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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KATHLEEN SONNER on Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

SCHWABE NORTH AMERICA, INC. and NATURE'S WAY PRODUCTS, LLC,

Defendants.

Case No. 5:15-cv-01358-VAP (SPx)

CLASS ACTION

PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: September 28, 2020
Time: 2:00 p.m.

USDJ: Virginia A. Phillips
Courtroom: 8A, 8th Fl., 1st Street-LA
USMJ: Sheri Pym
Courtroom: 3 or 4, 3rd Fl., R'side

Date Filed: July 7, 2015
Trial Date: November 3, 2020

DEMAND FOR JURY TRIAL

REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL

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Plaintiff Kathleen Sonner ("Plaintiff") submits this memorandum in support of the Joint Motion for Preliminarily Approval of Class Action Settlement. The Stipulation of Class Action Settlement ("Settlement" or "SA") is concurrently filed (ECF No. 186).

I. INTRODUCTION

Plaintiff seeks preliminary approval of the proposed Settlement of this class action against Schwabe North America, Inc. and Nature's Way Products, LLC (together, "Schwabe" or "Defendants"). Plaintiff alleged Defendants falsely advertised their ginkgo biloba dietary supplement Ginkgold[1] by claiming it provided cognitive health benefits that it did not provide. As a result, Plaintiff sought restitution and damages for violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*, Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1770, *et seq.*, as well as breach of express warranty.

The Settlement substantially meets the goals of this litigation by refunding consumers the retail price for their purchases of Ginkgold. The overall settlement value is substantial compared to the total sales of Ginkgold. Defendants will pay $3,375,000 into a Settlement Fund, which represents more than [redacted] of the total wholesale sales and [redacted] of the total retail sales of Ginkgold to Settlement Class Members.

Depending on the product purchased, Settlement Class Members will receive $18.00 or $33.00 per unit, based on a blended average of the retail prices actually paid by consumers. For Settlement Class Members with proof of purchase, they will be refunded for all purchases of Ginkgold. For those Settlement Class Members without proof of purchase, they will receive reimbursement for up to three purchases. Additionally, depending on the amount of money left in the non-reversionary

[1] "Ginkgold" includes the Ginkgold 60 mg 50 tabs, Ginkgold 60 mg 100 tabs, Ginkgold Max 120 mg 30 tabs, Ginkgold Max 120 mg 60 tabs, Ginkgold 60 mg 75 tabs, and Ginkgold 60 mg 150 tabs manufactured and distributed by Schwabe.

Settlement Fund, Settlement Class Members may receive up to five times their valid claim amount.

As a result of this hard-fought litigation, Schwabe also has significantly changed its labels for Ginkgold by eliminating images and words on the product labels that imply Ginkgold treats cognitive diseases.

Also paid from the Settlement Fund are the notice and settlement administration costs, Class Counsel's attorneys' fees and expenses not to exceed 33% of the Settlement Fund, and a requested $5,000 service award to the Class Representative. *See* SA, §§ 2.2, 2.4. No portion of the Settlement Fund will revert to Defendants. Any money remaining after calculating distribution of valid claims will be distributed to the Settlement Class by first increasing the dollar amount of those claims, and then distributing any remainder to the American Brain Foundation in accordance with the *cy pres* doctrine. *Id.*, § 2.2.4.

At the preliminary approval stage, the Court need only "make a preliminary determination of the fairness, reasonableness and adequacy of the settlement" so that notice of the Settlement may be given to the Settlement Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 11.25 (4th ed. 2002) ("Newberg"); David F. Herr, *Annotated Manual for Complex Litigation* ("Manual") § 21.632 (4th ed. 2008). In so doing, the Court reviews the Settlement to determine that it is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *see also In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 569 (9th Cir. 2019).

The proposed Settlement easily meets the preliminary approval standard. Thus, Plaintiff respectfully requests the Court: (1) grant preliminary approval of the Settlement; (2) approve and direct notice as set forth in the Notice Plan; (3) conditionally certify the Settlement Class; (4) approve the form and content of the

proposed Full Class Notice; (5) appoint Plaintiff Kathleen Sonner as Class Representative; (6) appoint Paula R. Brown and Timothy G. Blood of Blood Hurst & O'Reardon, LLC as Class Counsel; (7) appoint JND Legal Administration ("JND") as Settlement Administrator; and (8) schedule a Fairness Hearing.

II. HISTORY OF THE LITIGATION

The Settlement was reached after very hard-fought litigation spanning over five years, which included, extensive motion practice, a successful appeal by Plaintiff, class certification, significant discovery, expert reports, three full-day mediation sessions between two different mediators and numerous further mediated negotiations.

