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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

AMY FRIEDMAN, JUDI MILLER, KRYSTAL HENRY-MCARTHUR, and LISA ROGERS on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GUTHY-RENKER LLC and WEN BY CHAZ DEAN, INC.,

Defendants.

Case No. 2:14-cv-06009-ODW-AGR

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Hon. Otis D. Wright II
Motion Date: August 1, 2016
Time: 1:30 p.m.
Location: Courtroom 11

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I. INTRODUCTION

Plaintiffs[1] submit this memorandum in support of the Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.[2] Under the terms of the Settlement Agreement and Release of Claims ("Agreement," filed concurrently herewith) between Plaintiffs Friedman, Miller, Henry-McArthur and Rogers (collectively, "Plaintiffs") and Defendants Guthy-Renker LLC ("Guthy-Renker") and WEN by Chaz Dean, Inc. ("WEN") (collectively Guthy-Renker and WEN shall be referred to as "Defendants"), Defendants have agreed to provide valuable and substantial benefits to Settlement Class Members to resolve this Lawsuit. The Agreement contains all of the material terms of the Settlement, including the manner and form of notice to be provided to the Settlement Class, the conditions or contingencies pertaining to the settlement's final approval, and other necessary and proper terms under Fed. R. Civ. P. 23 ("Rule 23"). The Settlement meets the criteria for preliminary approval, and is well within the range of what might be approved as fair, reasonable, and adequate. As such, Plaintiffs respectfully move this Court to enter the Proposed Preliminary Approval Order, attached as Exhibit A to the Joint Declaration of Interim Lead Counsel in Support of Preliminary

[1] Pursuant to Local Civil Rule 7-3, Plaintiffs' counsel met and conferred with counsel for Guthy-Renker LLC, Dina Cox, and counsel for WEN by Chaz Dean, Inc., Barry Schirm, concerning the instant Motion, which relief requires the Court to weigh the various factors relating to approval of a class action settlement and can only be done on noticed motion. On June 28, 2016, both counsel for Defendants confirmed that their clients do not oppose the relief sought by this motion based upon the Parties' Settlement Agreement. Defendants note that this memorandum reflects *only* the views of Plaintiffs and, but for the Parties' Settlement Agreement, Defendants dispute Plaintiffs' allegations of liability, causation and damages, and they further contest class certification and reserve the right to contest certification should the settlement not be finally approved or should the Effective Date otherwise not take place. Defendants deny that they did anything wrong, and liability is disputed in this matter for the primary reason that WEN Hair Care products have not been proven to cause hair loss to consumers, nor has it been legally determined that advertising of the Products was false or misleading. The makers of WEN stand behind the quality, safety, and formulation of the Products, all of which meet or exceed all safety and quality standards set by the cosmetics industry.

[2] Capitalized terms not otherwise defined herein shall have the same meanings as ascribed to them in the Settlement Agreement and Release of Claims.

Approval ("Jt. Decl." or "Joint Declaration"), preliminarily approving the proposed settlement, conditionally certifying for settlement purposes only a Settlement Class (described below), and providing for notice to members of the Settlement Class.

II. PERTINENT PROCEDURAL HISTORY

This Lawsuit was initiated against Guthy-Renker on July 31, 2014. Following the filing of an amended complaint, a motion to dismiss and compel arbitration was filed on December 10, 2014. On February 27, 2015, this Court, granted in part and denied in part the motion to dismiss and compel arbitration. Shortly thereafter an intensive period of discovery began. Depositions were conducted of Plaintiffs Friedman and Miller in Florida and Maryland, respectively. Additionally, Plaintiffs conducted depositions of Guthy-Renker employees on a range of topics in North Carolina and California. Plaintiffs served more than 75 formal requests for production of documents, over 100 requests for admission and 18 interrogatories. Two motions to compel were litigated arising out of Plaintiffs' discovery requests. On June 19, 2015, in midst of the discovery process, Plaintiffs filed a second amended complaint naming WEN by Chaz Dean, Inc. as a Defendant. Following the filing of WEN by Chaz Dean, Inc.'s answer to that complaint, Plaintiffs served discovery on WEN by Chaz Dean, Inc. as well.

On September 24, 2015, this Court issued a stay of the litigation in order to facilitate negotiation of a potential settlement. The Parties attended four mediations (January 29, 2016; February 29, 2016; March 1, 2016; and March 31, 2016), which were conducted at JAMS in Los Angeles before the Hon. Peter D. Lichtman (Ret.). At the conclusion of the March 31, 2016 mediation, Judge Lichtman made a mediator's proposal that all Parties accepted on April 29, 2016. Since that time, the Parties held a two-day in-person meeting in Los Angeles on May 9-10, 2016, served and responded to a variety of confirmatory discovery, and worked diligently to reduce the Settlement Agreement to writing.

III. SUMMARY OF THE SETTLEMENT

The proposed Settlement contains the following material terms:

Settlement Class

The Settlement Class is defined as:

All purchasers or users of WEN Hair Care Products in the United States or its territories between November 1, 2007 and August 1, 2016, excluding (a) any such person who purchased for resale and not for personal or household use, (b) any such person who signed a release of any Defendant in exchange for consideration, (c) any officers, directors or employees, or immediate family members of the officers, directors or employees, of any Defendant or any entity in which a Defendant has a controlling interest, (d) any legal counsel or employee of legal counsel for any Defendant, and (e) the presiding Judge in the Lawsuit, as well as the Judge's staff and their immediate family members.

