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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JANE LOOMIS, on behalf of herself, all others similarly situated, and the general public,

Plaintiff,

v.

SLENDERTONE DISTRIBUTION, INC.,

Defendant.

Case No: 19-cv-00854-MMA-KSC

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Date: November 2, 2020
Time: 2:30 p.m.
Judge: Hon. Michael M. Anello
Location: Courtroom 3D

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NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 23(e), on November 2, 2020, at 2:30 p.m. or as soon thereafter as may be heard, in the Courtroom 3D of the United Stated District Court for the Southern District of California, 221 West Broadway, San Diego, California 92101 (Edward J. Schwartz Building), Plaintiff will move the Court, the Honorable Michael M. Anello presiding, for an Order preliminarily approving a proposed settlement on behalf of a California class (the "Settlement"), certifying the Settlement Class (as defined in the Settlement Agreement), approving the proposed Notice Plan (as defined in the Settlement Agreement), and setting schedules for notice, claims, opting out, objecting, and for the Court to conduct a Final Approval hearing.

The Motion is based upon this Notice of Motion, the below Memorandum, the concurrently-filed Declarations of Jack Fitzgerald ("Fitzgerald Decl.") and William Wickersham ("Wickersham Decl.") and all exhibits thereto, including the Settlement Agreement attached to the Fitzgerald Declaration as Exhibit 1 ("Settlement Agreement" or "SA"), all prior pleadings and proceedings in this action, and any additional evidence and argument submitted in support of the Motion.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

In this putative class action, Plaintiff Jane Loomis alleges Defendant Slendertone Distribution, Inc. ("Slendertone") violated California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act, and breached express warranties, by misleadingly and unlawfully marketing an Electrical Muscle Stimulator called the "Flex Belt." Specifically, Plaintiff alleges Slendertone falsely and misleadingly represented that using Flex Belt would assist in weight loss, body contouring, and developing visible "six-pack" abs, and that Flex Belt could be used effectively as a replacement for abdominal exercises. In denying in part Slendertone's motion to dismiss, the Court found that Plaintiff plausibly alleged two advertising claims were misleading:

- "For those looking for a convenient way to tone, strengthen and flatten the abdominal area"; and

- "Who Should Use the Flex Belt®? . . . Anyone that wants more attractive abs, regardless of current fitness levels."

See Loomis v. Slendertone Distrib., Inc., 420 F. Supp. 3d 1046 (S.D. Cal. 2019) (Anello, J.).

Plaintiff initiated this action in May 2017, when she sent a demand letter as required by the CLRA. After informal negotiations failed to resolve the dispute, she filed this action in May 2019. After more than a year of litigation, including significant motion practice and discovery, and in light of Slendertone's assertion of numerous factual and legal defenses and the effect of the current COVID-19 pandemic on Slendertone's business and operations, the parties have reached settlement agreement that provides substantial relief to a California Settlement Class, pursuant to which Slendertone has agreed to establish a $175,000 non-reversionary Common Fund to pay Class Member claims and other settlement expenses. Moreover, Slendertone has removed the above referenced statements from all advertising, and through the Settlement commits to no longer using those claims.

Thus, the proposed Settlement fairly and appropriately resolves the claims of the Class in a manner that provides immediate and definite monetary relief, which is especially appropriate given the risk that, due to Slendertone's present financial condition, absent settlement the Class may be unable to collect even if there is a judgment in its favor. Moreover, although Plaintiff is confident in the merits of her case, there is no way to ensure victory, and the proposed Settlement reflects the risk that the Court will not grant a contested motion to certify a class or that Slendertone will prevail at trial on one of its defenses. Even if Plaintiff did prevail at trial, Slendertone would undoubtedly appeal, leading to further expense, delay, and uncertainty. Accordingly, Plaintiff respectfully requests the Court grant preliminary approval, authorize Class Notice, appoint Plaintiff as Class Representatives and her counsel as Class Counsel, and schedule a Final Approval Hearing and related deadlines.

II. BACKGROUND

Plaintiff brought this action on May 7, 2019. Dkt. No. 1. Slendertone moved to dismiss, Dkt. No. 8, and the Court granted in part and denied in part its motion. Dkt. No. 17. On December 6, 2019, Slendertone filed its Answer. Dkt. No. 18.

The parties held their Rule 26(f) conference on January 14, 2020, after which they served initial disclosures, with Slendertone's disclosures accompanied by sales figures. Fitzgerald Decl. ¶ 3; *see also* Dkt. No. 23 (Joint Rule 26(f) Report).

