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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LEANNE TAN, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

QUICK BOX, LLC, et al,

Defendants.

Case No.: 3:20-cv-1082-LL-DDL

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH KONNEKTIVE PARTIES

Date:
Time: *
Ctrm: 2B
Judge: Hon. Linda Lopez

*PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT

Complaint Filed: June 12, 2020

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I. INTRODUCTION

Plaintiff and the Konnektive Defendants (Konnektive LLC, Converging Resources Corporation, Konnektive Rewards LLC, Matthew MArtorano, and Kathryn Martorano) have agreed to a Class Settlement to resolve the putative Class's claims against those Defendants in exchange for a minimum of $2 million and a maximum of $5 million. That amount will be determined via a summary bench trial before Judge Leshner. This agreement came after a lengthy litigation period of more than four years, an Early Neutral Evaluation (ENE), and two separate mediations. Combined with the previous Quick Box settlement, the Konnektive settlement offers relief to the Class that exceeds the entirety of the actual damages. And the settlement does not waive claims against the La Pura Defendants, such that not only is the Class guaranteed this substantial recovery against what they lost, but they will have the opportunity to recover even more should Plaintiff's counsel be successful in pursuing claims against those other Defendants. The settlement is, at a minimum, in "the range of possible approval," and thus the Court should grant preliminary approval and schedule the necessary proceedings for a final approval hearing after notice to the Class.

II. RELEVANT FACTS

This lawsuit was filed on June 12, 2020. Dkt. 1. Three separate groups of parties filed their own motions to dismiss. *See* dkts. 25, 29-34, 36-40. After an initial order on these motions by the Court, dkt. 88, Plaintiff filed a First Amended Complaint. Dkt. 89. Three separate motions to dismiss were again filed by each group of parties. *See* dkts. 94, 98, 99. The Court resolved those motions, dkt. 130, and the case has proceeded with discovery. This has involved formal or informal discovery motions and conferences on a large volume of issues. *See* dkts. 190, 218, 223, 246, 252, 284, 321. The case was stayed as Plaintiff dealt with a bankruptcy filing by Defendant Total Health Supply TUA, Inc. *See* dkts. 192-194. The lawsuit has been ongoing for more than four years to date.

Throughout the lawsuit, there have been both formal and informal efforts to settle the case. These efforts ranged from informal discussions to an Early Neutral Evaluation before Judge Butcher on June 30, 2021, dkt. 174; as well as a subsequent settlement conference

with Magistrate Judge Leshner, dkt. 345. Plaintiff and the Konnektive Parties then held a mediation with Antonio Piazza, a highly regarded mediator who assisted in negotiating the agreement between the parties.

After years of litigation, and multiple mediations, Plaintiff and the Konnektive Defendants have arrived at a settlement which will resolve the claims against those defendants in a way which is beneficial to the Class—and which Plaintiff requests be preliminarily approved by the Court, pending a final hearing after input from members of the Settlement Class. The parties have agreed to a Proposed Order which is attached.

The settlement provides a substantial monetary benefit to the Class: either $2 million or $5 million depending on the results of a bench trial on liability on the CLRA claim. Ex. 1 at section III(5)(b). The settlement is straightforward. It does not contain any of the hallmarks of self-dealing (negotiated attorney's fees which are disproportionate to the settlement, clear sailing provisions, or a reverter to the Defendants). It does not engage in any efforts to artificially inflate the value of the settlement, such as coupon settlements. Any money that is not distributed to the Class directly will go to a highly reputable non-profit, the National Consumer Law Center ("NCLC"). Class members will be eligible to receive up to three times the amount they paid for the La Pura products, depending on claims rates. Ex. 1 at section III ¶ 4(b). The settlement administrator, Epiq Class Action and Claims Solutions, was selected after a detailed interview with Class Counsel involving technical questions to ensure that they would be able to notify as many Class members as possible. And the settlement occurred not only after mediations with neutral mediators, but after a mediator's proposal which both sides agreed to—something that courts have held is a strong signal of a fair settlement that is not a product of any kind of self-dealing.

III. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

Approval of a class action settlement proceeds in three stages. First, the parties present a proposed settlement to the court for preliminary approval. Second, if the court preliminarily approves the settlement, notice of the proposed settlement is sent to the class, and class members are given an opportunity to object or opt out of the settlement. Third,

after holding a final fairness hearing, the court decides whether to give final approval to the settlement. *See* Fed. R. Civ. P. 23(e); 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:1 (6th ed.). At the first stage, preliminary approval, the parties must show "that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). "[W]hen considering certification of a settlement class, the court need not weigh whether further litigation would present case management difficulties as provided in Rule 23(b)(3)(D)." *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-md-2670-JLS-MDD, 2021 U.S. Dist. LEXIS 90054 at *61 (S.D. Cal. May 11, 2021). The Court has already certified the Class and considered the factors for certification. Dkt. 391. The question is thus whether the proposed settlement meets the standards for preliminary approval.

IV. THE CLASS SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

"Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) "To survive appellate review, the district court must show it has explored comprehensively all factors." *Id.* Federal Rule of Civil Procedure 23(e)(2) as amended in 2018 adds additional factors that must be considered: whether "the class representatives and class counsel have adequately represented the class," "the proposal was negotiated at arm's length," "the relief provided for the class is adequate" taking into account certain factors, and whether "the proposal treats class members equitably relative to each other."

"[A]t the preliminary approval stage, a court need only review the parties' proposed settlement to determine whether it is within the permissible 'range of possible approval' and thus, whether the notice to the class and the scheduling of a fairness hearing is appropriate."

Steinberg v. Corelogic Credco, LLC, No. 3:22-cv-00498-H-SBC, 2023 U.S. Dist. LEXIS 177325 at *17-18 (S.D. Cal. Oct. 2, 2023). "Preliminary approval of a settlement and notice to the class is appropriate if (1) 'the proposed settlement appears to be the product of serious, informed, and non-collusive negotiations'; (2) 'has no obvious deficiencies'; (3) 'does not improperly grant preferential treatment to class representatives or segments of the class'; and (4) 'falls within the range of possible approval.' *Id.* (citations omitted).

"[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Briseño v. Henderson*, 998 F.3d 1014, 1031 (9th Cir. 2021) (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). Plaintiff submits that on these facts, the proposed settlement with the Konnektive Defendants (which will be a minimum of $2 million, and a maximum of $5 million), when combined with a settlement with the Quick Box Defendants for $5.5 million, is not only a reasonable settlement, but an excellent result for the Class that guarantees them a substantial recovery which exceeds the actual damages in this case.

A. The Proposed Bench Trial Is In The Interests of the Class

The settlement proposes a bench trial before Magistrate Judge Leshner on the issue of liability on Plaintiff's CLRA claim. This proposal—which was submitted as a mediator's proposal and accepted by Plaintiff and the Konnektive Defendants—is a fair method of arriving at reasonable damages for the nationwide Class.

The proposed bench trial bears some resemblance to a bellwether trial used in mass torts or multi-District litigation ("MDL"). In that context, "[t]he method of selecting test cases for trial is 'limited only by the ingenuity of each . . . court and the coordinating attorneys.'" *Collazo v. WEN by Chaz Dean, Inc.*, No. 2:15-CV-01974-ODW-AGR, 2018 U.S. Dist. LEXIS 116509 at *17 (C.D. Cal. July 12, 2018) (quoting ELDON E. FALLON ET. AL., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2337 (2008)).

"The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar." *In re Hydroxycut*

Mktg. & Sales Practice Litig., No. 3:09-md-2087-BTM(KSC), 2012 U.S. Dist. LEXIS 93282 at *50 (S.D. Cal. June 28, 2012) (quoting *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997)).

The ability to hold a trial on one issue to expedite resolution is also generally authorized by Federal Rule of Civil Procedure 42(b): "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims."

Bellwether trials have been used in class actions previously by agreement of the parties. *See Abrams v. Nucor Steel Marion, Inc.*, 694 F. App'x 974, 977 (6th Cir. 2017) (unpublished) (describing bellwether process used in class action). In a consumer class action involving the law of numerous states, the Southern District of New York adopted a bellwether class action trial process in which an initial group of state law claims from three states would be tried as bellwethers to provide settlement information for the remaining state law classes. *In re GM LLC Ignition Switch Litig.*, 407 F. Supp. 3d 212, 216-17 (S.D.N.Y. 2019) (describing bellwether process). Similarly, a court in the District of Maryland applied a bellwether process to a Motion to Dismiss that involved consumer class action claims from a large number of states. *In re Marriott Int'l, Inc.*, 440 F. Supp. 3d 447 (D. Md. 2020). In that case, the parties selected a subset of class representatives and a subset of their claims to act as a bellwether as to the validity of the Motion to Dismiss. *Id.* Another court in the Central District of California noted that it had adopted a bellwether process in a class action case. *In re Toyota Motor Corp. Unintended Acceleration Mktg.*, No. 8:10ML2151 JVS (FMOx), 2012 U.S. Dist. LEXIS 189352 at *4-5 (C.D. Cal. Jan. 30, 2012).

