UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 17-1397 JVS (JDEx)	Date	September 16, 2019
Title	Meghan Schmitt, et al v. Younique, LLC		

Present: The Honorable	**James V. Selna, U.S. District Court Judge**

Lisa Bredahl	Sharon Seffens
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Adam Gonnelli Jason Sultzer	Sascha Henry Abby Meyer

Proceedings: **Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan [251]**

Cause is called for hearing and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court GRANTS the Plaintiffs' unopposed motion and rules in accordance with the tentative ruling as follows:

Plaintiffs Megan Schmitt ("Schmitt"), Deana Reilly ("Reilly"), Carol Orlowsky ("Orlowsky"), and Stephanie Miller Brun ("Brun") (together—"Plaintiffs") filed an unopposed motion for preliminary approval of a proposed class action settlement ("Settlement"), preliminary approval certifying of the Settlement Class, approval of the notice plan, and appointment of a Settlement Administrator. (Mot., Docket No. 251.)

For the following reasons, the Court **GRANTS** the motion.[1]

I. BACKGROUND

A. Allegations and Procedural History

The facts of this case are well-known to the parties and the Court. The Court relies

[1] The motion to decertify the class action is denied as moot in light of the parties' proposed settlement. (Docket No. 214.)

on the background facts from its order on class certification.

This case concerns the marketing and sales of Younique's mascara product, Moodstruck 3D Fiber Lashes (the "Lash Enhancer") from October 2012 until July 2015. (SAC, Docket No. 58 ¶ 1.) The Lash Enhancer consists of two components, a "Transplanting Gel" and "Natural Fibers." (Id. ¶ 3.) Younique represented that the Natural Fiber component was "natural" and consisted of "100% Natural Green Tea Fibers" on the Lash Enhancer's label. (Id. ¶ 8.) However, Plaintiffs allege that the Natural Fiber component did not actually contain any green tea leaves and instead was composed of ground-up nylon. (Id.) Plaintiffs allege that a reasonable person would not consider nylon "natural." (Id. ¶ 7.)

Younique's products are not sold in retail stores. (Opp'n, Docket No. 105-1 at 1.) The Lash Enhancer was sold by individual independent contractors ("Presenters") who marketed the Lash Enhancer via online platforms including "virtual" parties. (Id. at 1–2.) Customers can purchase products from Younique's website or from a Presenter's individual webpage, which is also connected to Younique's website. (Docket No. 111-4, Ex. 25, 235:24-236:7; Docket No. 111-5, Ex. 26, 90:7-91:12; Docket No. 111-6, Ex. 27, 42:17-44:8, 102:4-104:2, 107:8-108:5)

The Lash Enhancer contained tubes that were packaged inside a hard, black case (akin to an eyeglass case). (Henry Decl., Docket No. 111-1, Images 3, 15.) The case was shrink-wrapped in plastic. (Id., Image 4.) The ingredients were listed on a label stuck to the shrink-wrap on the back of the case. (Id., Image 5.) The two labels used featured one of the following representations:

> TRANSPLANTING GEL
> & NATURAL FIBERS
> ...
> Natural Fibers
> Net Wt. .02 oz/ .5g
> ...
> NATURAL FIBERS INGREDIENTS:
> 100% Natural Fibers taken from the
> Campanulaceae of Green Tea

(Henry Decl., Docket No. 111-1, Image 6.) or

> TRANSPLANTING GEL
> & NATURAL FIBERS
> ...
> Natural Fibers
> Net Wt. .02 oz/ .5g
> ...
> NATURAL FIBERS INGREDIENTS:
> 100% Natural Green Tea Fibers

(Id., Image 4.) Younique promotes itself as a company specializing in natural cosmetics. (Ranallo Depo., Docket No. 105-8, 67:13-24; August 2013 website capture, Docket No. 77-6, Ex. 2; August 2014 website capture, Docket No. 77-7, Ex. 3; Younique website capture, Docket No. 106-4, Ex. 16 "Nature. Love. Science.")