On February 27, the parties participated in an Early Neutral Evaluation with the Hon. Karen S. Crawford, but were unable to reach an agreement. *See* Dkt. No. 32.

On March 17, 2020, Plaintiff served Slendertone with Document Requests and Interrogatories. Fitzgerald Decl. ¶ 4. Plaintiff also served on third-party retailer Amazon.com a subpoena for sales records. *Id*. After its deadline was extended, *see* Dkt. Nos. 34-35, Slendertone responded to Plaintiff's discovery responses on June 5, 2020, producing documents and a privilege log, and supplementing its previous disclosure of sales records. Fitzgerald Decl. ¶ 5.

On May 1, 2020, Slendertone served Plaintiff with Document Requests and Interrogatories. *Id*. ¶ 6. After a brief extension, on July 2, 2020, Plaintiff responded to Slendertone's discovery. *Id*.

While discovery was ongoing, on June 10, 2020, Slendertone advised Plaintiff that it's global operations were significantly affected by the COVID pandemic, that it had been forced to terminate approximately seventy-five percent of its workforce within the United States, that it had been forced to decrease work hours and compensation for its remaining employees in the United States and globally, and that, while it was interested in resolving the case, it had little to offer. *Id*. ¶ 7. The parties negotiated and, on July 10, reached an agreement in principal to resolve Plaintiff's claims on a California-wide class basis for a $175,000 non-reversionary common fund and Slendertone's agreement to cease and refrain from using the potentially deceptive statements identified by the Court. *Id*. ¶ 8 & Ex. 1.

Plaintiff now submits this motion for preliminary approval. *See* Fed. R. Civ. P. 23(e).

III. SUMMARY OF THE SETTLEMENT

A. THE CLASS

The proposed Settlement is on behalf of a Class of all persons who, while residing in California during the Class Period—defined as May 7, 2015 to the date of preliminary approval—purchased the Slendertone Flex Belt for personal or household use. SA ¶ 1.3. The following persons would be excluded from the Class: (a) persons or entities who purchased the Flex Belt for the purpose of resale or distribution; (b) persons who are directors and Officers of Slendertone or its parent, subsidiary, or affiliate companies; (c) governmental entities; (d) persons who purchased the Slendertone Flex Belt for personal or household use, but subsequently received a refund from Slendertone; (e) persons who timely and properly exclude themselves from the Class as provided in the Agreement; (f) persons who signed a release of Slendertone for compensation for the claims arising out of the facts or claims asserted in the Action; and (g) and any judge to whom this matter is assigned, and his or her immediate family (spouse, domestic partner, or children). Based on product sales, the parties estimate the class size to be approximately 20,000 persons. Fitzgerald Decl. ¶ 9.

B. THE SETTLEMENT'S BENEFITS FOR THE CLASS

1. Monetary Relief: Slendertone will Establish a Non-Reversionary $175,000 Common Fund

Slendertone will establish a non-reversionary $175,000 Common Fund to pay Class Member claims and all Settlement expenses, *i.e.*, notice and administration, and any incentive award and attorneys' fees and costs awarded by the Court. SA ¶ 2.3.

a. Class Member Claims

The balance of the Common Fund, after deducting notice and administration costs and any fees, costs, and incentive payment awarded by the Court, shall be paid on a pro-rata basis to those Class Members who submit valid claims. *Id.* Class Members will make claims by submitting a form online, on the Settlement Website. *See* Wickersham Decl. ¶ 25. The Flex Belt is a relatively expensive product (typically under $200), sold only online. To combat fraud, and because virtually all Class Members will have a digital receipt, confirmation email,

or order number, the claim form will require Class Members to provide proof of purchase in the form of a digital receipt, confirmation email, or order number. *See id.*

b. Notice and Administration Costs

The Common Fund will be used to pay the actual costs of class notice and administration. SA ¶ 2.3. After soliciting bids from several potential administrators, the parties have agreed, with the Court's approval, to retain RG/2 Claims Administration, LLC ("RG2") as the Claim Administrator. Fitzgerald Decl. ¶ 10. RG2 estimates the cost of Notice and Administration will be $62,722, but has agreed to cap the amount it will be paid from the Common Fund at $60,000. *Id.* In the event RG2's actual costs exceed $60,000, RG2 will be reimbursed as follows: First, any checks that remain uncashed 120 days after distribution, when they expire as void, will be used to reimburse RG2 for any outstanding costs in excess of a total of $60,000. If those remaining funds are insufficient to cover RG2's actually incurred costs, Slendertone has agreed to contribute an additional amount up to $3,000 toward RG2's actual costs. On the other hand, if RG2 is fully compensated and there are remaining funds resulting from uncashed checks, that amount will be distributed to a *cy pres* recipient approved by the Court. *Id*. The proposed Notice Plan is detailed below.