Settlement Consideration

The settlement consideration consists of:

Settlement Fund

Defendants agree to provide consideration of $26,250,000 (the "Fund")This Fund shall be used to, *inter alia*, pay for notice and claims administration by a professional claims administration provider (the "Settlement Administrator"), to pay Class Member claims, to provide Incentive Awards to the Named Plaintiffs, to compensate the Special Master, and to compensate Class Counsel. None of these funds shall revert to Defendants under any circumstances. To the extent residual funds exist at the conclusion of the claim period, those funds will revert to *cy pres*, as described in Section 6 of the Settlement Agreement.

Tier 1 Class-Wide Flat Rate Claims

Any member of the Settlement Class who purchased WEN Hair Care Products, and does not timely request to opt-out of the Settlement Class, shall be

entitled to submit a claim against the Fund for a one-time flat payment of $25 per person as compensation for claims of misrepresentation regarding the qualities and attributes of WEN Hair Care Products, or undocumented claims of bodily injury, including but not limited to hair loss, hair damage, scalp pain or irritation, after using WEN Hair Care Products. Five Million Dollars ($5,000,000) of the Fund shall be set aside to pay Class Members making Tier 1 claims.

Tier 2 Documented Adverse Reaction Claims

Any member of the Settlement Class who alleges to have suffered bodily injury, including but not limited to hair loss, hair damage, scalp pain or irritation, as a result of using WEN Hair Care Products, and does not timely request to opt-out from the Settlement Class, may make a claim against the Fund for reimbursement of amounts spent to redress such alleged injuries, as well as an injury award designed to compensate the Class Member for any alleged injuries sustained, up to a maximum of $20,000 per Class Member, as set forth below. To make a claim under Tier 2, the Class Member must submit a valid Tier 2 Claim Form and supporting documentation, as set required by the Settlement Agreement.

Adverse Event Warning

Defendants agree that all labels for WEN Cleansing Conditioner created after the Effective Date shall bear a common sense caution materially consistent with the following: "If you experience any adverse reaction after using this product, immediately cease use and consult a physician."

Release

In exchange for the valuable consideration provided by this Settlement, the Parties have agreed to the following release: "any and all claims arising out of or in any manner related to the subject matter of the Lawsuit, including, but not limited to, the sale, marketing, advertising, distribution, design, formulation, manufacture, purchase, or use of WEN Hair Care Products by any Settlement Class Member, regardless of whether any such claim is known or unknown, asserted or as yet

unasserted. This Release of Claims shall not affect the ability of any governmental entity to conduct an investigation or assert a claim on its own behalf, but the Release of Claims shall continue to have preclusive effect as to any and all relief for or on behalf of any Settlement Class Member who has not opted-out of the Settlement."

Incentive Awards and Attorney's Fees

Subject to approval by the Court, Named Plaintiffs Amy Friedman and Judi Miller, who were subject to extensive discovery, including invasive review of medical records and deposition, shall receive Incentive Awards of $25,000 each for their substantial contribution in the prosecution of this Lawsuit for the benefit of the Class. Named Plaintiff Krystal Henry-McArthur shall receive an Incentive Award of $5,000 for her efforts in prosecuting the action for the benefit of the Class. And Named Plaintiff Lisa Rogers shall receive an Incentive Award of $2,500 for her efforts in prosecuting the Lawsuit on behalf of the Class.

Subject to approval by the Court, in light of the substantial work, considerable expenses expended, and risks associated with prosecuting this Lawsuit on behalf of the Class, Defendants agree not to oppose an application by Class Counsel for up to $6,500,000 to cover all costs and fees incurred in prosecuting this action on behalf of the Class. This request equates to less than 25% of the Fund. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) (recognizing 25% benchmark award in class actions and upholding award of 25% of $27,250,000 common fund).

IV. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23(e) requires judicial approval for any settlement agreement that will bind absent class members. *See* Fed. R. Civ. P. 23(e); *see also Briggs v. United States*, No. C 07–05760 WHA, 2010 WL 1759457, at *3 (N.D. Cal. Apr. 30, 2010). And it is well-settled in the Ninth Circuit that settlements are favored, particularly in class actions and other complex cases

where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). These economic gains multiply in pre-certification settlements since class certification undeniably represents a significant risk for Plaintiffs. *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 392 (C.D. Cal. 2007).

A court must take three steps in considering approval of a proposed settlement: (1) the court must preliminarily approve the proposed settlement; (2) members of the class must be given notice of it; and, (3) a final hearing must be held after which the court must decide whether the tentative settlement is fair, reasonable, and adequate. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632, at 320-21 (4th ed. 2004) ("MANUAL (FOURTH)"). The decision to approve a proposed class-action settlement is within the sound discretion of the district court judge "because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *accord Bruno v. Quten Research Inst., LLC*, No. SACV 11–00173 DOC (Ex), 2013 WL 990495, at *1 (C.D. Cal. Mar. 13, 2013).

