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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SKYE ASTIANA, et al., individually
and on behalf of all others similarly
situated,

Plaintiffs,

vs.

KASHI COMPANY,

Defendant.

CASE NO. 11-CV-1967-H
(BGS)¹

FINAL JUDGMENT AND
ORDER:

(1) CERTIFYING
SETTLEMENT CLASS;

(2) GRANTING FINAL
APPROVAL OF CLASS
SETTLEMENT;

(3) APPROVING
PLAINTIFFS' REQUEST
FOR ATTORNEYS' FEES,
COSTS, AND INCENTIVE
AWARD

On July 29, 2014, Plaintiffs Skye Astiana, Milan Babic, Tamara Diaz, Tamar Larsen, and Kimberly S. Sethavanish (“Plaintiffs”) filed a motion for final approval of class settlement and certification of the settlement class. (Doc. No. 229.) On July 29, 2014, Plaintiffs also filed a motion for attorneys’ fees, expenses and costs, and incentive awards for the class representatives. (Doc. No. 230.) Three class members

¹This is the lead case in consolidated cases 11-CV-2256-H (BGS), 11-CV-2285-H (BGS), 11-CV-2637-H (BGS), 11-CV-2356-H (BGS), 11-CV-2629-H (BGS), and 11-CV-2816-H (BGS). (Doc. Nos. 16, 22.)

1 filed objections to the settlement agreement. (Doc. Nos. 232, 233, and 235.) The Court
2 held a hearing on September 2, 2014. No objectors appeared at the hearing. Attorneys
3 Antonio Vozzolo, Joseph Kravec, Jr., Marc Godino, Michael Braun, and Rosemary
4 Rivas appeared telephonically for Plaintiffs. Attorney Dean Panos appeared
5 telephonically for Defendant. After due consideration, the Court certifies the
6 settlement class, grants final approval of the settlement, approves Plaintiffs' request for
7 attorneys' fees and expenses, approves the incentive awards for the class
8 representatives, and enters final judgment.

9 Background

10 I. Factual and Procedural Background

11 This is a consumer class action lawsuit brought on behalf of people who have
12 purchased Kashi food products. Plaintiffs claim the products contained deceptive and
13 misleading labeling and advertisements. (Doc. No. 49 ¶¶ 1-2.) Plaintiffs allege that
14 Defendant packaged, marketed, distributed, and sold Kashi products as being "All
15 Natural" or containing "Nothing Artificial." (Id.) Plaintiffs claim certain ingredients
16 or processes used to manufacture Kashi products are not "natural," but rather are
17 synthetic. (Id.)

18 In 2011, Plaintiffs filed class action complaints against Kashi in this Court in the
19 following cases: Bates v. Kashi Company, et al., 11-cv-1967; Babic v. Kashi Company,
20 11-cv-2816; Espinola v. Kashi Company, 11-cv-2629 (initially filed in the United
21 States District Court for the Central District of California (11-cv-8534)); Diaz v. Kashi
22 Company, et al., 11-cv-2256; Chatham v. Kashi Company, et al., 11-cv-2285;
23 Sethavanish, et al. v. Kashi Company, 11-cv-2356 (initially filed in the United States
24 District Court for the Northern District of California (11-cv-4453)); and Baisinger v.
25 Kashi Company, 11-cv-2367 (initially filed in the United States District Court for the
26 Northern District of California (11-cv-4581)).

27 On November 28, 2011, the Court ordered the consolidation of the actions
28 against Kashi. (Doc. No. 16; see also Doc. No. 22.) On January 18, 2012, the Court

1 appointed the law firms of Stember Feinstein Doyle & Payne, LLC and Faruqi &
2 Faruqi, LLP as interim co-lead counsel. (Doc. No. 41.)

3 On February 21, 2012, Plaintiffs filed a Consolidated Amended Complaint
4 against Kashi Company, Kashi Sales, LLC and Kellogg Company that amended and
5 superseded the Original Complaints. (Doc. No. 49.) On April 6, 2012, Defendants
6 filed a motion to dismiss the Consolidated Amended Complaint. (Doc. No. 61.) On
7 July 16, 2012, the Court granted in part and denied in part Defendants' motion to
8 dismiss. (Doc. No. 79.) The Court dismissed all of Plaintiffs' claims against Kashi
9 Sales, LLC and Kellogg Company. (Id. at 11-13.)

10 On August 15, 2012 Kashi answered the Consolidated Amended Complaint.
11 (Doc. No. 81.) The parties engaged in extensive discovery, including depositions of
12 Kashi's marketing expert, multiple sets of requests for production of documents and
13 interrogatories, and several subpoenas to third parties. (Doc. No. 220-1 at 15.)
14 Further, Kashi deposed the named Plaintiffs as well as Plaintiffs' marketing expert.
15 (Id.)

