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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEGAN SCHMITT, DEANA REILLY, CAROL ORLOWSKY, and STEPHANIE MILLER BRUN, individually and on behalf of themselves and all others similarly situated, Plaintiffs, v. YOUNIQUE, LLC, Defendant.	Case No. 8:17-cv-01397-JVS-JDE **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** *Filed Concurrently With Notice of Motion, Supplemental Declaration of Adam Gonnelli, Supplemental Declaration of Michael E. Hamer* DATE: April 6, 2020 TIME: 1:30 p.m. DEPT: 10C Complaint Filed: 8/17/17

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MEMORANDUM OF POINTS AND AUTHORITIES

On September 16, 2019, this Court granted the motion of Plaintiffs Megan Schmitt, Deana Reilly, and Stephanie Miller Brun ("Plaintiffs") for Preliminary Certification of Settlement Class, Preliminary Approval of Settlement, and Authorization of Notice. *See* ECF No. 255 ("Preliminary Approval Order"). Per the Preliminary Approval Order, on November 18, 2019, Plaintiffs filed their Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses to Class Counsel and Service Awards. *See* ECF No. 259 ("Fee Motion"). Plaintiffs, individually and on behalf of all others similarly situated, now move this Court for final approval of the Class Settlement Agreement ("Settlement Agreement" or "S.A.") and for certification of the Settlement Class.[1]

I. INTRODUCTION

This proposed class action settlement ("Settlement") is an excellent result for the Settlement Class and should be approved. The Settlement would resolve the claims of Settlement Class members who purchased Defendant Younique LLC's ("Defendant," together with Plaintiff, the "Parties") "Moodstruck 3D Fiber Lashes" (the "Product") between October 1, 2012 and July 31, 2015. *See* S.A. § 2.I. The $3,250,000 Settlement Fund paid for by Defendant will provide each member of the Settlement Class with a substantial payment, and Defendant has also agreed to make material and beneficial changes to its practices by conducting testing of its Product for three years to verify that its ingredients are "natural."

As detailed in the Supplemental Declaration of Michael E. Hamer ("Supplemental Hamer Decl."), the Settlement Administrator implemented a wide-ranging Notice Plan utilizing, among other things, email, direct mail, and online advertisements directed at Defendant's customers. *See id.* The response thus far from the Settlement Class has been

[1] Any terms not otherwise defined herein have the same meaning as in the Settlement Agreement, attached as Exhibit A to the Declaration of Adam Gonnelli in support of Plaintiffs' Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses to Class Counsel and Service Awards ("Gonnelli Fee Decl.," ECF No. 260).

overwhelmingly positive: with the deadline for Settlement Class members to object or opt-out having passed on January 21, 2020, *see* ECF No. 257, no objections and only four (4) opt-outs have been received. *See* Supplemental Hamer Decl., ¶¶ 9-10; Supplemental Declaration of Adam Gonnelli in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses to Class Counsel and Service Awards ("Supplemental Gonnelli Decl."), ¶ 3.

This class action satisfies the requirements of Federal Rule of Civil Procedure 23, and therefore the Settlement Class should be finally certified for purposes of the settlement. Moreover, the factors enumerated by Federal Rule of Civil Procedure 23(e)(2), as well as the standards set forth by the Ninth Circuit for the procedural and substantive fairness of the Settlement, including in *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575-76 (9th Cir. 2004), weigh strongly in favor of final approval of the Settlement.[2]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. History of the Litigation and Settlement Negotiations

Plaintiff Megan Schmitt filed this action on August 14, 2017, alleging that Defendant's representation that the Product fibers were composed of "Natural Fibers" and "100% Natural Green Tea fibers," constituted fraudulent, unfair, unlawful, and deceptive business practices, in violation of the laws of the state of California. *See* ECF No. 1. An amended complaint filed on October 13, 2017, added Plaintiffs Deana Reilly, Carol Orlowsky, and Stephanie Miller-Brun, and causes of action alleging violations of the laws of Ohio, Florida, and Tennessee. *See* ECF No. 43. Plaintiffs sought both injunctive and monetary relief. *See id.* at 37-38.

On November 3, 2017, Defendant moved to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *See* ECF No. 45. The Court

[2] Plaintiffs previously submitted a [Proposed] Final Approval Order and Judgment with their Fee Motion. *See* ECF No. 258-1.

granted in part and denied in part Defendant's motion. *See* ECF No. 53. Thereafter, Plaintiffs filed a Second Amended Complaint (ECF No. 58), which Defendant answered, explicitly denying Plaintiffs' allegations regarding the accuracy of the label and the ingredients of the Product at issue. *See* ECF No. 60.

