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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS PETERSON, on behalf of
himself and all others similarly
situated,

Plaintiff,

vs.

CJ AMERICA, INC d.b.a. CJ FOODS
INC.,

Defendant.

CASE NO. 14cv2570 DMS (JLB)

**ORDER DENYING PLAINTIFF'S
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

This case comes before the Court on Plaintiff's motion for preliminary approval of class action settlement. Defendant did not file an opposition to the motion, and also did not file a notice of non-opposition, as required by Civil Local Rule 7.1.f.3.a. For the reasons set out below, Plaintiff's motion is denied.

**I.
BACKGROUND**

Plaintiff Dennis Petersen is a resident of Lakeside, California. (First Am. Compl. ¶ 9.) Defendant CJ America, Inc. produces and distributes Annie Chun's food products, including the products at issue in this case. (*Id.* ¶ 11.)

On or about July 26, 2013, Plaintiff purchased an Annie Chun's Udon Soup Bowl from a Vons grocery store in Lakeside. (*Id.* ¶ 9.) The front of the package for

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1 the Udon Soup Bowl states: “100% all natural ingredients,” and “NO MSG ADDED.”¹
2 (*Id.* at 9.) Plaintiff alleges that label, as well as the labels and packaging for fifteen other
3 Annie Chun’s products, is false and misleading because the products contain ingredients
4 that have MSG.

5 To rectify this situation, Plaintiff filed the present case on behalf of himself and
6 the following proposed class:

7 All persons who bought one or more of CJ Foods’s Subject Products after
8 November 19, 2012 with the representations “NO MSG ADDED”
9 including: Chinese Chicken Soup Bowl, Hot & Sour Soup Bowl, Korean
10 Kimchi Soup Bowl, Miso Soup Bowl, Thai Tom Yum Soup Bowl, Udon
11 Soup Bowl, Vietnamese Pho, Garlic Scallion Noodle Bowl, Korean Sweet
12 Chili Noodle Bowl, Kung Pao Noodle Bowl, Pad Thai Noodle Bowl,
13 Peanut Sesame Noodle Bowl, Teriyaki Noodle Bowl, Soy Ginger Ramen,
14 Spicy Chicken Ramen, and Spring Vegetable Ramen.

15 (*Id.* ¶ 30.)² Plaintiff alleges claims for violation of California’s Consumers Legal
16 Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq.*, California’s False Advertising
17 Law (“FAL”), California Business and Professions Code § 17500, *et seq.*, California’s
18 Unfair Competition Law (“UCL”), California Business and Professions Code § 17200,
19 *et seq.*, and breach of express warranty, California Commercial Code § 2313.

20 In response to the original Complaint, Defendant filed a motion to dismiss and
21 motion to strike, which the Court granted in part and denied in part. Specifically, the
22 Court granted Defendant’s motion to strike Plaintiff’s request for injunctive relief and
23 denied the remainder of the motions.

24 Pursuant to the parties’ joint motion, on August 18, 2015, Plaintiff filed a First
25 Amended Complaint realleging his claim for injunctive relief.

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27 ¹ MSG stands for monosodium glutamate, which is “the processed sodium salt
28 of the common amino acid glutamic acid, an amino acid which is naturally present in
many foods and food additives.” (*Id.* ¶ 16)

² This nationwide class is the first class mentioned in the First Amended
Complaint and the focus of the present motion. The Court notes, however, that Plaintiff
also alleged an alternative class consisting of only California consumers. (*Id.* ¶ 32.)

1 Ten days later on August 28, 2015, the parties filed a Notice of Settlement. The
2 terms of that Settlement are as follows: Defendant has agreed to contribute \$1.5 million
3 to a Settlement Fund from which the following items will be paid: attorneys' fees and
4 expenses not to exceed \$375,000, an incentive award to Plaintiff of \$5,000, settlement
5 administration expenses and cash awards to class members. (Decl. of Rosemary Rivas
6 in Supp. of Mot. ("Rivas Decl."), Ex. 2 at 32.)³ The class is defined as:

7 all persons in the United States and United States Territories who
8 purchased at retail one or more of the Subject Products during the Class
9 Period. Specifically excluded from the Class are: (a) CJ its employees,
10 principals, officers, directors, agents, affiliated entities legal
11 representatives, successors and assigns; (b) the judges to whom the Action
has been or is assigned and any members of their immediate families; (c)
those who purchased the Subject Products for the purpose of re-sale; and
(d) all persons who have filed a timely Request for Exclusion from the
Class.