The sole inquiry at the preliminary approval stage is "'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'" *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (*quoting Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). But the ultimate question of fairness, reasonableness, and adequacy is answered at the final-approval stage, after notice of the settlement has been given to class members and they have had an opportunity to comment on the settlement. *See* 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.83(1), at 23-336.2 to 23-339 (3d ed. 2002). Preliminary approval is merely the prerequisite

to providing notice to the class so that all class members are "afforded a full and fair opportunity to consider the proposed [settlement] and develop a response." *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983). *See also Misra v. Decision One Mortgage Co.*, No. SA CV 07-0994 DOC (RCx), 2009 WL 4581276, at *3, 9 (C.D. Cal. Apr. 13, 2009) ("To determine whether preliminary approval is appropriate, the settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out.") (Emphasis in original; citation omitted).

Courts have consistently noted that the standard for preliminary approval is less rigorous than the analysis at final approval. Preliminary approval is appropriate as long as the proposed settlement falls "within the range of possible judicial approval." A. CONTE & H.B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:25 (4th ed. 2002) ("NEWBERG") (*citing* MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.41 (3rd ed. 1995) ("MANUAL (THIRD)")); MANUAL (FOURTH) § 21.632, at 321. Courts employ a "threshold of plausibility" standard intended to identify conspicuous defects. *Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774, at *6 (N.D. Cal. June 19, 2007). Unless the Court's initial examination "disclose[s] grounds to doubt its fairness or other obvious deficiencies," the Court should order that notice of a formal fairness hearing be given to settlement class members under Rule 23(e). *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438 WBS GGH, 2006 WL 1652598, at *11 (E.D. Cal. June 13, 2006) (citation omitted); MANUAL (FOURTH) § 21.632, at 321-22.

V. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Certification of a Settlement Class is appropriate where the class meets the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation), *and* the requirements of Rule 23(b)(3). (common questions of law or fact predominate, and the class action is superior to other available methods of

adjudication). *Hanlon*, 150 F.3d at 1019. In this Lawsuit, the proposed Settlement can and should be properly certified under Rule 23.

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

1. Numerosity

With millions of members scattered around the country, the Settlement Class is sufficiently numerous to satisfy Rule 23(a)(1). *Hanlon*, 150 F.3d at 1019.

2. Commonality

There are clearly questions of law and fact common to the Settlement Class sufficient to satisfy Rule 23(a)(2). The Rule 23(a)(2) commonality threshold is easily met where, *as here*, the same common nucleus of facts will prove each class member's claim. *See Parra v. Bashas's Inc.*, 2008 U. S. App. LEXIS 15985, *8 (9th Cir. July 29, 2008) (*citing Hanlon*, 150 F.3d at 1019) (under Rule 23(a)(2) not all questions of fact and law need be common).

Common questions in this Lawsuit include: (1) whether Defendants' advertising was false and misleading; (2) whether WEN Hair Care Products cause hair loss, scalp irritation or other adverse reactions; (3) whether Plaintiffs and Settlement Class Members suffered damages as a result of Defendants' conduct; (4) whether WEN Hair Care Products contain a design defect; (5) whether Defendants had exclusive knowledge of, but failed to disclose, the existence of a defect in WEN Hair Care Products; (6) whether Defendants' conduct constituted a breach of warranty; and, (7) whether, as a result of Defendants' omissions and/or misrepresentations of material facts, Plaintiffs and members of the Class have suffered an ascertainable loss of monies and/or property and/or value.

3. Typicality

The Rule 23(a)(3) requirement of typicality is also clearly satisfied here. Typicality is satisfied when the representative's claims are reasonably co-extensive with those of absent class members, when each class member's claim arises from the same course of events and each class member makes similar legal arguments to

prove the defendant's liability. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1019. In this Lawsuit, the claims of the Named Plaintiffs and the Settlement Class Members arise from the same alleged course of events: (1) that Defendants made misrepresentations in their national, uniform advertising concerning the sulfates and synthetic ingredients; and, (2) that WEN Hair Care Products have the capacity to cause hair loss and scalp irritation.

4. Adequacy

The adequacy prong of Rule 23(a)(4) is satisfied where the attorney or attorneys representing the class is qualified and competent, and the class representatives have no interests antagonistic to those of the Settlement Class Members. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (two criteria for determining adequacy, the named representatives must appear able to prosecute the lawsuit vigorously through competent counsel and representatives must not have antagonistic interests with absent class members).

Here Class Counsel is well qualified and competent. As set forth in Plaintiffs' Motion to Lift Stay and for Appointment of Interim Class Counsel Pursuant to Federal Rule of Civil Procedure 23(g) [Dkt No. 139], and the accompanying declarations of William Anderson, Neville Johnson and Brian Warwick [Dkt Nos. 139-1, 139-2, and 139-3], Plaintiffs' Counsel have substantial class action experience, as well as the financial and human resources necessary to prosecute this action through trial and any appeals. These are counsel who are "prepared to try a case." See *Hanlon*, 150 F.3d at 1021. This Court recognized as much when it granted the Motion and appointed Cuneo Gilbert & LaDuca, LLP; Johnson & Johnson LLP; and Varnell & Warwick, PA, as interim class counsel [Dkt No. 146].

Additionally, the Named Plaintiffs are not subject to any unique defenses that might render their interests antagonistic to those of the Settlement Class

Members. Each Plaintiff used WEN Hair Care Products, is a Settlement Class Member, and alleges common harm as the result of utilizing the products.