On October 4, 2018, Plaintiff Kirsten Bowers filed a class action complaint in the Circuit Court of Jackson County in the State of Missouri styled *Bowers v. Younique LLC*, 1816-CV25646. Bowers asserted similar factual claims as those in *Schmitt*. Defendant disputed, and continues to dispute, the allegations in both *Schmitt* and *Bowers*. There has been no decision on class certification in *Bowers*.

Following hard-fought and contentious discovery, Plaintiffs moved for class certification. *See* ECF No. 77. Defendant opposed the motion and moved for summary judgment, or in the alternative, summary adjudication. *See* ECF Nos. 94 and 106. On December 21, 2018, the Court granted Defendant's summary judgment motion with respect to some of Plaintiffs' causes of action, including all of Orlowsky's claims. *See* ECF No. 136. On January 10, 2019, the Court certified classes of California, Florida, and Ohio consumers. *See* January 10, 2019 Order Granting In Part And Denying In Part Plaintiffs' Motion For Class Certification ("Class Certification Order," ECF No. 149). Defendant vigorously attacked certification and sought interlocutory review by the Ninth Circuit, decertification by this Court, and stays of class notice. The parties also submitted motions *in limine* and competing jury instructions.

The Parties made numerous efforts to resolve the dispute throughout the litigation. *See* Gonnelli Fee Decl., ¶¶ 80-84. A first attempt at mediation in 2018 yielded no results, but a second mediation with the Honorable Leo Pappas (Ret.) on April 23, 2019 brought the Parties closer to a settlement. *See id.* Discussions continued through the mediators and between counsel, ultimately resulting in the Settlement Agreement. *See id.*

On September 16, 2019, the Court granted preliminary approval of the Settlement Agreement. *See* ECF No. 255. On November 18, 2019, Plaintiffs filed their Fee Motion.

See ECF No. 259.

B. Terms of the Settlement

1. Settlement Benefits

The proposed settlement provides for the creation of a Settlement Fund in the amount of $3,250,000.00 which shall pay for: (1) any necessary taxes and tax expenses of the Fund; (2) all payments of valid claims from members of the Settlement Class; (3) attorneys' fees and expenses to be determined by the Court; (4) Service Awards; and (5) all costs of settlement notice and administration. S.A. § IV.A.1.

The Settlement provides for monetary relief to each member of the Settlement Class who submits a timely and valid Claim Form pursuant to the terms and conditions of this Agreement in the form of a cash refund. *See id.* § V.J. The total amount of the payment to each member of the Settlement Class will be based on the number of valid claims submitted. *See id.* The Settlement Administrator shall determine each authorized Settlement Class member's pro rata share based upon each Settlement Class member's Claim Form and the total number of valid claims. *See id.* Accordingly, the actual amount recovered by each Settlement Class member who submits a timely and valid claim will not be determined until after the Claim Period has ended and the total amount of valid claims submitted is determined. *See id.*

Any value remaining in the Residual Fund shall increase approved Settlement Class members' relief on a *pro rata* basis until the Residual Fund is exhausted, unless a supplemental distribution is economically unfeasible, in which case the parties will meet and confer in good faith to reach an agreement on a *cy pres* recipient approved by the Court. *See* S.A. § V.L. Under no circumstances will any portion of the Settlement Fund revert to Defendant. *See id.*

Furthermore, under the Settlement Agreement, Defendant agrees that, for a period of three years, if Defendant elects to describe an ingredient in its current or future fiber lash products as "natural," Defendant will have the product tested by a reputable U.S.-based

laboratory every six months to confirm the ingredients identified as "natural" are as described. *See id.* § IV.B.1. Such testing shall be undertaken to confirm that the ingredients are natural and not "synthetic" as that term is defined in the Organic Foods Production Act of 1990, at 7 U.S.C. § 6502 (21). *See id.*

2. Requested Attorneys' Fees, Expenses and Service Awards

In Plaintiffs' previously filed Fee Motion, Class Counsel has applied for attorneys' fees in the amount of $1,083,333.33, and expenses of $152,744.79. *See id.* The Fee Motion also addresses Class Counsel's application for Service Awards of $15,000 each to Plaintiffs, $2,500 to the named plaintiff in the parallel Bowers action resolved as part of the Agreement, and $500 each to three members of the Settlement Class who significantly contributed to the litigation. *See id.* at 22-24.