12 (*Id.* at 23.) To receive a cash award, class members must submit a claim form declaring
13 under penalty of perjury that they purchased one of the subject products during the
14 Class Period (November 19, 2012 to the present) and provide proof of purchase. (*Id.*
15 at 32-33.) For each subject product purchased during the Class Period, the class
16 member will receive \$1.50, with a maximum recovery of \$15.00. (*Id.* at 33.) If there
17 are any funds remaining after payments of these expenses, those funds shall be
18 converted to a *cy pres* award and distributed evenly to National Farm to School
19 Network, the Mayo Clinic and Action for Healthy Kids. (*Id.* at 33.) In addition to the
20 establishment of the Settlement Fund, Defendant,

21 for a period of three years after the Effective Date, ... shall not order and/or
22 print labels or packaging of the Subject Products bearing the phrase "NO
23 MSG ADDED," and will otherwise not market and/or advertise Subject
Products shipped to distributors and/or retail customers after the Effective
Date as "NO MSG ADDED."

24 (*Id.* at 34.)

25 The notice provision of the Settlement is as follows: The proposed Settlement
26 Administrator Angeion Group will post advertisements about the Settlement on the
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28 ³ The page numbers cited are to the page numbers assigned by counsel according
to Civil Local Rule 5.1.e.

1 Internet. (Rivas Decl., Ex. 2-G at 121.) Angeion Group will also publish a Summary
2 Notice of the Settlement in the next issue of *Cooking Light* magazine. (*Id.* at 121-22.)
3 The Summary Notice will direct the public to the Settlement Website
4 www.noMSGaddedssettlement.com, where class members can receive more detailed
5 information about the settlement, including claim forms. (Rivas Decl., Ex. 2-F.) It will
6 also include a toll-free telephone number that class members may call for more
7 information. (*Id.*)

8 II. 9 DISCUSSION

10 “Because class actions present the risk that the named parties will negotiate a bad
11 deal for the absent members of the class, the Federal Rules of Civil Procedure require
12 that any settlement that binds class members must be approved by a court.” *Relente v.*
13 *Viator, Inc.*, No. 12-cv-05868-JD, 2014 U.S. Dist. LEXIS 160350, at *5 (N.D. Cal.
14 Nov. 14, 2014). “The Court’s approval involves a two-step process in which the Court
15 first determines whether a proposed class action settlement deserves preliminary
16 approval and then, after notice is given to class members, whether final approval is
17 warranted.” *Id.*

18 Preliminary approval of the settlement “requires conditionally approving the
19 class[.]” *Id.* at *6. *See also Carr v. Tadin, Inc.*, No. 12-cv-3040 JLS (JMA), 2014 U.S.
20 Dist. LEXIS 179835, at *3-4 (S.D. Cal. Apr. 18, 2014) (citing *Amchem Products, Inc.*
21 *v. Windsor*, 521 U.S. 591, 620 (1997)) (“Before granting preliminary approval of a class
22 action settlement agreement, the Court must first determine whether the proposed class
23 can be certified.”) The court must also “make a preliminary determination as to
24 whether the proposed settlement is ‘fair, reasonable, and adequate’ pursuant to” Federal
25 Rule of Civil Procedure 23(e)(2). *Id.* at *13. When the parties reach a settlement prior
26 to formal class certification, as they did in this case, “settlement approval requires a
27 ‘higher standard of fairness.’” *Lane v. Facebook, Inc.*, 696 F.3d 811, 820 (9th Cir.
28 2012). “The reason for more exacting review of class settlements reached before formal

1 class certification is to ensure that class representatives and their counsel do not secure
2 a disproportionate benefit ‘at the expense of the unnamed plaintiffs who class counsel
3 has a duty to represent.’” *Id.* Also, “[t]he dangers of collusion between class counsel
4 and the defendant . . . weigh in favor of a more probing inquiry than may normally be
5 required under Rule 23(e).” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
6 1997).