A. The Complaint and Defendants' Motion to Dismiss

This lawsuit was filed on July 7, 2015, alleging Defendants violated the CLRA, UCL, and Wisconsin's Unfair Trade Practices Act ("UTPA"), and breached the express warranty by Ginkgold and Ginkgold Max as providing cognitive health benefits when there is no actual significant effect. ECF No. 1. On August 28, 2015, Defendants moved the complaint or in the alternative to strike the nationwide class allegations. ECF No. 18.

On November 18, 2015, the Court granted in part and denied in part Defendants' motion, finding that Plaintiff did not have Article III standing to pursue injunctive relief, but denying the motion on all other grounds. ECF No. 26. Defendants answered the complaint on November 30, 2015. ECF No. 28.

B. Defendants' Motion for Summary Judgment and Plaintiff's Appeal

On September 14, 2016, Defendants moved for summary judgment, arguing that Plaintiff could not prove the Ginkgold advertising was false because there are scientific studies that support the cognitive health claims. ECF No. 50-1. Plaintiff opposed the motion by submitting the declaration of a neurologist and expert in ginkgo biloba who evaluated the body of scientific evidence and concluded that the studies demonstrated ginkgo biloba does not provide the advertised cognitive health

benefits. Declaration of Paula R. Brown in Support of Joint Motion for Preliminary Approval of Class Action Settlement ("Brown Decl."), ¶ 9.

Despite Plaintiff's efforts, on February 2, 2017, the Court granted Schwabe's motion for summary judgment, holding that Plaintiff did not meet her burden of proving Schwabe's advertising claims were false or misleading because her expert did not critique all studies relied on by Schwabe. ECF No. 89 at 15. Plaintiff appealed the ruling as to her UCL, CLRA and breach of express warranty claims.

The appeal before the Ninth Circuit was extremely hard fought. In addition to the parties' extensive briefing, the Council for Responsible Nutrition submitted an amicus brief in support of Schwabe. Brown Decl., ¶ 11. After oral argument, on December 26, 2018, the Ninth Circuit reversed the grant of summary judgment in favor of Schwabe, holding that through her expert's analysis, Plaintiff had demonstrated a triable issue of fact as to whether Schwabe's advertising claims were false or misleading. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 993 (9th Cir. 2018).

Schwabe petitioned the Ninth Circuit for rehearing. Brown Decl., ¶ 12. In support of its petition, the Council for Responsible Nutrition and the National Products Council both filed amicus briefs. *Id*. On February 12, 2019, the Ninth Circuit denied Schwabe's petition and on February 20, 2019, issued its mandate. *Id.*

C. Class Certification and Further Proceedings

Once back before this Court, the parties submitted supplemental briefing on Plaintiff's previously filed motion for class certification, which had been denied as moot. Brown Decl., ¶ 13. On July 2, 2019, the Court granted Plaintiff's motion for class certification as to a California class of consumers. ECF No. 118.

After remand from the Ninth Circuit, Schwabe filed a motion for leave to file a second motion for summary judgment on preemption grounds. ECF No. 123. Plaintiff opposed that request and on October 24, 2019, the Court denied it. ECF No. 129. Schwabe also filed a second motion to dismiss on jurisdictional grounds,

arguing the Court's certification of a California class reduced the jurisdictional amount in controversy below the necessary threshold. Plaintiff opposed the motion, and on June 11, 2020, the Court denied it. ECF No. 172.

Following this order, Plaintiff filed a putative class action for injunctive relief on June 6, 2020. As a result of this litigation, Schwabe substantially changed the labelling for Ginkgold and Ginkgold Max, including by eliminating the images of brains that suggest a connection to a brain disease or condition, and by clarifying on the front of the label that Ginkgold and Ginkgold Max merely "support" certain brain functions.

D. Discovery Efforts

The Parties engaged in comprehensive discovery over the course of five years. Plaintiff propounded several sets of interrogatories, requests for admission, and requests for production of documents. Brown Decl., ¶ 17. After meet-and-confer sessions to resolve objections, Defendants produced more than 172,000 pages of documents and data. The data and ESI Defendants produced broadly related to advertising for Ginkgold and Ginkgold Max, scientific evidence regarding Defendants' advertising claims, wholesale and retail sales data, and changes to the labels. *Id.*, ¶¶ 18-20. Plaintiff also subpoenaed numerous third-party retailers for retail sales data and worked closely with those retailers over the course of several months to obtain the information necessary to prove restitution and damages at trial. *Id.*, ¶ 28.

Plaintiff also took five separate depositions of Defendants' Rule 30(b)(6) witnesses, three of which were conducted in the months leading up to trial. *Id.*, ¶ 21. Given the COVID-19 crisis, the parties worked together to ensure discovery could continue and witnesses could be deposed safely via video conference. *Id.*

Defendants also took discovery from Plaintiff. Separate and apart from responding to formal discovery requests, Plaintiff also was deposed, devoted time and effort providing information to assist in the litigation of this case, participating in

periodic telephone conferences with her counsel, and reviewing and approving pleadings, including the complaint and the Settlement. *Id.*, ¶ 34.