C. Notice Provided to the Settlement Class

The Settlement Class received notice in various ways through the robust Notice Plan developed and implemented by the Heffler Claims Group ("Heffler"), the Settlement Administrator jointly agreed to by the Parties and approved by the Court. *See* S.A. § VI.A; Preliminary Approval Order at 20. The Notice Plan is described in the Supplemental Hamer Declaration and included the following:

1. Email Notice: On October 23, 2019, Heffler emailed a total of 790,247 email notices to all persons on the Class List for whom a facially valid email address was available. *See* Supplemental Hamer Decl., ¶ 6. Heffler tracked and monitored any emails that bounced back, and attempted to resend any such emails. *See id.* A total of 105,486 emails were ultimately unsuccessful. *See id.* A copy of the email notice that was emailed is attached as Exhibit C to the Supplemental Hamer Declaration.

2. Mailed Notice: As required by the Notice Plan, between November 1 and November 8, 2019, a total of 132,088 Postcard Notices were mailed to Settlement Class members for whom (a) the email notice bounced back and (b) a physical street address was provided in the Class List. *See id.*, ¶ 7. The Postcard Notices were mailed as follows: (a) on November 1, 2019, a total of 10,395 Postcard Notices were mailed; (b) on November 5, 2019, a total of 15,153 Postcard Notices were mailed; and (c) on November 8, 2019, a total of 106,540 Postcard Notices were mailed. *See id.* Thus, through November 8, 2019, a total of 132,088 Postcard Notices had been mailed.

Through December 31, 2019, Heffler had received a total of 11,985 Postcard Notices returned by the United States Postal Service ("the USPS") as undeliverable. *See id.*, ¶ 8. Of these, Heffler has remailed a Postcard Notice to the 173 that contained a forwarding address supplied by the USPS and performed skip-tracing research through LexisNexis on the 11,812 returned without a forwarding address. *See id.* Heffler then promptly remailed a Postcard Notice to the 8,726 updated addresses obtained from LexisNexis. *See id.* Subsequent to December 31, 2019, Heffler has received a total 342 Postcard Notices returned by the USPS as undeliverable and promptly remailed a Postcard Notice to the 29 persons whose Postcard Notices were returned with a forwarding address. *See id.* A copy of the Postcard Notice mailed to Settlement Class members is attached as Exhibit D to the Supplemental Hamer Declaration.

3. Targeted Media Program: Heffler implemented a targeted notice program consisting of internet and mobile banners via Google and social media outlets Facebook, Instagram, and Twitter. *See id.*, ¶ 5. Banner notifications specifically targeted to reach Younique customers were published online October 23, 2019 through November 21, 2019. *See id.* On Google, Heffler matched class member records with Gmail accounts to create a custom audience of known class members. *See id.* Ads were served to class members as they used Google search and as display ads at the top of their Gmail inboxes. *See id.* On Facebook and Instagram, Heffler matched class member records to serve ads to class members on their Facebook and Instagram newsfeeds. *See id.* Additionally, ads were served to users who liked Younique pages, posted about Younique, as well as users who purchase cosmetics online. *See id.* On Twitter, Heffler matched class member records to serve ads to class members. *See id.* Ads were also served to users who follow Younique pages or Tweet about Younique. *See id.* A total of more than 10 million online impressions were served. *See id.* Copies of the online ads are attached as Exhibit B to the Supplemental Hamer Declaration.

4. Settlement Website: On or about October 28, 2019, Heffler established and activated the Settlement Website. *See id.*, ¶ 11. The Settlement Website contains downloadable copies of, *inter alia*, the Settlement Notice (in English and Spanish), Claim Form, Settlement Agreement, Complaint, Motion for Preliminary Approval, Preliminary Approval Order and the Fee Motion. *See id.* It also contains a Frequently Asked Questions page and an "Important Dates" section reflecting key dates and deadlines regarding the settlement. *See id.* Settlement Class members are also able to file claims through the website. *See id.* Through March 5, 2020, the Settlement Website has hosted 127,865 user sessions with a total of 317,385 page views. *See id.* Copies of the Settlement Notices and Claim Forms posted to the Settlement Website are attached as Exhibit F to the Supplemental Hamer Declaration.

5. Print Notice: Heffler caused the 1/8-page Published Notice to be published in the San Jose Mercury on Monday, October 28, 2019, Monday, November 4,

2019, Monday, November 11, 2019, and Monday, November 18, 2019. *See id.*, ¶ 4. Verification of the publications through November 11, 2019 were attached as Exhibit C to the November 18, 2019 Hamer Declaration. *See* ECF No. 263 ("Hamer Declaration"). The .pdf "e-tearsheet" obtained from personnel of San Jose Mercury for the November 18, 2019 publication is attached as Exhibit A to the Supplemental Hamer Declaration.