The mediator's proposal in this case was designed to bridge the gap between the parties in their assessments of the strength of their cases (and thus the potential range of damages). Where both parties believe their case to be strong, it is difficult to fashion a settlement. The settlement here proposes to use a short bench trial on one issue—liability under Plaintiff's CLRA claims—to test the strength of the parties' respective claims and defenses. The

CLRA claims were selected because (1) they are simpler to try than a RICO claim or the other alternatives; and (2) the parties deemed it highly likely to provide information which would determine the strength of all of the claims in the case. While the elements and law regarding the claims at issue is not identical, the point of the proposed trial is to gather such information. The parties have agreed that if Plaintiff wins this proposed trial, the total damages for the class nationwide will be $5 million. This is because, if the Plaintiff wins, it suggests that Plaintiff was correct in her assessment of the strength of the claims as a whole. The parties have also agreed that if Plaintiff loses this proposed trial, the damages will be $2 million—because again, if Plaintiff loses, it suggests the Konnektive Defendants were correct in their own assessment as to the weakness of the claims as a whole.

Plaintiff believes this process is fair to the Class as a whole. While the claim to be tried is under California law, if the Plaintiff cannot prevail on liability as to this claim, it suggests that it would be difficult to prevail on the other claims as well, including the federal law RICO claim. A loss on liability for the CLRA claim would suggest that a lower settlement to resolve the claims as a whole is, in fact, fair. And similarly, although a win on liability for the CLRA claim does not guarantee a win on similar claims under RICO, it would suggest that those claims are more valuable and should be settled for a higher value. Plaintiff also believes that the settlement amounts proposed are fair, as discussed further below. The $2 million figure acts as a floor which guarantees a recovery to the Class even if their claims are determined to be weaker than Plaintiff expects.

The proposed process would consume significantly less resources on the part of the Court than a full-blown jury trial on all of the claims. Plaintiff and the Konnektive Defendants have agreed to allow Magistrate Judge Leshner to fashion appropriate procedures for the bench trial.

B. The Strength of the Plaintiff's Case

Even where a court believes a Plaintiff's case to be strong, courts have still held this factor to weigh in favor of settlement where the litigation is complex. *See Jeter-Polk v. Casual Male Store, LLC*, No. EDCV 14-891-VAP (DTBx), 2016 U.S. Dist. LEXIS 204837

at *8-9 (C.D. Cal. June 29, 2016) (considering the case to be strong, but subject to "risks and costs associated with future complex litigation"). Courts have recognized the inherent risks in litigation, even where a party believes its case to be strong. *Shahbazian v. Fast Auto Loans*, No. 2:18-cv-03076-ODW (KSx), 2019 U.S. Dist. LEXIS 231416 at *18 (C.D. Cal. June 20, 2019) ("Here, as with most class actions, there is risk to both parties in continuing towards trial.").

While Plaintiff believes her substantive case to be very strong, there is always an inherent risk of losing. Plaintiff still has to defeat a pending motion to decertify the Class, survive the pending *Daubert* motions, survive the remaining summary judgment motion, win a jury trial, and win an anticipated appeal. There are risks inherent to litigation that this settlement avoids by providing certainty and damages awards to the Class.

C. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (quoting 4 A Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed. 2002)). "Immediate receipt of money through settlement, even if lower than what could potentially be achieved through ultimate success on the merits, has value to a class, especially when compared to risky and costly continued litigation." *In re Celera Corp. Sec. Litig.*, No. 5:10-cv-02604-EJD, 2015 U.S. Dist. LEXIS 157408 at *16 (N.D. Cal. Nov. 20, 2015). "It has been held proper to take the bird in hand instead of a prospective flock in the bush." *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1041 (S.D. Cal. 2015) (citations omitted).