c. Attorneys' Fees and Costs and Class Representative Incentive Award

Plaintiff and her counsel will seek Court approval for an incentive award, and will seek an award of attorneys' fees and costs, to be paid from the Common Fund. SA ¶ 2.4. The parties did not agree to particular amounts Plaintiff and her counsel would seek, and Slendertone may, but is not obligated to respond to their applications. *Id.* If the Court awards less than requested, "this shall not be a basis for rendering the entire Settlement null, void or unenforceable," *id.*

Presently, Plaintiff intends to request no more than $10,000 for an incentive award, and her counsel intend to request no more than $60,000 in attorneys' fees and costs, which is approximately 1/3 of the Common Fund, and less than counsel's presumptively-reasonable lodestar, which is presently over $65,000. Fitzgerald Decl. ¶¶ 21, 23.

2. Prospective Injunctive Relief: Changed Advertising

Through the Settlement, "Slendertone warrants that it has changed its advertising to omit" two written statements the Court found might plausibly be misleading, "and has otherwise revised its website to address the issues identified by the Court in its Order." SA ¶ 2.2.

C. PROCEDURES FOR OPTING-OUT AND OBJECTING

1. Opting Out

Any Class Member who wishes to opt out of the Settlement must download from the Settlement Website and submit to the Claim Administrator by the deadline, a completed Opt-Out Form. SA ¶ 3.5. The parties propose a deadline of 45 days following commencement of Class Notice, but the Settlement provides the Court discretion in setting the deadline. *See id.*

2. Objecting

Any Class Member who wishes to object to the Settlement must either file a written objection with the Court, or serve copies on Class Counsel and Defense Counsel, who will be required to then file the objection, no later than fourteen days before the Fairness Hearing (or other date required by the Court). SA ¶ 3.4. Written objections must set forth:

- The name of this Action ("Jane Loomis v. Slendertone Distribution, Inc., Case No. 19-cv-854-MMA-KSC");
- The full name, address, and telephone number of the person objecting;
- The word "Objection" at the top of the document;
- An explanation of the basis upon which the person claims to be a Class member;
- The legal and factual arguments supporting the objection;
- The identity (name, address, and telephone number) of any counsel representing the person who will appear at the Fairness Hearing;
- A statement of whether the person intends to personally appear and/or testify at the Fairness hearing; and the person's signature or the signature of the person's duly authorized counsel or other duly authorized representative; and

- Include copies of any other documents that the objector wishes to submit in support of his or her position.

Id.

D. THE SETTLEMENT'S RELEASES

Class Members who do not opt out will be deemed to have fully released Slendertone and all related entities from all claims that could have been asserted in the litigation, consistent with the "identical factual predicate" doctrine. SA ¶ 4.2.

E. CLASS NOTICE

Class Notice will take two forms. *See generally id.* ¶ 3.2. First, Slendertone will provide the Claims Administrator the names and email addresses of approximately 10,803 Class Members (about 50% of the class), who will be given direct notice. Second, the Claims Administrator has devised a Notice Plan aimed at reaching 70% of the Class with a 2-3X frequency, through more than 4 million online impressions. *See* Wickersham Decl. ¶¶ 14, 16.

ARGUMENT

I. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

"Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Hilsley v. Ocean Spray Cranberries, Inc.*, 2020 WL 520616, at *2 (S.D. Cal. Jan. 31, 2020) (citing Fed. R. Civ. P. 23(a)). Under Rule 23(b)(3), common questions must predominate over individual questions, Fed. R. Civ. P. 23(b)(3), and the class action device must be "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*. The Court should conditionally certify the Settlement Class. *See Oxina v. Lands' Ends, Inc.*, 2016 WL 7626189, at *1 (S.D. Cal. Apr. 6, 2016).

