UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ALEXANDER VUCKOVIC, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. KT HEALTH HOLDINGS, LLC and KT HEALTH, LLC, Defendants.	**LEAVE TO FILE GRANTED ON: MAY 25, 2017** Civil Action No. 1:15–cv–13696–GAO

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, PRELIMINARY CLASS CERTIFICATION, APPROVAL OF FORM AND MANNER OF NOTICE AND TO SET A FAIRNESS HEARING

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INTRODUCTION

Plaintiff, Alexander Vuckovic ("Plaintiff"), on behalf of the proposed Class, by and through his attorneys, Pastor Law Office LLP ("PLO"), Leonard Law Office P.C. ("LLO") and Shepherd Finkelman Miller & Shah, LLP, ("SFMS"), respectfully submits this memorandum in support of the Parties' Joint Motion for Preliminary Approval of Proposed Settlement, Preliminary Class Certification, Approval of Form and Manner of Notice, and to Set a Fairness Hearing ("Preliminary Approval Motion").

Plaintiff alleges that Defendants KT Health Holdings LLC and KT Health LLC ("Defendants" or "KT") have engaged in a pattern of false, deceptive and misleading statements in their labeling and advertising in their sales and marketing practices for KT Tape.[1] Complaint, ¶¶ 1, 3, 67, 72-73. KT sells, and has sold during the relevant time period, several types or varieties of KT Tape, the most common of which are KT Tape Original, KT Tape Pro, and KT Tape Pro X. *Id.*, ¶ 5. The Complaint alleges that through representations made on the KT Tape packaging and labeling and the KT Tape website, which representations are set forth in detail in the Complaint, KT misrepresents that KT Tape works to treat a variety of sports-related injuries and that KT Tape has unique pain-relieving and injury-negating (or injury-preventing) effects when applied to human skin. *Id.*, ¶¶ 11-21, 38-44. The Complaint lists a number of specific alleged misrepresentations made by Defendants about KT Tape. *Id.*, ¶¶ 13, 15-17, 41-43.

KT Tape is purportedly based on a concept called "kinesio taping," or "kinesiology taping," which is claimed to alleviate pain and facilitate lymphatic drainage by

[1] KT Tape and other capitalized terms used herein have the same meaning as defined in the Parties' Settlement Agreement, submitted herewith.

microscopically lifting the skin. Unlike traditional athletic tape, which is wound around the affected portions of the body for a compression effect, KT Tape is instead pre-stretched, and stuck onto the skin above the injury to tension and lift the skin. *Id.*, ¶¶ 3, 5-8. KT Tape is claimed to "create[] neuromuscular feedback (called proprioception) that inhibits (relaxes) or facilitates stronger firing of muscles and tendons." *Id.*, ¶ 43 (citing http://www.kttape.com/what-is-kt-tape/). As alleged in the Complaint, traditional athletic tape, which is commonly used to provide compression and support, has a recognized place in sports medicine, but kinesio tape (which is used to stretch and lift the skin), does not. *Id.*, ¶ 8. The Complaint cites several peer-reviewed, scholarly, studies demonstrating a lack of evidence to support the use or effectiveness of kinesio taping in the treatment of sports injuries, including, in particular, a lack of evidence to support the claim that kinesio taping, by stimulating the lymphatic system, is effective in decreasing acute swelling after an ankle sprain. *Id.*, ¶ 23.

Plaintiff has alleged that Defendants' misrepresentations and false and misleading advertising are material and have induced Plaintiff and Class members to purchase KT Tape at a premium price (several times the price of traditional athletic tape). But while priced substantially higher than standard athletic tape, KT Tape is no more effective than the standard tape. *Id.*, ¶¶ 27-29.

The Action asserts claims for unjust enrichment, untrue and misleading advertising under G.L., c. 266, § 91, and unfair and deceptive conduct in violation of G.L., c. 93A, § 2, and seeks redress for Defendants' false advertising in the form of damages and injunctive relief.[2]

The terms of the Settlement are set forth in the Settlement Agreement attached as Exhibit

[2] Defendants dispute the allegations of the Complaint, and they deny that they engaged in any improper or unlawful conduct.