6. Toll-Free Telephone Helpline: Heffler established and has maintained a toll-free number (1-844-491-5745) to allow Settlement Class members to call and receive information about the settlement. *See id.*, ¶ 3.

7. Case-Specific Post Office Box: Heffler established and continues to use the post office box address of: Schmitt v. Younique LLC Settlement; c/o Settlement Administrator; P.O. Box 59419; Philadelphia, PA 19102-9419 ("the Settlement P.O. Box") to receive Requests for Exclusion, undeliverable Class Notices, paper Claim Forms, inquiries, and other communications about the settlement. *See id.*, ¶ 2.

On August 22, 2019, Heffler sent by First-Class Certified Mail a CAFA notice packet, and an accompanying CD containing the documents required under 28 U.S.C. §1715(b)(l)-(8), to the Attorney General of the United States and to the twelve (12) state Attorneys General identified in the Manifest for the CAFA notice. *See* Hamer Declaration ¶ 4 & Ex. B.

D. Processing of Claims and Method of Distributing Relief

Heffler set forth the details of its method for processing claims and distributing relief in the Supplemental Hamer Declaration. *See* ¶ 14. Through March 5, 2020, Heffler has received and logged a total of 68,458 Claim Forms, as follows: (a) a total of 67,090 Claim Forms filed on-line through the Settlement Website; and (b) a total of 1,368 filed on paper and received through the U.S. Mail. *See id.*. ¶ 13. Because there are clear indications that many of these claims are clearly facially invalid and/or fraudulent, Heffler continues to identify and audit the claims. *See id.* Heffler anticipates that its claims review will be completed by April 30, 2020. *See id.* A total of 65,631 claimants have claimed fewer than 34 units, and those units total 346,024 - or an average of approximately 5.3 units per claim. *See id.*

Once all valid claims have been tallied, Heffler will cause all electronic and hard copy

Claims to be processed, reviewed, and de-duplicated prior to preparing the finalized distribution list of Settlement Class members to receive payment. *See id.*, ¶14. Once the distribution list has been prepared, Heffler will issue bank checks to claimants at the addresses that the claimants provided during the claims process. *See id.* And in an effort to ensure that the checks will reach the intended claimant, any checks returned as undeliverable by the USPS which have a forwarding address will be re-mailed to that forwarding address, and any checks that are returned as undeliverable by the USPS without a forwarding address will be subject to address verification searches ("skip tracing"), utilizing a wide variety of data sources, including public records, real estate records, electronic directory assistance listings, etc., to locate updated addresses. *See id.* Checks will then be re-mailed to updated addresses located through skip tracing. *See id.*

III. ARGUMENT

A. The Court Should Grant Final Approval of the Proposed Settlement

Fed. R. Civ. P. 23(e)(2) set forth specific criteria that the Court must consider in determining whether a proposed settlement is fair, reasonable and adequate:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Courts in the Ninth Circuit have applied a number of additional factors in evaluating the adequacy of a class action settlement:

(1) the strength of the plaintiffs' case;

(2) the extent of discovery completed and the stage of the proceedings;

(3) the presence of a governmental participant; and

(4) the reaction of the class members of the proposed settlement.

Churchill, 361 F.3d at 575-76; *see also In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Most of these factors were also addressed in Plaintiffs' Motion for Preliminary Approval (ECF No. 251) and still weigh strongly in favor of final approval.

1. The Rule 23(e)(2) Factors Weigh in Favor of Final Approval

a. The Class Representatives and Class Counsel Have Adequately Represented the Class

Class Counsel are highly qualified with substantial experience litigating complex class actions of all kinds. *See* Gonnelli Fee Decl., ¶ 92, Ex. B. Additionally, as detailed in the Fee Motion, Class Counsel shepherded Plaintiffs and the Settlement Class through a gauntlet of impediments, facing and overcoming nearly every obstacle a plaintiff can face prior to trial in a class action. *See id.*, ¶¶ 8-85. The Class Representatives also made significant contributions to the litigation and have no conflicts with the Settlement Class. *See* Fee Motion at 22-24. Accordingly, this factor favors final approval.

b. The Proposal Was Negotiated at Arm's Length

The Settlement was negotiated during and after two arms-length mediation sessions with experienced mediators. *See* Gonnelli Fee Decl., ¶¶ 80-81; *see also G. F. v. Contra Costa Cnty.*, No. 13-cv-03667-MEJ, 2015 U.S. Dist. LEXIS 100512, at *43 (N.D. Cal. July 30, 2015) ("[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive") (internal quotation marks omitted). Moreover, the Settlement does not bear any signs that the Ninth Circuit has identified as potentially indicating collusion or conflicts of interest:

> (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;
>
> (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds; and
>
> (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.