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

1. Predominance

a. All Claims will be Governed by California Law

In this case, the California consumer laws will apply to a national class eliminating any "structural difficulties" arising from applying the consumer protection laws of the 50 states, a circumstance that could defeat a finding of predominance. *Hanlon*, 150 F.3d at 1021.

Under the choice of law principles of the forum, California law will apply to this Lawsuit[3] unless (1) California law conflicts with the law of another state, (2) the state whose law conflicts with California law has an interest in applying its own law, and (3) the foreign state's interest in applying its own law would be more impaired than California's interest if the law of such state were not applied. *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 919-20 (2001) ("California law may be used on a class wide basis so long as its application is not arbitrary or unfair with respect to nonresident class members"). Applying these principles to class actions asserting violations of California consumer protection laws, federal and state courts in California have held that a national class can be certified applying California laws exterritorialy where the defendant's conduct, *as here*, has a significant nexus with California.

In this Lawsuit, in particular, Plaintiffs allege that there are several factors establishing a close nexus between the claims of the entire class and the State of California:

- Defendants are headquartered in the Central District of California;

[3] Although Guthy-Renker has a California forum selection clause in its terms and conditions, not all retailers or potential defendants had such a requirement, meaning that national class certification pursuant to California law could have been contested.

- All decisions concerning the ingredients and formulations of WEN Hair Care Products during the class period were directed from the Central District of California;
- Defendants directed their national sales campaign from the Central District of California; and,
- Defendant Guthy-Renker's Terms and Conditions have a forum selection clause requiring that disputes be resolved in California.

Compare Clothesrigger, Inc. v. G.T.E. Corp., 191 Cal. App. 3d 605, 613 (1987) (in class action against a long distance telephone carrier, the court found sufficient contacts with California to justify application of California law to the claims of a nationwide class where (1) defendant did business in California; (2) defendant's primary offices were located in California; (3) a significant number of class members were located in California; and, (4) defendant's agents who prepared the advertising materials at issue were located in California); *See also Wershba v. Apple Computer*, 91 Cal. App. 4th 224, 242 (2001) (affirming the certification of a national class in an FAL action against California computer manufacturer, reasoning that "there were significant contacts with California in this case to satisfy constitutional concerns and support certification of a nationwide class…").[4] This Lawsuit is virtually indistinguishable from the foregoing cases in which courts have certified national classes under California's consumer protection laws.

b. Common Questions of Fact and Law Predominate

A common nucleus of facts and potential legal remedies "dominate this litigation." *See Hanlon*, 150 F.3d at 1022. Plaintiffs would establish Defendants'

[4] *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 223-224 (1999) (a national class may be certified when conduct violative of the UCL emanates from California); *Diamond Multimedia Systems, Inc. v. Superior Court* 19 Cal. 4th 1036, 1064 (1999) ("California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices and recognized the importance of extending state-created remedies to out-of-state parties harmed by wrongful conduct occurring in California.").

liability by demonstrating facts sufficient for the trier of fact to conclude: (1) Defendants made misrepresentations or omissions with a likelihood or tendency to deceive or confuse the public; (2) those misrepresentations or omissions were material; and, (3) WEN Hair Care Products were the proximate cause of physical injury to Plaintiffs and the Class. In this Lawsuit, the proof required at trial will be common to the entire Class, as Plaintiffs allege that the advertisements and promotional materials at issue were uniform, generated by Defendants in California, and distributed nationally. As to adverse reactions, common proof would be required at trial to demonstrate the causes of hair loss and scalp irritation.

Plaintiffs would be prepared to demonstrate through expert testimony that there is a quantifiable and scientifically sound method of determining the difference in value between WEN Hair Care Products as advertised and WEN Hair Care Products as they were actually provided. Put another way, Plaintiffs would utilize hedonic regression and conjoint analysis to establish the price premium paid for WEN Hair Care Products stemming from misrepresentations as to the characteristics of the products. Further, Plaintiffs would utilize expert medical and scientific testimony to establish that WEN Hair Care Products were the proximate cause of hair loss and scalp irritation for Plaintiffs and the Class.

And while some individual proof might be relevant to determining alternative measures of damages, i.e., the amount and severity of hair loss and scalp irritation, that does not preclude class certification. The amount of damages is invariably an individual question and does not defeat class action treatment. *Trujillo v. City of Ontario*, No. ED cv-04-1015 VAP at 7 (C.D. Cal., Apr. 14, 2005) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

2. Superiority

A class action is a vastly superior means, and likely the only practical means, of adjudicating the claims of millions of class members scattered all over the country. Comparing the available mechanisms for dispute resolution, and

where, as here, the individual claims are relatively small when compared to the complexity of the litigation and resources necessary for establishing causation and proof, the class action is clearly superior. *See Hanlon*, 150 F.3d at 1023.

VI. THE PROPOSED SETTLEMENT SATISFIES THE REQUIREMENTS FOR PRELIMINARY APPROVAL

A presumption of fairness for a proposed settlement arises where: (1) the settlement was reached through arm's-length negotiations; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; and, (3) counsel is experienced in similar litigation. *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, 11-12 (C.D. Cal. June 10, 2005); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Preliminary approval should be granted where a settlement has no obvious deficiencies and falls within the range of possible approval. *Alaniz v. California Processing, Inc.* 73 F.R.D. 296, 273 (C.D. Cal. 1976).

