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Elaine Oxina

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ELAINE OXINA; INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

LANDS' END, INC.,

Defendant.

Case No.: 3:14-cv-02577-MMA-NLS

CLASS ACTION

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

DATE: March 21, 2016
TIME: 2:30 p.m.
CRTRM: 3A
JUDGE: Hon. Michael M. Anello

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Plaintiff Elaine Oxina ("Plaintiff") hereby submits the instant Motion for Preliminary Approval of Class Action Settlement of this action (the "Action").

I. INTRODUCTION

This consumer class action arises from Plaintiff's allegations that Defendant engaged in false and misleading advertising, unfair competition, and deceptive conduct toward consumers by advertising Defendant's neckties, including the necktie purchased by Plaintiff, with the false representation that Defendant's product was "Made in U.S.A." in violation of, *inter alia*, California's Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code §§ 17200, et seq.; California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, et seq.; and California's "Made in USA" law, Cal. Bus. & Prof. Code §§ 17533.7; and California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.

The parties have reached a settlement in principal and have drafted a proposed Settlement Agreement for the Court's approval (the "Settlement" or "SA"), attached to the Declaration of Abbas Kazerounian in Support of Preliminary Approval of Class Action Settlement ("Kazerounian Decl.") as Exhibit 1. The proposed Settlement provides substantial relief to the Class as each Settlement Class Member shall be eligible to receive a full refund of the purchase price of the product at issue in addition to interest at the rate of ten (10) percent per annum from the date of purchase without making a claim. Kazerounian Decl. ¶12; Swigart Decl. ¶ 3; SA § 6a. In consideration for payment, Plaintiff, on behalf of the proposed Settlement Class, will dismiss the Action and the Settlement class will release and discharge the Released Parties from the Released Claims. *Id*. § 13. For the reasons set forth herein, Plaintiff assert that the Settlement is fair and reasonable, and warrants the Court's preliminary approval; and Defendant does not oppose this motion.

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Accordingly, Plaintiff moves the Court for an Order preliminarily approving of the Settlement Class Action Settlement, requesting an Order of (1) preliminary approval of the proposed Settlement Agreement, (2) approval the proposed Notice procedure an the form, manner and content of the Notice, (3) staying all proceedings until the Court renders a final decision regarding the approval of the Settlement, (4) conditionally certify the proposed Settlement Class, (5) appointing Plaintiff as Class Representatives and Plaintiff' Counsel as Class Counsel, and (6) scheduling a hearing for Final Approval.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff has alleged in this Action that Defendant engaged in false and misleading advertising, unfair competition, and deceptive conduct toward consumers by advertising Defendant's neckties, including the necktie purchased by Plaintiff, with the false representation that Defendant's product was "Made in U.S.A." in violation of, *inter alia*, California's Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code §§ 17200, et seq.; California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, et seq.; and California's "Made in USA" law, Cal. Bus. & Prof. Code §§ 17533.7; and California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.

Specifically, Plaintiff alleged that contrary to Defendant's claim that its Kid's to-be tied Necktie (hereinafter "Necktie" or the "Product") was advertised on Defendant's website as "Made in U.S.A." while the Product was in fact made in China, and thus foreign-made and/or incorporates foreign-made materials or component parts, contrary to Defendant's representations. *See* Plaintiff's Second Amended Complaint ("SAC") ¶¶ 1 and 3.

In response to the Action, Defendant filed a Motion to Dismiss on January 26, 2015. [Dkt. No. 11]. On February 17, 2015, Plaintiff filed her Response in Opposition

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to Defendant's Motion to Dismiss. [Dkt No. 12]. Defendant filed a Reply on February 23, 2015. Thereafter, on June 19, 2015, the Court issued an order granting Defendant's Motion to Dismiss without prejudice and with Leave to Amend. Subsequently, Plaintiff filed her Second Amended Complaint ("SAC"), which is now the operative complaint in the Action.

