyridoxine Hydrochloride, Alpha-
23 Tocopherol Acetate and/or Hexane-Processed Soy ingredients. The
24 Court excludes from the class anyone with a conflict of interest in this
25 matter.

26 In addition, the Court certified the following class, representing California
27 purchasers of Kashi products marketed and labeled as “All Natural” during the
28

1 class period:

2 All California residents who purchased Kashi Company's food
3 products on or after August 24, 2007 in the State of California that
4 were labeled "All Natural" but which contained one or more of the
5 following ingredients: Pyridoxine Hydrochloride, Calcium
6 Panthothenate and/or Hexane-Processed Soy ingredients. The Court
excludes from the class anyone with a conflict of interest in this
matter.

7 The Court also appointed Faruqi & Faruqi, LLP and Feinstein Doyle Payne
8 & Kravec, LLC as co-lead counsel for both classes.

9 The Court denied Plaintiffs' motion for class certification as to ten of the
10 Challenged Ingredients—ascorbic acid, calcium phosphates, glycerin, potassium
11 bicarbonate, potassium carbonate, sodium acid pyrophosphate, sodium citrate,
12 sodium phosphates, tocopherols, and xanthan gum—on the basis that those
13 ingredients were allowed in certified "organic" goods and consumers often equate
14 "natural" with "organic." *Astiana*, 291 F.R.D. at 508. Specifically, the Court
15 reasoned that "*at [that] time*, Plaintiffs fail[ed] to sufficiently show that ...
16 Defendant's representation of 'All Natural' in light of the presence of the
17 challenged ingredients would be considered to be a material falsehood by class
18 members." *Id.* (emphasis added).

19 On August 12, 2013, Kashi filed a Petition For Permission To Appeal Under
20 Federal Rule of Civil Procedure 23(f) in the United States Court of Appeals for the
21 Ninth Circuit, seeking the Ninth Circuit's permission to appeal the class
22 certification order. Defendants' petition argued that under the Supreme Court's
23 decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Plaintiffs' class
24 certification motions did not translate the legal theory of their false advertising
25 claims into a damages analysis that satisfies the predominance requirement of Rule
26

23(b)(3). Plaintiffs filed an opposition to Kashi's Rule 23(f) petition on August 22, 2013, asserting that the Ninth Circuit had already addressed the scope and applicability of the *Comcast* decision in *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013), and that this Court rendered a thoroughly reasoned class certification decision which correctly applied both *Comcast* and *Leyva*. On October 22, 2013, the Ninth Circuit denied Kashi's petition for permission to appeal the District Court's class certification ruling.

On August 27, 2013, Plaintiffs moved for partial reconsideration of the class certification order on the grounds that the Court erred by excluding the ingredient potassium bicarbonate from the "All Natural" class. (ECF No. 157.) Conversely, on August 28, 2013, Kashi moved for modification of the "All Natural" class definition, arguing that the Court erred by including the ingredients calcium pantothenate and pyridoxine hydrochloride. (ECF No. 160.) On September 18, 2013, the Court denied each of Plaintiffs' and Defendant's requests that the Court modify the definition of the "All Natural" class. (ECF No. 173.) On October 24, 2013, Kashi filed an additional motion to modify the Court's July 30, 2013 class certification order (ECF No. 182), which Plaintiffs opposed. On November 22, 2013, the Court denied Kashi's motion to modify the Court's class certification order. (ECF No. 203.)

On October 23, 2013 and December 5, 2013, Class Counsel, Defendant and Defendant's Counsel participated in mediations conducted by the Honorable Howard B. Weiner (retired) at which they reached a tentative settlement. Vozzolo Decl., ¶ 16. Subsequent to those sessions, the Parties engaged in protracted, extensive, and hard-fought settlement negotiations. *See id.* As a result of those negotiations, the Parties agreed to settle the Litigation pursuant to the terms set

1 forth in the Settlement Agreement. *See id.* ¶¶ 17-18.

2 Throughout the Litigation, Plaintiffs by and through their respective counsel,
3 conducted a thorough examination and investigation of the facts and law relating to
4 the matters in this case, including, but not limited to, completing merits and expert
5 discovery, review and analysis of Kashi's documents and data, and extensive
6 research and assessment of the Challenged Ingredients and the Products. *See id.*
7 ¶¶ 16-18. Class Counsel also evaluated the merits of all Parties' contentions and
8 evaluated this Settlement, as it affects all Parties, including Settlement Class
9 Members. *See id.* Plaintiffs and Class Counsel, after taking into account the
10 foregoing, along with the risks and costs of further litigation, are satisfied that the
11 terms and conditions of this Settlement are fair, reasonable and adequate, and that
12 this Settlement is in the best interest of the Settlement Class Members. As a result
13 of this extensive investigation and the extensive negotiations, the Parties reached
14 the proposed Settlement, and the Settlement Agreement was fully executed on May
15 2, 2014. *See id.* ¶¶ 18-19.