Plaintiffs filed a purported class action against Younique alleging eleven causes of action, including violations of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. 2301, et seq., the California Unfair Competition Law ("UCL"), California Bus.& Prof. Code § 17200, et seq., the California Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, et seq., the Florida Unfair and Deceptive Trade Practices Act ("FUDTPA"), Fla. Stat. § 501.201, et seq., the Ohio Consumer Sales Practices Act, Ohio Rev. Code § 1345.01, the Ohio Deceptive Trade Practices Act ("ODTPA"), Ohio Rev. Code § 4165.01, et seq., and the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-101, et seq.; breaches of an express warranty under California, Ohio, and Tennessee laws and breaches of the implied warranties of merchantability under California, Ohio, and Tennessee laws. (See generally SAC, Docket No. 58.)

In its ruling on the class certification motion, the Court denied Plaintiffs' motion to certify the Tennessee class, but granted the motion to certify the California, Florida, and Ohio classes. (Order, Dkt. No. 149 at 18.) The Court determined that on the evidence before it, there was "a methodologically plausible theory of classwide recovery." (Id. at 17.)

On December 12, 2018, Plaintiffs served Dr. May's Rule 26 report revealing his opinions for three classwide damages models. (Henry Decl., Dkt. No. 209-2 ¶ 11.) For

his models, Dr. May obtained sales data from Information Resources, Incorporated ("IRI") and coded the data for 1,126 products sold in California, 1,084 products sold in Florida, and 1,011 products sold in Ohio. (Report, Dkt. No. 214-6, Ex. H., Ex.3.) Dr. May also calculated R Square[2] numbers for California (.059), Florida (.067), and Ohio (.079). (Id.)

Plaintiffs now seek a Preliminary Approval Order that does the following: (1) conditionally certifies the class under Fed. R. Civ. P. 23(b)(3) for settlement purposes; (2) preliminarily approves the Settlement as fair, reasonable, and adequate; (3) approves the Notice and Election of the Opt-Out Form to be disseminated to the Class Members in the form and manner proposed by the Parties as set forth in the Settlement Agreement and Exhibits C, D, and E, (4) appoints Heffler Claims Group as the settlement administrator, and (5) appoints Class Counsel as counsel to the Settlement Class. (Docket No. 251-1, § II. Q.)

B. Summary of the Settlement

1. The Proposed Settlement Class

Pursuant to the Settlement Agreement, the proposed settlement class consists of:

> all persons who (1) during the Class Period, resided in one of the following states: California, Ohio, Florida, Michigan, Minnesota, Missouri, New Jersey, Pennsylvania, Tennessee, Texas, and Washington; and (2) purchased one or more Products for

[2] According to Dr. May, "R square refers to what's called the goodness of fit of the regression equation as a whole in terms of – one way to think about it in two dimensional space is how tight are the dots, the observations on the line that you're fitting to them. If they're very close, then you have a very good fit for their regression as a whole. If they're scattered far from the line, then it's – the fit for the line as a whole is not as good." (May Depo., Dkt. No. 214-5, 92:18-93:6.) Dr. May explained that an R square of .059920703 (the R square associated with the California regression model) indicates that "if you're looking at the explaining or predicting the price with the equation as a whole, you're explaining about six percent of the variation in price, 5.99 percent. . . . A perfect fit would be 1.0. So that would be a hundred. So, the R square is basically looking at the fit of the model as a whole, but it's not necessarily what we're interested in here. We're interested in certain coefficients, specifically Z one. . . . The short answer is it's not a great fit for the regression as a whole, but what we care more about is the fit on the Z one coefficient." (Id., 93:8-94:9.)

> personal, family or household use and not for resale. Presenters will not be excluded from the Class but only their purchases for personal, family or household use and not for resale will be subject to this Agreement as set forth in Section V. Excluded from the Settlement Class are: (a) Younique's board members or executive-level officers, including its attorneys; (b) governmental entities; (c) the Court, the Court's immediate family, and the Court's staff; and (d) any person that timely and properly excludes himself or herself from the Settlement Class in accordance with Section VIII(B) of this Agreement or as approved by the Court.

(Settlement Agreement, Docket No. 251-1, Gonnelli Decl., Ex. 1, § II. Z.) The "Class Period" runs from October 1, 2012 to July 31, 2015. (Id. § II. I.)