16 On April 15, 2013, Plaintiffs filed a motion for class certification. (Doc. No.
17 108.) On July 30, 2013, the Court certified a class of California purchasers of Kashi
18 products marketed and labeled as containing "Nothing Artificial" that contained
19 "Pyridoxine Hydrochloride, Alpha-Tocopherol Acetate and/or Hexane-Processed Soy
20 ingredients." (Doc. No. 148 at 25-26.) The Court also certified a class of California
21 purchasers of Kashi products marketed and labeled as "All Natural" that contained
22 "Pyridoxine Hydrochloride, Calcium Panthothenate and/or Hexane-Processed Soy
23 ingredients." (Id. at 26.) The Court appointed Faruqi & Faruqi, LLP and Feinstein
24 Doyle Payne & Kravec, LLC as co-lead counsel. (Id.)

25 On August 12, 2013, Kashi filed a petition to appeal the Court's class
26 certification order pursuant to Federal Rule of Civil Procedure 23(f) in the United
27 States Court of Appeals for the Ninth Circuit. (Doc. No. 150.) On October 24, 2013,
28 the Ninth Circuit denied Kashi's petition for permission to appeal the District Court's

1 class certification ruling. (Doc. No. 178.)

2 On August 27, 2013, Plaintiffs moved for partial reconsideration of the Court's
3 class certification order. (Doc. No. 157.) On August 28, 2013, Kashi moved for partial
4 reconsideration of the Court's class certification order. (Doc. No. 160.) On September
5 18, 2013, the Court denied both Plaintiffs' and Kashi's motions for reconsideration.
6 (Doc. No. 173.)

7 On October 24, 2013, Kashi filed an additional motion to modify the Court's
8 class certification order. (Doc. No. 182.) On November 22, 2013, the Court denied
9 Kashi's motion to modify the Court's class certification order. (Doc. No. 203.)

10 On October 23, 2013 and December 5, 2013 the parties participated in mediation
11 sessions conducted by an experienced mediator. (Doc. No. 219 ¶ I.M; Doc. No. 220-1
12 at 17.) With the mediator's assistance, the parties reached a settlement. (Doc. No. 219
13 ¶ I.M; Doc. No. 220-1 at 18.) On May 2, 2014, the parties entered into a Stipulation
14 of Settlement. (Doc. No. 219.)

15 On May 2, 2014, Plaintiffs filed a motion for preliminary approval of the
16 settlement, conditional certification of the settlement class, and approval of the class
17 notice. (Doc. No. 220.) On May 27, 2014, the Court granted preliminary approval of
18 the settlement, provisionally certified a settlement class under Federal Rule of Civil
19 Procedure 23(b)(3), and approved the form and manner of notice. (Doc. No. 222 at
20 13.) On July 29, 2014, Plaintiffs filed a motion for final approval of class settlement
21 and certification of the settlement class. (Doc. No. 229.) On July 29, 2014, Plaintiffs
22 also filed a motion for attorneys' fees, expenses and costs, and incentive awards for the
23 class representatives. (Doc. No. 230.) Three class members filed objections to the
24 settlement agreement. (Doc. Nos. 232, 233, and 235.) On August 28, 2014, Plaintiffs
25 filed a response in support of the motion for final settlement approval and response to
26 the objections. (Doc. No. 238.)

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1 II. The Settlement

2 The settlement provides relief to a settlement class comprising California
3 residents who, at any time between August 24, 2007 and May 1, 2014, purchased any
4 of the Kashi products labeled “All Natural” or “Nothing Artificial” that contained any
5 of the Challenged Ingredients. (See Doc. No. 219 ¶¶ II.A.1 (listing all the Challenged
6 Ingredients); II.A.23 (listing all relevant Kashi products).) Excluded from the class are:
7 (a) Kashi’s employees, officers and directors; (b) persons or entities who purchased the
8 Kashi products for the purpose of re-sale; (c) retailers or re-sellers of the Kashi
9 products; (d) governmental entities; (e) persons who timely and properly exclude
10 themselves from the settlement class; and (f) the Court, the Court’s immediate family,
11 and Court staff. (Id. ¶ II.A.5.)

12 The settlement provides for monetary relief to the settlement class by requiring
13 Kashi to pay \$5 million into a settlement fund. (Id. ¶ IV.A.2.) The settlement fund
14 pays any necessary taxes and tax expenses, all costs associated with the Class Action
15 Settlement Administrator, including costs of providing notice to the settlement class
16 members and processing claims and all costs relating to providing the necessary notices
17 in accordance with the Class Action Fairness Act of 2005, any award of fees and
18 expenses made by the Court to class counsel, any incentive award made by the Court
19 to the class representatives, and payments to authorized claimants. (Id. ¶ IV.A.2.b.)

20 The settlement also provides that class counsel may apply for an award of
21 attorneys’ fees and reimbursement for expenses from the settlement fund of up to
22 \$1,250,000 and each named Plaintiff may apply for a \$4,000 incentive award from the
23 settlement fund. (Id. ¶¶ VIII.A, VIII.C.)