7 **A. Preliminary Class Certification**

8 As stated above, “[i]n order to obtain preliminary approval, the parties must
9 demonstrate that the class action meets the requirements of Rule 23.” *Boyd v.*
10 *Avanquest N. Am., Inc.*, No. 12-cv-04391-WHO, 2015 U.S. Dist. LEXIS 93458, at *5
11 (N.D. Cal. July 17, 2015) (citing *Amchem*, 521 U.S. at 614). In this case, Plaintiff
12 moves for preliminary class certification under Rules 23(a) and (b)(3).

13 Federal Rule of Civil Procedure 23(a) sets out four requirements for class
14 certification. Those requirements are:

- 15 (1) the class is so numerous that joinder of all members is impracticable;
16 (2) there are questions of law or fact common to the class; (3) the claims
17 or defenses of the representative parties are typical of the claims or
defenses of the class; and (4) the representative parties will fairly and
adequately protect the interests of the class.

18 Fed. R. Civ. P. 23(a) Rule 23(b)(3) requires “that the questions of law or fact common
19 to class members predominate over any questions affecting only individual members,
20 and that a class action is superior to other available methods for fairly and efficiently
21 adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

22 1. Federal Rule of Civil Procedure 23(a)

23 Turning to the first requirement of Rule 23(a), numerosity, Plaintiff asserts this
24 requirement is undisputed. (Mem. of P. & A. in Supp. of Mot. at 9.) He goes on to
25 state that discovery has revealed that thousands of Defendant’s products were sold
26 during the class period. These alleged sale numbers are sufficient to meet Plaintiff’s
27 preliminary showing of numerosity.

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1 The second requirement is commonality. This requirement is met through the
2 existence of a “common contention” that is of “such a nature that it is capable of
3 classwide resolution[.]” *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S.Ct. 2541,
4 2551 (2011). As summarized by the Supreme Court:

5 What matters to class certification ... is not the raising of common
6 “questions” – even in droves – but, rather the capacity of a classwide
7 proceeding to generate common *answers* apt to drive the resolution of the
litigation. Dissimilarities within the proposed class are what have the
potential to impede the generation of common answers.

8 *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*,
9 84 N.Y.U. L. Rev. 97, 132 (2009)).

10 Here, Plaintiff asserts the commonality requirement is satisfied because the
11 claims of all class members raise the same question, namely whether Defendant’s
12 labeling of its products as “NO MSG ADDED” was false or misleading. (Mem. of P.
13 & A. in Supp. of Mot. at 9.) The answer to this question is common to all the class
14 members, and satisfies Plaintiff’s preliminary showing of commonality.

15 The next requirement is typicality, which focuses on the relationship of facts and
16 issues between the class and its representatives. “[R]epresentative claims are ‘typical’
17 if they are reasonably co-extensive with those of absent class members; they need not
18 be substantially identical.” *Hanlon*, 150 F.3d at 1020. “The test of typicality is whether
19 other members have the same or similar injury, whether the action is based on conduct
20 which is not unique to the named plaintiffs, and whether other class members have been
21 injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
22 508 (9th Cir. 1992) (citation and internal quotation marks omitted).

23 Here, Plaintiff asserts his claims are typical of the other class members because
24 they are based on the same products, which all contain the same labels. This is true, and
25 satisfies Plaintiff’s preliminary showing of typicality.