2. Settlement Amount and Injunctive Relief

The proposed settlement provides for the creation of a Settlement Fund in the amount $3,250,000.00. (Id. § IV. A.)

The Settlement Fund shall be applied to pay in the following order: (i) any necessary taxes and tax expenses; (ii) all costs and expenses associated with Class Notice, including all fees and expenses of the Settlement Administrator; (iii) all costs and expenses associated with the administration of the Settlement, including all fees and expenses of the Settlement Administrator; (iv) any Attorneys' Fees award made by the Court to Class Counsel; (v) any award of Expenses made by the Court to Class Counsel; (vi) any Service Awards made by the Court to Plaintiffs; (vii) cash payments distributed to Settlement Class members who have submitted timely, valid, and approved claims pursuant to the claims process; and (viii) the Residual Funds, if any. (Id. § IV. A. 1.)

Within ten bank days after the Preliminary Approval Order is entered, Younique shall transfer $200,000.00 into the Settlement Fund which shall be used to pay costs and expenses of the Settlement Administrator, including to effectuate Class Notice pursuant to the Notice Plan. (Id. § IV. A. 2.)

In addition, Younique agrees that, for three years, if it elects to describe an ingredient in its current or future fiber lash products as "natural," it 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. (Id. § IV.B.1.)

3. Attorneys' Fees and Costs

Class Counsel's attorneys' fees shall not exceed an amount equal to 33.33% of the Settlement Fund of $3,250,000.00. (Id. § X. A.) This amount shall be paid from the Settlement Fund and shall be the sole aggregate compensation paid by Younique to Class Counsel for representing Plaintiffs and the Settlement Class, for prosecuting the Action, the *Bowers* Action and any Related Action and relating to this Agreement. (Id.)

4. Administrative Expenses and Service Awards

The Settlement Agreement indicates that the Settlement Administrative Costs shall not exceed $175,000. (Id. § X. B.)

In addition, Class Counsel will make an application for Service Awards to the Megan Schmitt, Stephanie Miller-Brun and Deana Reilly that will not exceed $45,000 ($15,000 each). (Id. § X. C.) Class Counsel also intends to make an application for a Service Award to Kristen Bowers, Brenna Kelly-Starkebaum, Aschley Willey, Mekenzie Davis, Michelle Ellis, Jan Taylor, Nevina Saitta, Meagan Nelson and Casey Ratliff that will not exceed $22,500. (Id.) The Service Awards, if granted, shall be paid from the Settlement Fund and shall be the only Service Awards paid by Younique. (Id.)

5. Calculation of Settlement Payments

The relief to be provided to each member of the Settlement Class who submits a timely and valid Claim Form pursuant to the terms and conditions of this Agreement shall be a payment in the form of a cash refund. (Id. § V. J.) Payment will be based on the number of Products purchased by the member of the Settlement Class and the total amount of valid claims submitted. (Id.) Cash refunds will be paid by the Settlement Administrator via check, pursuant to Section V(K). (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. (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 number of Products purchased by the member of the Settlement Class and the total

amount of valid claims submitted is determined. (Id.)

The Settlement Administrator shall begin paying timely, valid, and approved claims via first-class mail no later than 30 days after the Effective Date. (Id. § V. K. 1.) The Settlement Administrator shall have completed the payment to Settlement Class members who have submitted timely, valid, and approved claims pursuant to the claim process no later than 45 days after the Effective Date. (Id. § V. K. 2.)

6. Release

Upon the Effective Date of this Agreement, Plaintiffs and each member of the Settlement Class, and each of their successors, assigns, heirs, and personal representatives, shall be deemed to have, and by operation of the Final Approval Order and Judgment shall have, fully released, relinquished, and discharged all Released Claims against the Released Persons. (Id. § IX. A.)

The Court notes that the definition of "Released Claims" appears to be a general release. This is fine for the named Plaintiffs, but not the Class members. The Class members should release the claims asserted in the current Complaint, i.e. any claim which could have been asserted based on the facts in the current Complaint. The Court will not approve a general release for Class members.

7. Notice

Class Counsel and Younique recommend and retain Heffler Claims Group to be the Settlement Administrator for this Agreement. (Id. § VI. A.)