16 Kashi, while denying all allegations of wrongdoing and disclaiming all
17 liability with respect to all claims, considers it desirable to resolve the action on the
18 terms stated herein in order to avoid further expense, inconvenience and burden
19 and, therefore, has determined that this Settlement on the terms set forth herein is
20 in Kashi's best interests.

21 **III. THE STANDARD FOR PRELIMINARY APPROVAL OF CLASS** 22 **ACTION SETTLEMENTS**

23 Approval of class action settlements involves a two-step process. First, the
24 Court must make a preliminary determination whether the proposed settlement
25 appears to be fair and is "within the range of possible approval." *In re*
26 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *In re*

1 *Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *Alaniz v. Cal.*
2 *Processors, Inc.*, 73 F.R.D. 269, 273 (N.D. Cal. 1976), *cert. denied sub nom.*
3 *Beaver v. Alaniz*, 439 U.S. 837 (1978). If so, notice can be sent to class members
4 and the Court can schedule a final approval hearing where a more in-depth review
5 of the settlement terms will take place. *See Manual for Complex Litigation* (Third)
6 § 30.41 at 236-38 (1995) (hereinafter “*Manual*”). The purpose of a preliminary
7 approval hearing is to ascertain whether there is any reason to notify the putative
8 class members of the proposed settlement and to proceed with a fairness hearing.
9 *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice of a
10 settlement should be disseminated where “the proposed settlement appears to be
11 the product of serious, informed, non-collusive negotiations, has no obvious
12 deficiencies, does not improperly grant preferential treatment to class
13 representatives or segments of the class, and falls within the range of possible
14 approval.” *Id.* (quoting *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F.
15 Supp. 2d 561 (E.D. Pa. 2001)). Preliminary approval does not require an answer to
16 the ultimate question of whether the proposed settlement is fair and adequate, for
17 that determination occurs only after notice of the settlement has been given to the
18 members of the settlement class. *See Dunk v. Ford Motor Co.*, 48 Cal. App. 4th
19 1794, 1801 (1996).

20 Nevertheless, a review of the standards applied in determining whether a
21 settlement should be given *final* approval is helpful to the determination of
22 preliminary approval. One such standard is the strong judicial policy of
23 encouraging compromises, particularly in class actions. *See In re Syncor*, 516 F.3d
24 at 1101 (citing *Officers for Justice v. Civil Serv. Comm’n of the City and Cnty. Of*
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1 *S.F.*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, *Byrd v. Civil Service Com.*, 459
2 U.S. 1217 (1983)); *Manual* § 23.11 at 166:

3 Beginning with the first [pretrial] conference, and from time to
4 time throughout the litigation, the court should encourage the
5 settlement process. The judge should raise the issue of
6 settlement at the first opportunity, inquiring whether any
7 discussions have taken place or might be scheduled. As the
8 case progresses, and the judge and counsel become better
9 informed, the judge should continue to urge the parties to
10 consider and reconsider their positions on settlement in light of
11 current and anticipated developments.

12 While the district court has discretion regarding the approval of a proposed
13 settlement, it should give “proper deference to the private consensual decision of
14 the parties.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). In
15 fact, when a settlement is negotiated at arm’s-length by experienced counsel, there
16 is a presumption that it is fair and reasonable. *See In re Pac. Enters. Sec. Litig.*, 47
17 F.3d 373, 378 (9th Cir. 1995). Ultimately, however, the court’s role is to ensure
18 that the settlement is fundamentally fair, reasonable and adequate. *See In re*
19 *Syncor*, 516 F.3d at 1100.

20 Beyond the public policy favoring settlements, the principal consideration in
21 evaluating the fairness and adequacy of a proposed settlement is the likelihood of
22 recovery balanced against the benefits of settlement. “Basic to this process in
23 every instance, of course, is the need to compare the terms of the compromise with
24 the likely rewards of litigation.” *Protective Comm. for Indep. Stockholders of TMT*
25 *Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said, “the
26 court’s intrusion upon what is otherwise a private consensual agreement negotiated
27 between the parties to a lawsuit must be limited to the extent necessary to reach a
28 reasoned judgment that the agreement is not the product of fraud or overreaching
29 by, or collusion between, the negotiating parties, and that the settlement, taken as a

whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice*, 688 F.2d at 625.