E. Rule 26 Expert Reports

Class Counsel spent significant time working with five well-respected experts in their fields who prepared and provided Rule 26 reports. Plaintiff retained Dr. Annette Fitzpatrick, an epidemiologist who specializes in age-related disease and disorders and who conducted the largest clinical trial of ginkgo biloba to date, who assessed the entire body of scientific evidence concerning ginkgo biloba, provided affirmative opinions, and assessed and rebutted several of Defendants' experts. *Id.*, ¶ 22. Thomas Maronick, a marketing and consumer perception expert, created and conducted a consumer survey that tested consumers' perceptions of the Ginkgold label, and he assessed and opined on Defendants' marketing expert's report. *Id.*, ¶ 23. Plaintiff also retained damages expert Jennie M. McNulty, a CPA who analyzed the extensive wholesale and retail data to provide opinions on the aggregate damages. *Id.*, ¶ 24.

For rebuttal purposes, Plaintiff retained and submitted the reports of Dr. Steven DeKosky, a neurologist that has conducted clinical trials on ginkgo biloba, and Laura Plunkett, Ph.D., an expert in the processes of the U.S. Food and Drug Administration. *Id.*, ¶ 26.

F. Settlement Negotiations

The parties participated in three mediation sessions, one before Honorable Edward A. Infante (Ret.) on June 8, 2016, and two with Scott Markus, Esq. on February 13, 2020, and April 1, 2020. Brown Decl., ¶¶ 29-31. In connection with these efforts, the Parties submitted and exchanged detailed mediation statements setting forth their respective views as to the strengths of their cases. These settlement negotiations occurred while the Parties were preparing for trial and continuing to litigate discovery and other issues. The last formal mediation session was followed by numerous telephonic conferences and email exchanges, with the assistance of

Mr. Markus, until a memorandum of understanding was reached in July 2020. Over the past several months, the Parties continued to negotiate over the written terms and details of the Settlement, exchanging numerous drafts of settlement documents. Brown Decl., ¶¶ 31-32.

Every aspect of this Settlement was heavily negotiated, including the overall dollar amount of the Settlement and each aspect of the agreement and exhibits, including the amounts available to individual Settlement Class Members and details surrounding the Full Class Notice. *Id.*, ¶ 33. Class Counsel believe the Settlement represents a good and fair outcome that readily meets the fair, reasonable and adequate standard, and is in the best interests of the Settlement Class. *Id.*, ¶ 6.

III. SETTLEMENT TERMS

A. The Settlement Class

The proposed Settlement Class is defined as:

> All people who purchased in California Ginkgold or Ginkgold Max from July 7, 2011 through the date of preliminary approval, and all people who purchased in the United States other than in California Ginkgold or Ginkgold Max from January 1, 2016 through the date of preliminary approval.

SA, § 1.3.1.

Excluded from the Settlement Class are: (a) Schwabe, their officers, directors and employees, affiliates and affiliates' officers, directors and employees; (b) Class Counsel; (c) judicial officers and their immediate family members and associated court staff assigned to this case; (d) persons or entities who purchased Ginkgold or Ginkgold Max for resale; and (e) persons who timely and properly exclude themselves from the Settlement Class as provided in the Agreement. *See* SA, § 1.3.2.

B. Settlement Relief

1. Payments to Settlement Class Members

Pursuant to the Settlement, Schwabe has agreed to pay $3,375,000 into a non-reversionary Settlement Fund to reimburse Settlement Class Members, pay for Full

Notice, and any award of attorneys' fees, expenses, and Class Representative service award.

Settlement Class Members will receive $18.00 or $33.00 for each unit of Ginkgold or Ginkgold Max product they purchased, depending on the product variation. SA, § 2.2.1. The reimbursement amounts are based on a blended average of actual retail prices paid by Settlement Class Members and so represent close to a full refund, the monetary relief sought in this action. For Settlement Class Members with minimal proof of purchase, they can receive reimbursement for all qualifying purchases of Ginkglod and Ginkgold Max. For Settlement Class members with no proof of purchase, they may receive reimbursement for up to three purchases. If the amount in the Net Settlement Fund exceeds the aggregate of the valid claims, each claim will be increased by up to five times the submitted amount.

To be eligible for reimbursement, Settlement Class Members need only complete and timely submit a simple claim form, either on the Settlement Website or by mail to the Settlement Administrator. SA, §§ 2.2.1, 2.2.2, Ex. D. Claim forms can be submitted up to 30 days after the Court issues its Final Approval Order. *Id.*, § 2.2.2.

The Settlement Administrator will decide whether the submitted claim forms are complete and timely. *Id.*, § 3.2, iv. Settlement Class Members are given an opportunity to correct any incomplete claim forms or to appeal the Settlement Administrator's rejection of any claim. *Id.* The Claims Administrator will pay all valid claims from the Settlement Fund be sending a checking to the Settlement Class Member. *Id.*, § 3.2, v.