A. The Requirements of Rule 23(a) are Satisfied

1. Numerosity

Slendertone sold about $3.5 million dollars of Flex Belts in California during the Class Period. Fitzgerald Decl. ¶ 16. The price of the Flex Belt fluctuates with time and promotions. Presently, it sells for a reduced price of $139.99, though it typically sells for $199.99 without

any price promotions. *See id.* Ex. 2. Plaintiff paid $177.40. *See id.* Ex. 3. Based on the sales data, the parties estimate the Settlement Class to be approximately 20,000 persons. *Id.* ¶ 9. "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Hilsley*, 2020 WL 520616, at *2 (quotation omitted). Thus, numerosity is easily satisfied. *See id.* ("Here, the proposed Class consists of thousands of consumers . . . therefore, the numerosity factor is easily satisfied."); *see also Martin v. Monsanto*, 2017 WL 1115167, at *3 (C.D. Cal. Mar. 24, 2017) (numerosity "easily satisfied because Monsanto sold thousands of Roundup Concentrates bearing the challenged labels to at least tens of thousands of consumers").

2. Commonality

Rule 23(a)(2) is satisfied if "there are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), which means that "the class members have suffered the same injury," so that their claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "What matters" is "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quotation omitted). Questions "have that capacity" when they have a "close relationship with the . . . underlying substantive legal test." *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).

"[P]laintiff's burden for showing commonality is 'minimal,'" *Mezzadri v. Med. Depot, Inc.*, 2016 WL 5107163, at *3 (S.D. Cal. May 12, 2016) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts," *Hanlon*, 150 F.3d at 1019. "[A] common nucleus of operative fact is usually enough to satisfy the commonality requirement," *Rasario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992), which exists "where a defendant has engaged in standardized conduct toward members of the class." *Hale v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 4992504, at *6 (S.D. Ill. Sept. 16, 2016) (citing *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (collecting cases)). To satisfy Rule 23(a)(2), "even

a single common question will do." *Dukes*, 564 U.S. at 359 (brackets omitted).

Where "the class members' claims stem from the same legal claims and common nucleus of facts, that the [challenged advertising claims] are false and misleading . . . commonality has been met." *Hilsley*, 2020 WL 520616, at *2; *see also Martin*, 2017 WL 1115167, at *4 (

> A classwide proceeding in this [false advertising] case has the capacity to generate common answers to common questions apt to drive the resolution of the litigation, including, for example: (1) whether the [challenged labeling claim] is an express warranty; (2) whether Monsanto breached that warranty by selling non-conforming products; (3) whether the [challenged claim] is material, and (4) whether the statement was likely to deceive reasonable consumers.).

Here, Plaintiff's claims, and the claims of other Class Members, are all based on the allegations that the two challenged advertising claims regarding body contouring and weight loss are false and misleading, and that purchasers lost money as a result. The Court should find that the commonality requirement is easily met.

3. Typicality

Rule 23(a)(3) is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class," Fed. R. Civ. P. 23(a)(3). This occurs where a plaintiff's claims "are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quotation omitted); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiff's legal theory," *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) (citation and internal quotation marks omitted).

Here, Plaintiff's "claims are typical of those of the Class in that their claims arise out of the purchase of [the Flex Belt] after relying on the allegedly misleading [advertising] and suffered the same injury as putative Class members." *Hilsley*, 2020 WL 520616, at *3.

4. Adequacy

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020 (citation omitted).

Here, Plaintiff and her counsel are adequate. Plaintiff has no conflict of interest with other Class Members, and has been and will continue prosecuting the action vigorously on behalf of the Class. *See* Fitzgerald Decl. ¶ 18. Plaintiff's counsel are adequate Class Counsel because they are experienced in consumer protection class actions and other false advertising litigation, have no conflicts, and have been and will continue prosecuting the action vigorously on behalf of the Class. *Id.* & Ex. 4.

B. The Requirements of Rule 23(b)(3) are Satisfied

1. Predominance

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also* Fed. R. Civ. P. 23(b)(3). Predominance exists where common questions present "a significant aspect of the case that can be resolved for all members of the class in a single adjudication." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (internal quotation, brackets, and alteration omitted). "[W]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (quotation omitted).

