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

MOLLIE DELANEY, ANGELA DOBBINS, and AMANDA RETCOFSKY individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

SENSA PRODUCTS, LLC, SENSA, INC., f/k/a INTELLIGENT BEAUTY, INC., GENERAL NUTRITION CORP., GENERAL NUTRITION CENTERS, INC., and ALAN R. HIRSCH,

Defendants.

CASE No. 14-CV-2120 JLS (WVG)

ORDER (1) GRANTING GNC'S REQUEST FOR JUDICIAL NOTICE AND (2) GRANTING PLAINTIFF'S MOTION TO CONSOLIDATE AND TO APPOINT INTERIM CLASS COUNSEL PURSUANT TO FED. R. CIV. P. 23(G)(3)

(ECF No. 34)

JOSE CONDE, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

SENSA PRODUCTS, LLC; and DOES 1-10, Inclusive,

Defendants.

CASE No. 14-CV-51 JLS (WVG)

(ECF No. 17)

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SUSAN GRACE STOKES,
Individually and On Behalf of Herself
and All Others Similarly Situated,

Plaintiff,

vs.

SENSA PRODUCTS, LLC; and
DOES 1-10, Inclusive,

Defendants.

CASE No. 14-CV-2325 JLS (WVG)

(ECF No. 24)

Presently before the Court are three related cases: *Conde v. Sensa, et al.*, Case No. 14-CV-51 JLS (WVG), *Delaney v. Sensa, et al.*, Case No. 14-CV-2120 JLS (WVG), and *Stokes v. Sensa, et al.*, Case No. 14-CV-2325 JLS (WVG). Plaintiffs Mollie Delaney, Angela Dobbins, and Amanda Retcofsky (the “Delaney Plaintiffs”) bring this Motion to Consolidate the Above-Captioned Cases and to Appoint Bursor & Fisher, P.A. as Interim Class Counsel Pursuant to Fed. R. Civ. P. 23(G)(3). Also before the Court is Defendants General Nutrition Corp. and General Nutrition Centers, Inc.’s (“GNC”) Opposition to Plaintiff’s Motion, Objections to the Declaration of Timothy Fisher, and Request for Judicial Notice. (ECF No. 37, 39, 40.)

The Court vacated the hearing set for December 18, 2014 and took the matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the Parties’ arguments and the law, the Court **GRANTS** GNC’s request for judicial notice, **GRANTS** Plaintiff’s Motion to Consolidate and to Appoint Interim Class Counsel, and declines to rule on GNC’s Objections.¹

¹Neither of these objections are relevant to the Court’s decision. That Plaintiff Stokes supports the motion is corroborated in the fact that she did not file an opposition. Additionally, this is a preliminary and non-dispositive motion and the Court finds it appropriate to act on the representations of counsel in the interests of judicial efficiency.

BACKGROUND

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2 The *Conde*, *Stokes*, and *Delaney* cases each seek class certification on behalf of
3 U.S. purchasers of the Sensa Weight Loss System which was marketed as “an easy,
4 effective way to lose weight.” (Mot. To Consolidate 2, ECF No. 34-1.) The Sensa
5 System consists of shaking “tastant crystals” or “sprinkles” on one’s food, which work
6 with a person’s sense of smell to stimulate the brain and curb the appetite. (*Id.*)
7 Plaintiffs claim that the sales pitch used is “false, misleading, and unsubstantiated
8 because there is no competent and reliable scientific evidence to substantiate these
9 claims.” (*Id.*) Each Plaintiff also states in the complaint that they would not have
10 purchased Sensa, had it not been for the false and misleading advertising. (*Id.* at 7.)
11 A brief overview of each of the cases follows.

12 In *Conde*, Plaintiff is a California resident seeking national class certification on
13 behalf of all persons who purchased Sensa from August 22, 2012 to present. (RJN, Ex.
14 B, ECF No. 40.) Plaintiff brings three claims including: Violation of California’s False
15 Advertising Law; Unlawful, Fraudulent, and Unfair Business Practices; and Violation
16 of the Consumers Legal Remedies Act. (*Id.* at 35–38.)

17 In *Stokes*, Plaintiff is a Florida resident seeking national class certification on
18 behalf of all persons who purchased Sensa from August 22, 2012 to present. (RJN, Ex.
19 A, ECF No. 40.) Plaintiff also seeks to certify a sub-class of Florida residents. (*Id.*)
20 Plaintiff brings four claims including: Breach of Implied Warranty of Merchantability,
21 Breach of Express Warranty, Violation of Florida Deceptive and Unfair Trade Practices
22 Act, and Unjust Enrichment. (*Id.* at 13–19.)