24 Settlement class members may seek reimbursement of \$0.50 per package for
25 every Kashi product purchased from August 24, 2007 to May 1, 2014.² (Id. ¶ IV.A.1.)
26 Settlement class members may seek reimbursement by presenting written proof of

27 ²Because the number of claims did not exhaust the settlement fund, class members will
28 receive approximately \$4.30 for each product claimed. (Doc. No. 238 at 11.)

1 purchase in the form of a receipt or a retail rewards submission, in which case there is
2 no limit on the amount of their recovery. (Id.) Settlement class members may seek
3 reimbursement without presenting written proof of purchase by submitting a valid
4 claim form, in which case there is a maximum recovery of \$25 per household. (Id.)
5 If the total amount of eligible claims exceeds the \$5 million settlement fund, then each
6 claimant's award will be proportionately reduced. (Id. ¶ IV.A.3.) If, after all valid
7 claims (plus other authorized costs and expenses) are paid, money remains in the
8 settlement fund, the remaining amount will be used to increase pro rata the recovery
9 of each eligible claim. (Id.)

10 Furthermore, the proposed settlement requires Kashi to modify its labeling and
11 advertising to remove "All Natural" and "Nothing Artificial" from those products that
12 contain the following Challenged Ingredients:

- 13 (i) pyridoxine hydrochloride, calcium pantothenate and/or
14 hexane-processed soy ingredients in products labeled "All Natural," and
15 (ii) pyridoxine hydrochloride, alpha-tocopheral acetate and/or
16 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. (Id. ¶ IV.B.)

17 In exchange, class members, other than those who opt-out, agree to release all
18 claims asserted in the Consolidated Amended Complaint relating to Kashi's packaging,
19 marketing, distribution, or sale of food products labeled as "All Natural" or "Nothing
20 Artificial." (Id. ¶ VII.)

21 III. Class Members' Notice of Settlement

22 On June 9, 2014, The Garden City Group ("GCG"), the settlement administrator,
23 commenced the notice plan. (Doc. No. 229-14, Declaration of Jennifer M. Keough
24 ("Keough Decl.") ¶ 6.) GCG published notice of the settlement once in the California
25 editions of People Magazine, Parade, and USA Weekend, published four consecutive
26 weekly notices in the San Diego Union-Tribune, Los Angeles Times, San Francisco
27 Chronicle, and Sacramento Bee, and issued a press release containing notice of the
28 settlement. (Id. ¶¶ 7, 11.) Additionally, GCG established a website and a toll-free

1 telephone number to provide information about the settlement to potential class
2 members. (Id. ¶¶ 12, 14.) GCG also purchased Internet banner notices through the
3 Xaxis Premium Network, Yahoo.com, and Advertising.com that contained a brief
4 statement advising class members of the settlement and took those who clicked on the
5 banner notices to the settlement website. (Id. ¶ 10.) Finally, GCG mailed notice
6 packets to those settlement class members who so requested. (Id. ¶ 13.) GCG
7 estimated that notice reached 83% of the class members. (Id. ¶ 5.)

8 As of July 24, 2014, the settlement website had 59,814 visits, the toll-free
9 telephone number received 502 calls, and GCG mailed 328 notice packets to potential
10 class members. (Id. ¶¶ 12-14.) No class member has opted-out of the settlement.
11 Three class members have filed objections to the settlement agreement. (See Doc. Nos.
12 232, 233, and 235.)

13 Discussion

14 When the parties reach a settlement agreement prior to class certification, the
15 Court is under an obligation to “peruse the proposed compromise to ratify both the
16 propriety of the certification and the fairness of the settlement.” Staton v. Boeing Co.,
17 327 F.3d 938, 952 (9th Cir. 2003). Thus, the court must first assess whether a class
18 exists, and second, determine whether the proposed settlement is “fundamentally fair,
19 adequate, and reasonable.” Id.

20 I. Class Certification

21 A plaintiff seeking to certify a class under Rule 23(b)(3) of the Federal Rules of
22 Civil Procedure must first satisfy the requirements of Rule 23(a). Fed. R. Civ. P. 23(b).
23 Once subsection (a) is satisfied, the purported class must then fulfill the requirements
24 of Rule 23(b)(3). Here, Plaintiffs seek to certify a class for settlement purposes
25 consisting of all California residents who, at any time between August 24, 2007 and
26 May 1, 2014 purchased any of the Kashi products labeled “All Natural” or “Nothing
27 Artificial” that contained any of the Challenged Ingredients. (See Doc. No. 219 ¶¶
28 II.A.1 (listing all the Challenged Ingredients); II.A.23 (listing all relevant Kashi

1 products).)

2 A. Rule 23(a) Requirements

3 Rule 23(a) establishes that one or more plaintiffs may sue on behalf of class
4 members if all of the following requirements are met: (1) numerosity; (2) commonality;
5 (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a).

6 The numerosity prerequisite is met if “the class is so numerous that joinder of all
7 members is impracticable.” Fed. R. Civ. P. 23(a)(1). Plaintiffs assert that the class
8 consists of thousands of consumers, and notes that Kashi has sold millions of units in
9 the United States in the past four years. (Doc. No. 108-1 at 22.) Accordingly, the class
10 satisfies the numerosity requirement.