Finally, any money that remains in the Net Settlement Fund after all valid claims are paid will be distributed to the American Brain Foundation pursuant to the *cy pres* doctrine. The American Brain Foundation is an appropriate *cy pres* recipient as it supports research related to all types of brains disorders and diseases. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (*cy pres* recipient should be related to the nature of the lawsuit and the class members, including their location);

Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990)*;* Declaration of Jane Ransom in Support of *Cy Pres* Designation of the American Brain Foundation, ¶¶ 2-4.

2. Notice and Administration Costs, Attorneys' Fees and Expenses, and Class Representative Service Award

All notice and administration expenses (capped at $400,000), attorneys' fees and expenses and a Class Representative service award will be paid from the Settlement Fund. SA, §§ 2.8, 3.2, iii; Brown Decl., ¶¶ 5, 36. Defendants agree to not oppose Class Counsel's application for reasonable attorneys' fees and expenses not to exceed 33% of the Settlement Fund ($1,113,750). SA, § 2.4; Brown Decl., ¶ 36. Defendants also agree not to oppose any request for a Court-awarded service award of $5,000 to Plaintiff. SA, § 2.4.

C. The Class Notice Program

The parties have developed a Notice Plan with the assistance of JND Legal Administration ("JND" or the "Settlement Administrator"), a firm which specializes in developing class action notice plans. Declaration of Jennifer M. Keough Regarding Notice Plan ("Keough Decl."), ¶¶1-7. Within fourteen days of preliminary approval, and continuing for 45 days, JDN will disseminate notice through a digital media campaign, using a programmatic partner, which allows for multiple targeting layers and provides the greatest reach. Keough Decl., ¶¶11-13, 16-20. The multiple targeting layers, which include both geographic targeting and category contextual targeting, will help ensure delivery to the most appropriate digital users. The digital notice messaging will utilize standard Internet Advisory Board (IAB) banner advertisement sizes, multiple size banner advertisements on Facebook, and approximately 294,000,000 impressions will be served. SA, Ex. B; Keough Decl., ¶25.

JND Legal Administration designed the notice plan by analyzing the demographics and media usage of Settlement Class Members to determine how best to reach them. Keough Decl., ¶¶21-24. The media campaign will utilize online banner

advertisements that contain hyperlinks directing Settlement Class Members to the Settlement Website where detailed information, including the Full Class Notice, is available and claims can be made. Using the demographic data, the online banner advertisements will appear throughout the Google Display Network family of highly-trafficked websites and Facebook, and focus on California adults aged 35 and older who have shown an interest in health, wellness, and fitness.

The Full Class Notice will inform Settlement Class Members concerning this action, the benefits of the Settlement, the Settlement Class Members' options in opting out or objecting to the Settlement, and procedures for filing claims for reimbursement. SA, § 3.2, ii; SA, Ex. A.

The Settlement Administrator will also maintain a dedicated Settlement Website (www.GinkgoldSettlement.com) to provide potential Settlement Class Members with information about the Settlement, a general description of the lawsuit, the Settlement relief, important dates and deadlines, and Settlement Class Members' legal rights. The Settlement Website will post relevant pleadings and settlement documents including, the First Amended Complaint, the Stipulation of Class Action Settlement and its exhibits, the Long Form Notice, this memorandum, and, when filed, the Preliminary Approval Order, memorandum in support of the motion for final approval, memorandum in support of an award of attorneys' fees and reimbursement of costs and expenses, and the Final Approval Order. SA, § 3.2, iii; Keough Decl., ¶29.

Finally, the Full Class Notice will also direct Settlement Class Members to a toll-free telephone number hosted by the Settlement Administrator where additional information is available. *Id*., § 3.2, iii; SA, Ex. A.

IV. THE SETTLEMENT MERITS PRELIMINARY APROVAL

The trial court has broad discretion over the matter of the approval of a proposed class action settlement. *Officers for Justice*, 688 F.2d at 625. In making this determination, the Court should evaluate the fairness of the settlement in its entirety.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . [t]he settlement must stand or fall in its entirety.").

Courts strongly favor settlements of class actions. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *see also Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). Class actions readily lend themselves to compromise because of the uncertainties in outcome, difficulties in proof, and lengthy duration inherent in the nature of class actions. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (public interest in settling litigation is "particularly true in class action suits . . . which frequently present serious problems of management and expense").