23 There are three named plaintiffs in *Delaney*. Plaintiffs Mollie Delaney and
24 Angela Dobbins are residents of California. (Compl. 8, 14cv2120, ECF. No. 1.)
25 Plaintiff Amanda Retcofsky is a resident of Pennsylvania. (*Id.*) They seek national
26 class certification on behalf of themselves and other purchasers of Sensa crystals from
27 August 22, 2012 to present and “assert claims against Defendants for violations of the
28 Magnuson-Moss Warranty Act, California’s Consumers Legal Remedies Act,

1 California’s False Advertising Law, the unlawful, unfair and fraudulent prongs of
 2 California’s Unfair Competition Law, Pennsylvania’s Unfair Trade Practices and
 3 Consumer Protection Law, for breach of implied and express warranties, and for
 4 negligent misrepresentation.” (*Id.* at 5, 36.) The *Delaney* Plaintiffs seek certification
 5 of California and Pennsylvania subclasses. (*Id.* at 36.)

6 The *Conde* and *Stokes* cases name Sensa Products, LLC and Does 1–10 as
 7 Defendants. The *Delaney* case additionally names Sensa, Inc., f/k/a Intelligent Beauty,
 8 Inc., GNC, and Alan R. Hirsch as defendants. The *Delaney* Plaintiffs move to
 9 consolidate the three cases and to appoint Bursor & Fisher as interim class counsel.
 10 GNC is the only party who opposes this Motion.²

11 REQUEST FOR JUDICIAL NOTICE

12 Pursuant to Federal Rule of Evidence 201, a court may take judicial notice of
 13 facts not subject to reasonable dispute. Courts may take notice of “proceedings in other
 14 courts, both within and without the federal judicial system, if those proceedings have
 15 a direct relation to the matters at issue.” *United States v. Borneo, Inc.*, 971 F.2d 244,
 16 248 (9th Cir. 1992).

17 GNC requests the Court take judicial notice of (A) the Complaint in *Stokes v.*
 18 *Sensa Products, LLC*, Case No. 3:14-cv-02325-JLS-WVG, Southern District of
 19 California, (B) the Complaint in *Conde v. Sensa Products, LLC*, Case No. 3:14-cv-
 20 00051-JLS-WVG, Southern District of California, and (C) the Complaint in *FTC v.*
 21 *Sensa Products, LLC, et. al.*, Case No. 14-cv-0072, Northern District of Illinois -
 22 Eastern Division. (RJN, ECF No. 40.) Because each of these is a pleading in a U.S.
 23 District Court, and has a direct relation to Plaintiff’s Motion to Consolidate, the Court
 24 takes judicial notice of each Complaint.

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 26
 27 ²Plaintiff Jose Conde filed a notice of non-opposition. (Notice of Non-Opp’n, 14cv51, ECF No.
 28 21.) Plaintiff Susan Stokes supports the motion. (Fisher Decl. 1, ECF No. 34-2.) Additionally, Civil
 Local rule 7.1(f)(3)(c) states that if an opposing party fails to file their papers, that failure may
 constitute a consent to the granting of a motion. Accordingly, the other parties who have not opposed
 Plaintiff’s Motion have consented to the Court granting Plaintiff’s requests.

CONSOLIDATION

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2 Under Federal Rule of Civil Procedure 42(a), this Court may consolidate cases
3 that “involve a common question of law or fact.” Fed. R. Civ. P. 42(a). A district court
4 has broad discretion to consolidate cases pending in the same district. *Investors*
5 *Research Co. v. U.S. Dist. Ct. for Cent. Dist. Of California*, 877 F.2d 777 (9th Cir.
6 1989). In addition, the Court may consolidate cases for discovery purposes even if
7 joinder would not be permitted under Federal Rule of Civil Procedure 20. *In re EMC*
8 *Corp.*, 677 F.3d 1351, 1360 (Fed. Cir. 2012).

9 Plaintiffs contend that the cases should be consolidated because they involve
10 substantially similar factual issues, including: “the cases name the same defendants;
11 Plaintiffs are all individuals who purchased Sensa; Defendants’ false and misleading
12 statements about Sensa’s efficacy; if the truth about the efficiency of Sensa had been
13 disclosed, none of the Plaintiffs in any of the three actions would have purchased the
14 product, since it was falsely and misleadingly advertised; [and] Plaintiffs have lost
15 money in the form of the purchase price paid for Sensa.” (Mot. to Consolidate 6–7,
16 ECF No. 34-1.) Accordingly, Plaintiffs argue that consolidating the three cases will
17 promote the expeditious resolution of pleading matters, simplify the presentation of
18 issues Defendants intend to raise concerning the sufficiency of the complaint, avoid
19 duplicative motions and hearings, and avoid the unnecessary delay in their resolution.
20 (*Id.* at 7.)