III. THE SETTLEMENT

A. The Settlement Class

Plaintiff has agreed to settle this action on behalf of all other similarly situated consumers in California who, at any time from October 29, 2010 through October 29, 2014, purchased the "Kids To-Be-Tied Plaid Necktie" in the State of California (the "Settlement Class"). SA § I. Defendant has represented to Plaintiff that the Settlement Class consists of 38 consumers. *Id*. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of Defendants or its subsidiaries and affiliated companies, the Court and its immediate family and staff, as well as any person(s) who timely exercise their right to opt out of the Settlement Class. *Id*. § J.

B. Settlement Payment

The parties have agreed to the proposed Settlement which, if approved by this Honorable Court, will result in the dismissal of the Action in consideration for payment of the Settlement Funds to the Members of the Settlement Class. Under the terms of the Settlement Agreement, in consideration for the dismissal of the Lawsuit under the terms of this Agreement, the Parties agree as follows:

i. Settlement Class Members shall be eligible to receive a refund of their purchase price plus interest at the rate of ten (10) percent per annum from the date of purchase, without making a claim.

ii. Lands' End will administer payment to the Settlement Class through its customer service department and all costs and expenses

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of class notice and administration of claims shall be paid and borne by Lands' End outside of the compensation being offered to Class Members; and send a Declaration to Class Counsel of the timing and results of he refund within ten (10) days of issuance.

iii. If Lands' End and Plaintiff's Counsel are unable to resolve any disputes concerning the administration of the claims, those disputes may be submitted to the Honorable Nita L. Stormes.

The Parties have agreed to undertake their respective Best Efforts to effectuate the Settlement as described herein and in the proposed Settlement Agreement. Accordingly, the parties encourage the Court to approve the proposed Settlement Agreement. The parties further represent, agree and acknowledge that the Settlement is a fair resolution of these claims for the Parties and the Settlement Class Members. SA § 7.

C. Notice and Administration of the Settlement

As provided in the proposed Settlement Agreement, the parties agree that no later than 30 days following the Court's entry of the Order of Preliminary Approval, Lands' End shall cause notice to be disseminated as directed in the Order of Preliminary Approval by sending Settlement Class Members direct notice by e-mail and U.S. Mail to all Members of the Settlement Class for whom it has a valid e-mail address and to the last known mailing address contained in Lands' End's records. SA § 4.

The parties agree that the method of notice set forth in the Settlement Agreement constitutes the best form of notice to the Settlement Class that is practicable under the circumstances. SA § 4. Lands' End shall pay all costs associated with disseminating and publishing the Notice to the Settlement Class and all associated expenses, which shall be in addition to and not deducted from the settlement

compensation described in Section 6 of the Settlement Agreement or the amount of attorneys' fees and expenses described in Section 12 of the Settlement Agreement. *Id*.

D. Opportunity to Object or Opt Out

Under the terms of the proposed Settlement Agreement, members of the Settlement Class will have the right to object to the Settlement and/or its terms. SA § 8. Any Settlement Class Member who wishes to object to any term of this Agreement must do so in writing by filing a written objection with the Clerk of the Court and mailing it to the Parties' respective counsel at the addresses set forth in the Settlement Agreement. Any such objection must (a) identify the date on which the objecting party purchased a "Kids To-Be-Tied Plaid Necktie" in the state of California, (b) attach copies of any materials that will be submitted to the Court or presented at the fairness hearing, (c) be signed by the Settlement Class Member, (d) clearly state in detail (i) the legal and factual ground(s) for the objection, (ii) the Settlement Class Member's name, address and telephone number, and (iii) if represented by counsel, such counsel's name, address and telephone number; and (e) Any attorney representing an objector must list all objections previously filed for anyone, the case name, court, and case number, and how much, if any amount, was paid in connection with the objection. Any objection that fails to satisfy the requirements of this Section, or that is not properly and timely submitted, may be deemed ineffective, and will be deemed by the Parties to have been waived, and the Parties will argue that the Settlement Class Member asserting such objection shall be bound by the final determination of the Court.