26 The fourth and final requirement under Rule 23(a) is adequacy. This requirement
27 asks whether “the representative parties will fairly and adequately protect the interests
28 of the class.” Fed. R. Civ. P. 23(a)(4). This requirement is grounded in constitutional

1 due process concerns; “absent class members must be afforded adequate representation
2 before entry of judgment which binds them.” *Hanlon*, 150 F.3d at 1020 (citing
3 *Hansberry v. Lee*, 311 U.S. 32,42-43 (1940)). In reviewing this issue, courts must
4 resolve two questions: “(1) do the named plaintiffs and their counsel have any conflicts
5 of interest with other class members, and (2) will the named plaintiffs and their counsel
6 prosecute the action vigorously on behalf of the class?” *Id.* (citing *Lerwill v. Inflight*
7 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). The named plaintiffs and
8 their counsel must have sufficient "zeal and competence" to protect the interests of the
9 rest of the class. *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir.
10 1975).

11 Here, Plaintiff asserts he and his counsel have no conflicts with the other class
12 members. The Court agrees there are no apparent conflicts. Plaintiff also argues he and
13 his counsel will prosecute this case vigorously on behalf of the class, and the Court
14 agrees with that, also. Plaintiff and his counsel mounted a successful opposition to
15 Defendant’s motion to dismiss, negotiated the filing of a First Amended Complaint that
16 allowed for the repleading of Plaintiff’s request for injunctive relief and negotiated the
17 present settlement. Under these circumstances, Plaintiff has shown that the adequacy
18 requirement is preliminarily satisfied.⁴

19 2. Federal Rule of Civil Procedure 23(b)(3)

20 Having made a preliminary showing on the requirements of Rule 23(a), the next
21 issue is whether Plaintiff has shown that the requirements of Rule 23(b)(3) are met.
22 *Amchem*, 521 U.S. at 614-15. Certification under Rule 23(b)(3) is proper "whenever
23 the actual interests of the parties can be served best by settling their differences in a
24 single action." *Hanlon*, 150 F.3d at 1022 (internal quotations omitted). Rule 23(b)(3),
25 as discussed, calls for two separate inquiries: (1) do issues of fact or law common to the
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27 ⁴ A corollary requirement for class certification is ascertainability.
28 Ascertainability looks to whether the class is sufficiently definite or adequately defined.
Turcios v. Carma Labs, Inc., 296 F.R.D. 638, 645 (C.D. Cal. 2014). That requirement
is met in this case.

1 class "predominate" over issues unique to individual class members, and (2) is the
2 proposed class action "superior" to other methods available for adjudicating the
3 controversy. Fed. R. Civ. P. 23(b)(3). In adding the requirements of predominance and
4 superiority to the qualifications for class certification, "the Advisory Committee sought
5 to cover cases 'in which a class action would achieve economies of time, effort, and
6 expense, and promote ... uniformity of decisions as to persons similarly situated,
7 without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem*, 521 U.S. at 615 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee notes).

9 Here, Plaintiff argues the predominance requirement is satisfied because
10 Defendant engaged in the same conduct nationwide, namely labeling its products as
11 "NO MSG ADDED" despite the presence of MSG in the products. Plaintiff also asserts
12 that the statutes at issue apply an objective standard to the question of whether Plaintiff
13 and the class members were likely to be deceived, which removes any individual
14 concerns on that issue.

15 Although these arguments support a finding that the predominance requirement
16 is satisfied, Plaintiff fails to address another issue relevant to the predominance inquiry,
17 namely, whether the statutes at issue in this case should apply to class members outside
18 of California. *See Hanlon*, 150 F.3d at 1022 (citing *Phillips Petroleum Co. v. Shutts*,
19 472 U.S. 797, 821-23 (1985)) (stating "class counsel should be prepared to demonstrate
20 the commonality of substantive law applicable to all class members.") For California
21 law to apply to those class members, Plaintiff must show that California has "a
22 significant contact or significant aggregation of contacts, creating state interests, such
23 that choice of its law is neither arbitrary nor fundamentally unfair." *Sullivan v. Oracle*
24 *Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011) (quoting *Shutts*, 472 U.S. at 818). Plaintiff
25 did not address that issue despite his proposal to represent a nationwide class, and it is
26 unclear from the record whether those contacts exist in this case. Clearly, Defendant
27 sells the subject products in California, and according to the First Amended Complaint,
28 has an office in California, (FAC ¶ 10), but Defendant's headquarters appear to be in