11 The commonality prerequisite is met if there are “questions of law or fact
12 common to the class.” Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) is construed
13 permissively. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). “[T]he
14 key inquiry is not whether the plaintiffs have raised common questions, ‘even in
15 droves,’ but rather, whether class treatment will ‘generate common answers apt to drive
16 the resolution of the litigation.’” Abdullah v. U.S. Sec. Associates, Inc., 731 F.3d 952,
17 957 (9th Cir. 2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551
18 (2011)). Here, there are questions of law and fact that are common to the class, such
19 as whether settlement class members were exposed to advertising using the terms “All
20 Natural” or “Nothing Artificial” and purchased Kashi products containing the
21 Challenged Ingredients based on those representations. Accordingly, the class satisfies
22 the commonality requirement.

23 Typicality requires that “the claims or defenses of the representative parties [be]
24 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). A plaintiff’s
25 claims are “‘typical’ if they are reasonably co-extensive with those of absent class
26 members; they need not be substantially identical.” Hanlon, 150 F.3d at 1020.
27 Typicality requires that a representative plaintiff “possess the same interest and suffer
28 the same injury as the class members.” Gen. Tel. Co. of the Southwest v. Falcon, 457

1 U.S. 147, 156 (1982). Here, Plaintiffs and settlement class members purchased a Kashi
2 product based on alleged misrepresentations and false advertising. (Doc. No. 49 ¶¶ 1-
3 2.) As Plaintiffs' claims are reasonably co-extensive with the claims of absent class
4 members, the class satisfies the typicality requirement.

5 Adequacy of representation under Rule 23(a)(4) requires that the class
6 representative be able to "fairly and adequately protect the interests of the class." Fed.
7 R. Civ. P. 23(a)(4). Representation is adequate if the named plaintiff and class counsel
8 (1) do not have any conflicts of interest with other class members and (2) will
9 prosecute the action vigorously on behalf of the class. Hanlon, 150 F.3d 1020. Here,
10 there are no conflicts of interest between Plaintiffs and the absent class members.
11 Additionally, Plaintiffs have participated in the litigation process and discovery. (Doc.
12 No. 229-1 at 25.) Class counsel have extensive experience and expertise in prosecuting
13 consumer class actions related to food labels. (Doc. No. 229-1 at 26.) As a result,
14 Plaintiffs and their counsel are adequate representatives of the proposed class. For the
15 foregoing reasons, Plaintiffs have met all of the requirements of Rule 23(a).

16 B. Rule 23(b)(3) Requirements

17 Rule 23(b)(3) requires the court to find that: (1) "the questions of law or fact
18 common to class members predominate over any questions affecting only individual
19 members;" and (2) "that a class action is superior to other available methods for fairly
20 and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These
21 requirements are referred to as the "predominance" and "superiority" tests. See Vinole
22 v. Countywide Home Loans, Inc., 571 F.3d 935, 944 (9th Cir. 2009). Rule 23(b)(3)'s
23 predominance and superiority requirements are designed "to cover cases 'in which a
24 class action would achieve economies of time, effort, and expense, and promote . . .
25 uniformity of decision as to persons similarly situated, without sacrificing procedural
26 fairness or bringing about other undesirable results.'" Amchem Products, Inc. v.
27 Windsor, 521 U.S. 591, 615 (1997) (quoting Advisory Committee's Notes on Fed. R.
28 Civ. P. 23, 28 U.S.C. App., pp. 696-97).

1 1. Predominance

2 “The main concern in the predominance inquiry [is] the balance between
3 individual and common issues.” In re Wells Fargo Home Mortg. Overtime Pay
4 Litigation, 571 F.3d 953 (9th Cir. 2009). This analysis requires more than proof of
5 common issues of law and fact. Hanlon, 150 F.3d at 1022. Rather, the common
6 questions should “present a significant aspect of the case and . . . be resolved for all
7 members of the class in a single adjudication.” Id. (internal quotation omitted).

8 Courts have found that common factual issues involving a single advertisement
9 seen by all class members can predominate over individual issues. See Weeks v.
10 Kellogg Co., No. 09-8102, 2011 U.S. Dist. LEXIS 155472 (C.D. Cal. Nov. 23, 2011)
11 (certifying a class under Rule 23(b)(3) alleging that defendant’s marketing campaign
12 that certain of its cereal products can support a family’s immune system was false and
13 misleading). On the basis of additional evidence after the certification order, and after
14 considering the merits, the parties have agreed that an expanded settlement class
15 encompassing all the Challenged Ingredients best resolves the common questions
16 regarding Kashi’s alleged conduct. (Doc. No. 220-1 at 30; 36.) The Court agrees.