In addition, any Settlement Class Member who wishes to be excluded from membership in the Settlement Class must do so in writing by mailing a written request for exclusion from the Settlement to the Parties' respective counsel at the addresses set forth in the Settlement Agreement. SA § 10. Such requests must (a) be signed by the Settlement Class Member, (b) identify the date on which the Settlement Class Member

purchased a "Kids To-Be-Tied Plaid Necktie" in the state of California, (c) clearly express the Settlement Class Member's desire to be excluded (or to "opt out") from the Settlement Class, and (d) include the Settlement Class Member's name, address and telephone number, and, if represented by counsel, counsel's name, address and telephone number. *Id*. Any request for exclusion that is untimely or fails to satisfy the requirements of the Settlement Agreement, may be deemed ineffective, and the person shall be deemed a Settlement Class Member for all purposes under this Agreement. *Id*.

E. Class Counsel's Application for Attorneys' Fees and Costs

The proposed Settlement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees, costs. SA § 12. Lands' End agrees not to oppose an award by the Court of reasonable attorneys' fees and litigation costs through the entry of the Final Order and Judgment, to Plaintiff's Counsel in an amount not to exceed $32,500 in fees and expenses, subject to Court approval. Plaintiff's Counsel agrees that they will not seek attorneys' fees and litigation costs that exceed $32,500, in the aggregate. Plaintiff's Counsel's application for an award of attorneys' fees and costs pursuant to this subsection shall be made no later than thirty (30) days prior to any opt out or objection period. Such application will be heard at the time of the Fairness Hearing or as soon thereafter as may be determined by the Court. *Id*. § 12a. The parties' negotiation and agreement upon the foregoing attorneys' fees and expenses occurred only after the substantive terms of the proposed Settlement Agreement had been negotiated and agreed upon. *Id* § 12b.

IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

A class action may not be dismissed, compromised or settled without the approval of the court. Fed. R. Civ. P. 23(e). The purpose of the Court's preliminary evaluation of the settlement is to determine whether it is within the "range of

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reasonableness," and thus whether notice to the class of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are worthwhile. *See* 4 Herbert B. Newberg, *Newberg on Class Actions* § 11.25 et seq., and § 13.64 (4th ed. 2002 and Supp. 2004). Thus, the "judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." Manual for Complex Litigation (Fourth) (Fed. Judicial Center 2004) ("Manual") at § 21.632.

A. Public Policy Favors Settlement

As a matter of public policy, settlement is a strongly favored method for resolving disputes. *See Utility Reform Project v. Bonneville Power Admin*., 869 F.2d 437, 443 (9th Cir. 1989); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). This is especially true in class actions such as this one. As a result, courts should exercise their discretion to approve settlements "in recognition of the policy encouraging settlement of disputed claims." *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995). To make the preliminary fairness determination, courts may consider several relevant factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; [and] the experience and views of counsel…" *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998).

B. Conclusions of Fact And Law Are Not Necessary At This Stage

Furthermore, courts must give "proper deference to the private consensual decision of the parties," since "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product

of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.* at 1027.

In considering a potential settlement, the Court need not reach any ultimate conclusions on the issues of fact and law, which underlie the merits of the dispute, (*West Va. v. Chas. Pfizer & Co*., 440 F.2d 1079, 1086 (2d Cir. 1971)), and need not engage in a trial on the merits, *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement…may be submitted to members of the prospective class for their acceptance or rejection." *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp*., 323 F. Supp. 364, 372 (E.D. Pa. 1970). Preliminary approval of the settlement should be granted if there are no "reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." Manual at § 21.632.

C. Counsel's Experienced Judgment Holds Considerable Weight

The opinion of experienced counsel supporting the Settlement is entitled to considerable weight.[1] The decision to approve or reject a proposed settlement "is committed to the sound discretion of the trial judge[.]" *See Hanlon,* 150 F.3d at 1026. This discretion is to be exercised "in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned," which minimizes substantial litigation expenses for both sides and conserves judicial

[1] *See e.g.*, *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal.1988) (opinion of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement); *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of plaintiffs' counsel should be given a presumption of reasonableness).