21 The Plaintiffs in the *Conde* and *Stokes* cases have not objected to consolidation.
22 The only objection comes from GNC who is a defendant in only one of the three cases.
23 GNC objects to the consolidation for three reasons: (1) GNC is not a defendant in the
24 *Conde* or *Stokes* cases and the facts that relate to GNC are unique to it, (2) the cases
25 may involve consumer protection laws from three different states, and (3) consolidation
26 will result in confusion, delay, and prejudice because Plaintiff will conflate the
27 different Defendants’ actions in attempt to hold GNC liable for Sensa’s actions.

28

1 other complex litigation, counsel’s knowledge of the applicable law, the resources
2 counsel would commit to the case, and any other matter pertinent to counsel’s ability
3 to fairly and adequately represent the class. In general, a class is fairly and adequately
4 represented where counsel is qualified, experienced, and generally capable of
5 conducting class action litigation. *Jordan v. Cnty. of L.A.*, 669 F.2d 1311, 1323 (9th
6 Cir. 1980), *vacated on other grounds*, 459 U.S. 810 (1982).

7 Defendant GNC argues that the Court should not appoint interim class counsel
8 because it would be premature. However, the Court may “designate interim counsel
9 to act on behalf of a putative class before determining whether to certify the action as
10 a class action.” F.R.C.P. 23(g)(3). The Court agrees with Plaintiffs that appointing
11 interim class counsel at this stage in the proceedings will eliminate duplicative work
12 going forward in the interests of judicial efficiency. Furthermore, Bursor & Fisher has
13 demonstrated that it is capable of adequately and fairly representing Plaintiffs in this
14 case. Bursor & Fisher has successfully represented other Sensa purchasers in a
15 previous class action and the firm has spent a considerable amount of time and
16 resources investigating the current case. (Mot. to Consolidate 9–13, ECF No. 34-1.)
17 The Firm also represents that it is prepared to provide significant resources and
18 personnel to the present action. (*Id.* at 16.) Lastly, the firm has a strong familiarity
19 with consumer protection law and extensive experience in multi-state class actions and
20 other complex litigation. (*Id.* at 14–16.)

21 Because the Court finds that consolidation is appropriate, other Plaintiffs’ do not
22 object to the appointment, and Bursor & Fisher is able to fairly and adequately
23 represent the class, the Court appoints Bursor & Fisher as interim class counsel.

24 CONCLUSION

25 Upon consideration of the foregoing motions, the papers submitted in support,
26 and good cause appearing, **IT IS HEREBY ORDERED** that the motions are
27 **GRANTED** as follows:
28

- 1 1. The above-referenced actions shall be consolidated onto a single docket and bear
2 the civil case number of 14-CV-51 JLS (WVG) (the “Consolidated Action”).
3 The Consolidated Action shall bear the name: *Conde, et al. v. Sensa, et al.*
- 4 2. Bursor & Fisher is hereby appointed as Interim Class Counsel.
- 5 3. Interim Class Counsel shall be responsible for coordinating the activities of
6 Plaintiffs during pretrial proceedings and shall have the sole authority to:
- 7 a. determine and present (in briefs, oral argument, or such other fashion as
8 may be appropriate, personally or by a designee) to the Court and
9 opposing parties the position of the Plaintiffs on all matters arising during
10 the pretrial proceedings;
- 11 b. coordinate the initiation and conduct of discovery on behalf of Plaintiffs
12 consistent with the requirements of the Federal Rules;
- 13 c. conduct settlement negotiations on behalf of Plaintiffs and the putative
14 class;
- 15 d. delegate specific tasks to other counsel in a manner to ensure that pretrial
16 preparation for the Plaintiffs is conducted efficiently and effectively;
- 17 e. enter into stipulations with opposing counsel as necessary for the conduct
18 of the litigation;
- 19 f. monitor the activities of all counsel to ensure that schedules are met and
20 unnecessary expenditures of time and funds are avoided;
- 21 g. perform such other duties as may be incidental to the proper coordination
22 of Plaintiffs’ pretrial activities or authorized by further order of the Court.
- 23 4. Plaintiffs’ counsel shall file a Consolidated Amended Complaint within 30 days
24 of this Order.

25 **IT IS SO ORDERED.**

26 DATED: April 13, 2015

27 
28 Honorable Janis L. Sammartino
United States District Judge