17 For the purposes of class certification, it is sufficient that the statements
18 regarding the “All Natural” and “Nothing Artificial” products were part of common
19 advertising to which the entire class was exposed, and is a sufficiently definite
20 representation whose accuracy has been legitimately called into question. See Hanlon,
21 150 F.3d at 1019-22; Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1173
22 (9th Cir. 2010). Accordingly, Plaintiffs have met their burden to show that the issues
23 common to the class predominate over the individual issues. Fed. R. Civ. P. 23(b)(3).

24 2. Superiority

25 “Rule 23(b)(3)’s superiority test requires the court to determine whether
26 maintenance of this litigation as a class action is efficient and whether it is fair.”
27 Wolin, 617 F.3d at 1175-76. Notably, the class action method is considered to be
28 superior if “classwide litigation of common issues will reduce litigation costs and

1 promote greater efficiency.” Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234
2 (9th Cir. 1996) (citation omitted). Here, there is no evidence that absent class members
3 wish to pursue their claims individually. Further, class-wide treatment of these issues
4 will be efficient as the settlement class members’ claims appear to involve a relatively
5 small amount of damages per member. (See generally Doc. No. 49.) Accordingly, the
6 class action meets the superiority requirement. As Plaintiffs have satisfied the
7 requirements of Rule 23(b)(3), the Court certifies the settlement class.

8 II. Settlement

9 Rule 23(e) requires a court to determine whether a proposed settlement is
10 “fundamentally fair, adequate, and reasonable.” Staton, 327 F.3d at 959 (quoting
11 Hanlon, 150 F.3d at 1026). To make this determination, a court must consider a
12 number of factors, including: (1) the strength of plaintiff’s case; (2) the risk, expense,
13 complexity, and likely duration of further litigation; (3) the risk of maintaining class
14 action status throughout the trial; (4) the amount offered in settlement; (5) the extent
15 of discovery completed, and the stage of the proceedings; (6) the experience and views
16 of counsel; (7) the presence of a governmental participant; and (8) the reaction of class
17 members to the proposed settlement. Staton, 327 F.3d at 959. In addition, the
18 settlement may not be the product of collusion among the negotiating parties. In re
19 Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000) (citing Class Plaintiffs
20 v. City of Seattle, 955 F.2d 1268, 1290 (9th Cir. 1992)).

21 In determining whether a proposed settlement should be approved, the Ninth
22 Circuit has a “strong judicial policy that favors settlement, particularly where complex
23 class action litigation is concerned.” In re Heritage Bond Litigation, 2005 WL
24 1594403, at *2 (C.D. Cal. June 10, 2005) (citing Class Plaintiffs v. Seattle, 955 F.2d
25 1268, 1276 (9th Cir. 1992)). The Ninth Circuit favors deference to the “private
26 consensual decision of the [settling] parties,” particularly where the parties are
27 represented by experienced counsel and negotiation has been facilitated by a neutral
28 party, in this instance, a private mediator and a magistrate judge. See Rodriguez v.

1 West Publishing Corp., 563 F.3d 948, 965 (9th Cir. 2009). “In reality, parties, counsel,
2 mediators, and district judges naturally arrive at a reasonable range for settlements by
3 considering the likelihood of a plaintiff’s or defense verdict, the potential recovery, and
4 the chances of obtaining it, discounted to present value.” Id.

5 A. The Strength of Plaintiffs’ Case and Risk of Further Litigation

6 Both parties have expended significant time, effort, and resources supporting
7 their positions, and would continue to do so if the settlement failed to get final
8 approval. (Doc. No. 229-1 at 21-22.) The disputed factual and legal issues would be
9 complex and costly to resolve at trial. (Id. at 22-24.) Both parties have considered the
10 uncertainty and risk of the outcome of future litigation, the burdens of proof for
11 liability and damages, as well as the general difficulties and delays of litigation. (Id.
12 at 21-24.) These considerations led the parties to conclude that a timely settlement
13 would be best for all involved parties. See Linney v. Cellular Alaska Partnership, 151
14 F.3d 1234, 1242 (9th Cir. 1998) (“[I]t is the very uncertainty of outcome in litigation
15 and avoidance of wasteful and expensive litigation that induce consensual settlement.”)
16 (emphasis, internal quotation marks, and citation omitted). The Court agrees that the
17 recovery through settlement confers a substantial benefit to the class that outweighs the
18 potential recovery that could have been obtained through full litigation.

19 B. The Amount Offered in Settlement

20 The proposed settlement provides class members with immediate monetary relief
21 by establishing a common fund of \$5 million. Class members may recover \$0.50 per
22 package, without limitation, for every Kashi product purchased during the class period
23 for which the member provides written proof of purchase. Settlement class members
24 may seek reimbursement without presenting written proof of purchase by submitting
25 a valid claim form, in which case there is a maximum recovery of \$25 per household.
26 If money remains in the settlement fund after all valid claims, fees, and expenses are
27 paid, the remaining amount will be used to increase pro rata the recovery of each
28

1 eligible claim.³ Additionally, the proposed settlement requires Kashi to modify its
2 labeling and advertising to remove “All Natural” and “Nothing Artificial” from those
3 products that contain the Challenged Ingredients. This settlement is a good result for
4 the class and eliminates the risks, expenses, and delay associated with continued
5 litigation. Moreover, the settlement amount is the result of arm’s-length negotiation
6 conducted by experienced counsel. Accordingly, the Court concludes that the amount
7 offered in settlement weighs in favor of granting final approval of the settlement.