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resources. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (quotations omitted).

Based on these standards, Class Counsel respectfully submit that, for the reasons detailed below, the Court should preliminarily approve the proposed Settlement as fair, reasonable and adequate. Kazerounian Decl. ¶ 32; Swigart Decl. ¶ 3. Defendant, through its counsel, joins in this submission for Preliminary Approval. SA § 3.

V. THE SETTLEMENT IS FAIR, REASONABLE, ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED BY THE COURT

A. Liability is Contested and Both Parties Face Significant Challenges in Litigating the Action

Based on Class Counsel's thorough analysis of the legal and factual issues raised by this case in Defendant's Motion to Dismiss [Dkt. No. 11], the Court's resulting Order [Dkt. No. 15], and Defendant's subsequent Motion to Dismiss [Dkt. No. 21], this litigation has reached the stage where "the Parties certainly have a clear view of the strengths and weaknesses of their cases" sufficient to support the Settlement. *Boyd v. Bechtel Corp*., 485 F.Supp 610, 617 (N.D. Cal. 1979). Based on their experience with these types of cases and analysis of the issues raised in this action in Defendant's Motions to Dismiss, the parties share the view that this is a fair and reasonable settlement and in the best interests of the Class. Because of the detailed legal and actual analysis conducted by counsel for both parties, their endorsement of the Settlement "is entitled to significant weight" in deciding whether to approve the Settlement. *Fisher Bros. v. Cambridge Lee Industries, Inc.,* 630 F.Supp. 482, 488 (E.D. Pa. 1985); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal.1980); *Boyd v. Bechtel Corp*., 485 F.Supp. 616-617. Courts should not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *National Rural*

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Telecommunications Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004).

Here, in evaluating the settlement set forth in this Agreement, Plaintiff's Counsel have concluded that the benefits provided to the Settlement Class under this Agreement make a settlement with Lands' End and the other Released Parties pursuant to such terms and conditions in the best interest of the Settlement Class in light of, among other considerations, the benefits afforded to the Settlement Class, the uncertainty associated with obtaining class certification for liability purposes, the expense and length of time necessary to prosecute this action through trial, and the uncertainty of the outcome of the Action. Accordingly, the parties respectfully request that this Court preliminarily approve the Class Settlement.

B. <u>The Settlement Provides Fair and Substantial Benefit to the Class</u>

Defendant will provide Settlement Class Members with a full refund of their purchase price plus interest at the rate of ten (10) percent per annum from the date of purchase, without the need for Settlement Class Members to make a claim. *See* SA § 6a. Defendant will administer payment to the Settlement Class through its customer service department and all costs and expenses of class notice and administration of claims shall be paid and borne by Lands' End outside of the compensation being offered to Class Members. *See* SA § 6b.

The Settlement payment that each Settlement Class Member will receive is fair, appropriate, and reasonable given the purposes of the consumer protection laws at issue in this action and in light of the anticipated risk, expense, and uncertainty of continued litigation. Kazerounian Decl., ¶ 13 & 30; Swigart Decl. ¶ 3. Furthermore, Class Counsel submits that the proposed Settlement is the best result possible, as Settlement Class Members will receive a return of 100 cents on the dollar, in addition to the rate of ten (10) percent per annum from the date of purchase without making a claim. Kazerounian Decl. ¶ 12; Swigart Decl. ¶ 3. SA § 6a. Therefore, the Settlement

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largely achieves the best recovery that Plaintiffs could achieve at trial, without he risks and inherent delays of an adverse trial decision or potential appeal. Moreover, the Settlement Class Members will also benefit from the effect of this Settlement, as it has a deterrent effect and sets a precedent for other businesses that misrepresent their products as "Made in USA" (or similar words). *See Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283, *5 (S.D. Cal., May 29, 2012) (class members will also benefit from the deterrent effect of the Settlement). Thus, the Settlement will provide substantial benefit to the Settlement Class Members.