Factors to be considered by the court in evaluating a proposed settlement may include, among others, some or all of the following: the experience and views of counsel; the risks, complexity, expense and likely duration of continued litigation; the strengths of plaintiff’s case; the amount offered in settlement; and the stage of proceedings. *See id.* In evaluating preliminarily the adequacy of a proposed settlement, the proposed settlement enjoys a presumption of fairness because it is the product of extensive arm’s length negotiations conducted by experienced and capable counsel with a firm understanding of the strengths and weaknesses of their respective clients’ positions. *See Linney v. Cellular Alaska P’ship*, No. C-96-3008 DLJ, 1997 U.S. Dist. LEXIS 24300, at *16 (N.D. Cal. July 18, 1997) (“the fact that the settlement agreement was reached in arm’s length negotiations, after relevant discovery [has] taken place create[s] a presumption that the agreement is fair”), *aff’d*, 151 F.3d 1234 (9th Cir. 1998); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) (“there was extensive discovery prior to settlement, allowing both counsel and the Court to fully evaluate the strengths, weaknesses, and equities of the parties’ positions”), *aff’d*, 661 F.2d 939 (9th Cir. 1981); *see also Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622-23 (N.D. Cal. 1979).

In sum, a compromise must be viewed in the circumstances in which it was achieved. In the final analysis, that decision is committed to the sound discretion of the court.

IV. TERMS OF THE PROPOSED SETTLEMENT

The Parties reached agreement on the terms of the proposed settlement through a vigorous debate of legal and factual theories by counsel and extensive arm's-length negotiations. The proposed Settlement Class consists of all California residents who, at any time between August 24, 2007 and May 1, 2014 purchased any of the Products. Excluded from this definition are: (a) Kashi's employees, officers and directors; (b) persons or entities who purchased the Products for the purpose of re-sale; (c) retailers or re-sellers of the Products; (d) governmental entities; (e) persons who timely and properly exclude themselves from the Class as provided in the Settlement Agreement; and (f) the Court, the Court's immediate family, and Court staff. Settlement Class Members who exclude themselves from the Settlement, pursuant to the procedures set forth in Section VI.B of the Settlement Agreement, shall no longer thereafter be Settlement Class Members and shall not be bound by the Settlement Agreement and shall not be eligible to make a claim for any benefit under the terms of the Settlement Agreement.

A. Benefit To Settlement Class Members From The Settlement Fund

Kashi has agreed to injunctive relief in the form of a modification of its current labeling and advertising to remove "All Natural" and "Nothing Artificial" from certain Products as follows: "By the later of (i) 120 days following the Effective Date or (ii) December 31, 2014 (the 'Injunctive Relief Effective Date'), Kashi agrees to modify its current labeling and advertising to remove 'All Natural' and 'Nothing Artificial' from those Products that contain the following Challenged Ingredients: (i) pyridoxine hydrochloride, calcium pantothenate and/or hexane-processed soy ingredients in products labeled 'All Natural,' and

(ii) pyridoxine hydrochloride, alpha-tocopheral acetate and/or hexane-processed soy ingredients in products labeled ‘Nothing Artificial,’ unless the ingredients are approved or determined as acceptable for products identified as ‘natural’ by a federal agency or controlling regulatory body.” *See* Settlement Agreement § IV.B.

Additionally, the Settlement Agreement provides for monetary relief to the proposed Settlement Class by, among other things, requiring Kashi to pay \$5.0 million, less any costs associated with the Class Action Settlement Administrator paid by Kashi prior to that time, into a settlement fund. *See* Settlement Agreement § IV.A.2. Defendant shall fund the Settlement Fund within seven (7) days of the Effective Date. *Id.* § IV.A.7. The Settlement Fund shall be applied to pay in full and in order: (i) any necessary taxes and tax expenses; (ii) all costs associated with the Class Action Settlement Administrator, including costs of providing notice to the Class members and processing claims; (iii) any Fee and Expense Award made by the Court to Class Counsel under section VIII(a) of the Settlement Agreement; (iv) any class representative Incentive Awards made by the Court to Plaintiffs under section VIII(c) of the Settlement Agreement; and (v) payments to authorized Claimants and any others as allowed by the Settlement and to be approved by the Court. *Id.* § IV.A.2.

Class members may seek reimbursement of \$0.50 per package for every Product purchased during the Settlement Class Period, for which they can present written proof of purchase in the form of a receipt or a retail rewards submission. Class members may make a claim for every package of such Products for which they submit a valid Claim Form. For Products for which Class members cannot present such proof of purchase, Class members may seek reimbursement of \$0.50 per package, with a maximum recovery of \$25. Class members may obtain relief

1 under both sections IV.A.1(a) and (b), with the appropriate paper work and subject
2 to the maximum recovery amount permitted for claims made without written proof
3 of purchase. The amount of each cash payment will depend on the number and
4 amount of authorized claims submitted. If the total amount of eligible claims
5 exceeds the Settlement Fund, then each claimant's award shall be proportionately
6 reduced. If after all valid claims (plus other authorized costs and expenses) are
7 paid, money remains in the Settlement Fund, the remaining amount shall be used to
8 increase pro rata the recovery of each eligible claim.