As described above, there are significant risks, even if Plaintiff believes the case on the merits to be strong. Other courts have recognized that "RICO claims are complex claims that are expensive and time-consuming to litigate." *Chan v. Brady*, No. 20-CV-06569-LHK, 2021 U.S. Dist. LEXIS 153096 at *11 (N.D. Cal. Aug. 13, 2021). There are 475 docket entries in this lawsuit already, and the Defendants have vigorously disputed the claims and

can be expected to continue to do so absent settlement. It could take an additional two years (or more) to reach finality after an appeal. There will be significant expense associated with pursuing the claims to a jury trial, much of which is avoided by the mechanism of the proposed bench trial. This factor thus weighs in favor of approval of the settlement.

D. The Risk of Maintaining Class Action Status Throughout the Trial

On this factor, the Court considers the risk of whether a class action can be maintained as a class throughout the trial. There is a pending motion to de-certify the class filed by the Konnektive Parties. Dkt. 422. Where a motion to de-certify has been filed prior to settlement, this factor weighs in favor of approval. *See Stevens v. Safeway, Inc.*, No. CV 05-01988 MMM (SHx), 2008 U.S. Dist. LEXIS 17119 at *20-21 (C.D. Cal. Feb. 25, 2008); *see also In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("[T]he notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement."). In addition, there is inherently a risk that the jury might not find its evidence of the Class having seen the same general misrepresentations on the websites at issue as persuasive, because jury decisions can be difficult to predict. This factor therefore favors approval.

E. The Amount Offered in Settlement

"[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 527. In the context of statutes with treble damages provisions, the Ninth Circuit has held that a District Court may analyze the reasonableness of the amount of a proposed settlement against either single damages, treble damages, or both. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009) ("It is our impression that courts generally determine fairness of an antitrust class action settlement based on how it compensates the class for past injuries, without giving much, if any, consideration to treble damages…. We have never precluded courts from comparing the settlement amount to both single and treble damages. By the same token, we do not require them to do so in all cases.").

Plaintiff's estimate of the actual damages for a nationwide class is slightly over $6.4 million. Decl. of C. Covey at ¶ 28. Trebling of this number would lead to maximum damages of just over $19.2 million. This is consistent with the estimates of maximum liability provided in bankruptcy by the La Pura Defendants. Decl. of K. Kneupper at ¶ 31. The Konnektive Defendants have disputed this number and submitted an expert report calculating this number at $5.4 million, and further suggesting a more appropriate damages range is between $20,903 and $3,693,712.

Based on the higher numbers estimated by Plaintiff, in the event Plaintiff loses the bench trial and the Class receives $2 million, the partial settlement with the Konnektive Parties amounts to 37% of the actual damages and 10.4% of those damages if trebled. If Plaintiff wins the bench trial and the Class receives $5 million, the partial settlement with the Konnektive Parties amounts to 92.5% of the actual damages and 26% of those damages if trebled.

Importantly, this is a partial settlement, and there is already a recovery of $5.5 million from the proposed settlement with the Quick Box Parties which will also be used to compensate the class. Taken together, on the low end the recovery for the Class will be $7.5 million—138% of the actual damages, and 39% of those damages if trebled. On the high end, if Plaintiff wins the proposed bench trial, the total recovery of $10.5 million will be 194% of the actual damages, and 54.6% of those damages if trebled.

Other courts in this Circuit have approved amounts in the range of or less than this settlement. *See Nguyen v. Radient Pharm. Corp.*, No. SACV 11-00406 DOC(MLGx), 2014 U.S. Dist. LEXIS 63312 at *7-8 (C.D. Cal. May 6, 2014) (describing a settlement of "roughly 25.8 percent of the maximum provable damages" as "an excellent recovery"); *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) (describing a recovery of roughly 16.67% of the maximum damages as "fair and adequate"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015) (describing a settlement that "represents between 27 percent and 11 percent of the total potential recovery" as "fair"); *Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015

U.S. Dist. LEXIS 78671 at *12-13 (N.D. Cal. June 17, 2015) (describing a settlement of 7.3 percent as "on the low end of the spectrum for class settlement awards receiving approval" but still "within the range of reasonableness").