C. The Settlement Was Reached As A Result of Arms-Length Negotiations

Typically, "[t]here is a presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval." NEWBERG, supra, §11.41; see also Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 (C.D. Cal. 2004) (great weight given to the recommendation of counsel who are the most closely acquainted with the facts of the litigation); *In re Employee Benefit Plans Secs. Litig.*, No. 3-92-708, 1993 WL 330595,at *5 (D. Minn. June 2, 1993) (same).

Here, the proposed Settlement is the result of intensive arms-length negotiations. *See* SA p. 2. The parties have actively litigated the Action for over a year, including engaging in extensive, adversarial motion practice. Kazerounian Decl. ¶ 10; Swigart Decl. ¶ 3; *see* Dkt. Nos. 11-21. Working independently of the Court, the Parties also participated in direct discussions about possible resolution of this litigation including numerous telephonic conferences, and were able to reach a Settlement. *Id.* After reaching an agreement in principle to settle the Action, Class Counsel engaged in extensive discussions that were necessary to determine the details surrounding the Settlement Agreement. Kazerounian Decl. ¶ 10 & 11; Swigart Decl. ¶ 3.

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D. Experienced Counsel Have Determined That The Settlement is Appropriate and Fair to the Class

In negotiating the proposed Settlement, Plaintiff has had the benefit of highly skilled counsel, with extensive experience in litigating complex class action litigation. Class Counsel has extensive experience in class actions, as well as particular expertise in class actions relating to consumer protection. Kazerounian Decl. ¶¶ 34-43; Swigart Decl. ¶¶ 4-14. Similarly, Defendant's Counsel has extensive experience based upon a long track record in complex class action litigation.[2] Class Counsel believe that under the circumstances, the proposed Settlement is fair, reasonable, and adequate and in the best interest of the Class Members. Kazerounian Decl. ¶ 31; Swigart Decl. ¶ 3.

VI. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS AS THE REQUIREMENTS OF FED. R. CIV. P. 23(a) ARE MET.

A. Numerosity

Fed. R. Civ. P. 23(a)(1) requires that certification be supported by a class "so numerous that joinder of all members is impracticable." *Littledove*, 2001 WL 42199, at * 2, citing *East Texas Motor Freight Sys. V. Rodriguez*, 431 U.S. 395, 405 (1977). In addition, the impracticality of joinder depends on the facts and circumstances of each case and does not, as a matter of law, require the existence of any specific minimum number of class members. *Kraszewski v. State Farms Ins. Co.*, 1981 WL 26982, *2 (N.D. Cal., September 9, 1981). The courts of this Circuit have adhered to the view that, "the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone." *Amone v. Aveiro*, 226 F.R.D. 677, 684 (D. Haw. 2005) *quoting* Newberg and Conte, Newberg on Class Actions § 3.6 (4th ed. 2002).

[2] *See* http://www.gtlaw.com/Experience/Practices/Class-Action-Litigation

Because Defendant, Lands' End, is a large American clothing retailer that sells its products nationwide and internationally,[3] and the product at issue in this Action is a mass-produced product which was advertised and distributed to consumers in the same way via Defendant's website with the same "Made in USA" representation, the class is so numerous that the joinder of all members would be impracticable. As such, the numerosity requirement under Rule 23(a)(1) has been satisfied.

B. Commonality

Rule 23(a)(2) requires that the class members' claims be linked through common questions of law or fact. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This means that the Settlement Class Members' claims "must depend on a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. A common nucleus of operative fact is generally enough to satisfy the commonality requirement. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id*.