The Settlement Administrator shall establishing a website, www. FiberLashesSettlement.com that contains the Complaint, this Agreement, the long form of the Class Notice (Exhibit D hereto), a Claim Form capable of being completed and submitted online or printed, the documents to be filed supporting a motion for preliminary approval of this settlement, the documents to be filed supporting an application for an award of Attorneys' Fees, Expenses and Service Awards, and the documents to be filed supporting a motion for Final Approval Order and Judgment. (Id. § VI. A. 1. c.) The Settlement Website shall be activated according to the Notice Plan,

and shall remain active until 90 calendar days after the Effective Date. (Id.)

The Settlement Administrator will also send the Class Notice and/or Claim Form to any potential member of the Settlement Class who so requests, via electronic or U.S. mail. (Id. § VI. A. 1. d.)

8. Unpaid Funds

If, after the payment of the items set forth in Section IV(A)(1)(i)-(vi) and the expiration of checks mailed to members of the Settlement Class, value remains in the Settlement Fund, it shall be called the Residual Fund. (Id. § V. L.) Any value remaining in the Residual Fund shall increase eligible Settlement Class members' relief on a pro rata basis until the Residual Fund is exhausted, unless the Parties mutually agree that a supplemental distribution is economically unfeasible. (Id.) Should the Parties mutually agree that a supplement distribution is economically unfeasible, then the parties will meet and confer in good faith to reach an agreement on a *cy pres* recipient approved by the Court. (Id.) If the Parties are unable to reach an agreement on a *cy pres* recipient, then Younique, on the one hand, and Plaintiffs, on the other hand, may submit alternative proposals for the cy pres recipient to the Court and the Court will select the recipient. (Id.) There shall be no reverter to Younique. (Id.)

9, Opt-Out and Objection Process

A member of the Settlement Class may object to this Agreement or request exclusion from this Agreement. (Id. § VIII.) Any member of the Settlement Class who does not request exclusion from the Settlement has the right to object to the Settlement. (Id.) Members of the Settlement Class may not both object to and opt out of the Settlement. (Id.) Any member of the Settlement Class who wishes to object must timely submit an objection as set forth in Section VIII(A). (Id.) If a member of a Settlement Class submits both an objection and a written request for exclusion, he or she shall be deemed to have complied with the terms of the procedure for requesting exclusion as set forth in Section VIII(B) and shall not be bound by the Agreement if approved by the Court, and the objection will not be considered by the Court. (Id.)

The Court notes that there should be at least a 60-day window for Class members to object, instead of the 30-day window stated in § VIII. A. 2.

10. Revocation of Agreement

Pursuant to the Settlement Agreement, the parties shall each have the right to terminate this Agreement if (1) the Court denies preliminary approval or final approval of this Agreement, or (2) the Final Approval Order and Judgment does not become final by reason of a higher court reversing the Final Approval Order and Judgment, and the Court thereafter declines to enter a further order approving settlement on the terms in this Agreement. (Id. § XII. A.)

In addition, Younique has the right to terminate the Agreement if, prior to the entry of the Final Approval Order and Judgment, .1% or more members of the Settlement Class for whom the parties have class contact information submit timely and valid requests for exclusion. (Id. § XII. B.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure Rule 23(e) states that "[t]he claims … of a certified class—or a class proposed to be certified for purposes of settlement—may be settled . . . or compromised only with the court's approval." "The parties must provide the court with information sufficient to enable it to determine whether to give notice of the propos[ed] [settlement] to the class." Fed. R. Civ. P. 23(e)(1)(A). "The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the propos[ed] [settlement] under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Id. 23(e)(1)(B)(i)(ii).

III. DISCUSSION

A. Preliminary Approval of the Proposed Class Settlement

1. The Fairness Factors Support Settlement Approval

Under Rule 23(e)(2) if the proposed settlement would bind class members, the Court may approve it only after a hearing and only on finding that it is fair, reasonable and adequate. To make this determination, the Court must consider the following factors:

(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 attorneys' 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).