A. The Settlement Negotiations Occurred at Arm's-Length and Were Assisted by an Experienced Mediator

Courts accord "considerable weight" to settlements that are the product of hard-fought negotiations by experienced counsel. *Ellis*, 87 F.R.D. at 18; *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, *5 (N.D. Cal. July 11, 2014). Settlements that follow sufficient discovery and genuine arm's-length negotiation are presumed fair. *Nat'l Rural Telcoms. Coop. v. Directv, Inc.*, 2003 U.S. Dist. LEXIS 25375, *13 (C.D. Cal. 2004). When a settlement is achieved through arm's-length negotiations between experienced counsel, the Court should be hesitant to substitute its own judgment for that of counsel absent a showing of fraud, collusion or other forms of bad faith because the "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373,

378 (9th Cir. 1995)).

As detailed above and in the accompanying Joint Declaration, the Settlement is the product of hard-fought arm's-length negotiations. The Parties were aided in this process by a highly respected mediator—Hon. Peter D. Lichtman (Ret.)—who assisted the negotiations during four separate mediations held at JAMS in Los Angeles. Jt. Decl., ¶ 4. The process pursuant to which the proposed settlement was achieved is a factor weighing in favor of preliminary approval. *Adams v. Inter-Con Sec. Sys.*, 2007 U.S. Dist. LEXIS 83147 (N.D. Cal. Oct. 29, 2007) (the assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive); *see also In re Immune Response Secs. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007) (fact that a settlement was reached through negotiations with an experienced mediator is highly indicative of fairness).

B. Class Counsel Engaged in Sufficient Discovery to Make an Informed Judgment Concerning the Merits of Their Claims

The Court need not reach any ultimate conclusions on the contested issues of fact and law underlying the merits of the dispute, for it is the uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Approval of a class action settlement does not require that discovery be formal or exhaustive. *See Clesceri v. Beach City Investigations & Protective Servs.*, 2011 WL 320998, at *9 (C.D. Cal. Jan. 27, 2011) ("In the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement." (*quoting Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998))).

Class Counsel firmly believe that the claims in this action have merit and are supported by ample evidence. Class Counsel has been actively engaged in this litigation for approximately two years and thoroughly researched the contested

issues prior to and during the Litigation. Jt. Decl., ¶ 2). As the Court is aware, the Parties engaged in extensive discovery and discovery-related motion practice. Jt. Decl., ¶ 3. Class Counsel reviewed thousands of pages of relevant documents produced by Defendants and third parties and took depositions of Defendants' employees and executives. *Id*. Plaintiffs Friedman and Miller were subject to substantial discovery and were both deposed. *Id*. Class Counsel engaged multiple experts knowledgeable about the subject matter of the Lawsuit to assist them in the review and analysis of information obtained through discovery, as well as in developing their theory of the case. *Id*. All of this helped solidify Class Counsel's belief in the merits of the claims. This factor too supports preliminary approval. *Nat'l Rural Telcoms. Coop.*, 2003 U.S. Dist. LEXIS 25375 at*13.

C. The Proponents of the Settlement are Highly Experienced Class Action Litigators

Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation. *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). The recommendations of plaintiffs' counsel should be given a presumption of reasonableness. *Clesceri*, 2011 WL 320998, at *10 ("Courts give weight to counsels' opinions regarding the fairness of a settlement, when it is negotiated by experienced counsel."). As the docket in this case reflects, Class Counsel have vigorously prosecuted this case from the beginning, and are willing, able, and prepared to litigate this case through trial and beyond. Class Counsel has considerable experience in handling complex class actions in general, and consumer class actions in particular. *See* Dkt Nos. 139, 139-1, 139-2, and 139-3. This factor weighs in favor of granting preliminary approval.

D. The Settlement is Within the Range of Possible Approval

This settlement is tailored towards resolving Class Members' complaints concerning advertising misrepresentations and omissions, as well as claims of

bodily injury. The Settlement provides a simple and straightforward means by which Class Members can receive flat-rate compensation for advertising claims and for undocumented claims of bodily injury. To the extent that Class Members claim bodily injury, including hair loss and scalp irritation, the Settlement provides an innovative and technologically advanced means by which Class Members can receive up to $20,000 each. The claim process for Tier 2 claims is efficient and designed to reduce the burden on the Court. Finally, the adverse reaction warning ensures that those who use WEN Hair Care Products are instructed to cease use of the product and consult a physician if they experience an adverse reaction.

The Parties worked long and hard to come up with a settlement that provides meaningful benefits to all Settlement Class Members, that is tailored to remedy the specific issues raised by Plaintiffs' allegations, and that is user-friendly and accessible to Settlement Class Members. It is unlikely that a successful result at trial would garner a significantly better result than that achieved by the proposed Settlement. But even if it did, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) (*citing Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir. 1975)). Given the uncertainties of class certification and trial, the value of the Settlement plainly meets (and exceeds) the adequacy standard and renders this factor supportive of the proposed Settlement.