Here, the commonality requirement is met for the Class because the claims of all Class Members arise from the same common questions of both law and fact concerning the "Made in USA" representation Defendant's made regarding its product. Every prospective class member purchased and viewed the same "Made in USA" representation advertised on Defendant's website. Plaintiff's Complaint addresses the

[3] *See* http://www.landsend.com/aboutus/company/

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following legal issues and each applies equally to each and every member of the class, namely:

1. Whether Defendant participated in or committed the wrongful conduct alleged in Plaintiff's Complaint;
2. Whether Defendant's acts, transactions, or course of conduct constituted violations of California's Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code §§ 17200, et seq.; California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500, et seq.; and California's "Made in USA" law, Cal. Bus. & Prof. Code §§ 17533.7; and California's Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq.
3. Whether members of the Class sustained and/or continue to sustain damages attributable to Defendant's conduct, and, if so, the proper measure and appropriate formula to be applied in determining such damages; and
4. Whether members of the Class are entitled to injunctive and/or equitable relief.

Consequently, the determination of these common legal issues will resolve an issue that is central to the validity of each one of the claims on a class wide basis in "one stroke." Therefore, the commonality requirement of Rule 23(a)(2) is satisfied.

C. Typicality

Rule 23(a)(3) requires that the proposed Class Representatives' "claims or defenses" be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality requirement is intended to "assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Courts consistently find that the typicality

requirement is met if the claims arise from a common course of conduct. A named Plaintiff's claim is typical if "it arises from the same practice or course of conduct that gives rise to the claims of other class members and is based on the same legal theory as their claims." *Newman v. CheckRite California, Inc.*, 1996 WL 1118092, *5 (E.D. Cal., August 2, 1996). Typicality is so closely related to commonality that "a finding of one will generally satisfy the other." *Newman*, 1996 WL 1118092, at *5, *citing* H. Newberg, Class Actions, § 3.13 (1997).

Here, each and every member of the proposed class is alleged to have purchased the same product and viewed the same "Made in USA" representation on Defendant's website in connection with purchase of the product at issue. Thus, each member of the Class has the very same claims against the Defendant arising from the same common course of conduct, and each of those claims would be susceptible to the same defenses. Plaintiff respectfully submits that, since the claims of all Class members, including the Plaintiff, arise from the same event, practice or course of conduct, namely, the purchase of Defendant's product advertised with a "Made in USA" representation from Defendant's website, typicality is satisfied.

D. Fair and Adequate Representation

The Ninth Circuit recognizes two criteria for determining fairness and adequacy of representation under Rule 23(a)(4): "First, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). As the U.S. Supreme Court has held, "a class representative must be part of the class and 'posses the same interest and suffer the same injury' as the class members." *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Rodriguez v. West Publishing Corp.*, 56 3 F.3d 948, 959 (9th Cir. 2009).

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Plaintiff has sufficiently demonstrated her desire and ability to vigorously prosecute this action. Declaration of Elaine Oxina ("Oxina Decl."), ¶ 3; Kazerounian Decl. ¶¶ 21-23; Swigart Decl. ¶ 3. Since the case's inception, Plaintiff has maintained regular contact with her counsel and has remained available and accessible to them. *Id*. Plaintiff recognizes that, as the named Plaintiff, she must represent all consumers in the Class. Oxina Decl. ¶ 1; *Id*.; *Id*. Plaintiff's interests are aligned with those of the other Class Members and there have been no indication or suggestion that their interests may conflict with the interests of unnamed Class Members. Oxina Decl. ¶ 6; *Id*.; *Id*.

For the foregoing reasons, the Court must conclude that Plaintiff has and will continue to provide fair and adequate class representation in satisfaction of the fourth prong of Fed. R. Civ. P. 23(a).

Appointment of Class Counsel is one of the obligations of the trial court. The Court may consider any "matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," Fed. R. Civ. P. 23(g)(1)(B). However, Fed. R. Civ. P. 23(g)(1)(A) sets forth four (4) factors which must be considered by the Court in order to satisfy its obligations. Those factors are: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

In evaluating the adequacy of representation, the court may also examine the attorney's professional qualifications, skills, experience and resources. *See Newman v. CheckRite California, Inc*., 1996 WL 118092, *6 (E.D. Cal., Aug. 2 1996) (citing *North American Acceptance Corp. v. Arnall, Golden & Gregory*, 593 F.2 d 642 (5th Cir. 1979)). The Court is entitled to look to counsel's demonstrated performance in this

suit in rendering its determination. Assessment of the quality of the pleadings and motions presented during the course of the litigation can be a useful tool in assessing adequacy of counsel. See *Sullivan v. Chase Inv. Serv. Of Boston*, 79 F.R.D. 246, 258 (N.D. Cal. 1978) (citing *Wofford v. Safeway stores, Inc.*, 78 F.R.D. 46 0, 486-487 (N.D. Cal 1978)).