9 To be eligible for a cash payment, the Settlement Class Member must timely
10 submit a signed and completed Claim Form containing his or her name and mailing
11 address. The Claim Form will also request an e-mail address for the Settlement
12 Class Member, but an e-mail address will not be required to be eligible for a cash
13 payment. The Settlement Administrator may pay claims that are otherwise valid
14 but untimely filed if there is sufficient money to pay all valid and timely claims in
15 full plus untimely but otherwise valid claims from the Settlement Fund, and
16 payment of any such untimely but valid claims is administratively feasible and
17 otherwise reasonable, taking into account the need to timely pay claims. The
18 determination of the Class Action Settlement Administrator after consultation with
19 Class Counsel and Defendant's Counsel concerning the eligibility and amount of
20 payment shall be final. In the event a Settlement Class Member disagrees with
21 such a determination, the Class Action Settlement Administrator agrees to
22 reconsider such determination, which includes consultation with Class Counsel and
23 Defendant's Counsel. To be eligible, Claim Forms must be postmarked or
24 submitted online no later than eight (8) days before the Settlement Hearing.

1 All Claimants must include information in the claim form—completed
2 online or in hard copy mailed to the Settlement Administrator—confirming, under
3 penalty of perjury, that they did in fact purchase between August 24, 2007 and
4 May 1, 2014 the packages of Product(s) for which they seek reimbursement. *See*
5 Settlement Agreement § IV.A.1.d.

6 **B. Release And Discharge Of Claims**

7 The Settlement Agreement provides for the release of all claims or causes of
8 action relating to Kashi's packaging, marketing, distribution or sale of food
9 products labeled as "All Natural" or "Nothing Artificial," which have been
10 asserted in the Consolidated Amended Complaint or in any of the Original
11 Complaints. The release will finally resolve Plaintiffs' and Class Members' claims
12 once the Settlement becomes effective as defined in the Settlement Agreement. *See*
13 Settlement Agreement § VII.

14 **C. Payment Of Attorneys' Fees And Expenses**

15 Subject to Court approval, Kashi will pay Class Counsel Court-approved
16 fees and expenses up to a maximum of \$1,250,000. The attorneys' fees were
17 negotiated separately and apart from the other terms of the Settlement Agreement.
18 The payment by Kashi of Class Counsel's fees and expenses will be from the
19 Settlement Fund to the extent approved and ordered by the Court. *See* Settlement
20 Agreement § VIII.A.

21 **D. Compensation For The Class Representatives**

22 In addition to the individual relief discussed above, Kashi has also agreed to
23 pay Incentive Awards to the Class Representatives, Skye Astiana, Milan Babic,
24 Tamara Diaz, Tamar Larsen, and Kimberly S. Sethavanish, not to exceed \$4,000
25 per representative plaintiff. The payment by Kashi of Class Representatives'
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Incentive Awards will be from the Settlement Fund to the extent approved and ordered by the Court. *See* Settlement Agreement § VIII.C.

E. Payment Of Notice And Administrative Fees

Kashi shall pay to the administrator handling the administration of the Settlement the reasonable costs and expenses of providing notice to the Class in accordance with the Settlement Agreement.³ Any reasonable costs associated with the Class Action Settlement Administrator incurred and paid prior to the funding of the Settlement Fund will be paid by Kashi, but upon the occurrence of the Effective Date and the triggering of the payments required by section IV.A of the Settlement Agreement, any such payments will reduce the amount Kashi is obligated to pay to establish the Settlement Fund. *See* Settlement Agreement § V.C.

V. THIS COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT, PROVISIONALLY CERTIFY THE CLASS AND ENTER THE PRELIMINARY APPROVAL ORDER

A. The Settlement Should Be Preliminarily Approved Because It Satisfies Accepted Criteria

It is well established that the law favors the compromise and settlement of class action suits: “[S]trong judicial policy favors settlements” *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004) (original ellipsis omitted). This is particularly true where “class action litigation is concerned.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

The approval of a proposed settlement of a class action is a matter of

³ Notice costs also include notification of the Attorney General of the United States and the attorney general of the State of California in accordance with the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1715(b).

1 discretion for the trial court. *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d
2 962, 972 (9th Cir. 2007) (“[T]he district court has substantial discretion in
3 approving the details of a class action settlement”). Courts, however, must give
4 “proper deference to the private consensual decision of the parties,” since “the
5 court’s intrusion upon what is otherwise a private consensual agreement negotiated
6 between the parties to a lawsuit must be limited to the extent necessary to reach a
7 reasoned judgment that the agreement is not the product of fraud or overreaching
8 by, or collusion between, the negotiating parties, and that the settlement, taken as a
9 whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150 F.3d at
10 1027; *accord.* Fed. R. Civ. P. 23(e)(2) (settlement must be “fair, reasonable, and
11 adequate”).