1 South Korea, and there is no information about where the marketing or labeling
2 decisions for the subject products were made. Absent any evidence or argument on this
3 issue, Plaintiff has not made a preliminary showing that the predominance requirement
4 is met. *Cf. Walter v. Hughes Communications, Inc.*, No. 09-2136 SC, 2011 U.S. Dist.
5 LEXIS 72290, at *22-23 (N.D. Cal. July 6, 2011) (stating commonality requirement
6 unsatisfied for nationwide class based on claims under California law).

7 Turning to the superiority requirement, Rule 23(b)(3) provides a list of factors
8 relevant to this requirement:

9 (A) the class members' interests in individually controlling the prosecution
10 or defense of separate actions;

11 (B) the extent and nature of any litigation concerning the controversy
12 already begun by or against class members;

13 (C) the desirability or undesirability of concentrating the litigation of the
14 claims in the particular forum; and

(D) the likely difficulties in managing a class action.

15 Fed. R. Civ. P. 23(b)(3). This inquiry “requires the court to determine whether
16 maintenance of this litigation as a class action is efficient and whether it is fair,” such
17 that the proposed class is superior to other methods for adjudicating the controversy.
18 *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010).

19 Plaintiff argues the class members have little interest in bringing separate actions
20 given the limited amount of any potential recovery. The Court agrees that the potential
21 recovery for each class member (under the Settlement, \$15) provides little incentive for
22 class members to bring their own individual claims. Thus, this factor favors a
23 preliminary finding of superiority.

24 Plaintiff also states he is unaware of any other litigation involving the facts of this
25 case, which also favors a preliminary finding of superiority.

26 Plaintiff asserts it is desirable to concentrate this litigation in this Court because
27 it would reduce the risk of inconsistent outcomes and reduce litigation costs. However,

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1 there being no other cases involving these facts, there is no risk of inconsistent
2 outcomes or any reduction in litigation costs. Thus, this factor is neutral.

3 Finally, Plaintiff contends there would be no difficulties in managing this case
4 if the settlement is conditionally approved. Although that may be true, it does not
5 address the real question, which is whether there are any likely difficulties in managing
6 this case as a class action. On that question, there are likely difficulties, like the choice
7 of law issue discussed above, which suggests there may be difficulties in managing this
8 class action. Accordingly, this factor weighs in favor of a preliminary finding of
9 superiority.

10 After considering all of the factors, the Court agrees with Plaintiff that the
11 superiority requirement is preliminarily satisfied in this case. The Court declines,
12 however, to grant preliminary certification of the class due to Plaintiff's failure to
13 establish that the predominance requirement of Rule 23(b)(3) is met. With a nationwide
14 class, as is proposed in this case, Plaintiff should have been prepared "to demonstrate
15 the commonality of substantive law applicable to all class members." *Hanlon*, 150 F.3d
16 at 1022 (citing *Shutts*, 472 U.S. at 821-23). Plaintiff failed to make that preliminary
17 showing, and thus the Court declines to grant preliminary certification of the proposed
18 class.

19 **B. Preliminary Fairness Determination**

20 Having addressed the issue of preliminary certification of the class, the Court
21 now turns to a preliminary consideration of whether the settlement is "fair, reasonable,
22 and adequate." This determination involves a consideration of:

23 "(1) the strength of the plaintiff's case; (2) the risk, expense, complexity,
24 and likely duration of further litigation; (3) the risk of maintaining class
25 action status throughout the trial; (4) the amount offered in settlement; (5)
26 the extent of discovery completed, and the stage of the proceedings; (6)
the experience and views of counsel; (7) the presence of a governmental
participant; and (8) the reaction of the class members to the proposed
settlement."

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1 *Boyd*, 2015 U.S. Dist. LEXIS 93458, at *5 (quoting *Villegas v. J.P. Morgan Chase &*
2 *Co.*, No. CV 09-00261 SBA EMC, 2012 U.S. Dist. LEXIS 166704, at *5 (N.D. Cal.
3 Nov. 21, 2012)).