Additionally, settlements are entitled to a presumption of fairness when negotiated by experienced counsel at arm's-length. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution[.]"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 145701, at *743 (N.D. Cal. Oct. 18, 2016) ("The Settlement is also the product of arm's-length negotiations by experienced Class Counsel; as such, it is entitled to an initial presumption of fairness.").[2]

Rule 23(e) sets forth a "two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

At this stage, the Court need only conduct a *prima facie* review of the relief and

[2] Unless otherwise noted, citations are omitted and emphasis is added.

notice provided by the Settlement to determine whether notice should be sent to the Class. *In re M.L. Stern Overtime Litig.*, 2009 U.S. Dist. LEXIS 31650, at *9-10 (S.D. Cal. Apr. 13, 2009); *Pereira v. Ralph's Grocery Co.*, 2010 U.S. Dist. LEXIS 142803, at *7 (C.D. Cal. Mar. 24, 2010). The Court's review is "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625; *accord Hanlon*, 150 F.3d at 1027.

The Ninth Circuit has articulated various factors to use in evaluating the fairness of a class action settlement: (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 consideration offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; and (6) the experience and views of counsel. *Jack v. Hartford Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 118764, at *11 (S.D. Cal. Oct. 13, 2011); *see also Hanlon*, 150 F.3d at 1026 (identifying factors). "The relative degree of importance to be attached to any particular factor will depend . . . [on] the unique . . . circumstances [of each] case." *Officers for Justice*, 688 F.2d at 625.

Here, all relevant factors weigh in favor of preliminary approval.

A. The Strengths of Plaintiff's Case and Inherent Risks of Continued Litigation Weigh in Favor of Preliminary Approval

Courts strongly favor settlements because they resolve the inherent uncertainty on the merits, especially in class actions. *See Van Bronkhorst*, 529 F.2d at 950; *U.S. v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977). The same applies to this action. The Parties disagree about the merits of the case, and there is significant uncertainty about the ultimate outcome at trial. Plaintiff believes in the strength of her case, but Defendants have demonstrated their willingness and ability to litigate this action through trial and appeal, if necessary.

If litigation were to proceed, Plaintiff would face substantial hurdles in obtaining a successful verdict, and any upside would be limited by the claims and remedies. Defendants argue that Plaintiff has suffered no injury because Ginkgold provides the promised cognitive health benefits. Additionally, to the extent Ginkgold does not provide cognitive health benefits, Defendants argue it provides other benefits, and so, Plaintiff and other Class members are not entitled to a full refund. This Settlement provides full refunds to Settlement Class Members.

Given the uncertainties and limited upside of continued litigation, this factor weighs in support preliminary approval of the Settlement.

B. The Risk, Complexity, Expense, and Duration of the Litigation

The risk, expense, complexity, and duration of the case if litigated through trial rather than settled weighs heavily in favor of preliminary (and, ultimately, final) approval of the Settlement. There is little (if any) advantage to be gained by lengthy uncertain litigation given the Settlement relief compared to the relief sought.

Here, the Settlement provides substantial benefits to Settlement Class Members. The guaranteed recovery also obviates the risk and delay of continued litigation, trial, and appeal, which are significant factors considered in evaluating a settlement. *See Create-A-Card, Inc. v. INTUIT, Inc.*, 2009 U.S. Dist. LEXIS 93989, at *13 (N.D. Cal. Sept. 22, 2009). Any continued litigation would be time-consuming and expensive and may not obtain any more than is immediately available through the Settlement. In fact, there is a very real risk the Settlement Class may receive nothing. Thus, the elimination of delay and expense weighs in favor of approval. *Nobles v. MBNA Corp.*, 2009 U.S. Dist. LEXIS 59435, at *5 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); *Kim v. Space Pencil, Inc.*, 2012 U.S. Dist. LEXIS 169922, at *15 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and

appeal, as well as the financial wherewithal of the defendant.").

In reaching this Settlement, the Parties have established a means for prompt resolution of Settlement Class Members' claims. A simple claim form ensure the Settlement Class Members will benefit from the Settlement. Given the alternative of continued, complex litigation before this Court, the risks involved in such litigation that Settlement Class Members might get nothing, and the possibility of further appellate litigation, the availability of prompt relief under the Settlement is highly beneficial to the Settlement Class.

C. The Settlement Provides Significant Relief

The Settlement provides actual relief for the Settlement Class that is consistent with full refunds they would receive after a successful trial. The reimbursement amounts are based on a blended average of actual retail prices paid by Settlement Class Members, and act as a cash reimbursement for the actual loss they incurred. Under the Settlement, each Settlement Class Member may be entitled to reimbursement for all qualifying purchases for which they are able to provide proof of purchase. Further, Settlement Class Members may submit claims for up to three reimbursements by filling out a simple claim form.

In evaluating the fairness of consideration offered in settlement, courts should give significant weight to the negotiated resolution of the parties. "'[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *Hanlon*, 150 F.3d at 1027 (quoting *Officers for Justice*, 688 F.2d at 625); *accord Rodriguez*, 563 F.3d at 965. The issue is not whether the settlement could have been better in some fashion, but whether it is fair: "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair,

adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

D. The Extent of Discovery and Stage of Proceedings

This factor "evaluates whether the parties have sufficient information to make an informed decision about settlement." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 588 (N.D. Cal. 2015). "A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528.