1 to Declaration of David Pastor In Support of the Motion for Preliminary Approval ("Pastor Dec."). Under the Settlement Agreement, Defendants will provide a Settlement Fund in the sum of $1,750,000, from which the claims of Class members will be paid. The Settlement Fund will also be used to pay Plaintiff's attorneys' fees and expenses and the costs of notice and settlement administration. The Settlement Agreement also provides for injunctive relief in the form of labeling and advertising changes that Defendants have agreed to make in all of their packaging and advertising for KT Tape. As more fully set forth in the Settlement Agreement, the Class includes persons who purchased KT Tape during the period from October 30, 2011 through the date of entry of the Preliminary Approval Order. In return, Class Members release any claims arising from Defendants' alleged misrepresentations.

Plaintiff respectfully submits that preliminary approval of the Settlement is appropriate. The Settlement represents the product of good faith, arm's-length negotiations among experienced counsel for the Parties. In entering into the Settlement, Plaintiff was fully conversant with the strengths and weaknesses of his claims. Being thus well-positioned to evaluate the risks of continued litigation versus the fairness and prudence of a resolution at this time, Plaintiff believes the Settlement produces a fair and reasonable result. Preliminary approval of the Settlement will allow the parties to notify Class Members of the Settlement and of their right to request exclusion or object. Preliminary approval does not require the Court to rule on the ultimate fairness of the Settlement, but to make only a "preliminary determination" of the "fairness, reasonableness, and adequacy" of the proposed settlement. *See* Federal Judicial Center, Manual for Complex Litigation, § 21.632 (4th ed. 2004). As set forth herein, the Court should permit notice of the Settlement to be sent to Class Members, as the settlement is fair and reasonable.

Accordingly, Plaintiff requests that the Court enter an order, in the form of the accompanying proposed Preliminary Approval Order: (1) granting preliminary approval of the proposed Settlement; (2) preliminarily certifying the Class; (3) approving the Parties' proposed form and manner of notice and directing that notice be given to the Class; (4) naming Plaintiff Alexander Vuckovic and his counsel, PLO, LLO, and SFMS as Class Representative and Class Counsel; (5) scheduling appropriate dates for requirements and/or obligations of the Parties and Class members as more fully described in the proposed Order filed concurrently herewith; and (6) scheduling a Fairness Hearing during which the Court will consider (a) the Parties' request for final approval of the Settlement and entry of the proposed Final Order and Final Judgment, (b) Class Counsel's application for an award of attorneys' fees and reimbursement of expenses, and (c) dismissal of the Action pending before this Court.

STATEMENT OF FACTS

I. Background of Litigation

On August 14, 2015, pursuant to M.G.L. c. 93A § 9(3), Plaintiff sent a written demand for relief to KT. Defendant failed to tender a reasonable offer of relief in response to Plaintiff's written demand. On October 30, 2015, Plaintiff filed his Class Action Complaint in this Court, alleging that KT sold KT Tape to Plaintiff and Class members by the use of false, misleading and deceptive statements about the ability of KT Tape to relieve pain, prevent injury and treat various sports-related injuries. Pastor Dec., ¶ 4. Plaintiff filed a First Amended Class Action Complaint on January 25, 2016, and KT responded with its Answer and Affirmative Defenses on February 26, 2016. *Id.*, ¶ 5. On July 7, 2017, Plaintiff filed a Second Amended Complaint. *Id.*, ¶ 6

The Court held an initial scheduling conference, after which the Court set a partial pre-

trial schedule for the litigation (relating to class certification), including a schedule for fact discovery, expert disclosure and discovery and briefing on class certification.[3] *Id*., ¶¶. 7-8. The Parties then exchanged initial disclosures and served and responded to written discovery, including interrogatories and document requests. Plaintiff sent a "meet and confer" letter to KT's counsel, pointing out certain deficiencies in KT's discovery responses, and KT's counsel sent a response letter.[4]

The Parties had an early in-person meeting to discuss the possibility of settlement, and then had further communications by telephone and email concerning possible settlement of the Action. The Parties eventually agreed to mediation with the Honorable Howard B. Wiener.[5] The Parties had two full-day mediation sessions with Justice Wiener in San Diego, the first on November 15, 2016 (rescheduled from August 30-31, 2016) and the second on January 17, 2017. The mediation sessions were also attended by Defendants' insurance carriers. The Parties made significant progress at the mediation, but without reaching agreement on all of the terms of a settlement. The parties continued to discuss settlement, by telephone and email and in person, ultimately resulting in the Settlement Agreement dated May 24, 2017. *Id.*, ¶¶ 11-18.