Before the revisions to the Federal Rule of Civil Procedure 23(e), the Ninth Circuit had developed its own list of factors to be considered. See e.g., In re Bluetooth Headset Products Liab. Litig., 654 F.3d 935, 964 (9th Cir. 2011) (citing Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)). The revised Rule 23 "directs the parties to present [their] settlement to the court in terms of [this new] shorter list of core concerns[.]" Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes. "The goal of [amended Rule 23(e)] is . . . to focus the [district] court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Id.

a. Adequacy of Representation by Class Representatives and Class Counsel

Under Rule 23(e)(2)(A), the first factor to be considered is whether the class representatives and class counsel have adequately represented the class. This analysis includes "the nature and amount of discovery" undertaken in the litigation. Fed. R. Civ. P. 23(e)(2)(A), 2018 Advisory Committee Notes.

The proposed Class Representatives actively participated in the case, including by reviewing the complaint and other case documents and through extensive communications with Class Counsel regarding the status of the case. (Docket No. 25-1, Gonnelli Decl. at ¶ 20.) Plaintiffs Schmitt, Reilly, and Miller-Brun each traveled to

California to attend all-day depositions. (Id.)

Plaintiffs' Counsel have likely also adequately represented the Class. They have adequately prosecuted the case, having retained experts to test the ingredients of the Product and to conduct an analysis fo the product's pricing and potential damages, based on estimates of the potential price premium due to the alleged misrepresentations. (Id. ¶¶ 5-6.) Counsel obtained almost 6,000 documents in discovery regarding the sales, marketing and composition of the Product. (Id. ¶ 9.) They participated in a mediation in Santa Ana. (Id. ¶ 11.)

Because Plaintiffs and Class Counsel have adequately represented the Class, this factor weighs in favor of preliminary approval.

b. Negotiated at Arm's Length

The second Rule 23(e)(2) factor asks the Court to confirm that the proposed settlement was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B). As with the preceding factor, this can be "described as [a] 'procedural' concern[], looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23(e)(2), 2018 Advisory Committee Notes. "[T]he involvement of a neutral or court-affiliated mediator or facilitator in [settlement] negotiations may bear on whether th[ose] [negotiations] were conducted in a manner that would protect and further the class interests." Fed. R. Civ. P. 23(e), 2018 Advisory Committee Notes; accord Pederson v. Airport Terminal Servs., No. 15-cv-02400, 2018 WL 2138457, at *7 (C.D. Cal. April 5, 2018) (the oversight "of an experienced mediator" reflected noncollusive negotiations).

In August 2018, the parties participate in a mediation before the Honorable John Leo Wagner. (Docket No. 251-1, Gonnelli Decl. ¶ 11.) In April 2019, the parties participated in private mediation under the supervision of The Honorable Leo Pappas. (Id.) Discussions continued through the mediator and between counsel, ultimately resulting in this Agreement. (Id.) In sum, the Court is confident in the arm's length process Parties undertook, and that the Settlement is not the production of collusion.

c. Adequacy of Relief Provided for the Class

The third factor the Court considers is whether "the relief provided for the class is adequate, taking in to 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 attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C). Under this factor, the relief "to class members is a central concern." Fed. R. Civ. P. 23(e)(2)(C), Advisory Committee Notes.

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

"A[] central concern [when evaluating a proposed class action settlement] . . . relate[s] to the cost and risk involved in pursuing a litigated outcome." Fed. R. Civ. P. 23(e), 2018 Advisory Committee Notes. In evaluating this factor, the Court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case[.]" Kullar v. Foot Locker Retail, Inc., 168 Cal. App.4th 116, 130 (2008). "In the context of a settlement . . . the test is not the maximum amount plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances." Wershba v. Apple Computer, Inc., 91 Cal. App.4th 224, 250 (2001).

Plaintiffs assert that although they believe in the strength of their claims, the risks of continued litigation for Class Members are significant. (Docket No. 251-1, Gonnelli Decl. ¶ 17.) Defendant filed a number of pre-trial motions, including challenges to the admissibility of Plaintiffs' damages and liability reports, as well as a motion to decertify the Classes. (Id. ¶ 18.) Plaintiffs provide that this action was positioned for a hotly contested trial, which would have consumed a substantial amount of attorney, court time, and potential appeals, depending on the motion and its result. (Id.) Plaintiffs assert that they and the other members of the Settlement Class paid a price premium over and above what they otherwise would have paid for the Products based on Defendant's representations. (Id. ¶ 19.) Plaintiffs believe that they could demonstrate the existence of such a price premium. (Id.) However, litigation presents no guarantee for recovery, let alone a recovery greater than that provided by the Settlement. (Id.) The Parties would likely spend significant time and resources on this issue at trial. (Id.)