8 C. The Extent of Discovery Completed and Stage of the Proceedings

9 In the context of class action settlements, as long as the parties have sufficient
10 information to make an informed decision about settlement, “formal discovery is not
11 a necessary ticket to the bargaining table.” Linney, 151 F.3d at 1239 (quoting In re
12 Chicken Antitrust Litig., 669 F.2d 228, 241 (5th Cir.1982)).

13 The parties reached settlement over two years after the first complaint was filed
14 and after extensive discovery and analysis of Plaintiffs’ claims. (Compare Doc. No.
15 1 with Doc. No. 219; Doc. No. 229-1 at 25-26.) Defendant produced, and Plaintiffs’
16 counsel reviewed, thousands of pages of documents, including technical and scientific
17 documents, marketing and business plans, product packaging and labels, and email
18 communications. (Doc. No. 229-1 at 25-26; Doc. No. 229-2, Declaration of Antonio
19 Vozzolo (“Vozzolo Decl.”) ¶ 43.) Defendant deposed the class representatives and
20 Plaintiffs’ marketing expert, and Plaintiffs deposed several individuals, including
21 Defendant’s marketing expert. (Doc. No. 229-1 at 25; Doc. No. 229-2, Vozzolo Decl.
22 ¶ 16.) Class counsel were able to negotiate the settlement based on a full record and
23 a thorough understanding of the strengths and weaknesses of the claims. Accordingly,
24 the parties’ extensive investigation, discovery, and subsequent settlement discussions
25 weigh in favor of granting final approval.

26 ///

27 _____
28 ³Because the number of claims did not exhaust the settlement fund, class members will
receive approximately \$4.30 for each product claimed. (Doc. No. 238 at 11.)

1 D. The Experience and Views of Counsel

2 Plaintiffs' counsel has extensive experience acting as class counsel in consumer
3 class action cases, including cases involving false advertising claims. (See Doc. No.
4 229-1 at 26; Doc. No. 229-2, Vozzolo Decl. ¶ 41.) Class counsel recommend the
5 settlement as both fair and adequate, a factor that weighs in favor of granting final
6 approval. (Doc. No. 229-1 at 26; Doc. No. 229-2, Vozzolo Decl. ¶ 46.)

7 5. The Reaction of the Class Members to the Proposed Settlement

8 As of July 24, 2014, the settlement website has been visited 59,814 times and the
9 settlement administrator, GCG, has received 502 calls on a case-dedicated, toll-free
10 telephone number. (Doc. No. 229-14, Keough Decl. ¶¶ 12, 14.) Additionally, GCG
11 mailed 328 notice packets to potential class members who requested such packets. (Id.
12 ¶ 13.) No class member had opted-out of the settlement as of July 24, 2014, and only
13 three class members have filed objections to the settlement agreement. (Id. ¶ 15.; see
14 Doc. Nos. 232, 233, and 235.) The small number of objectors supports the fairness,
15 reasonableness, and adequacy of the settlement. See In re Austrian & German Bank
16 Holocaust Litig., 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of
17 objections are received, that fact can be viewed as indicative of the adequacy of the
18 settlement." (citations omitted)); Boyd v. Bechtel Corp., 485 F. Supp. 610, 624 (N.D.
19 Cal. 1979) (finding "persuasive" the fact that 84% of the class had filed no opposition).
20 Accordingly, the reaction of the class members weighs in favor of granting final
21 approval.

22 6. No Evidence of Collusion Between the Parties

23 The collusion inquiry addresses the possibility the agreement is the result of
24 either overt misconduct by the negotiators or improper incentives of certain class
25 members at the expense of other members of the class. Stanton, 327 F.3d at 960. In
26 the present case, because there is no evidence of overt misconduct, the Court's inquiry
27 focuses on the aspects of the settlement that lend themselves to self-interested action.

28 The \$4,000 incentive awards for Plaintiffs Skye Astiana, Milan Babic, Tamara

1 Diaz, Tamar Larsen, and Kimberly S. Sethavanish do not appear to be the result of
2 collusion. The Court evaluates incentive awards using ““relevant factors including the
3 actions the plaintiff has taken to protect the interests of the class, the degree to which
4 the class has benefitted from those actions, . . . [and] the amount of time and effort the
5 plaintiff expended in pursuing the litigation” Staton, 327 F.3d at 977 (quoting
6 Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)). In the present case, Plaintiffs
7 have protected the interests of the class by engaging in investigation and discovery,
8 each attending a deposition, and assisting counsel with other aspects of the case. (Doc.
9 No. 229-2, Vozzolo Decl. ¶ 79; Doc. No. 229-13, Declaration of Joseph N. Kravec, Jr.
10 (“Kravec Decl.”) ¶ 7.) Therefore, the \$4,000 award to each of the class representatives
11 appears to be reasonable in light of their efforts in this litigation.