Both in response to Plaintiff's document requests and in connection with the settlement discussions, KT produced in excess of 15,500 pages of documents, which were reviewed by Plaintiff's counsel. These documents included, among other things, Defendants' insurance policies and documents related to those policies; Defendants' financial statements; documents containing sales information and sales figures for KT Tape during the relevant time period; samples of labeling, packaging and advertising for KT Tape; and clinical studies asserted by

[3] In entering the scheduling order, the Court adopted Defendants' proposal, which provided for conducting discovery and briefing on class certification before proceeding to the merits of the case (a proposal which was opposed by Plaintiff).
[4] *Id.*, ¶ 9.
[5] Justice of the California Court of Appeal, Retired.

Defendants to support Defendants' product claims for KT Tape labeling and in KT Tape advertising that are the subject matter of the Action. *Id*., ¶ 10.[6]

During and after the mediation, Defendants produced additional documents, consisting primarily of additional clinical studies relied upon by Defendants in support of the KT Tape product claims made by them.[7]

During the parties' settlement discussions, including the mediation sessions, Defendants were engaged in discussions with their insurers. The insurers had what they claimed to be complete defenses to coverage for the acts and omissions giving rise to Plaintiff's claims in the Action. One of the insurers commenced a declaratory judgment action against Defendants in this Court, and obtained partial summary judgment supporting their denial of coverage. *The Cincinnati Ins. Co. v. KT Health Holdings, LLC*, *et al.*, No. 16-11722-FDS (March 27, 2017) (ECF No. 58). Pastor Dec., ¶ 16.

After conducting sufficient discovery such that each side was in a position to evaluate the merits, strengths and weakness of any claims or defenses, the Parties, as described above, engaged in arms-length negotiations. During the course of those negotiations, Plaintiff and Plaintiff's counsel looked at the uncertainties of trial and the benefits to be obtained under the Settlement, and they considered the costs, risks, and delays associated with the continued prosecution of the Action and the likely appeals of any rulings in favor of either Plaintiff or Defendants. After substantial settlement discussions, the Settlement was reached. The Parties executed a Settlement Agreement (the "Settlement Agreement") on May 24, 2017.[8] *Id*., ¶ 17. After the execution of the Settlement Agreement, the Parties prepared, exchanged drafts of,

[6] Defendants produced financial statements and other information for the purpose of demonstrating their limited financial ability to fund a settlement or substantial judgment in this case. Plaintiff's counsel engaged the services of a forensic accountant to assist in the review of the financial information produced by Defendants.
[7] Pastor Dec., ¶¶ 12, 15.
[8] A copy of the Settlement Agreement is annexed to the Pastor Dec. as Exhibit 1.

negotiated the language of, and edited, the related settlement documents, including the Class Notice, the Claim Form, and the proposed orders in connection with court settlement approval. *Id.*, ¶ 18.

II. Summary of Settlement Terms and Benefits

Under the Settlement, the proposed Class is defined as follows: all persons who purchased KT Tape during the period from October 30, 2011 through the date of entry of the Preliminary Approval Order. Pastor Dec., ¶ 19.

Pursuant to the Settlement, KT will provide a Settlement Fund in the sum of $1,750,000, which will be used to pay valid and timely claims of Class members, court-awarded attorneys' fees and expenses to Class Counsel, a court-awarded incentive award to Plaintiff, and the Notice and Administration Costs. Qualified Claimants (i.e., Class members who submit valid and timely claim forms)[9] will receive cash refunds of up to 50% of the full retail prices of the KT Tape products they purchased during the Class Period, as specified in the Settlement Agreement,[10] and subject to the limitations and *pro rata* adjustments summarized herein. Each Class member can submit a claim for one (1) package (i.e., roll) of KT Tape without providing proof of purchase, and can submit claims for up to five (5) packages with purchase receipts or other valid proof of purchase. The Settlement provides that in no event will the aggregate amount distributed to the Class be less than the total amount of attorneys' fees and expenses awarded to Class Counsel (the "Class Distribution Threshold"). *Id.*, ¶¶ 20-21.