"Considering whether 'questions of law or fact common to class members predominate' begins . . . with the elements of the underlying causes of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Plaintiff brings her claims on behalf of the Class for breach of warranty, and under California's consumer protection statutes. Because both include objective elements that are subject to common proof, these types of

claims are readily amenable to certification. Because "common questions of law and fact exist and predominate over individual questions"—specifically, whether Slendertone's advertising claims "were false and misleading or reasonably likely to deceive consumers," whether Slendertone "violated the CLRA, UCL, [and] FAL," whether Slendertone "defrauded Plaintiffs and the Class Members," and "whether the Class has been injured by the wrongs complained of, and if so, whether Plaintiffs and the Class are entitled to damages, injunctive and/or other equitable relief, including restitution, and if so, the nature and amount of such relief"—the Court should "conclude[] that . . . predominance ha[s] been satisfied." *Hilsley*, 2020 WL 520616, at *2; *see also Martin*, 2017 WL 1115167, at *7 ("In light of the elements of the claims for breach of express warranty, and violations of the CLRA, FAL, and UCL, the Court concludes that 'the questions of law or fact common to the class members predominate over any questions affecting only individual members.'"); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) (objective tests for deception and materiality "renders claims under the UCL, FAL, and CLRA ideal for class certification because they will not require the court to investigate class members' 'individual interaction with the product'" (quotation omitted)).

2. Superiority

"A consideration of the[] factors [set forth in Rule 23(b)(3)(A)-(D)] requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated most profitably on a representative basis." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) (quotation omitted). The superiority requirement "is met '[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis.'" *Tait*, 289 F.R.D. at 486 (quoting *Wolin*, 617 F.3d at 1175); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Here, the product at issue costs less than $200 per unit, and most Class Members likely did not purchase more than one Flex Belt during the four-year Class Period. As a result, Class Members' claims for individual damages are small in comparison to the costs of litigation. "The Ninth Circuit has recognized that a class action is a plaintiff's only realistic

method for recovery if there are multiple claims against the same defendant for relatively small sums." *Culley v. Lincare Inc.*, 2016 WL 4208567, at *8 (E.D. Cal. Aug. 10, 2016) (citation omitted); *see also Hilsey* 2020 WL 520616, at *3 ("class settlement is superior to other available methods for a fair resolution of the controversy because the class mechanism will reduce litigation costs and promote greater efficiency.").

II. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT

Should the Court certify a settlement class, the Court must then determine whether to preliminarily approve the class action settlement. "Rule 23(e) was amended in 2018 to create uniformity amongst the circuits and to focus the inquiry on whether a proposed class action is 'fair reasonable, and adequate.'" *Hilsey* 2020 WL 520616, at *4 (quoting Fed. R. Civ. P. 23(e)). As amended, Rule 23(e) provides that a court should consider whether:

> (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). "The first and second factors are viewed as 'procedural' in nature, and the third and fourth factors are viewed as 'substantive' in nature." *Hilsley*, 2020 WL 520616, at *5 (quoting Fed. R. Civ. P. 23(e)(2)).

"The court's task at the preliminary approval stage is to determine whether the

settlement falls 'within the range of possible approval.'" *Shannon v. Sherwood Mgmt. Co.*, 2020 WL 2394932, at *5 (S.D. Cal. May 12, 2020) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (quoting *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561, 570 n.12 (E.D. Pa. 2001))). "Preliminary approval is appropriate if the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (internal quotations and citation omitted).

Public policy "strong[ly] . . . favors settlements, particularly where complex class action litigation is concerned." *Pilkington v. Cardinal Health, Inc.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *accord Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) ("[O]verriding public interest in settling and quieting litigation" is "particularly true in class action suits." (internal quotations omitted)); *Ma v. Covidien Holding, Inc.*, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014) ("In general, there is a strong judicial policy favoring class settlements." (citing *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1272 (9th Cir. 1992)).

A. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations

The Settlement was reached more than a year into the litigation, and after more than three years of pursuing Plaintiff's claims against Slendertone. Settlement was also only reached after the Court considered Slendertone's motion to dismiss and after the parties exchanged discovery, attended an ENE, and after substantial settlement negotiations. The parties were well-informed and well-represented when negotiating the settlement from mid-June to mid-July 2020. Moreover, nothing about the settlement indicates collusion, with "subtle signs" of collusion absent: Plaintiff's counsel do not stand to receive a disproportionate distribution of the settlement, there is no clear sailing provision on attorneys' fees, and there is no reversion of unawarded funds to defendant. *See In re Bluetooth Headset*

Prods. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011).

B. The Settlement Has No Obvious Deficiencies

The Settlement provides retrospective monetary relief and prospective injunctive relief that addresses the primary concern raised in Plaintiff's Complaint. The Common Fund will be divided equally among all units claimed, making reimbursement fair and simple.