12 To grant preliminary approval of this class action Settlement, the Court need
13 only find that the Settlement falls within the range of possible approval. *See, e.g.*,
14 *Livingston v. Toyota Motor Sales USA, Inc.*, No. C-94-1377-MHP, 1995 U.S. Dist.
15 LEXIS 21757, at *24 (N.D. Cal. June 1, 1995) (“The proposed settlement must fall
16 within the range of possible approval.”); *see also* 4 Alba Conte and Herbert
17 Newberg, *Newberg on Class Actions* § 11.25 (4th ed. 2002). The *Manual for*
18 *Complex Litigation* (Fourth) § 21.632 at 320 (2004) characterizes the preliminary
19 approval stage as an “initial evaluation” of the fairness of the proposed settlement
20 made by the court on the basis of written submissions and informal presentation
21 from the settling parties.

22 Here, as discussed above, the Settlement should be preliminarily approved
23 because it clearly falls “within the range of possible approval.” *Alaniz*, 73 F.R.D.
24 at 273. The settlement was reached on the cusp of trial, after two years of
25 litigation, during which time, Plaintiffs completed extensive merits and experts
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discovery, including multiple expert depositions. It is non-collusive, fair, and reasonable. The likelihood that a greater result could be achieved at trial is remote. The Settlement achieves injunctive relief in the form of a modification of Kashi's current labeling and advertising to remove "All Natural" and "Nothing Artificial" from certain Products, as described above. Additionally, the Settlement will provide a significant monetary benefit to Settlement Class Members by providing them with \$.50 in cash for each Product purchased (without limitation) during the Settlement Class Period with written proof of purchase in the form of a receipt or a retail rewards submission or up to a maximum payment of \$25.00 per household for claims made without written proof of purchase.

At the same time, the Settlement eliminates the substantial risk and delay of litigation. Although Plaintiffs believe their claims have merit, they recognize that they face significant legal, factual, and procedural obstacles to recovery. Kashi continues to vigorously deny any wrongdoing and denies any liability to the Plaintiffs or any members of the Class. Although Plaintiffs and Class Counsel have confidence in the claims and although this Court has already certified an "All Natural" and "Nothing Artificial" class, a favorable outcome is not assured. *See, e.g., In re POM Wonderful LLC Mktg. and Sales Practices Litig.*, No. 10-02199, 2014 U.S. Dist. LEXIS 40415 (C.D. Cal. Mar. 25, 2014) (decertifying nationwide class); *see also Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907, 2014 U.S. Dist. LEXIS 18600, at *13-18 (N.D. Cal. Feb. 13, 2014) (denying class certification, finding lack of ascertainability); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387, 2014 U.S. Dist. LEXIS 1640, at *8-11, *28-41 (N.D. Cal. Jan. 7, 2014) (denying class certification for lack of ascertainability and predominance). Even if judgment were entered against Kashi, any appeal in the Ninth Circuit

1 would likely take years to resolve. By settling, Plaintiffs and the Settlement Class
2 avoid these risks, as well as the delays and risks of a lengthy trial and appellate
3 process. The Settlement will provide Settlement Class Members with monetary
4 benefits that are immediate, certain and substantial, and avoid the obstacles that
5 might have prevented them from obtaining relief.

6 In light of the relief obtained, the magnitude and risks of the litigation and
7 the legal standards set forth above, the Court should allow notice of the settlement
8 to be sent to the Settlement Class so that Class members can express their views on
9 it. The Court should conclude that the Settlement's terms are "within the range of
10 possible approval." *Toyota*, 1995 U.S. Dist. LEXIS 21757, at *24

11 **B. The Proposed Settlement Class Should Be Certified**

12 The Settlement Class consists of all California residents who, at any time
13 between August 24, 2007 and May 1, 2014 purchased any of the referenced
14 Products. On July 30, 2013, this Court granted in part Plaintiffs' motion for class
15 certification, certifying two classes of California purchasers of Kashi products:
16 (i) all California residents who purchased Kashi's food products on or after
17 August 24, 2007 in the State of California that were labeled "Nothing Artificial"
18 but which contained one or more of the ingredients pyridoxine hydrochloride,
19 alpha-tocopherol acetate and/or hexane-processed soy ingredients; and (ii) all
20 California residents who purchased Kashi's food products on or after August 24,
21 2007 in the State of California that were labeled "All Natural" but which contained
22 one or more of the ingredients pyridoxine hydrochloride, calcium panthothenate
23 and/or hexane-processed soy ingredients. The proposed Settlement Class is
24 expanded to include Products containing all the Challenged Ingredients. In this
25 Court's class certification order, the Court denied Plaintiffs' motion for class
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1 certification as to ten of the Challenged Ingredients on the basis that those
2 particular ingredients were allowed in certified “organic” goods and that “*at [that]*
3 *time*, Plaintiffs fail[ed] to sufficiently show that ... Defendant’s representation of
4 ‘All Natural’ in light of the presence of th[os]e challenged ingredients would be
5 considered to be a material falsehood by class members.” *Astiana*, 291 F.R.D. at
6 508 (emphasis added). Putting aside the fact that Plaintiffs now have evidence to
7 show the materiality of Defendant’s “All Natural” claims as to those ten
8 ingredients, rather than proceed to trial the Parties have entered into an arm’s-
9 length agreement that permits all Class members who wish compensation for their
10 claims to seek monetary relief by submitting a claim form. Accordingly, any
11 concern that individual views of each class member could predominate over
12 common issues is unwarranted. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d
13 Cir. 2011) (affirming class certification and approval of settlement, finding Rule
14 23’s predominance requirement does not preclude nationwide *settlement-only* class
15 certification of claims brought under consumer protection and unjust enrichment
16 laws of all 50 states). For settlement purposes only, the parties and their counsel
17 request that the Court provisionally certify the Settlement Class.