E. Additional Factors Weighing in Favor of Preliminary Approval

Although not required to be demonstrated at the preliminary approval stage, the proposed settlement also satisfies many of the other criteria for final approval as being fair, reasonable, and adequate.

Courts in the Ninth Circuit have examined some or all of the following factors in making such a determination: (1) the strength of plaintiff's 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 view of counsel; (7) the presence of a governmental participant; and, (8) the reaction of the class members to the proposed settlement. *Hanlon*, 150 F.3d at 1026.[5] Factors (1), (4) (5), and (6) are largely discussed above, and factor (8), the reaction of the class to the settlement, can only be determined after notice has been accomplished.[6] An analysis of factors (2) and (3), further favors preliminary approval of the proposed Settlement.

1. The Complexity, Expense, and Likely Duration of the Litigation Favors Settlement

Significantly, despite having a factually well-developed case, the Parties still face significant uncertainty due to the novelty of the factual and legal issues presented and the lack of binding authority on point. Defendants deny the factual allegations in the operative complaint and any legal liability arising from those claims. Plaintiffs and Defendants recognize the substantial time and expense that would be required to take this case to trial and through appeal, and the circumstances and attendant risks favor settlement. *See Hanlon*, 150 F. 3d at 1026.

While Plaintiffs largely prevailed on Guthy-Renker's motion to dismiss and compel arbitration, and the Parties were able to reach the proposed settlement through meaningful discovery and mediation, the continued litigation of contested issues would involve significant time and expense. Additional discovery would be needed to prepare for class certification, trial, and beyond. *See* Jt. Decl. at ¶ 5.

[5] The Ninth Circuit has stressed that this is not an exhaustive list of relevant considerations, nor even necessarily the most significant factors. *Officers For Justice*, 688 F.2d at 625. Moreover, the relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sought, and the unique facts and circumstances presented by each individual case. *Id.* The issue is not whether the settlement could be better, but whether it is fair, reasonable, and adequate and free from collusion. *Hanlon*, 150 F.3d at 1027.

[6] Factor (7) does not appear to be pertinent, as no government agency is or was a party to this action.

Additional motions to compel discovery would be likely. *Id.* The parties would require additional depositions and motion practice to brief and argue class certification. *Id.* Multiple expert reports would be prepared and exchanged. Summary judgment briefs would likely be exchanged and argued, and further time and expense would be endured in preparation for and through the duration of any trial and future appeal. And an MDL motion would be probable, if not certain. As such, the proposed settlement offers a compromise that meaningfully addresses the claims at issue in light of the substantial amount of time and expense that would be involved with litigating the claims through trial and appeal. This factor weighs in favor of granting preliminary approval.

2. The Risk of Maintaining Class Action Status through Trial Favors Settlement

The risks associated with maintaining a class action through trial are a relevant criterion in evaluating the reasonableness of a proposed class action settlement. *Amchem Products, Inc., et al. v. Windsor et al.*, 521 U.S.at 591 (1997) ; *see also In re Heritage Bond Litig.*, 2005 WL 1594403 (C.D. Cal. June 10, 2005).

Plaintiffs anticipate that Defendants would vigorously contest class certification. Defendants engaged in sufficient class discovery (i.e., depositions and document discovery of Named Plaintiffs), to make evident that Defendants carefully considered various possible defenses against class certification. While Plaintiffs believe the criteria of Rule 23 are satisfied here, Plaintiffs recognize the risks inherent in obtaining, and maintaining, class certification in a nationwide consumer class action applying California law.

It should be noted that the requirement of Rule 23 that the class action be "manageable" need not be met in the context of certification of a settlement class. *Amchem*, 521 U.S. at 591. If this action were to continue, Defendants would likely contend that this case would present a host of case management problems.

Finally, even if Plaintiffs were successful in obtaining class certification,

Defendants would likely pursue an interlocutory appeal pursuant to Rule 23(f). The outcome of such an appeal would also be uncertain, and, at a minimum, would delay and add complexity and additional risk and cost to the proceedings, delaying or eliminating the possibility of meaningful recovery for Plaintiffs and the Class.

VII. THE FORM AND METHOD OF CLASS NOTICE SHOULD BE APPROVED

A Rule 23(e) class notice is sufficient if it informs the class members of the nature of the pending action, the general terms of the settlement, the options available to class members (e.g. submitting a claim form, opting out, and/or objecting), the time and place of the fairness hearing, and ways to obtain more detailed information. *Manual for Complex Litigation*, § 21.312 (4th ed. 2004). The distribution of class notice is sufficient if it is given in a form and manner that does not systematically leave an identifiable group without notice. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1027-1028 (N.D. Cal. 1999), *quoting Officers for Justice*, 688 F.2d at 624 (*citing Mandujano v. Basic Vegetable Prod., Inc.*, 541 F.2d 832, 835-836 (9th Cir. 1976)). Due process requires only a procedure reasonably calculated to reach class members. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

More specifically, Rule 23(c)(2)(B) requires the notice directed to the class to clearly, and in concise, plain, easily-understood language state: (a) the nature of the action; (b) the definition of the class certified; (c) the class claims, issues, or defense; (d) that a class member may enter an appearance through an attorney if he or she desires; (e) that the court will exclude any member of the class upon request; (f) the method and time to request exclusion; and, (g) that the judgment will be binding on class members. Here, the Parties strictly adhered to these requirements.