This Court should find that the counsel chosen by Plaintiff meets the standards imposed by Rule 23. Kazerouni Law Group, APC, and Hyde & Swigart have extensive experience in consumer class actions and other complex litigation. Kazerouni Law Group, APC has engaged exclusively in the area of consumer rights litigation and class action litigation. Kazerounian Decl. ¶¶ 34-43; Swigart Decl. ¶¶ 4-14.

From the outset, Kazerouni Law Group, APC and Hyde & Swigart have vigorously pursued this action on behalf of Plaintiff and the proposed class members and have demonstrated their ability to do so before this court and have worked diligently with Defendant's Counsel in reaching a meaningful settlement in the best interest of all the parties. Finally, Defendant does not oppose the appointment of Kazerouni Law Group, APC and Hyde & Swigart to represent the proposed class. As such, Plaintiff's Counsel, Abbas Kazerounian of Kazerouni Law Group, APC and Joshua B. Swigart of Hyde & Swigart, should be appointed as Class Counsel.

E. The Proposed Method of Class Notice is Appropriate

Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the court must direct to class members the "best notice practicable" under the circumstances. Rule 23(c)(2)(B) does not require "actual notice" or that a notice be "actually received." *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). Notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.

306, 314 (1950). "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F.3d at 1025.

Pursuant to Rule 23(e)(1)(B), "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." The notice must concisely and clearly state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class; (iii) the class claims, issues, or defenses; (iv) that class members may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

Here, the direct notice sent by both e-mail and U.S. Mail to all Members of the Settlement Class for whom Defendant has a valid e-mail address and to the last known mailing address contained in Defendant's records meet all the notice requirements. See SA § 4; Exhibit B attached thereto. In addition, Class Counsel's website will allow Settlement Class Members to access a copy of the direct e-mail and mail notice and the Settlement Agreement. *See* Exhibit B.

The Class Counsel and Defendant agree that the method of notice set forth in the Settlement Agreement constitutes the best form of notice to the Settlement Class that is practicable under the circumstances. Defendant, Lands' End, shall pay all costs associated with disseminating and publishing the Notice to the Settlement Class and all associated expenses, which shall be in addition to and not deducted from the settlement compensation or the amount of attorneys' fees and expenses described in the Settlement Agreement. *See* SA §§ 4, 6, 12.

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Kazerouni Law Group, APC
Costa Mesa, California

VII. THE REQUIREMENTS OF FED. R. CIV. P. 23(b)(3) ARE ALSO MET

In addition to meeting the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a), the proposed class must also meet one of the three provisions of Rule 23(b). It is the Parties' position that the class may be certified under Fed. R. Civ. P. 23(b)(3).

For certification under Fed. R. Civ. P. 23(b)(3), a two-pronged test must be met. First, "questions of law or fact common to class members [must be found to predominate over questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Additionally, the Court must find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*. In reaching its conclusions, the Rule requires a Court to consider the interests of individual members of the class in controlling their own individual litigation, the nature and extent of any existing parallel litigation, the desirability of concentrating the litigation in one forum and the manageability of the class action. Fed. R. Civ. P. 23(b)(3); see *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615-16 (1997). The Court will find that the Rule 23(b)(3) criteria have been met.

A. Common Questions Predominate

The predominance inquiry considers whether "questions of law or fact common to the class will predominate over any questions affecting only individual members as the litigation progresses." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). This analysis starts with the underlying causes of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 133 S. Ct. 2179, 2184 (2011).