18 The Ninth Circuit has recognized that certifying a settlement class to resolve
19 consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When
20 presented with a proposed settlement, a court must first determine whether the
21 proposed settlement class satisfies the requirements for class certification under
22 Rule 23. In assessing those class certification requirements, a court may properly
23 consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,
24 620 (1997) (“Confronted with a request for settlement-only class certification, a
25 district court need not inquire whether the case, if tried, would present intractable
26

management problems . . . for the proposal is that there be no trial.”). For the reasons below, this Class meets the requirements of Rule 23(a) and (b).

1. The Settlement Class Satisfies Rule 23(a)

a. Numerosity

Rule 23(a)(1) requires that “the class is so numerous that joinder of all members is impracticable.” *See* Fed. R. Civ. P. 23(a)(1). “As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21.” *See Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). Here, the proposed Settlement Class is comprised of thousands of consumers who purchased the Products – a number that obviously satisfies the numerosity requirement. *See Astiana*, 291 F.R.D. at 501 (“Here the parties estimate that Kashi has sold millions of Kashi products in the last four years in the United States, representing thousands of products sold in each state with labels including the alleged misrepresentations.”). Accordingly, the proposed Settlement Class is so numerous that joinder of their claims is impracticable.

b. Commonality

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” *See* Fed. R. Civ. P. 23(a)(2). Commonality is established if plaintiff and class members’ claims “depend upon a common contention,” “capable of class-wide resolution . . . mean[ing] 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.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Because the commonality requirement may be satisfied by a single common issue, it is

1 easily met. 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 3.10 at
2 3-50 (1992).

3 There are ample issues of both law and fact here that are common to the
4 members of the class. Indeed, all of the Settlement Class Members' claims arise
5 from a common nucleus of facts and are based on the same legal theories. The
6 Plaintiffs allege that Defendant misled consumers by labeling certain of its
7 products "All Natural" or "Nothing Artificial," when those products contained
8 certain synthetic and artificial ingredients, which ingredients Plaintiffs allege
9 preclude those products from properly being labeled as "All Natural" or "Nothing
10 Artificial." Here, all of the Settlement Class Members purchased one or more of
11 the Products. "By definition, all class members were exposed to such
12 representations and purchased Kashi products, creating a common core of salient
13 facts." *Astiana*, 291 F.R.D. at 501 (internal quotation marks omitted).
14 Commonality is satisfied here, for settlement purposes, by the existence of these
15 common factual issues. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158
16 F.R.D. 439, 448 (N.D. Cal. 1994) (commonality requirement met by "the alleged
17 existence of common discriminatory practices").

18 Second, Plaintiffs' claims are brought under legal theories common to the
19 class as a whole, including whether the use of the terms "All Natural" and
20 "Nothing Artificial" to advertise food products that allegedly contain the artificial
21 and synthetic ingredients violates the UCL, FAL, CLRA, or Defendant's own
22 warranties. *See Astiana*, 291 F.R.D. at 501. Alleging a common legal theory is
23 alone enough to establish commonality. *See Morgan v. Laborers Pension Trust*
24 *Fund*, 81 F.R.D. 669, 676 (N.D. Cal. 1979) (commonality met based on whether
25 operation of the eligibility structure of Trust Fund's pension plan violated ERISA).