The Parties have provided the Court with information regarding what the potential recovery would have been had Plaintiffs won the case. (Mot. at 19, Docket No. 251-2.) They suggest that even if claims are made for ten percent of the purchases made by members of the Settlement Class, the damages for those members would be approximately $5.5 million. (Id.) Thus, the $3.25 million Settlement Fund represents approximately 59% of estimated damages. (Id.) However, the Court is not able to fully evaluate the amount of the settlement without at least some estimate of the likely individual recovery.

ii. Effectiveness of Proposed Method of Relief Distribution

Next, the Court must consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C). "Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims." Fed. R. Civ. P. 23(e), 2018 Advisory 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." Id.

The Settlement Agreement details eligibility for a cash payment and the process for class members to obtain a cash payment by submitting a timely and valid claim form. (Settlement Agreement, Docket No. 251-1, Gonnelli Decl., Ex. 1, § V. A-L.) This Court finds that this process facilitates the filing of legitimate claims and is not unduly demanding, and that the proposed method of distributing relief to the Class is effective.

iii. Terms of Proposed Award of Attorneys' Fees

Third, the Court must consider "the terms of any proposed award of attorneys' fees, including timing of payment." Fed. R. Civ. P. 23(e)(2)(c).

Class Counsel seeks one-third of the Settlement Amount, which exceeds the Ninth Circuit benchmark of 25%. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998); see also In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 942 (9th Cir. 2011) ("Where a settlement produces a common fund for the benefit of the entire class, . . . courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record for any 'special circumstances'

justifying a departure.").

Because the negotiated fee award exceeds the Ninth Circuit benchmark, the Court is unlikely to grant Class Counsel entitlement to one-third of the Settlement Amount, absent a strong showing that such an award is justified.

The Court finds that this factor is not an impediment to preliminary approval. However, Class Counsel will need to provide the relevant information to justify their entitlement to their requested fee award, including a lode star calculation with evidentiary support, which Class Counsel shall file within sixty (60) days of preliminary approval.

iv. Agreement Identification Requirement

The Court must also evaluate any agreement made in connection with the proposed Settlement. See Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3).

Here, the Settlement Agreement before this Court is the only agreement. (Docket No. 251-1.) Thus, the Court need not evaluate any additional agreements outside of the evaluation it makes of the Settlement Agreement.

d. Equitable Treatment of Class Members

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "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." Fed. R. Civ. P. 23(e)(2)(D), 2018 Advisory Committee Notes.

Plaintiffs provide that 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 Class Member. (Mot., Docket No. 251-2 at 22.) They argue that this approach provides claimants the ability to obtain a payment commensurate with their potential losses, as compared to other members of the Settlement Class. (Id.) But, the Class Representatives will receive additional compensation in the form of a service award. (Docket No. 251-1,

§ X. C.) It is unclear on the present record exactly what their participation was, and hence, the Court cannot assess the proposed additional payment. See Boyd v. Bank of Am. Corp., No. 13-cv-0561-DOC, 2014 WL 6473804, at *7 (C.D. Cal. Nov. 18, 2014) (citing Staton v. Boeing Co., 327 F.3d 938, 976–77 (9th Cir. 2003)).

Although Plaintiffs claim that each Class Representative is entitled to their additional compensation for their participation in the Actions, the Court will only approve the Class Representative Service Awards if they are supported by adequate proof for each representative, including approximate time spent on case. To simply provide "tiers" of compensation without a showing of how those calculations were made is inadequate. Moreover, the Court is unlikely to award payments that far exceed the individual payments made to Class Members absent proof of significant participation This is another reason the Court requires an estimate of individual recovery.

Class Counsel shall submit declarations from each named Plaintiff, supporting their service award, when Class Counsel files the fee motion.

Other than the Court's stated concern regarding the sufficiency of documentation supporting the service awards, which the Court will address in the final settlement approval, the Court is satisfied that all class members are treated equitably.