Here, the Settlement was reached after protracted formal and informal settlement negotiations, extensive motion practice, including an appeal, extensive discovery, and full Rule 26 expert reports. *See* § II.A-E, above. As a result, Class Counsel, who are experienced in prosecuting complex class action claims, were able "to make reasoned and informed settlement decisions." *In re LinkedIn*, 309 F.R.D. at 588. Moreover, the fact that the Settlement was negotiated over the course of several mediation sessions in front of experienced mediators demonstrates the Settlement was not collusive. *See*, *e.g.*, *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010) ("The arms-length negotiations, including a day-long mediation before Judge Lynch, indicate that the settlement was reached in a procedurally sound manner."); *In re M.L. Stern*, 2009 U.S. Dist. LEXIS 31650, at *13 (settlement sound where it "was reached with the supervision and assistance of an experienced and well-respected independent mediator"). Further, the nature of subsequent negotiations between the Parties, the experience of Class Counsel, and the fair result reached are illustrative of arms-length negotiations.

E. The Experience and Views of Counsel

Class Counsel have substantial experience serving as class counsel in consumer fraud class actions, and they endorse the Settlement as fair, reasonable, and adequate. Brown Decl., ¶ 6; *Id.*, Ex. 1.

F. The Settlement Is Fair

The proposed Settlement is fair as to all Settlement Class Members because

they are receiving refunds, the exact relief they sought through this action. Further, Plaintiff does not receive any unduly preferential treatment. With the exception of a potential $5,000 service award to account for her willingness to step forward and represent other Settlement Class Members and to compensate her for her time and effort devoted to the action, Plaintiff is treated the same as every other Settlement Class Member. Such service awards are "fairly typical in class action cases." *Rodriguez*, 563 F.3d at 958; *see also Simon v. Toshiba Am.*, 2010 U.S. Dist. LEXIS 42501, at *12-13 (N.D. Cal. Apr. 30, 2010) (awards of $5,000 are "presumptively reasonable"); *Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 19674, at *10 (S.D. Cal. Mar. 4, 2010) ("Although [Plaintiff] seeks a $5,000 service fee for himself which is not available to other class members, the fee appears to be reasonable in light of [Plaintiff's] efforts on behalf of the class members."); *In re M.L. Stern Overtime Litig.*, 2009 U.S. Dist. LEXIS 94671, at *11 (S.D. Cal. Oct. 9, 2009) ($15,000 awards).

V. THE CLASS NOTICE PROGRAM SHOULD BE APPROVED

The threshold class notice requirement is whether the distribution method is "reasonably calculated" to apprise the class of the pendency of the action, the proposed settlement, and the class members' rights to opt-out or object. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The court retains discretion over the mechanics of the notice process, which are subject only to the broad "reasonableness" standards imposed by due process. *Mullane*, 339 U.S. at 314-15. This Circuit considers settlement notice "satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Rodriguez*, 563 F.3d at 962 (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)); *Hanlon*, 150 F.3d at 1025 (notice should provide class members with the opportunity to opt-out and pursue other recovery opportunities). The notice should also present information "neutrally,

simply, and understandably," including "describ[ing] the aggregate amount of the settlement fund and the plan for allocation." *Rodriguez*, 563 F.3d at 962.

The proposed Full Class Notice is written in simple terminology and satisfies these requirements. It includes: (1) basic information about the Action; (2) a description of the benefits provided by the Settlement; (3) an explanation of how Settlement Class Members can obtain Settlement benefits; (4) an explanation of how Settlement Class Members can exercise their right to opt-out or object to the Settlement; (5) an explanation that any claims against Defendants related to the action will be released if the Settlement Class Member does not opt-out; (6) the names of Class Counsel and information regarding attorneys' fees, expenses, and the service award; (7) the Fairness Hearing date; (8) an explanation that each Settlement Class Member has the right to appear at the Fairness Hearing; and (9) the Settlement Website address and a toll-free number where additional information can be obtained. *See* SA, Ex. A.

The contents of the proposed Full Class Notice are more than adequate, and they comply with the Federal Judicial Center's model class action notices. *See* https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction (last visited Aug. 14, 2017); *In re Skechers Toning Shoe Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 113641, at *46-47 (W.D. Ky. Aug. 13, 2012) (approving class notices that "comply with the Federal Judicial Center's illustrative class action notices"); Fed. R. Civ. P. 23 Advisory Committee Notes (2003); *Carr v. Tadin, Inc.*, 2014 U.S. Dist. LEXIS 179835, at *22 (S.D. Cal. Apr. 18, 2014) (approving a notice of class action settlement, observing "the notices . . . 'mirror the exemplar notices set forth in the Federal Judicial Center, Class Action Notice and Claims Process Checklist (2010)'"). The Full Class Notice provides Settlement Class Members with sufficient information to make an informed decision on whether to object to or opt out of the Settlement. As such, it satisfies the content requirements of Rule 23. *Rodriguez*, 563 F.3d at 962.