In re Bluetooth, 654 F.3d at 946 (internal quotation marks omitted). Here, Class Counsel will be paid from the same non-reversionary Settlement Fund as members of the Settlement Class and so had every reason to negotiate the largest fund possible. S.A. § X.A. Plaintiffs' attorneys' fee request also constitutes no more than 33% of the Settlement Fund, which is within the range of permissible percentage-based awards. *See* Fee Motion at 11-12. And the Settlement Agreement does not allow any of the Settlement Fund to revert to Defendant. *See id*. at § X.L. This factor weighs strongly in favor of the Court finally approving the Settlement.

c. The Relief Provided to the Class Is Adequate

i. The Costs, Risks, and Delay of Trial and Appeal

Plaintiffs and their counsel believe their claims are meritorious, but Defendant has raised, and would continue to raise, challenges to the legal and factual basis for such claims. Defendant has filed a number of pre-trial motions, including challenges to the admissibility of the reports of both Plaintiffs' damages expert and liability expert. Even if Plaintiffs' damages calculations were not excluded, Defendant would vigorously challenge the accuracy of those calculations and it would be Plaintiffs' burden to prove how much, if any, of the Product's price is based on the "natural" representations at issue.

Moreover, while three state classes have already been certified in this case, Defendant has filed a motion for decertification arguing that Plaintiffs failed to present common evidence of falsity and that their damages calculations contained various errors and did not measure Plaintiffs' harm. *See* ECF No. 214. While Plaintiffs opposed the decertification motion, *see* ECF No. 216, and believe that the Court would ultimately uphold the

certification decision, the risk of decertification in this case supports final approval. *See Wallace v. Countrywide Home Loans. Inc.*, NO. SACV 08-1463-JLS (MLGx), 2015 U.S. Dist. LEXIS 190929, at *16 (C.D. Cal. Apr. 17, 2015) ("The risk of decertification should the action proceed favors approving the settlement"); *McKenzie v. Fed. Express Corp*., No. CV 10-02420 GAF (PLAx), 2012 U.S. Dist. LEXIS 103666, at *4 (C.D. Cal. July 2, 2012) ("settlement avoids all possible risk [of decertification]").

In light of the risks and uncertainties presented by the pending motions and a potential jury trial in this action, the $3,250,000 Settlement Fund achieved for the Class in this case is an excellent result. "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982). The Ninth Circuit has explained "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id*. at 625 (citations omitted). Rather, any analysis of a fair settlement amount must account for the risks of further litigation and trial, as well as expenses and delays associated with continued litigation. *See Retta v. Millennium Prods.*, No. CV15-1801 PSG AJWx, 2017 U.S. Dist. LEXIS 220288, at *15 (C.D. Cal. Aug. 22, 2017).

Even so, the Settlement Fund represents a significant portion of Plaintiffs' potential recovery in this case. If the Court grants Class Counsel's requested attorneys' fees and expenses (totaling $1,236,078.12), requested Service Awards (totaling $49,000), and the Settlement Administrator incurs costs up to the currently anticipated $285,000, *see* Supplemental Hamer Decl., ¶ 15, approximately $1,679,921.88 will remain to pay for valid claims by Settlement Class members. As of March 5, 2020, based on the claims submitted so far, the Settlement Administrator currently estimates that there may ultimately be 65,631 valid claims seeking refunds for a total of 346,024 Products, or an average of 5.27 Products

per claim. *See id.*, ¶ 13.[3] If these were the final calculations, and based on a retail value of $29 per Product, the total refunds sought would be $10,034,696. This would mean that each Settlement Class member submitting a valid claim would receive a refund of 17.1% of their $29 purchase price for each Product purchased, or an average of $4.85 per claimed Product and $25.60 per claimant. This is an excellent result for the Settlement Class. *See, e.g., In re Celera Corp. Sec. Litig.*, No. 5:10-CV-02604-EJD, 2015 U.S. Dist. LEXIS 157408, at *18-19 (N.D. Cal. Nov. 20, 2015) (granting final approval on a settlement fund which represented 17% of the plaintiffs' total estimated damages); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) (granting final approval of a settlement fund where the gross class recovery was 9% of maximum potential recovery); *Destefano v. Zynga, Inc.*, No. 12- cv-04007-JSC, 2016 U.S. Dist. LEXIS 17196, at *37-38 (N.D. Cal. Feb. 11, 2016) (finding settlement amount reasonable where it represented "approximately 14 percent of likely recoverable aggregate damages at trial.").