If the total amount claimed by Qualified Claimants exceeds the Net Settlement Fund, each Qualified Claimant's award shall be reduced on a *pro rata* basis. If the total amount claimed is less than the Class Distribution Threshold, each Qualified Claimant's award shall be

[9] A copy of the Claim Form to be used by Class members is annexed to the Exhibit A to the Settlement Agreement.
[10] The Settlement Agreement contains a list of the retail prices for the various KT Tape products which will be the basis for Class member refunds. Settlement Agreement, Section III.B.3.

increased on a *pro rata* basis until the Class Distribution Threshold is reached. If there are funds remaining in the Net Settlement Fund after the claims of all Qualified Claimants have been fully paid, any such remaining funds shall be distributed, to Special Olympics, Inc., or such other appropriate *cy pres* recipient as the Court shall designate or approve. *Id.*, ¶ 21.

Pursuant to the Settlement, KT has also agreed to make certain changes to the language of all KT Tape labeling, packaging and advertising, including, without limitation, the following: 1) the phrases "it will keep you pain free," "prevents injury," "for injury prevention," and "provides 24-hour pain relief per application" will be eliminated; 2) the phrase, "can be used for hundreds of common injuries" will be modified to say, "can be used for many common injuries;" 3) the disclaimer language on the back of KT Tape packages, on in-store displays and elsewhere, saying, "not clinically proven for all applications" will be modified to say, "not clinically proven for all injuries;" 4) the revised disclaimer will be in bold print and increased type size; 5) the revised disclaimer will be added wherever the words, "for fast, easy pain relief," "for common injuries," or "common injuries" are used. *Id.*, ¶ 22.

III. Incentive Award and Attorneys' Fees

Plaintiff and Class Counsel intend to seek Court approval for an incentive award to Plaintiff of Five Thousand ($5,000.00) Dollars in recognition of the time and effort spent by Plaintiff as the Class Representative, which is to be paid from the Settlement Fund. *Id.*, ¶ 23. Plaintiff's Counsel intend to apply to the Court for an award of attorneys' fees of up to one-third of the Settlement Fund, plus reimbursement of litigation expenses. Defendants have agreed that they will take no position on the Plaintiff's incentive award or Class Counsel's application for attorneys' fees and expenses. *Id.*, ¶ 24.

IV. Class Notice

The proposed notice program (summarized below) is described in detail in the Declaration of the Class Action Settlement Administrator.[11] Notice will be sent by e-mail to each reasonably identifiable Class Member's last known e-mail address reasonably obtainable from Defendants, and a Direct Mail Notice (by postcard) will be mailed to each Class member for whom Defendants have a street address, but no email address.[12] There will also be an extensive program of electronic notice, consisting of: a targeted mix of desktop and mobile banner notification advertisements placed on selected websites, including running/cycling/fitness websites and websites directed at athletes and people with an active lifestyle; notification advertisements on social media (such as Facebook), targeted to athletes and an active population; and paid keyword search advertisements through search engines (Google, Yahoo and Bing), with links to the settlement website.[13] In addition, the Class Notice will be posted on the settlement website (with the web address listed in the Summary Notice and Direct Mail Notice),[14] and the Settlement Administrator will also set up a toll-free voice response unit with message capabilities.[15]

ARGUMENT

I. Preliminary Approval Of The Settlement Agreement Is Appropriate

A. Overview Of The Class Settlement Approval Process

Courts consistently recognize "the clear policy in favor of encouraging settlements," especially in the class action context. *Durrett v. Housing Auth. Of City of Providence,* 896

[11] *See* Declaration of Mark A. Fellows with Respect to Settlement Notice Plan ("Fellows Dec."), Exhibit I to the Settlement Agreement.
[12] Fellows Dec., ¶¶ 15, 19-21.
[13] Fellows Dec., ¶¶ 15-16, 22-27.
[14] *Id.*, ¶¶ 30-31. Copies of the Class Notice, Direct Mail Notice, and Summary Notice are exhibits B, C, and G, respectively, to the Settlement Agreement.
[15] Fellows Dec., ¶ 32.