Additionally, the proposed dissemination of the Full Class Notice satisfies all due process requirements. The independent Settlement Administrator will provide notice to the Settlement Class after preliminary approval of the Settlement, for a period of 45 days through a digital media campaign, using a programmatic partner, which allows for multiple targeting layers and provides the greatest reach. Notice will also be available through the Settlement Website specifically established for this action.

Thus, the contents and dissemination of Notice Program constitutes the best notice practicable, and fully complies with Rule 23's requirements.

VI. THE PROPOSED CLASS SHOULD BE CERTIFIED

In this Circuit, it is considered proper to certify a settlement class to resolve consumer lawsuits. *See Hanlon*, 150 F.3d at 1019; *In re Hyundai*, 926 F.3d at 556-57. When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23. *Id*. However, where a court is evaluating the certification question in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes are not considered. *See In re Hyundai*, 926 F.3d at 556-57 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Here, the preliminary certification of the Settlement Class is appropriate for purposes of settlement because all the requirements of Rule 23 have been met.

A. The Rule 23(a) Requirements Are Satisfied

1. The Settlement Class Is Sufficiently Numerous

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a). The Settlement Class consists of approximately [redacted] units of Ginkgold. Thus, it would be impracticable to join all members of the Settlement Class. *Jordan v. Cnty. of L.A.*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

2. There Are Common Questions of Law and Fact

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury . . . . Their claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Still, "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to satisfy commonality], as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019; *In re First Alliance Mortg. Co.*, 471 F.3d 977, 990-91 (9th Cir. 2006). The commonality requirement is construed "permissively." *Hanlon*, 150 F.3d at 1019. Here, a classwide proceeding will generate a common answer to the primary questions in this case: whether Defendants misrepresented that the Ginkgo supplement provided cognitive benefits when in reality it has so significant effect on health. Finally, by its very nature, determination of the declaratory relief claim will generate common answers. *See Lebrilla v. Farmers Grp., Inc.*, 119 Cal. App. 4th 1070, 1086 (2004) (finding declaratory and injunctive relief claims under the UCL appropriate for class treatment where the court had to interpret a uniform insurance contract and enforce its terms as to the entire class).

3. The Class Representative's Claims Are Typical

Rule 23(a)(3) typicality is satisfied where the plaintiff's claims are "reasonably co-extensive" with absent class members' claims; they need not be "substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Wiener v. Dannon Co.*, 255 F.R.D. 658, 665 (C.D. Cal. 2009). The test for typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Thus, "[t]he purpose of the typicality requirement is to assure that the interest of the

named representative aligns with the interests of the class." *Id*. For example, certifying UCL and CLRA claims, the court in *Keilholtz v. Lennox Health Prods., Inc.*, 268 F.R.D. 330 (N.D. Cal. 2010) found that typicality was satisfied because "Plaintiffs' claims are all based on Defendants' sale of allegedly dangerous fireplaces without adequate warnings." *Id*. at 338.

Typicality is met here, as Plaintiff and the proposed Settlement Class assert the same claims, arising from the same course of conduct: Defendants' advertising of its ginkgo biloba supplement as providing cognitive health benefits when it had no such effect. Plaintiff and Settlement Class Members also seek the same relief for the same alleged wrongful conduct—refunds. Plaintiff's claims are the same as those of other Settlement Class Members. Therefore, the typicality requirement is met.

4. The Class Representative and Class Counsel Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." In the Ninth Circuit, adequacy is satisfied where (i) counsel for the class is qualified and competent to vigorously prosecute the action, and (ii) the interests of the proposed class representatives are not antagonistic to the interests of the class. *See, e.g.*, *Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir. 2003); *Hanlon*, 150 F.3d at 1020.

For settlement purposes, the Parties agree that adequacy has also been met. Proposed Class Counsel are qualified and experienced in class action litigation, including in prosecuting false advertising cases. *See* Brown Decl., Ex. 1 (Firm Resume for BHO). Additionally, the interests of Plaintiff and Settlement Class Members are fully aligned and conflict free: Plaintiff and Settlement Class Members allege the same claims, they are seeking redress from the same conduct, and there are no disabling conflicts of interest.

B. The 23(b)(3) Requirements Are Satisfied

Rule 23(b)(3) certification is appropriate "whenever the actual interests of the parties can be served best by settling their difference in a single action." *Hanlon*, 150 F.3d at 1022 (quoting 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1777 (2d ed. 1986)). There are two fundamental conditions to certification under Rule 23(b)(3): (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Local Joint Exec. Bd. of Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1022; *Wiener*, 255 F.R.D. at 668. As such, Rule 23(b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615; *Wiener*, 255 F.R.D. at 668.