Moreover, the Settlement Agreement not only provides substantial payments to Settlement Class members who elect to file claims, but also provides significant injunctive relief that benefits the Settlement Class and the public, further supporting Plaintiffs' fee request. Specifically, the Settlement Agreement provides that, if Defendant elects to describe an ingredient in its current or future fiber lash products as "natural," Defendant will have the product tested by a reputable U.S.-based laboratory every six months to confirm the ingredients identified are in fact "natural" as described and remain so. S.A., § IV.B.1.

[3] The estimated 346,024 Products, when set against the approximately 3,000,000 units sold in the states covered by the Settlement Agreement, represents an 11.5% claims rate, well above the norm in consumer class action litigation. *See, e.g., e.g., Moore v. Verizon Communs.*, Inc., No. C 09-1823 SBA, 2013 U.S. Dist. LEXIS 122901, at *29-30 (N.D. Cal. Aug. 28, 2013) (approving class settlement with 3% claim rate); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1257 (C.D. Cal. 2016) (approving class settlement with 2.75% claim rate); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2016 U.S. Dist. LEXIS 9944, at *25 (N.D. Cal. Jan 26, 2016) ("claims rates in consumer class actions 'rarely exceed seven percent even with the most extensive notice campaigns'") (quoting *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 329 n.60 (3d Cir. 2011)) (*en banc*).

Such testing will be undertaken to confirm that the ingredients are natural and not "synthetic" as that term is defined in the Organic Foods Production Act of 1990, at 7 U.S.C. § 6502(21). *See id.* This testing will assure that the Settlement Class and the public will not be exposed to fiber lashes from Defendant that are mislabeled as "natural," adds value to the settlement, and supports the reasonableness of the requested fees weighs in favor of final approval. *See In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 37286, at *21 (N.D. Cal. Mar. 18, 2013) (settlement value "includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief"); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("'It is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'") (quoting *Officers for Justice*, 688 F.2d at 628).

ii. The Effectiveness of Method of Distributing Relief to the Class and Processing Claims

The Settlement Administrator is highly skilled in processing class claims and distributing the proceeds to Claimants. As described *supra*, Section II.B.1, the Settlement Agreement provides that Settlement Class members who file valid claims will receive refunds for the purchase price of the Product, while the Settlement Administrator retains the right to request verification or more information regarding the purchase of the Product for the purpose of preventing fraud. *See* S.A., § V.F. This is in line with the instruction provided by the Committee Notes on Rules—2018 Amendment to Fed. R. Civ. P. 23 ("2018 Committee Notes"): "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." The proposed method of processing claims here strikes that delicate balance, and this factor weighs in favor of final approval.

iii. The Proposed Attorneys' Fees

Plaintiffs are seeking attorneys' fees in the amount of one-third of the Settlement Fund, $1,083,333.33. As detailed in the Fee Motion, such requests are frequently granted in class actions in this Circuit, including consumer protection class actions. *See id.* at 11-

12. As the attorney's fees Plaintiffs seek are in line with typical awards in this Circuit, and the fee request will be reviewed by the Court (and has been made available for review by the Settlement Class), this factor weighs in favor of final approval.

iv. There Are No Agreements Required to Be Identified Under Rule 23(e)(3)

Apart from the Settlement Agreement and other materials associated with the negotiation of the Settlement (and disclosed herein), there are no additional agreements between the Parties or with others made in connection with the Settlement. *See* ECF No. 251-1, ¶ 22. Accordingly, this factor weighs in favor of final approval of the Settlement.

d. The Proposal Treats Members of the Settlement Class Equitably Relative To Each Other

The 2018 Committee Notes explain that this factor "calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *Id.*

None of the concerns raised by the 2018 Committee Notes are present here. Each member of the Settlement Class is treated in the same manner with respect to the claims they are releasing and their eligibility for an award, with the amount of the award dependent on the number of Products purchased by each Settlement Class member. This approach provides each participating Settlement Class members with the equal opportunity to obtain a payment commensurate with their potential losses, and is fully in line with the 2018 Committee Notes' directive to "deter or defeat unjustified claims" without being "unduly demanding." *Id.* Accordingly, this favor weighs in favor of final approval of the Settlement.