B. Preliminary Certification of the Proposed Settlement Class

The second prerequisite for directing notice of the settlement to the Class is a determination that the Class is likely to meet the requirements for certification for settlement purposes. Fed. R. Civ. P. 23(e)(1)(B)(ii). Certification requires that all four elements of Rule 23(a) and at least one prong under Rule 23(b) be satisfied. For purposes of this Settlement Agreement, the Parties stipulate to class action certification. (Settlement Agreement, Docket No. 251-1, Ex. 1, § III. A.) The Court examines each requirement to determine whether the Class can be certified for purposes of the Settlement Agreement.

1. The Proposed Settlement Class Meets the Requirements Under Fed. R.

Civ. Pro. 23(a).

Rule 23(a) imposes four prerequisites for class actions: (1) the class is so numerous that a joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). Fed. R. Civ. P. 23(a); United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. ConocoPhillips Co., 593 F.3d 802, 806 (9th Cir. 2010).

a. Numerosity

Under Rule 23(a)(1), a class must be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). Because this requirement is not tied to a fixed numerical threshold, a court needs to examine the specific facts of each case. Rannis v. Recchia, 380 Fed. App'x 646, 651 (9th Cir. 2010). Typically, courts have found that the numerosity requirement is satisfied when the proposed class includes at least forty members. Id.

Here, Younique sold 459,441 stand-alone units in California, 154,146 in Ohio, 100,158 in Tennessee and 180,404 in Florida. (Docket No. 80-1 at 12.) Thus, Plaintiffs have easily satisfied the Rule 23(a)(1) numerosity element. Accordingly, the Court finds that joinder of individual members is impracticable.

b. Commonality

Rule 23(a)(2) requires that there are common questions of law or fact. Fed. R. Civ. P. 23(a)(2). However, to satisfy this rule, all questions of fact and law do not need to be common. Hanlon, 150 F.3d at 1019. For instance, a class meets the commonality requirement if members share the same legal issues but have different factual foundations. Id. In addition, commonality is satisfied if members of the class share a common core of facts despite having different legal remedies. Id.

The proposed Classes' theory of liability is that "class members were subjected to the same labeling that contained the same misrepresentations, that the fibers were

'Natural' and made of 100% green tea fibers." (Docket No. 80-1 at 12.) Plaintiffs indicate that the common issues include: (1) whether the label misrepresented the ingredients; (2) the ingredients of the fibers; (3) whether the representations on the label were material to a reasonable consumer; and (4) the proper measure of class damages. (Id.) The Court finds that sufficient commonality has been established.

c. Typicality

Rule 23(a)(3) requires that 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). Rule 23(a)(3) has a permissive standard: the representative claims are typical if they are reasonably comparable to the claims of the absent class members; substantial identicalness between the claims is not required. Hanlon, 150 F.3d at 1020. The test for typicality is (1) whether other members have a similar injury, (2) whether the action is based on conduct that is not unique to the named plaintiffs, and (3) whether the same course of conduct has injured other class members. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

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 fibers. (Mot., Docket No. 251-2 at 11.) The same representations were made on all Products, including those purchased by Plaintiffs during the class period. (Id.) Thus, the typicality requirement is also satisfied.

d. Adequacy

Rule 23(a)(4) requires that a representative party fairly and adequately protects the interest of the class. Fed. R. Civ. P. 23(a)(4). Representation is fair and adequate when (1) the representative plaintiffs and counsel have no conflicts of interest with other class members and (2) representative plaintiffs and counsel will prosecute the action vigorously on behalf of the class. Staton, 327 F.3d at 957.

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. (Docket No. 251-1, Gonnelli Decl.¶ 20.)

The Court finds that adequacy has been established for purposes of preliminary approval.

2. The Proposed Settlement Class Meets the Requirements Under Federal Rule of Civil Procedure 23(b)(3).

Because the proposed settlement class satisfied the prerequisites under Rule 23(a), the Court must now consider whether it also satisfies Rule 23(b). Based on the following analysis, the Court finds that it meets the requirements of Rule 23(b)(3).