To start, the Parties have developed a four-part Notice Plan which involves direct notice, by email and US Mail, to approximately 6 million Settlement Class members for whom Defendants possess contact information. Second, notice will

be published in a manner comporting with due process in order to reach those Class Members for whom no contact information is available. Third, a Settlement Website will be created. Finally, the Settlement Administrator will provide notice to governmental agencies pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b). This multi-step approach is reasonable under the circumstances of this case. Each form of Notice will be addressed in turn.

First, the majority of Class Members will receive notice by direct email in the form of Exhibit B to the Joint Declaration. Unlike many consumer products, the vast majority of Class Members purchase WEN Hair Care Products online, either directly from Guthy-Renker or WEN by Chaz Dean or through one of the online retailers such as QVC and Amazon. Because the majority of sales were made online, email addresses are already the primary method for communicating product information to these customers, such as receipts, promotions and delivery information. The Parties are in the process of obtaining email addresses from their online retailers. It is estimated that email notice will be issued to approximately 5 million class members. *See, Spann v. J.C. Penney Corporation*, 314 F.R.D. 312, 331 (C.D. Cal., 2016) (approving email and postcard notice plan); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 151 (E.D. La. 2013) (approving email and post card notice plan.). Accordingly, providing notice to the Class through email is preferable and will cost only a fraction of the cost of regular mail.

Second, any Class Member who did not provide a valid email address will be issued notice by postcard delivered by regular mail in the form of Exhibit C to the Joint Declaration. Approximately 1 million class members will receive notice by regular mail. The postcard notice will be in summary form and will provide information to allow the class member to obtain more detailed information. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 173 (1974) (individual mailed notice is the best practicable notice with respect to those class members whose names and addresses are easily identifiable); *Boggess v Hogan* 410 F Supp 433, 442 (N.D. Ill.

1975) (Rule 23(e) is not violated where notice of settlement is individually mailed but never published).

The third component of the Notice Plan involves notice by publication. The publication notice will comport with due process requirements and direct potential class members to the Settlement Website at www.WENClassSettlement.com or toll-free phone line where full information concerning the Settlement, as well as Claim Forms and instructions, will be available.

Finally, the Court-approved Settlement website will: (1) provide full details of the benefits available under the Settlement; (2) explain the rights of Class Members to object to or opt-out of the Settlement, (3) clarify that no further notice will be provided to them and that the Settlement has been preliminarily approved; and, (4) inform Class Members that they should monitor the Settlement Website for further developments and to obtain Claim Forms. The Long-Form Notice for the Settlement Website is attached as Exhibit D to the Joint Declaration. The Publication Notice is attached as Exhibit E to the Joint Declaration.

Accordingly, the proposed Notice Plan describes the proposed Settlement and sets forth, among other things: (1) the nature, history and status of the litigation; (2) the definition of the proposed Class and who is excluded from the Class; (3) the reasons the parties have proposed the Settlement; (4) the amount of the Settlement; (5) the Class's claims and issues; (6) the parties' disagreement over damages and liability; (7) the plan for allocating the Settlement proceeds to the Class through the two-tier claim process; (8) the maximum amount of attorneys' fees and expenses that Class Counsel intends to seek; (9) the maximum amount of Representative Plaintiffs' request for incentive awards; and, (10) the date, time and place of the final settlement hearing.

Further, the proposed Notice Plan discusses the rights Class Members have in connection with the Settlement, including: (1) the right to request exclusion from the Class and the manner for submitting a request for exclusion; (2) the right

to object to the Settlement, or any aspect thereof, and the manner for filing and serving an objection; and, (3) the right to participate in the Settlement and instructions on how to complete and submit Tier 1 and Tier 2 Claim Forms. The Notice Plan also provides contact information for Class Counsel and counsel for the Defendants, as well as the postal address for the Court.

Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See also* Rule 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the propos[ed settlement]."). As detailed above, the Notice Program proposed in connection with the Settlement more than satisfies the requirements of the Federal Rules of Civil Procedure and due process. Moreover, courts routinely find that comparable notice procedures meet the requirements of Rule 23 and due process. Accordingly, in granting preliminary approval of the Settlement, Plaintiffs respectfully requests that the Court also approve the proposed form and method of giving notice to the Class as set forth herein.[7]

VIII. THE PROPOSED CLAIMS PROCESS SHOULD BE APPROVED

Under the Settlement, the Parties have agreed to a two tier claim process. First, Tier 1 Class-Wide Flat Rate Claims are class-wide flat rate claims for $25 each. Tier 1 is for Class Members that have experienced no adverse reaction to the Products or have no documentation. Exhibit F to the Joint Declaration is a copy of the Tier 1 Claim Form. The Tier 1 Claim Form is simple and requires no proof of purchase.

Tier 2 Documented Adverse Reaction Claim Forms will be used for Class Members that have documented adverse reactions to the product and will be eligible to receive up to $20,000, as determined by a Court-appointed Special

[7] The Parties are gathering necessary data for solicitation of bids from potential notice and claims administration providers. The Parties expect to provide an update on this issue at or before the Preliminary Approval Hearing.