Here, all of the legal theories and causes of action asserted by Plaintiffs are common to all Settlement Class Members. Especially since there are virtually no issues of law which affect only individual members of the class, common issues of law clearly predominate over individual ones. Thus, considering the nature of the issues and facts that bind each class member together, commonality is satisfied.

c. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiff be “typical of the claims . . . of the class.” *See* Fed. R. Civ. P. 23(a)(3). “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement, the representative plaintiff simply must demonstrate that the members of the settlement class have the same or similar grievances. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

In the instant action, Plaintiffs’ claims are typical of those of the Settlement Class. Like those of the Settlement Class, their claims arise out of the allegations that Kashi misled consumers by labeling certain of its products “All Natural” or “Nothing Artificial,” when those products contained certain synthetic and artificial ingredients, which Plaintiffs alleged precludes those products from properly being labeled as “All Natural” or “Nothing Artificial.” Each Plaintiff purchased one or more of the Products. Plaintiffs have precisely the same claims as the Settlement Class, and must satisfy the same elements of each of their claims, as must other Settlement Class Members. Supported by the same legal theories, Plaintiffs and all Settlement Class Members share claims based on the same alleged course of conduct. Plaintiffs and all Settlement Class Members have been injured in the

1 same manner by this conduct. Therefore, Plaintiffs satisfy the typicality
2 requirement.

3 *d. Adequacy*

4 The final requirement of Rule 23(a) is set forth in subsection (a)(4) which
5 requires that the representative parties “fairly and adequately protect the interests
6 of the class.” *See* Fed. R. Civ. P. 23(a)(4). A plaintiff will adequately represent
7 the class where: (1) plaintiffs and their counsel do not have conflicts of interests
8 with other class members; and (2) where plaintiffs and their counsel prosecute the
9 action vigorously on behalf of the class. *See Staton v. Boeing Co.*, 327 F.3d 938,
10 957 (9th Cir. 2003). Moreover, adequacy is presumed where a fair settlement was
11 negotiated at arm’s-length. 2 *Newberg on Class Actions*, *supra*, §11.28, at 11-59.

12 Class Counsel have vigorously and competently pursued the Settlement
13 Class Members’ claims. The arm’s-length settlement negotiations that took place
14 demonstrate that Class Counsel adequately represent the Settlement Class.
15 Moreover, Plaintiffs and Class Counsel have no conflicts of interests with the
16 Settlement Class. Rather, Plaintiffs, like each absent Settlement Class Member,
17 have a strong interest in proving Kashi’s common course of conduct, establishing
18 its unlawfulness and obtaining redress. In pursuing this litigation, Class Counsel, as
19 well as the Plaintiffs, have advanced and will continue to advance and fully protect
20 the common interests of all members of the Class. Class Counsel have extensive
21 experience and expertise in prosecuting complex class actions. Class Counsel are
22 active practitioners who are highly experienced in class action, product liability,
23 and consumer fraud litigation. *See* Vozzolo Decl. Exs. 1 and 2 (Class Counsel’s
24 firm resumes). Faruqi & Faruqi, LLP and Feinstein Doyle Payne & Kravec, LLC
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were appointed Co-Lead Class Counsel for the Class on July 30, 2013. Accordingly, Rule 23(a)(4) is satisfied.

2. The Settlement Class Satisfies Rule 23(b)(3)

In addition to meeting the prerequisites of Rule 23(a), Plaintiffs must also meet one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001). Under Rule 23(b)(3), a class action may be maintained if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See Fed. R. Civ. P. 23(b)(3)*. Certification under Rule 23(b)(3) is appropriate and encouraged “whenever the actual interests of the parties can be served best by settling their differences in a single action.” *Hanlon*, 150 F.3d at 1022.

a. Common Questions Of Law And Fact Predominate

The proposed Settlement Class is well-suited for certification under Rule 23(b)(3) because questions common to the Settlement Class Members predominate over questions affecting only individual Settlement Class Members. Predominance exists “[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication.” *Hanlon*, 150 F.3d at 1022. As the United States Supreme Court has explained, when addressing the propriety of Settlement Class certification, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 620.

In this case, common questions of law and fact exist and predominate over any individual questions, including, *inter alia*: (1) whether Kashi’s marketing and

1 sale of the Products was illegal; (2) whether Kashi's Products contained artificial
2 or synthetic ingredients and whether Kashi made material representations to the
3 contrary; (3) whether Class Members suffered a loss of money or property as a
4 result of Kashi's misrepresentations; and (4) whether Plaintiffs and Settlement
5 Class Members are entitled to damages, restitution, injunctive and/or monetary
6 relief, and if so, the amount and nature of such relief. These issues can be resolved
7 for all members of the proposed Settlement Class in a single adjudication.
8 Moreover, the Court's concern on class certification that there was insufficient
9 evidence of materiality as to ingredients permitted in certified "organic" goods,
10 thus requiring individual proof of reliance (*see Astiana*, 291 F.R.D. at 508-09),
11 should not defeat a finding of predominance for purposes of certifying the
12 settlement class. Such a "merits inquiry is...unwarranted in the settlement context
13 since a district court need not 'envision the form that a trial' would take, nor
14 consider 'the available evidence and the method or methods by which plaintiffs
15 propose to use the evidence to prove' the disputed element at trial."
16 *Sullivan*, 667 F.3d at 306 (citations omitted); *see also id.* at 302-03 (finding
17 concerns regarding predominance inquiry "marginalized" and noting "the concern
18 for manageability that is a central tenet in the certification of a litigation class is
19 removed from the equation" given the settlement posture of the case). As such, the
20 answers to the common questions that resulted from Kashi's alleged conduct are
21 the primary focus and central issues of this class action and thus predominate over
22 any individual issues that may exist.