Also significant is that unlike these other cases, these two settlements (with the Quick Box Parties and the Konnektive Parties) are a partial settlement which leaves the Class free to pursue its claims against the La Pura Defendants, as well as others behind them under a post-judgment alter ego theory. The percentage recovered here thus does not mean it is the maximum the Class will recover—it is the percentage that the Class will "bank" as a certain recovery and as a hedge against any risk of losing the Class's claims against the non-settling parties which Counsel will continue to zealously pursue.

F. The Relief Provided to the Class Is Adequate

FRCP 23(e)(2)(C) requires that the relief provided in a class settlement be adequate, taking into account "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). As to whether the relief is adequate, "[t]he amount offered in the proposed settlement agreement is generally considered to be the most important consideration of any class settlement." *Hudson v. Libre Tech. Inc.*, No. 3:18-cv-1371-GPC-KSC, 2020 U.S. Dist. LEXIS 84576 at *17 (S.D. Cal. May 12, 2020).

The adequacy of the amount negotiated has been addressed above. The costs, risks, and delay of trial and appeal have likewise been addressed above.

As to "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," the key questions are whether these methods are unduly burdensome and whether they deter or defeat illegitimate claims. *Loomis v. Slendertone Distribution*, No. 19-cv-854-MMA (KSC), 2021 U.S. Dist. LEXIS 44047 at *17-18 (S.D. Cal. Mar. 8, 2021). The settlement proposes to create pre-populated claim forms based on the granular class member data available from Defendants' databases.

Ex. 1 at section IV ¶ 1. The forms may be submitted via mail or via a website portal. *Id.* In *Loomis*, the Court held that "any subjective burden by a Class Member would be sufficiently mitigated by the toll-free helpline and settlement website to provide assistance." *Loomis*, 2021 U.S. Dist. LEXIS 44047 at *17. This settlement provides for both. Ex. 1 at section V ¶ 1(b). Epiq, the settlement administrator, has further provided a declaration describing how this claims process will be tailored to ensure that claims are easy to file. Decl. of C. Azari at ¶ 25-27, 31-32. As for illegitimate claims, because both Quick Box and Konnektive have produced spreadsheets with detailed information about the class members and their identities, it is unlikely that illegitimate claims would be successful.[1]

As to the terms of any proposed award of attorney's fees, including timing of payment, the amount of any attorney's fees have not been negotiated, and will be subject to approval by motion.

As to "any agreement required to be identified under Rule 23(e)(3)," there is no such agreement, and the terms of the executed settlement were the only agreement made by the parties in connection with this settlement proposal. Decl. of K. Kneupper at ¶ 37.

G. The Class Representative and Class Counsel Have Adequately Represented the Class

FRCP 23(e)(2)(A) requires consideration of whether "the class representatives and class counsel have adequately represented the class." As to this factor, courts consider in part the experience of counsel. *See Sengvong v. Probuild Co. LLC*, No. 3:19cv2231-MMA-JLB, 2021 U.S. Dist. LEXIS 189993 at *7-8 (S.D. Cal. Oct. 1, 2021). Class Counsel are experienced in both complex litigation and consumer law. Decl. of K. Kneupper at ¶ 1-29; decl. of C. Covey at ¶ 1-22. The adequacy of the settlement amount is further evidence that both counsel and Ms. Tan have adequately represented the Class.

H. The Extent of Discovery Completed and the Stage of Proceedings

In considering "the extent of discovery completed and the stage of the proceedings,"

[1] This issue is more of a concern in class actions with no identifying records for the class, for example, when class members bought products in a retail store.

courts have focused on whether "sufficient discovery has been taken or investigation completed to enable counsel and the Court to act intelligently…." *Maree v. Deutsche Lufthansa AG*, No. 8:20-cv-00885-SVW-MRW, 2023 U.S. Dist. LEXIS 25130 at *25-26 (C.D. Cal. Feb. 13, 2023) (quoting Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2013)). Courts consider the extent of both formal and informal discovery as to this factor. *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) ("However, '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.'").

Courts have previously found this factor to weigh in favor of approval in cases that have been litigated for several years with multiple mediations. *See Arellano v. Kellermeyer Bldg. Servs., LLC*, No. 13-cv-00533-BAS(BGS), 2014 U.S. Dist. LEXIS 168986 at *23-24 (S.D. Cal. Dec. 5, 2014). Similarly, in a case where defendants had produced 3,000 pages of documents, a substantial amount of ESI, and had taken multiple depositions, the court found this to be extensive discovery that justified settlement approval. *Banales v. Autoclaims Direct, Inc.*, No. 11cv2914-DHB, 2012 U.S. Dist. LEXIS 201160 at *5-6 (S.D. Cal. Dec. 20, 2012).