4 Plaintiff does not address the first factor, the strength of his case. Obviously,
5 Plaintiff's claims were sufficiently stated to withstand Defendant's motion to dismiss,
6 but the merits of those claims remains to be seen. The phrase "NO MSG ADDED"
7 could be interpreted literally to mean that no MSG was added to the products, which
8 Defendant contends is true, or it could be interpreted to mean there is no MSG at all in
9 the products, which Plaintiff contends is false. Both arguments are plausible. Thus, the
10 first factor is neutral.

11 The second factor looks at the risk, expense, complexity and likely duration of
12 further litigation. Considering the merits of the claims, both sides face considerable risk
13 in terms of time and expense if the litigation continues. Although the substantive claims
14 are not complex as the marketing and labels are consistent across all of the subject
15 products, issues of class certification pose some complexity as evidenced by the choice
16 of law problem. Absent settlement, the parties would have to reopen discovery,
17 designate experts, prepare and file any dispositive motions and then prepare for trial,
18 which is currently scheduled for October 11, 2016. This factor, therefore, weighs in
19 favor of approving the settlement.

20 The third factor, the risk of maintaining class status throughout the trial, does not
21 apply here given the Court's finding that Plaintiff has not met the requirements for
22 preliminary class certification.

23 The fourth factor, the amount offered in settlement, "'is generally considered the
24 most important, because the critical component of any settlement is the amount of relief
25 obtained by the class.'" *In re Celera Corp. Securities Litig.*, No. 5:10-cv-02604-EJD,
26 2015 U.S. Dist. LEXIS 157408, at *18 (N.D. Cal. Nov. 20, 2015) (quoting *Bayat v.*
27 *Bank of the West*, No. C-13-2376 EMC, 2015 U.S. Dist. LEXIS 50416, 2015 WL
28 1744342, at *4 (N.D. Cal. Apr. 15, 2015)). Here, Defendant has agreed to pay \$1.5

1 million into the settlement fund. That fund will be used to pay attorneys' fees, up to a
2 maximum of \$375,000, an incentive award to Plaintiff in the amount of \$5,000, as well
3 as all costs of notice and settlement administration, which are unknown at this time.
4 The settlement fund will also be used to pay the claims of class members. The precise
5 number of class members is unknown, but Plaintiff estimates it to be in the thousands.
6 Assuming there is at least \$1 million remaining in the settlement fund after payment of
7 the fees and costs described above, and each class member submits a claim for the
8 maximum amount of \$15, there would be enough money in the settlement fund to pay
9 the claims of more than 66,000 class members. If there is any money remaining in the
10 settlement fund after the payment of all claims, that money will be distributed in equal
11 parts to three national organizations.

12 Although the amount of the settlement fund may be fair, reasonable and adequate,
13 the Court has some concern about the *cy pres* component of the settlement. The Ninth
14 Circuit requires “that there be ‘a driving nexus between the plaintiff class and the *cy*
15 *pres* beneficiaries.’” *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (quoting
16 *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011)). “A *cy pres* award must
17 be ‘guided by (1) the objectives of the underlying statute(s) and (2) the interests of the
18 silent class members,’ and must not benefit a group ‘too remote from the plaintiff
19 class[.]’” *Id.* (citations omitted). In this case, the underlying statutes are California’s
20 false advertising law, unfair competition law and the CLRA. “As California courts have
21 stated, ‘[t]he UCL is designed to preserve fair competition among business competitors
22 and protect the public from nefarious and unscrupulous business practices,’ and the
23 purpose of the CLRA is similarly ‘to protect consumers against unfair and deceptive
24 business practices[.]’” *Id.* at 866 (citations omitted). In cases based on these statutes,
25 “appropriate *cy pres* recipients are not charities that feed the needy, but organizations
26 dedicated to protecting consumers from, or redressing injuries caused by, false
27 advertising.” *Id.* at 867.