12 Finally, the attorneys’ fees do not appear to be the result of collusion. Plaintiffs’
13 counsel may simultaneously negotiate the merits of the action and their attorneys’ fees.
14 Stanton, 327 F.3d at 971. The attorneys’ fees, litigation costs, and administration costs
15 sought by Plaintiffs’ counsel are reasonable under the circumstances.

16 The Court has reviewed the objectors’ arguments and finds they have no merit.⁴
17 Accordingly, the objections to the settlement and attorneys’ fees are overruled.

18 After considering all applicable factors, the Court concludes the settlement is
19 “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); Staton, 327 F.3d at 959.
20 Accordingly, the Court grants Plaintiffs’ motion for final approval of the settlement.

21 III. Attorneys’ Fees and Expenses

22 With respect to the attorneys’ fees, the Ninth Circuit has established a 25%
23 “benchmark” for common fund cases. Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370,
24 1376 (9th Cir. 1993). This “benchmark percentage should be adjusted, or replaced by

25
26 ⁴For example, one week after the settlement administrator filed a declaration
27 demonstrating compliance with the Class Action Fairness Act’s notice requirement, one
28 objector claimed “there is no evidence that counsel has complied with the requirements of the
Class Action Fairness Act as it relates to providing state and federal authorities with notice of
the settlement.” (Compare Doc No. 229-15, Declaration of Jennifer M. Keough - CAFA; with
Doc. No. 233.)

1 a lodestar calculation, when special circumstances indicate that the percentage recovery
2 would be either too small or too large in light of the hours devoted to the case or other
3 relevant factors.” Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301,
4 1311 (1990). Regardless of whether the court uses the percentage approach or the
5 lodestar method, the main inquiry is whether the end result is reasonable. Powers v.
6 Eichen, 229 F.3d 1249, 1258 (9th Cir. 2000). The Ninth Circuit has identified a
7 number of factors that may be relevant in determining if the award is reasonable: (1)
8 the results achieved; (2) the risks of litigation; (3) the skill required and the quality of
9 work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and
10 (6) the awards made in similar cases. See Vizcaino v. Microsoft Corp., 290 F.3d 1043,
11 1048-50 (9th Cir. 2002). Here, Plaintiffs have requested an award of \$873,414.05 in
12 attorneys’ fees and \$376,585.95 in out-of-pocket litigation costs for a total of
13 \$1,250,000. (Doc. No. 230-1 at 2, 25.) The requested amount of attorneys’ fees is
14 approximately 17.5% of the total fund.

15 The results achieved in this case were favorable. Class members are provided
16 with immediate monetary and injunctive relief, and the overall award is substantial.
17 Additionally, the risks of litigation were real and substantial. Further, the complexity
18 and potential duration of the case, coupled with the intensity of settlement negotiations,
19 indicate that a 17.5% award is reasonable. Moreover, class counsel took this case on
20 a contingent fee basis, bearing the entire risk and cost of litigation. (Doc. No. 203-1
21 at 12.) Finally, the request for attorneys’ fees in the amount of 17.5% of the common
22 fund falls below the Ninth Circuit’s 25% benchmark. See Vasquez v. Coast Valley
23 Roofing, Inc., 266 F.R.D. 482, 491 (E.D. Cal. 2010) (noting that “[t]he typical range
24 of acceptable attorneys’ fees in the Ninth Circuit is 20% to 33 1/3% of the total
25 settlement value, with 25% considered the benchmark”). Finally, class counsel has
26 represented that \$873,414.05 is approximately 39% of the amount that would have
27 been calculated using the lodestar method. (Doc. No. 230-1 at 25-26.) See In re
28 Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 944-45 (9th Cir. 2011)

1 (encouraging district courts to cross-check their calculations under the percentage-
2 of-recovery method against the lodestar method).

3 Plaintiffs have represented to the Court that class counsel have incurred litigation
4 expenses in the amount of \$376,585.95. (Doc. No. 230-1 at 31; Doc. No. 229-2,
5 Vozzolo Decl. ¶ 69; Doc. No. 229-6, Declaration of D. Joshua Staub ¶ 13; Doc. No.
6 229-7, Declaration of Michael D. Braun ¶ 12; Doc. No. 229-8, Declaration of Bruce D,
7 Greenberg ¶ 13; Doc. No. 229-9, Declaration of Janet Spielberg ¶ 10; Doc. No. 229-10,
8 Declaration of Marc L. Godino ¶ 17; Doc. No. 229-11, Declaration of Rosemary M.
9 Rivas ¶ 25; Doc. No. 229-12, Declaration of Jason Hartley ¶ 13; Doc. No. 229-13,
10 Kravec Decl. ¶¶ 11-12.) After reviewing counsels' declarations regarding expenses,
11 the Court concludes \$376,585.95 in litigation expenses is reasonable. Similarly,
12 Plaintiffs' request of \$354,608 in costs for the settlement administrator is reasonable
13 in light of the fact that it is less than the \$800,000 that was set aside by the settlement
14 agreement for administration costs. (Doc. No. 229-1 at 20.)