This case was filed on June 12, 2020 and has been pending for more than four years. Prior to filing this lawsuit, Plaintiff's counsel spent nearly six months investigating the specific claims in this lawsuit in detail. Decl. of K. Kneupper at ¶ 32. Plaintiff's counsel further had been conducting an industry-wide investigation into similar allegations against other companies which lasted much longer. *Id*. Those informal investigations continued during the pendency of the lawsuit. Plaintiff's counsel conducted informal interviews of former employees of the Konnektive Parties. *Id*. The Konnektive Parties produced sworn declarations regarding their financial assets. *Id.* Plaintiff's counsel further obtained publicly available information about (1) real estate assets held by the Konnektive Parties; (2) corporations in which the Konnektive Parties had a financial interest; and (3) estimates of their transaction volume. *Id*. at ¶ 31.

There have been numerous discovery issues resolved by the Court, including a lengthy hearing conducted by Magistrate Judge Leshner addressing dozens of discovery disputes. Dkt. 321, 322. The Konnektive Defendants produced more than 12,000 pages of documents. Decl. of K. Kneupper at ¶ 33. The Konnektive Defendants further produced highly granular data about the sales at issue. *Id*. Ms. Tan was deposed, as well as Defendants Matthew Martorano and Kathryn Martorano. *Id*. Four former Konnektive employees were deposed, as well as three current employees. *Id.* Kiet Lieu was deposed, and the owner of Total Health Supply TUA, Inc. was questioned under oath at a bankruptcy hearing. *Id*. Four individuals employed in the payment processing industry were also deposed, as were several expert witnesses on either side. *Id*.

In addition, Plaintiff had insight into the merits of the lawsuit both from the Court's rulings on multiple rounds of motions to dismiss (dkts. 88, 130), its ruling granting class certification (dkt. 391); and its ruling denying the motion for summary judgment by Kathryn Martorano (dkt. 416).

Plaintiff's counsel thus had more than adequate information available to assess the strength of their case.

I. The Proposal Was Negotiated At Arms' Length

Rule 23(e)(2)(B), as amended in 2018, now requires that the Court consider whether the proposed class settlement "was negotiated at arm's length." The Ninth Circuit has laid out certain factors which Courts should consider in conducting the "higher level of scrutiny for evidence of collusion or other conflicts of interest" that is required for pre-certification settlements. *See Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). This includes a requirement that the Court look for certain "subtle signs that class counsel have allowed pursuit of their own self-interests . . . to infect the negotiations." *Id.* (quoting *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 947 (9th Cir. 2011)).

Those signs of self-dealing include: (1) when counsel receive a disproportionate distribution of the settlement; (2) when the parties negotiate a 'clear sailing' arrangement'

(i.e., an arrangement where defendant will not object to a certain fee request by class counsel); and (3) when the parties create a reverter that returns unclaimed fees to the defendant. *Id.*

None of these signs exist here. There is nothing in the proposed agreement as to the amount that counsel will receive. Instead, that issue has been left for the Court itself to resolve via motion. *See, e.g.*, Ex. 1 at section III ¶ 5(a); section VIII. Counsel did not seek to negotiate any agreement as to their own fees **at all** in this settlement. The Ninth Circuit has held that a decision by class counsel to leave the issue of their fees to the Court via motion is a strong sign that there has been no collusion or self-dealing: "Providing further assurance that the agreement was not the product of collusion, class counsel McCuneWright did not reach an agreement with the automakers regarding the amount of attorney's fees to which they were entitled." *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926 F.3d 539, 569-70 (9th Cir. 2019).

As to the second sign of self-dealing, a clear sailing arrangement, there is none in this settlement.