C. The Settlement Does Not Grant Preferential Treatment to the Class Representative or any Class Members

All Class Members who make a claim, including the Class Representative, will receive the same reimbursement for each unit purchased, and all Class Members are subject to the same requirements and limitations regarding claims. *See Harris v. Vector Mktg. Corp.*, 2011 WL 1627973, at *9 (N.D. Cal. Apr. 29, 2011) (no preferential treatment where settlement "provides equal relief to all class members" and "distributions to each class member—including Plaintiff—are calculated in the same way").

D. The Settlement Falls Within the Range of Possible Approval

"[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 San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Relevant factors to the fairness determination include: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class-action status throughout the trial; (4) the amount offered in settlement; (5) 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. *See Hanlon*, 150 F.3d at 1026; *see also Churchill Vill.*, 361 F.3d at 575. "[S]ome of these factors cannot be fully assessed until the court conducts its fairness hearing," *West v. Circle K Stores, Inc.*, 2006 WL

1652598, at *9 (E.D. Cal. June 13, 2016).

1. The Strength of Plaintiff's Case and Risks of Continued Litigation

Plaintiff believes her case has merit and that she would ultimately secure a judgment of liability. *See* Fitzgerald Decl. ¶ 11. However, Slendertone has asserted numerous factual and legal defenses in this action. Indeed, in partially granting Slendertone's motion to dismiss, the Court excluded several claims initially pleaded by Plaintiff, and found some to be mere puffery. *Loomis*, 420 F. Supp. 3d at 1082. Moreover, the Court found that only two of the challenged statements could be found to be plausibly misleading. *Id*. at 1084. The Court also acknowledged that Slendertone makes "disclaiming language that the Flex Belt is insufficient to achieve weight loss and that a more attractive abdominal area requires proper diet and exercise." *Id*. at 1083. While not dispositive of liability, those findings reflect a risk that a jury would find the disclaiming language defeats liability or reduces damages. *See* Fitzgerald Decl. ¶ 11. Additionally, proving a price premium will require substantial and expensive discovery and expert analysis, increasing complexity at the class certification stage, and potentially impacting the ultimate damages figure at trial, if any.

Of further specific concern in this case is the ongoing COVID pandemic. Slendertone recently informed Plaintiff that its global operations were significantly affected by the COVID pandemic, that it had been forced to terminate approximately seventy-five percent of its workforce within the United States, that it had been forced to decrease work hours and compensation for its remaining employees in the United States and globally, and that, while it was interested in resolving the case, it had little to offer. *See id.* ¶ 7. These risks are exacerbated by continued litigation. *See id.* ¶ 12.

In short, "further litigation would be risky, burdensome, and expensive." *Shannon*, 2020 WL 2394932, at *9. Plaintiff would have to ultimately prevail on a contested motion to certify the class, and against a motion for summary judgment. Then there are the delay and axiomatic "uncertainties [that] would await at trial and on a potential appeal." *Id*. Plaintiff's counsel considered these risks in pursuing an early settlement. Fitzgerald Decl. ¶¶ 11-15. The

Settlement eliminates these risks and seeks to ensure that the Class Members will receive compensation for their claims in a timely manner.

2. The Experience and Views of Counsel

"Because the parties' counsel are the ones most familiar with the facts of the litigation, courts give 'great weight' to their recommendations." *Shannon*, 2020 WL 2394932, at *10 (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)); *see also In re Pac. Enters. Secs. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation."). "Therefore, the plaintiffs' counsel's recommendations 'should be given a presumption of reasonableness.'" *Shannon*, 2020 WL 2394932, at *10 (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).

Here, Plaintiff's counsel have reviewed discovery and are apprised of the (modest) sales of the Flex Belt in California during the Class Period and of Slendertone's financial position. Given the likely refund for each claimant, counsel believe this is a fair, reasonable, and adequate result, particularly in light of some of the unique challenges this case presents, which are discussed further below. Fitzgerald Decl. ¶ 17.

3. The Amount of the Proposed Settlement is Fair, Reasonable, and Adequate

The Settlement's $175,000 Common Fund for a California Class of approximately 20,000 consumers is fair, reasonable, and adequate. Assuming the Court awards $60,000 in attorneys' fees and costs, and a $10,000 incentive award, and assuming notice and administration costs paid form the common fund are $60,000, there will be $45,000 left in the Common Fund to divide among claimants.