Master. A sample Tier 2 Claim Form is attached as Exhibit G to the Joint Declaration. In order to make a claim under Tier 2, the Class Member must submit a valid and complete Tier 2 Claim Form, along with Supporting Documentation as described in Section 6.B.2 of the Settlement Agreement. Draft instructions for Tier 1 and Tier 2 Claim Forms are attached as Exhibit H to the Joint Declaration.

The Settlement Administrator and Special Master shall have authority to determine the validity, or lack thereof, of any Tier 2 claims submitted, including the sufficiency of the Class Member's evidence of his or her claimed Injury and any other documentation submitted in support of the claim. The Special Master shall have full and final authority over any decision with respect to a Tier 2 claim and that decision shall not be subject to an appeal or reconsideration.

The following forms of documents will be considered "Supporting Documentation" and shall be received by the Settlement Administrator and reviewed by the Special Master in support of a Tier 2 claim: before or after photographs (labeled or dated as such) depicting the Class Member's claimed injury, video testimony of the Class Member describing the claimed injury, medical records from a licensed medical professional related to the Class Member's claimed injury, and/or supporting declarations from witnesses who verify the Class Member's claimed injury. Additionally, the following forms of Supporting Documentation shall be received by the Settlement Administrator in support of a claim for reimbursement of out-of-pocket expenses incurred to redress injury purportedly caused by WEN Hair Care Products: dated medical bills evidencing payments related to the Class Member's claimed injury, dated receipts for out-of-pocket expenses, dated credit card statements evidencing payment by the Class Member related to the Class Member's claimed injury, or dated bank statements evidencing payment of out-of-pocket expenses related to the Class Member's claimed injury. Dated receipts and/or declarations supplied by, for example, a medical provider or hairdresser confirming the amount spent to redress

a claimed injury will also be considered. Recently, in *Martin v. Reid*, 818 F.3d 302, 309 (7th Cir. 2016), the Seventh Circuit approved of a very similar settlement structure and specifically stated that the information required by the Special Master was appropriate for hair loss claims.

The Supporting Documentation described above is not intended to provide an exclusive list of the supporting evidence that may be submitted in support of a Claim. The Settlement Administrator and Special Master have discretion to accept forms of evidence in addition to or in place of the examples set forth above.

IX. INCENTIVE AWARDS TO NAMED PLAINTIFFS AND ATTORNEYS' FEES AND COSTS

Class Counsel is entitled to compensation and reimbursement of expenses for bringing the case and obtaining a fair, reasonable and adequate settlement. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1997) (attorneys' fees are recoverable where plaintiff has maintained a suit that confers a common benefit). The Settlement Agreement provides that Defendants will not oppose Class Counsel's application for a fee and expense award in the amount of $6.5 million. This amounts to less than 25% of the non-reversionary Fund established for the payment of claims. The Settlement Agreement also provides that Class Counsel will submit applications for, and Defendants will not oppose, incentive awards for Plaintiffs Friedman and Miller of $25,000 each, an incentive award for Plaintiff Henry-McArthur of $5,000, and Plaintiff Rogers of $2,500.

The proposed Named Plaintiffs' Incentive Awards are also reasonable. Courts recognize that a class representative is entitled to compensation for the expense he or she incurred on behalf of the class lest individuals find insufficient inducement to lend their names and services to the class action. *In re Oracle Sec. Litig.*, No. 90-0931, 1994 U.S. Dist. LEXIS 21593, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) (citing In re Continental Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992)). Such payments are routinely approved when, as here, they are

reasonable in light of applicable circumstances, and not unfair to other class members. *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 368 (S.D. Miss. 2003). To assess whether an incentive award is excessive, the Court must balance the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003).

Here, the Named Plaintiffs provided meaningful representation to the class by participating in all (or some) of the following litigation-related activities: reviewing court filings, answering interrogatories, responding to document requests, preparing for depositions with their attorneys, and sitting for depositions. Jt. Decl., ¶ 3. Furthermore, Plaintiffs Friedman and Miller were subject to invasive review of their medical records. *Id*. The proposed Named Plaintiffs' Incentive Awards are appropriate considering the time and effort involved in representing the interests of the Class. Even the payments at the higher end of the spectrum for Plaintiffs Friedman and Miller represent only modestly more than the individual cap for Tier 2 claims. And, in the case of Plaintiffs Henry-McArthur and Rogers, much less. As such, the proposed incentive awards are within a reasonable range.

X. CONCLUSION

As the above analysis and supporting documents demonstrate, the proposed Settlement clearly meets the standards for preliminary approval. Therefore, Plaintiffs respectfully request that this Honorable Court enter an order (a) certifying, for settlement purposes, the Class; (b) preliminarily approving the proposed settlement described in the Settlement Agreement filed concurrently herewith; (c) authorizing the form and method of class notice described herein and filed concurrently herewith; (d) setting a date for the Final Approval Hearing to consider final approval of the settlement; and (e) granting such other and additional relief as the Court deems just and appropriate.

DATED: June 28, 2016

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ATTESTATION RE: SIGNATURES

I, Jordanna G. Thigpen, am the ECF User who is filing Plaintiffs' Memorandum of Law in Support of Preliminary Approval. I attest that all other signatories listed, and on whose behalf the filings are being submitted, concur in the content of such filings and have authorized the filing of such documents.

DATED: 6/28/16

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