As to the third sign of self-dealing, an agreement to revert unclaimed fees to the defendants, again, there is none. Instead, class counsel negotiated a clean settlement in which unclaimed fees would be distributed to a well-respected *cy pres* recipient, the NCLC. *See* Ex. 1 at section III ¶ 4(e); section I ¶ 17. The NCLC is a non-profit which has a history of addressing internet fraud and payment processing fraud. Decl. of R. Dubois. The NCLC has been approved as an appropriate *cy pres* recipient in various other cases. *See Smith v. One Nev. Credit Union*, No. 2:16-cv-02156-GMN-NJK, 2020 U.S. Dist. LEXIS 244534 at *3-6 (D. Nev. Dec. 30, 2020); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1261 (C.D. Cal. 2016) ("Indeed, courts have repeatedly found the NCLC to have the requisite nexus with consumer classes for qualification as a *cy pres* recipient."); *Feist v. Petco Animal Supplies, Inc.*, No. 3:16-cv-01369-H-MSB, 2018 U.S. Dist. LEXIS 197186 at *17-18 (S.D. Cal. Nov. 16, 2018) Counsel for Plaintiffs have no connection personally or professionally to the NCLC and their only relationship has been purchasing and utilizing highly valuable

practice guides the NCLC has created on consumer law, including in this lawsuit. Decl. of K. Kneupper at ¶ 34.

Not only are there no signs of self-dealing, but there are many signs to the contrary. The settlement was negotiated only after an initial Early Neutral Evaluation before Magistrate Judge Butcher, dkt. 174, as well as a subsequent settlement conference with Magistrate Judge Leshner, dkt. 345. Plaintiff and the Konnektive Parties then held a mediation with Antonio Piazza. Decl. of K. Kneupper at ¶ 35. Mr. Piazza is a highly regarded mediator who assisted in negotiating the agreement between the parties. *Id*. *See Bluetooth*, 654 F.3d at 948 (holding that the "presence of a neutral mediator," while not dispositive, is "a factor weighing in favor of a finding of non-collusiveness"). Further supporting non-collusiveness is that the settlement amount and proposed bench trial here was a result of a mediator's proposal made by Mr. Piazza. Decl. of K. Kneupper at ¶ 35. *See Barragan v. Populus Fin. Grp., Inc.*, No. 2:21-cv-08021-SB-MRW, 2023 U.S. Dist. LEXIS 27605 at *9 (C.D. Cal. Feb. 10, 2023) ("The settlement was reached after mediation and only after the parties received a mediator's proposal, which suggests that it was the product of informed, arm's-length negotiations.").

Other aspects of the settlement discussed herein further suggest a lack of collusion. The case was not one in which class counsel sought a quick settlement: it was instead a hard-fought one with extensive discovery, as well as extensive investigation pre-suit, and an amount that reflects Class Counsel's willingness to pursue the case zealously as far as needed to secure a favorable recovery for the Class.

J. The Experience and Views of Counsel

"Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. This is because parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *Lloyd v. Navy Fed. Credit Union*, No. 17-cv-1280-BAS-RBB, 2019 U.S. Dist. LEXIS 89246 at *33 (S.D. Cal. May 28, 2019) (quoting *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528).

Counsel for Plaintiff in this case are highly experienced in complex litigation. *See* Decl. of K. Kneupper at ¶¶ 1-29; Decl. of C. Covey at ¶ 1-22. Counsel are further highly experienced in consumer law cases, and the law firm of Kneupper & Covey currently maintains a docket of over 200 active individual consumer law cases in either arbitration or litigation. Decl. of K. Kneupper at ¶ 29. The law firm has settled or recovered judgments in over 500 individual consumer law cases, and counsel are regularly involved in numerous mediations or settlement discussions. *Id.* at ¶ 30. In 2023, these individually settled or recovered cases by Kneupper & Covey amounted to more than $2.5 million. *Id.*

Based on their experience, Counsel for Plaintiff believe this is a highly favorable settlement for the Class. Partly this is because the amount being recovered exceeds the actual damages, and has the potential to exceed them by a significant amount if Plaintiff prevails in the proposed bench trial. Weighed against the risks of an unfavorable litigation outcome and the time and expense needed to try for a higher damages award before a jury, Counsel believes they have obtained an extremely favorable outcome for the Class, even if this was all that is ever recovered.

A settlement that "offers an immediate and certain award for a large number of potential class members" creates "much less risk of anyone who may have actually been injured going away empty-handed." *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007). By putting a floor on the damages of $2 million, the Class is guaranteed a highly significant recovery even if they lose on the issue of liability, while retaining the ability to try to recover more money through the proposed bench trial. And while it would theoretically be possible absent settlement to seek a higher award than the $5 million ceiling, to do so would create collectability issues. The Konnektive Defendants have stated in discovery that they do not have an insurance policy that applies to the claims here. Decl. of K. Kneupper at ¶ 31. There is significant uncertainty if a larger, eight figure judgment would be collectable. And even if Plaintiff was successful in locating and levying substantial assets that the Konnektive Defendants controlled such a process would likely significantly delay any recovery to the Class for months if not years.