1. Common Questions Predominate

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623; *In re Hyundai*, 926 F.3d at 558. "Predominance is a test readily met in certain cases alleging consumer [] fraud." *Amchem*, 521 U.S. at 625. "When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1778 (3d ed. 2005); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that commonality and typicality tend to merge); *In re Hyundai*, 926 F.3d at 559-60.

The predominance requirement is satisfied here. As discussed above, Plaintiff alleges the Settlement Class Members are entitled to the same legal remedies

premised on the same alleged wrongdoing. The central issue for every claimant is whether Defendants' advertising of Ginkgold as providing cognitive health benefits was false or misleading. This primary issue predominates and constitutes the "heart of the litigation" because it would be decided in every trial brought by individual Settlement Class Members and can be proven or disproven with the same classwide evidence. Under these circumstances, predominance is satisfied. *In re Hyundai*, 926 F.3d at 559.

2. Class Treatment Is Superior

Rule 23(b)(3) sets forth the relevant factors for determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These factors include: (i) the class members' interest in individually controlling separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3); *see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92 (9th Cir. 2001). "[C]onsideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Id.* at 1190; *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (finding the superiority requirement satisfied where granting class certification "will reduce litigation costs and promote greater efficiency").

According to the Rule 23(b)(3) "superiority" factors shows, a class action is the preferred procedure for this settlement. Even if liability were proven, the potential monetary relief for each Settlement Class Member would be too small to justify individual litigation. *Zinser*, 253 F.3d at 1191; *Wiener*, 255 F.R.D. at 671. It is neither economically feasible, nor judicially efficient, for Settlement Class Members to pursue their claims against Defendants on an individual basis. *Hanlon*, 150 F.3d at

1023; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 808 (1971); *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). Moreover, the fact of settlement removes any potential difficulties in managing the trial of this action as a class action. *See Amchem*, 521 U.S. at 620 (when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial"). Therefore, under the present circumstances, a class action is clearly superior to any other mechanism for adjudicating the case. The requirements of Rule 23(b)(3) are satisfied.

VII. PROPOSED CLASS REPRESENTATIVE AND CLASS COUNSEL SHOULD BE APPOINTED FOR THE SETTLEMENT CLASS

The Parties also requests that the Court designate Plaintiff Kathleen Sonner as Class Representative for the Settlement Class. As discussed above, and as the Court found in certifying a California class, Plaintiff will fairly and adequately protect the interests of the Settlement Class.

Rule 23(g)(1) also requires the Court to appoint class counsel to represent the interests of the Settlement Class. *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 355 (N.D. Cal. 2005). The Parties respectfully request that Paula R. Brown and Timothy G. Blood of Blood Hurst & O'Reardon, LLP ("BHO") be appointed Class Counsel for the Settlement Class. BHO is experienced and well equipped to vigorously, competently, and efficiently represent the proposed Settlement Class. *See* Brown Decl., Ex. 1. Accordingly, the Court should appoint Paula R. Brown and Timothy G. Blood of BHO as Class Counsel for the Settlement Class.

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VIII. THE PROPOSED SCHEDULE OF EVENTS

The key settlement-related dates, such as the time to begin notice or to opt-out or object, are based on when preliminary approval of the settlement is granted and the date for the Fairness Hearing. The relevant settlement-related dates calculated in accordance with the provisions of the Settlement are:

EVENT	DEADLINE
Dissemination of Class Notice	Within 14 calendar days from entry of the Preliminary Approval Order, for 45 days
Briefs in support of final approval and for award of attorneys' fees	No later than 28 days prior to the Fairness Hearing
Deadlines for objections and opt-outs	21 days before date first set by Court for Fairness Hearing
Notices to appear	No later than 21 days before the Fairness Hearing
Briefs in response to objections and in further support of final approval and attorneys' fees	No later than 14 days prior to the Fairness Hearing

The presumptive time period between the completion of notice and the due date for objections/opt outs is 30 days. Accordingly, assuming the Court grants preliminary approval by September 16, 2020, the Parties request the Court schedule the Fairness Hearing for December 21, 2020, or as soon thereafter as the Court's schedule permits.

IX. CONCLUSION

For the reasons set forth above, the Parties respectfully request that the Court: (1) grant preliminary approval of the Settlement; (2) approve and direct notice as set forth in the Notice Plan; (3) conditionally certify the Settlement Class; (4) approve the form and content of the proposed Full Class Notice; (5) appoint Plaintiff Kathleen Sonner as Class Representative; (6) appoint Paula R. Brown and Timothy G. Blood

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of Blood Hurst & O'Reardon, LLC as Class Counsel; (7) appoint JND Legal Administration ("JND") as Settlement Administrator; and (8) schedule a Fairness Hearing.

Respectfully submitted,

Dated: August 26, 2020

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Attornevs for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 26, 2020.

s/ Timothy G. Blood

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