23 ***b. A Class Action Is The Superior Mechanism For***
24 ***Adjudicating This Dispute***

25 The class mechanism is superior to other available means for the fair and
26 efficient adjudication of the claims of the Settlement Class Members. Each

individual Settlement Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Kashi's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents the potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Kashi's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

Moreover, since this action will now settle, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R. Civ. P. 23 (b)(3)(D), for the proposal is that there be no trial."). Accordingly, common questions predominate and a class action is the superior method of adjudicating this controversy.

C. The Proposed Notice Program Constitutes Adequate Notice And Should Be Approved

Once preliminary approval of a class action settlement is granted, notice must be directed to class members. For class actions certified under Rule 23(b)(3), including settlement classes like this one, "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." Fed. R. Civ. P. 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and

1 requires the Court to “direct notice in a reasonable manner to all class members
2 who would be bound by a proposal.” Fed. R. Civ. P. 23(e)(1)

3 When a court is presented with a class, the class certification notice and
4 notice of settlement may be combined in the same notice. *Manual* (Fourth)
5 § 21.633 at 321-22 (“For economy, the notice under Rule 23(c)(2) and the Rule
6 23(e) notice are sometimes combined.”). This notice allows the settlement class
7 members to decide whether to opt out of or participate in the class and/or to object
8 to the settlement and argue against final approval by the court. *Id.*

9 The proposed forms of notice here, attached as Exhibits C and D to the
10 Settlement Agreement, satisfy the above criteria. The notices accurately inform
11 Settlement Class Members of the salient terms of the Settlement Agreement, the
12 Settlement Class to be certified, the final approval hearing and the rights of all
13 parties, including the rights to file objections and to opt out of the class.

14 The Parties in this case have created and agreed to perform the following
15 forms of notice, which will satisfy both the substantive and manner of distribution
16 requirements of Rule 23 and Due Process. The language of the proposed notices
17 and accompanying claim form is plain and easy to understand, providing neutral
18 and objective information about the nature of the Settlement.

19 Individual Settlement Class Members cannot be identified through
20 reasonable effort due to the nature of the consumer product at issue. Therefore,
21 Class Notice shall be provided as set forth in the Media Plan, attached to the Settlement
22 Agreement as Exhibit G. Kashi will cause the summary notice to be published once
23 in *People Magazine*, once in *USA Weekend*, and once in *Parade*, and once weekly
24 for four consecutive weeks in the *San Diego Union Tribune*, *Los Angeles Times*,
25 *San Francisco Chronicle*, and the *Sacramento Bee*. Internet banner notices will
26

also be purchased using Xaxis Premium Network (formerly 24/7 Real Media Network), Yahoo.com and Advertising.com's network, which will include embedded links to the case website. Additionally, notice of the Settlement will be posted on the Settlement Website and, at their option, on the websites of Class Counsel. The Class Notice shall also be sent via electronic mail or regular mail to those Class Members who so request. This proposed method of giving notice (similar if not identical to the method used in countless other class actions) is appropriate because it provides a fair opportunity for members of the Settlement Class to obtain full disclosure of the conditions of the Settlement Agreement and to make an informed decision regarding the proposed Settlement. Thus, the notices and the procedures embodied in the notices amply satisfy the requirements of due process. The actual costs and expenses of the Settlement Administrator, which have been estimated by the Settlement Administrator to be \$354,608.00, will be paid from the Settlement Fund in accordance with the Settlement Agreement.

VI. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement Agreement, provisionally certify the Settlement Class, approve the proposed notice plan and enter the Preliminary Approval Order in the form attached to the settlement Agreement as Exhibit F.

Dated: May 2, 2014

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS.:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10866 Wilshire Blvd., Suite 1470, Los Angeles, CA 90024.

On May 2, 2014, I served the document(s) described as:

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, PROVISIONAL
CERTIFICATION OF SETTLEMENT CLASS AND APPROVAL OF
PROCEDURE FOR AND FORM OF NOTICE**

[X] BY ELECTRONIC TRANSMISSION USING THE COURT'S ECF SYSTEM: I caused the above document(s) to be transmitted by electronic mail to those ECF registered parties listed on the Notice of Electronic Filing (NEF) pursuant to Fed. R. Civ. P. 5(d)(1) and by first class mail to those non-ECF registered parties listed on the Notice of Electronic Filing (NEF). “A *Notice of Electronic Filing (NEF)* is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed. R. Civ. P. 5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se.”

Executed on May 2, 2014, at Los Angeles, California.

/s/ David E. Bower