K. The Remaining Factors

As to the presence of a governmental participant, "[n]o government entity participated in this case. Under these circumstances, this factor is neutral." *Klee v. Nissan N. Am., Inc.*, No. CV 12-08238 AWT (PJWx), 2015 U.S. Dist. LEXIS 88270 at *28 (C.D. Cal. July 7, 2015). With respect to the reaction of the class members to the proposed settlement, "[t]he Class has yet to be notified of the Settlement and given an opportunity to object; thus it is premature to assess this factor." *Beaver v. Tarsadia Hotels*, No. 11-cv-01842-GPC-KSC, 2017 U.S. Dist. LEXIS 80648 at *17 (S.D. Cal. May 24, 2017).

As to whether "the proposal treats class members equitably relative to each other," the settlement treats class members equitably because it bases their recovery on the amount they paid, subject to pro rata increases or decreases based on the number of claims. Ex. 1 at section III. Depending on how many class members make claims, that amount can also be increased pro rata up to three times the class member's actual damages (to reflect trebling). *Id.* at section IV(4)(b).

While Plaintiff intends to seek an incentive award in line with 9th Circuit authority, *see* ex. 1 at section VIII(2), the amount was not negotiated as part of the settlement and the Court will ultimately determine whether such an award is proper, and if so, the amount. Such incentive awards do not constitute inequitable treatment of class members. *Preston v. Porch.Com, Inc.*, No. 21-CV-168 JLS (BLM), 2022 U.S. Dist. LEXIS 75256 at *19 (S.D. Cal. Apr. 25, 2022).

V. THE COURT SHOULD APPROVE THE PROPOSED METHOD OF NOTICE

After the Court has determined that a settlement should be preliminarily approved, it must order that the parties provide notice to the settlement class. *See* Fed. R. Civ. P. 23(e)(1). The parties must provide the absent class with the "best notice practicable" under the circumstances. *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). While this standard does not demand individual notice to every class member, it does require "individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2); *see In re Packaged Seafood Prods. Antitrust Litig.*, No. 15md2670

DMS(MDD), 2023 U.S. Dist. LEXIS 42200 at *46 (S.D. Cal. Mar. 13, 2023). Notice may be provided to the class via "United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B).

The parties have agreed to a notice plan designed to make sure that as much of the Class receives notice as possible. The proposed notice forms are attached as Exhibits 6-8 to the executed settlement. Ex. 1. They have been drafted in plain English in an attempt to make them easily readable to Class members. The methods of notice include e-mail notice, postcard notice, and website notice. *Id.* at section V (2) (c) and (d). The parties have agreed to consult with the Class Administrator regarding additional targeted notice via internet advertising and other procedures. *Id.* at section V (2)(e). These include, for example, re-mailing postcards using new address data for any that are returned. Decl. of C. Azari at ¶ 24. The online advertising proposed would involve a "list activation" strategy that uses the e-mail addresses for the Class to specifically target class members using advertisements on major social media networks (i.e., to show the ads only to Class members). *Id.* at ¶ 29-30. The Class Administrator estimates that 90% of the Class will be reached by the direct methods of notice, even before the proposed targeted online advertising. *Id.* at ¶ 17, 35.

The parties have selected Epiq Class Action and Claims Solutions as the settlement administrator to handle the notice plan. Ex. 1 at section I(39). Plaintiff independently contacted and reviewed other potential administrators, but the parties agreed to Epiq after Plaintiff's counsel conducted an interview with them and was satisfied with, in particular, their technical understanding of targeted Internet advertising. Decl. of K. Kneupper at ¶ 36. Plaintiff's counsel has personal experience with such advertising and considered it particularly important because of its effectiveness. *Id.*

VI. CONCLUSION

Plaintiff respectfully requests that the Court should grant preliminary approval and schedule the necessary proceedings for a final approval hearing after notice to the Class.

DATED: September 3, 2024

KNEUPPER & COVEY, PC

/s/Kevin M. Kneupper

Kevin M. Kneupper, Esq.

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