Under Rule 23(b)(3), a plaintiff must show (1) that common factual and legal issues predominate over individual questions and (2) that a class action is a superior method to resolve the class claims. Fed. R. Civ. P. 23(b)(3). There are several relevant factors to consider during this analysis: (1) the class members' interest in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members, (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (4) the likely difficulties in managing a class action. Id. 23(b)(3)(A)–(D). Here, the Court finds (1) that common factual and legal issues predominate over individual questions and (2) that a class action is a superior method to resolve the class claims.

a. Common Factual and Legal Issues Predominate Over Individual Questions.

To meet the predominance requirement, common questions must be so significant that a single suit resolves all the issues at dispute for all of the class members. Berger v. Home Depot USA, Inc., 741 F.3d 1061, 1067 (9th Cir. 2014), abrogated on other grounds by Microsoft Corp. v. Baker, 137 U.S. 1702 (2017). This predominance inquiry is a more rigorous analysis, and it presumes that there is commonality. Gold v. Midland Credit Mgmt., Inc., 306 F.R.D. 623, 633 (N.D. Cal. 2014).

As explained previously, the Court has found commonality. Plaintiffs' case depends 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. (Mot., Docket No. 251-2 at 12.) Accordingly, common issues predominate over any potential individual ones because liability and damages can be resolved for all Class Members using the same evidence

Thus, the Court finds that the predominance requirement has been met.

b. A Class Action is a Superior Method to Resolve the Class Claims.

A class action is a superior method to resolve the claims.

If all Class Members brought individual actions, they would need to prove the same wrongdoing by Younique, using the same evidence. Resolving these claims through a class action avoids the inefficiency of repetitious litigation and the potential risk of inconsistent rulings. Additionally, litigating each claim individually is unrealistic, as this would impose extraordinary burdens on the parties. See Wren v. RGIS Inventory Specialists, 256 F.R.D. 180, 210 (N.D. Cal. 2009) (finding class action superior where "[t]he alternative–hundreds or even thousands of individual actions–is not realistic."). Further, the amount in dispute for individual Class Members is too small, and the required expert testimony and document review is too costly. See Just Film, Inc. v. Buono, 847 F.3d 1108, 1123 (9th Cir. 2017). Accordingly, the Court finds that a class action in this case is a superior method to resolve the claims.

C. The Proposed Settlement Class Generally Meets the Notice Requirements Under Fed. R. Civ. Pro. 23(c)(2)(B).

Under Rule 23(c)(2)(B), "for any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members 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). Rule 23(c)(2)(B) further states that the notice may be made by one of the following: United States mail, electronic means, or another type of appropriate means. Id. "The notice must clearly and concisely state in plain, easily understood language: (I) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Id.

The Notice Program includes emailing the Notice to potential Settlement Class members for whom Younique has contact information, mailing the Notice to Settlement class members for whom the email is returned as undeliverable, launching an internet and social media campaign to reach members of the Settlement Class, and posting the Long-Form Notice on a dedicated website for the case to allow potential Class members to obtain information about the settlement and file a claim online. (Docket No. 251-1, Fenwick Decl. ¶¶ 5-12.)

Further, the Court finds that the Notice clearly and adequately conveys all relevant information regarding the proposed Settlement as required by Rule 23(c)(2)(B). The Notice concisely states a description of the action and the definition of the certified class. (Docket No. 251-1, Exs. C, D.) It identifies the class claims, and explains that class members member may enter an appearance through an attorney if the member so desires. (Id.) Finally, the Notice states that the court will exclude from the class any member who requests exclusion, the time and manner for requesting exclusion, and the binding effect of a class judgment on members under Rule 23(c)(3). (Id.) Accordingly, the proposed Settlement Class generally meets the requirements for notice. However, the Court notes that Class members should have at least 60 days to object

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' motion certifying the proposed Settlement Class, granting preliminary approval of the proposed settlement, directing dissemination of notice to the Class pursuant to the proposed notice plan, and appointing Heffler Claims Group as the Settlement Administrator for the dissemination of notice. Class counsel shall file a motion for final settlement approval within forty-five (45) days of the Response Deadline.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 17-1397 JVS (JDEx) Date September 16, 2019

Title Meghan Schmitt, et al v. Younique, LLC

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Initials of Preparer lmb