Claims rates in false advertising cases typically range between 2% and 5%. Because the product is relatively expensive, and because 10,803 Class Members will receive direct notice, the Claims Administrator believes the claim rate in this case will be around 10%, and may be as high as 15%. The below table provides an estimate of the amount each claimant

will receive for these various claims rates, and the percent of the Flex Belt sale price (assuming an average price of $158[1]). Even at a 15% claim rate, the amount recovered likely exceeds the amount of damages Plaintiffs would prove at trial.

Claims Rate	5%	10%	15%
Refund	$45	$22.50	$15
% Refund	28%	14%	9.5%

In sum, claimants will likely receive a refund of approximately 9.5% to 28% of the average price. This is a material recovery since, to establish damages at trial, Plaintiff would have to show "the difference between the prices customers paid and the value of the [product] they bought—in other words, the 'price premium' attributable to [Defendant's advertising claims]," which would likely only be a small fraction of the purchase price. *See Brazil v. Dole Packaged Foods, LLC*, 660 F. App'x 531, 534 (9th Cir. 2016); Fitzgerald Decl. ¶ 17. The Class's recovery, moreover, might be limited as a result of the disclaiming language in Slendertone's advertising. Consequently, the Settlement represents a fair, reasonable, and adequate result for the Class. *See Shannon*, 2020 WL 2394932, at *9 (approving a $450,000 settlement compared to potential recovery of $3 million); *see also Hilsley*, 2020 WL 520616, at *6 (Concluding that a $1.00 recovery per purchase "is an excellent result" considering the fraction of purchase price recoverable at trial and in light of expert opinion that the price premium attributable to the false claim was approximately 19%).

4. Investigation and Discovery

Investigation and discovery have been sufficient to permit the parties and Court to make an informed analysis. The parties have exchanged documents and written discovery responses. The parties were also aided by the Court's thorough discussion in its 53-page Order on Slendertone's motion to dismiss. *See* Dkt. 17. That discovery was not completed is of no moment: "formal discovery may not be necessary where 'the parties have sufficient

[1] Counsel for Slendertone represents that the average sale price for the Flex Belt during the Class Period was $158. Fitzgerald Decl. ¶ 16

information to make an informed decision about settlement.'" *Shannon*, 2020 WL 2394932, at *9 (quoting *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (explaining that a combination of investigation, discovery, and research conducted prior to settlement can provide sufficient information for class counsel to make an informed decision about settlement).

III. THE COURT SHOULD APPROVE THE PROPOSED NOTICE AND NOTICE PLAN, AND ENTER THE PROPOSED FINAL APPROVAL SCHEDULE

As described in the Declaration of William Wickersham, RG2 proposes—in addition to direct notice to Class Members for which it has contact information—a Notice Plan taking advantage of digital media, targeted to the Class using methods universally employed in the advertising industry at persons that match characteristics of purchasers of exercise equipment or supplements, with a goal of 70% reach at a 2-3X frequency. Wickersham Decl. ¶ 14. RG2's robust media Notice Plan is reasonable under the circumstances. The plan will result in over 4 million impressions over Facebook, Instagram, Twitter, and Google Search Engine Marketing. *Id.*

The proposed Long-Form Notice itself, *see id.* Ex. 4, is also appropriate, since it contains "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment" *See In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

Assuming the Court grants preliminary approval, Plaintiff proposes the following schedule leading up to a final approval hearing, which gives absent Class Members sufficient time to receive Notice and make a claim or opt out; and sufficient time to review and object to Plaintiff's Final Approval Motion and application for fees, costs, and an incentive award.

Event	Day	Approximate Weeks After Preliminary Approval
Date Court grants preliminary approval	0	-
Deadline to commence direct notice	7	1 week
Deadline to complete direct notice	35	5 weeks
Deadline to make a claim or opt out	42	6 weeks
Deadline for plaintiffs to file Motions for Final Approval, Attorneys' Fees, and Incentive Awards	49	7 weeks
Deadline for objections	63	9 weeks
Deadline for replies to objections	70	10 weeks
Final approval hearing date	91	13 weeks

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court grant preliminary approval, authorize Class Notice, appoint Plaintiff as Class Representative and her counsel as Class Counsel, set deadlines for making claims, opting out, and objecting, and schedule a Final Approval Hearing and related deadlines.

Dated: September 30, 2020

Respectfully Submitted,
/s/ Jack Fitzgerald

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