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1 Here, the parties selected the Mayo Clinic, Action for Healthy Kids and the
2 National Farm to School Network as the proposed *cy pres* recipients. Plaintiff asserts
3 these organizations provide consumers with information on food labeling and food
4 choices, (Mem. of P. & A. in Supp. of Mot. at 5-6), but he fails to provide any specific
5 evidence to support that assertion. Indeed, the evidence he does cite, the organizations'
6 websites, reflects the Mayo Clinic's mission is "To inspire hope and contribute to health
7 and well-being by providing the best care to every patient through integrated clinical
8 practice, education and research[;]" www.mayoclinic.org. Action for Healthy Kids's
9 mission is "To engage diverse organizations, leaders and volunteers that foster sound
10 nutrition and good physical activity in children, youth and schools[;]"
11 www.actionforhealthykids.org, and "[t]he National Farm to School Network is an
12 information, advocacy and networking hub for communities working to bring local food
13 sourcing and food and agricultural education into school systems and preschools."
14 www.farmtoschool.org. All of these are noble and lofty goals, but none of them
15 appears to serve the objectives of the statutes at issue in this case or the interests of class
16 members. Thus, the proposed *cy pres* recipients do not appear to meet the Ninth
17 Circuit's standards.

18 The next factor in considering whether the proposed settlement is fair, reasonable
19 and adequate is the extent of discovery completed and the stage of the proceedings.
20 Plaintiff states the parties conducted "adequate discovery to make an informed
21 judgment on the claims[;]" and he lists the discovery completed. (Mem. of P. & A. in
22 Supp. of Mot. at 18.) The Court agrees this discovery was adequate for the parties to
23 make an informed decision about the settlement. The proceedings had progressed to the
24 end of the discovery period and the beginning of expert discovery, and were sufficiently
25 advanced at the time the settlement was reached. Accordingly, this factor weighs in
26 favor of preliminary approval.

27 The next factor is the experience and views of counsel. The Court agrees that
28 counsel are fully experienced in these matters, and at least Plaintiff's counsel believes

1 the settlement is fair, reasonable and adequate and should be preliminarily approved.
2 (Rivas Decl. ¶ 16.) Therefore, this factor weighs in favor of preliminary approval.

3 The final two factors are the presence of a governmental participant and the
4 reaction of class members to the proposed settlement. There is no evidence of
5 compliance with 28 U.S.C. § 1715(b),⁵ and thus no governmental participant in this
6 case. Therefore this factor is neutral.⁶ The final factor also does not apply at this stage
7 as the class has yet to receive notice of the settlement.

8 Considering the factors discussed above, there is only one that weighs against a
9 finding that the settlement is fair, reasonable and adequate: the *cy pres* recipients.
10 Otherwise, the factors weigh in favor of finding the settlement is fair, reasonable and
11 adequate.

12 **III.**
13 **CONCLUSION**

14 For the reasons set out above, the Court denies Plaintiff’s motion for preliminary
15 approval of the settlement in this proposed class action. Absent a showing that
16 California law should apply to the claims of class members outside of California, Rule
17 23(b)(3)’s predominance requirement is not met, and the class cannot be conditionally
18 certified. Furthermore, the *cy pres* recipients do not meet the Ninth Circuit’s test in

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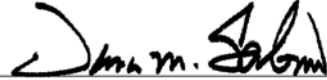
25 ⁵ Section 1715(b) states: “Not later than 10 days after a proposed settlement of
26 a class action is filed in court, each defendant that is participating in the proposed
27 settlement shall serve upon the appropriate State official of each State in which a class
28 member resides and the appropriate Federal official, a notice of the proposed settlement
....” 28 U.S.C. § 1715(b).

⁶ If the parties decide to renegotiate the settlement and submit that settlement for
court approval, they should submit evidence of compliance with § 1715(b).

1 *Dennis v. Kellogg*, which precludes the Court from finding the settlement is fair,
2 reasonable and adequate.

3 **IT IS SO ORDERED.**

4 DATED: December 16, 2015



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6 HON. DANA M. SABRAW
7 United States District Judge
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