2. The Proposed Settlement Satisfies the *Churchill* Factors

Churchill sets forth the factors that the Ninth Circuit considers in valuating class actions settlement. *See id.*, 361 F.3d at 575-76. Many of those factors overlap with the Rule

23(e)(2) requirements and are discussed above. *Churchill* sets forth several additional factors which further weigh in favor of final approval in this case:

a. The Strength of Plaintiffs' Case

Plaintiffs believe they have built a strong case for liability and damages. The heart of Plaintiffs' claims is that Defendant adopted, promulgated, and benefited from the representation that the Product was composed of natural ingredients. Plaintiffs believe there is ample evidence that the fibers were not "natural." Testing by the Plaintiffs' liability expert demonstrated that the Product contained synthetic ingredients rather than "100% Natural Green Tea Fibers" as represented by Defendant. *See* ECF No. 157. In addition, in January 2014, Defendant received an ingredient list from its China-based vendor, Six Plus, which stated that the sole ingredient in the fibers was not natural green tea but was instead polyvinyl alcohol fiber. *See* ECF No. 111 at 9. During the subsequent 18 months that Defendant continued selling the Product, Defendant did not disclose that the Product's fibers were synthetic. Plaintiffs believe that they could prove Defendant's deceptive conduct using this evidence, while Defendant contends that it had no obligation to make disclosures because it had already changed suppliers by the time it received the Six Plus email. *See id.* The Court denied Defendant's motion for summary judgment with respect to a number of Plaintiffs' claims. *See* ECF No. 136.

Plaintiffs also calculated classwide price-premium damages in this case using a hedonic regression model designed to capture how much more Defendant charged over similar products that did not contain a "natural" representation on the packaging. ECF No. 146-2.[4] Despite this, as discussed *supra*, Section III.A.1.c.i, significant litigation risks and risks of delay still exist, which militate in favor of the settlement.

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[4] Defendant moved to exclude both Plaintiffs' liability and damages expert. *See* ECF Nos. 141 and 142.

b. The Extent of Discovery Completed and The Stage of Proceedings

Before entering into settlement discussions on behalf of class members, counsel should have "sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citations omitted). This litigation has been ongoing for more than two years and the parties have formally exchanged extensive discovery. *See* Gonnelli Fee Decl. ¶¶ 17-40. Defendant provided almost 6,000 documents in discovery regarding the sales, marketing and composition of the Product. *See id.*, ¶¶ 21-25. Plaintiffs conducted depositions of Defendant's corporate representatives and Defendant deposed Plaintiffs and Plaintiffs' experts. *See id.*, ¶¶ 26, 37.

As detailed *supra*, the Parties have also briefed a motion to dismiss, a motion for summary judgment, motions for certification and decertification, motions *in limine* and appellate motions. They also completed nearly all trial-related documents and were prepared to proceed to the pretrial conference in February. Accordingly, the Parties are now well aware of the strengths and weaknesses of their claims and defenses, and are well-equipped to negotiate the Settlement Agreement. This factor supports final approval.

c. The Presence of a Government Participant

As there is no governmental participant in this action this factor is irrelevant for the purposes of final approval.

d. The Reaction of Members of the Settlement Class to the Proposed Settlement

The Settlement Class has reacted entirely positively to the Settlement, with no objections and only four (4) requests for exclusion by the deadline, while at the same time submitting over 65,631 claims for more than 346,024 Products. *See* Supplemental Hamer Decl., ¶¶ 9-10, 13; Supplemental Gonnelli Decl., ¶ 3. Therefore, this factor strongly supports final approval of the Settlement. *See, e.g., Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW(FFMx), 2019 U.S. Dist. LEXIS 180474, at *22 (C.D. Cal. Oct. 10, 2019) ("The absence of any objections to the Settlement Agreement among Class Members supports final approval.") (internal quotations and brackets omitted).

Accordingly, the factors discussed above counsel in favor of final approval.

B. The Court Should Certify the Settlement Class

1. The Class Meets the Requirements of Rule 23(a)

The Court has already certified classes of consumers who purchased the Product during the Class Period in California, Florida, and Ohio. *See* Class Certification Order. For the purposes of settlement, the Parties ask the Court to extend the Settlement Class to include purchasers from Michigan, Minnesota, Missouri, New Jersey, Pennsylvania, Tennessee, Texas and Washington.

Before assessing the Parties' settlement, the Court should first confirm that the underlying settlement class meets the requirements of Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019). Each of the state Settlement Classes meet the prerequisites for class certification under Rule 23(a): numerosity, commonality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a).[5]

Here there is no dispute that thousands of people in each of the relevant states purchased Defendant's Product during the proposed class period. *See* ECF No. 251-1, ¶ 21. Therefore, numerosity is easily satisfied. The proposed class also satisfies the commonality requirement of Rule 23(a), which requires that class members' claims "depend upon a common contention" of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs contend that the central questions behind the claims in this litigation are (1) did the label misrepresent the ingredients; (2) what were the fibers in the Product made of; (3) were the representations on the label material to a

[5] While the Court declined to certify a class of Tennessee purchasers on the grounds that Plaintiff Orlowsky did not have standing to sue under Tennessee law (*see* Class Certification Order at 6) a Tennessee class of consumers should be included for purposes of settlement. As with each of the other proposed state classes, the class of Tennessee consumers meets the requirements of Rules 23(a) and 23(b)(3).

reasonable consumer; and (4) what is the proper measure of class damages? The answers to these questions depend on common evidence that does not vary from one class member to another, and so can be fairly resolved—whether through litigation or settlement—for all class members at once. *See also* Class Certification Order at 6-8 (finding commonality satisfied among California, Ohio, and Florida class members).