15 For these reasons, the Court concludes that an award of attorneys' fees in the
16 amount of \$873,414.05, and litigation expenses in the amount of \$376,585.95, are
17 reasonable and warranted in this case. Accordingly, the Court grants Plaintiffs' request
18 for attorneys' fees and expenses.

19 V. Incentive Payments to Class Representatives

20 Finally, the \$4,000 incentive awards for Plaintiffs Astiana, Babic, Diaz, Larsen,
21 and Sethavanish are reasonable. "The criteria courts may consider in determining
22 whether to make an incentive award include: 1) the risk to the class representative in
23 commencing suit, both financial and otherwise; 2) the notoriety and personal
24 difficulties encountered by the class representative; 3) the amount of time and effort
25 spent by the class representative; 4) the duration of the litigation and; 5) the personal
26 benefit (or lack thereof) enjoyed by the class representative as a result of the litigation."
27 Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995)
28 (citations omitted).

1 After reviewing the factors announced in Van Vranken, the Court concludes that
2 the requested incentive awards for the named Plaintiffs are reasonable. The \$4,000
3 awards are well within the acceptable range awarded in similar cases. See, e.g., Fulford
4 v. Logitech, Inc., No. 08-CV-02041, 2010 WL 807448, at *3 n.1 (N.D. Cal. 2010)
5 (collecting cases awarding incentive payments ranging from \$5,000 to \$40,000). Each
6 of the Plaintiffs advanced the interests of the absent class members by engaging in
7 investigation and discovery, attending depositions, and assisting counsel with other
8 aspects of the case. (See Doc. No. 229-2, Vozzolo Decl. ¶ 79; Doc. No. 229-13,
9 Kravec Decl. ¶ 7.) Accordingly, the Court approves the \$4,000 incentive awards for
10 Plaintiffs Astiana, Babic, Diaz, Larsen, and Sethavanish.

11 Conclusion

12 For the reasons stated above, it is ordered that:

- 13 1. This Judgment incorporates by reference the definitions in the Stipulation
14 of Settlement dated May 2, 2014 (Doc. No. 219, “Settlement”) and all
15 terms used in this Judgment shall have the same meanings as set forth in
16 the Settlement.
- 17 2. The Court has jurisdiction over the subject matter of this action and all
18 parties to the action, including all Settlement Class Members.
- 19 3. The Court certifies the following Class: All California residents who
20 purchased any of the Products listed in paragraph 22 of the Settlement
21 during the Settlement Class Period. Excluded from the Class are: (a)
22 Kashi’s employees, officers and directors; (b) persons or entities who
23 purchased the Products for the purpose of re-sale; (c) retailers or re-sellers
24 of the Products; (d) governmental entities; (e) persons who timely and
25 properly exclude themselves from the Class as provided herein; and (f) the
26 Court, the Court’s immediate family, and Court staff.
- 27 4. All Persons who satisfy the Class definition above, except those Class
28 Members who timely and validly excluded themselves from the Class, are

1 Settlement Class Members bound by this Judgment.

2 5. The form and method of notice satisfied the requirements of the Federal
3 Rules of Civil Procedure, 28 U.S.C. § 1715 (“CAFA”), and the United
4 States Constitution, including the Due Process Clause.

5 6. No part of the Settlement, this Judgment, nor the fact of the settlement
6 constitutes any admission by any of the Parties of any liability,
7 wrongdoing or violation of law, damages or lack thereof, or of the validity
8 or invalidity of any claim or defense asserted in the Litigation.

9 7. Class Counsel is awarded \$873,414.05 in attorneys’ fees, and
10 \$376,585.95 in expenses.

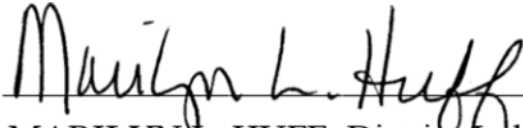
11 8. Plaintiff Class Representatives are each entitled to an incentive award of
12 \$4,000. The attorneys’ fees and expense award and Plaintiffs’ incentive
13 awards are to be paid out of the Settlement Fund created by Kashi
14 pursuant to the time table set forth in the Settlement.

15 10. Without affecting the finality of this Judgment, the Court reserves
16 jurisdiction over the implementation, administration, and enforcement of
17 this Judgment and the Settlement, and all matters arising thereunder.

18 11. This document shall constitute a judgment for purposes of Rule 58 of the
19 Federal Rules of Civil Procedure. Final Judgment in this action is
20 entered. The Court dismisses with prejudice the action, and all Released
21 Claims against each and all Released Persons and without costs to any of
22 the Parties as against the others.

23 IT IS SO ORDERED.

24 DATED: September 2, 2014

25 
26 MARILYN L. HUFF, District Judge
27 UNITED STATES DISTRICT COURT
28