Here, Defendant's alleged misrepresentation regarding the country of origin of the product at issue in this Action clearly predominates over any questions affecting only individual members of the Settlement Class. As such, individual issues concerning identification of prospective class members and entitlement to actual

damages are capable of determination and considered "ancillary to the Court's evaluation of the predominantly common issues." *Wyatt v. Creditcare, Inc*., 2005 WL 2780684, *5 (N.D. Cal., October 25, 2005). Therefore, the "predominance" requirement is met.

B. A Class Action is Superior to Other Methods of Adjudication

The law favors settlements, particularly in class actions and complex cases where substantial resources can be conserved by avoiding the time, costs and rigors of prolonged litigation. *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976); CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS § 11.41(2003) ["By their very nature, because of the uncertainties of outcome, difficulties of proof, length of litigation, class action suits lend themselves readily to compromise."]. Furthermore, the size of individual claims is usually so small there is little incentive to sue individually.

Here, the parties have stipulated and agreed that the putative Settlement Class consisting of 38 members shall be awarded the full amount of their purchase price of the product at issue, plus interest at a rate of ten (10) percent per annum. Thus, the proposed Settlement largely achieves what Plaintiff would strive to achieve at trial, without the use of additional resources, the inherent delay of continued litigation, or the risks of an adverse trial verdict or necessity for a potential appeal.

Finally, concerns of judicial efficiency and consistency favor litigating the propriety of the Defendant's conduct by all class members in one action rather than several individual suits. Moreover, the Defendant, class representatives and a vast majority of the putative class members reside in this district, therefore the current venue is ideal. In light of the Congressional intent behind consumer protection laws such as those at issue in this Action, a class action under the circumstances presented here would be superior to any other method of adjudication.

VIII. THE PARTIES JOINTLY REQUEST AN ORDER APPROVING THE PROPOSED CLASS SETTLEMENT

The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re Gen. Motors*, 55 F.3d 768, 784 (3d Cir.1995). Because the requirements of Fed. R. Civ. P. 23 have been met, the parties respectfully request that the defined class be conditionally certified for settlement purposes and jointly request that the Court schedule a Final Approval Hearing. The parties respectfully request that the Court approve and adopt the parties' proposed Settlement Agreement.

By settling this matter, both parties avoid the expense of trial and uncertainty of outcome. If this matter proceeded to trial the net value of the recovery would be further decreased due to the costs of compelling further discovery, retaining expert witnesses, preparing for trial and possibly, engaging in post trial matters, including the lodging of an appeal. The Court, after reviewing the terms negotiated upon by the parties, will find that the settlement reached will be fair, adequate and reasonable for all involved. Therefore, the circumstances of this matter, as discussed above, heavily weigh in favor of the proposed settlement.

IX. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED

The last step in the settlement approval process is the formal fairness hearing or final approval hearing, at which time the Court may hear all evidence and arguments, for and against, to evaluate the proposed Settlement. A true and correct copy of the parties' proposed Final Approval Order is attached to the Agreement as Exhibit C.

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Costa Mesa, California

X. CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court (1) grant preliminary approval of the proposed Settlement, (2) approve the proposed Notice procedure an the form, manner and content of the Notice, (3) stay all proceedings until the Court renders a final decision regarding the approval of the Settlement, (4) conditionally certify the proposed Settlement Class, (5) appoint Plaintiff as Class Representative and Plaintiff's Counsel, Abbas Kazerounian and Joshua B. Swigart as Class Counsel, and (6) schedule a hearing for Final Approval.

Respectfully submitted,

Dated: February 12, 2016

KAZEROUNI LAW GROUP, APC

BY: */s/ Abbas Kazerounian*
ABBAS KAZEROUNIAN, ESQ.
MONA AMINI, ESQ.
Attorneys for Plaintiff and the Putative Class

Respectfully submitted,

Dated: February 12, 2016

GREENBERG TRAURIG, LLP

BY: */s/ Francis A. Citera*
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