The final requirements of Rule 23(a)—typicality and adequacy—are likewise satisfied here. Plaintiffs contend the claims of the class arise from the same misconduct that Plaintiffs seek to remedy – the misrepresentations concerning the ingredients in the Product's fibers. The same representations were made on every Product, including those purchased by Plaintiffs during the class period. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017) ("it is sufficient for typicality if the plaintiff endured a course of conduct directed against the class"). The proposed class representatives also have no conflicts with the class, have participated actively in the case, and are represented by attorneys experienced in class action litigation. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 566 (adequacy satisfied if plaintiffs and their counsel lack conflicts of interest and are willing to prosecute the action vigorously on behalf of the class); ECF No. 251-1, ¶ 20. *See also* Class Certification Order at 9-11 (finding typicality and adequacy).

2. The Class Meets the Requirements of Rule 23(b)(3)

"In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2) or (3)." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1022 (9th Cir. 1998). The predominance requirement is somewhat relaxed in the context of settlement because "[a] class that is certifiable for settlement may not be certifiable for litigation if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable." *In re Hyundai & Kia Fuel Econ. Litig*., 926 F.3d at 558.

Here, the proposed class is maintainable under Rule 23(b)(3) because common questions predominate over any questions affecting only individual members, and class

resolution is superior to other available methods for a fair resolution of the controversy. *See id.* Plaintiffs' liability case depends, first and foremost, on whether: (1) Defendant represented that the fibers in its Product was made with "Natural Fibers" and made from "100% Green Tea Fibers"; (2) whether those representations were false; (3) whether those representations were material; and (4) whether class members suffered damages as a result of those misrepresentations. Plaintiffs contend that these questions can be resolved using the same evidence for all class members and thus are the types of predominant questions that make a class-wide adjudication worthwhile. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 559 (finding predominance satisfied where class members were exposed to uniform misrepresentations and suffered identical injuries within only a small range of damages); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) . . . .'").

Nor do variations in substantive state law militate against a finding of predominance in the settlement context because such concerns impact trial manageability. In a settlement, however, "the proposal is that there be no trial," and therefore manageability considerations have no impact on whether the proposed settlement class should be certified. *Amchem*, 521 U.S. at 620; *see also In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 557 ("manageability is not a concern in certifying a settlement class where, by definition, there will be no trial."). *See also* Class Certification Order at 12-17 (finding predominance after analyzing reliance and damages issues).

With respect to superiority, the issues in this case cannot be resolved through individual trials because the amount at stake for individual members of the Settlement Class is too small, the technical issues involved are too complex, and the required expert testimony and document review too costly. *See* Class Certification Order at 17-18 (finding superiority prong satisfied in part because of relatively low cost of Product"); *see also Just Film*, 847 F.3d at 1123. A class action is thus the superior method of adjudicating consumer claims

arising from Defendant's alleged conduct—just as in other consumer protection cases where a classwide settlement has been approved. *See, e.g., Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016) (granting final approval settling claims of nationwide class of consumers who purchased allegedly defective dishwashers); *Tait v. BSH Home Appliances Corp.*, No. SACV 10-0711-DOC (ANx), 2015 U.S. Dist. LEXIS 98546 (C.D. Cal. Jul. 27, 2015) (granting final approval of settlement on behalf of nationwide class of purchasers of allegedly defective washing machines); *Hartless v. Clorox Co.*, 273 F.R.D. 630 (S.D. Cal. 2011) (granting class certification and final approval of settlement on behalf of nationwide purchasers of toilet bowl cleaner that allegedly damaged plumbing).

C. The Notice to Settlement Class Members was Adequate

The federal rules require that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Where the settlement class is certified pursuant to Rule 23(b)(3), the notice must also be the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

The notice methods utilized here complied with the direction of the Preliminary Approval Order. Notice was conveyed through a multi-layered Notice Program. *See* Supplemental Hamer Decl. Accordingly, the Settlement meets the requirements for reasonable notice in order to obtain final approval.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this motion for final approval of the Settlement in all respects.

Dated: March 6, 2020

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