F.2d 600, 604 (1st Cir. 1990) (reversing denial of approval of class action settlement as an abuse of discretion). Moreover, public policy in the First Circuit highly favors settlement as a means of resolving disputes. *See Hotel Holiday Inn de Isla Verde v. N.L.R.B.*, 723 F.2d 169, 173 (1st Cir. 1983) (settlement agreements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits"); This is especially so in the context of complex class action litigation. *See, e.g.*, *Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) ("Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved"); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements").

By favoring the settlement of complex class action litigation, the law seeks to minimize the litigation expense on both sides, and to reduce the strain on judicial resources. *See, e.g.*, *Lazar*, 757 F.2d at 440.

In order to approve a proposed class action settlement, a court generally follows two steps:

> [T]he judge is required to scrutinize the proposed settlement to ensure that it is fair to the persons whose interests the court is to protect. Those affected may be entitled to notice and an opportunity to be heard. This usually involves a two- stage procedure. First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.

In re Relafen Antitrust Litig., 231 F.R.D. 52, 57 (D. Mass. 2005) (quoting Manual For Complex Litigation, Fourth ("MCL") § 13.14).

At the preliminary approval stage, the Court is not required to undertake an in-depth consideration of the relevant factors for final approval. Instead, the "judge must make a

preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." MCL § 21.632. The Court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." If the court finds a settlement proposal "within the range of possible approval," it then proceeds to the second step in the review process, the fairness hearing. *See In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007).

B. The Applicable Factors Favor Preliminary Approval

Applying the approach set forth above, the Court should preliminarily approve the Settlement because it is fair, reasonable and adequate, and thus it falls squarely within the range of possible approval.

First, the Settlement Agreement provides reasonable monetary relief and substantially fulfills the purposes and objectives of this class action. It provides for a cash Settlement Fund of $1,750,000.00, which will be available for payment of Class members' claims for product refunds, after the payment of Notice and Administration costs, court-awarded attorneys' fees and expenses to Class Counsel, and a Court-approved incentive award to Plaintiff. Qualified Claimants will receive cash refunds of up to 50% of the full retail prices of the KT Tape products they purchased during the Class Period, as specified in the Settlement Agreement, subject to certain limitations and subject to the availability of funds in the Net Settlement Fund. In the event that the total amount claimed by Qualified Claimants exceeds the Net Settlement Fund, each Qualified Claimant will receive a *pro rata* share of the Net Settlement Fund. Also, if the total amount claimed by Qualified Claimants is less than the Class Distribution Threshold, each Qualified Claimant's award will be increased on a *pro rata* basis until the Class Distribution Threshold is reached.

The Settlement also provides for significant injunctive relief in the form of changes to the language in Defendants' labeling and advertising for KT Tape, which Defendants have agreed to make. Those changes are summarized above and are described in greater detail in Exhibit H to the Settlement Agreement.

While Plaintiff continues to believe in the merits of his claim, he recognizes that there are risks in continued litigation, including that: the Class might not be certified; class certification may not be maintained through trial; Plaintiff may not prevail at summary judgment or at trial; and a favorable judgment might be vacated or reversed on appeal. *See, e.g., In re Lupron*, 228 F.R.D. at 97 ("the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.") (internal quotation marks omitted); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539-40 (D.N.J. 1997) ("Because establishing liability at trial and prevailing on appeal is not, and never can be, guaranteed, and because the Proposed Settlement is certain and avoids many of the obstacles potentially implicated by a trial, on balance the risks of establishing liability weigh in favor of approving the settlement."). The proposed Settlement ensures the Class a substantial benefit, while eliminating further uncertainty, expense, and delay.

The Settlement amount also reflects Defendants' somewhat limited financial resources, and the real risk that Defendants may not be able to satisfy a judgment substantially in excess of the Settlement amount.[16] Defendants have produced potentially applicable insurance policies, which contain provisions appearing to exclude coverage for

[16] Defendants have provided, subject to a confidentiality agreement, financial documents and information supporting their claim of limited financial resources.

most of the claims asserted in the Action.[17]

Second, the terms of the proposed Settlement are the product of arm's length negotiations. The proposed Settlement is the result of intensive negotiation between the Parties. The Parties had two full-day mediation sessions with an experienced mediator, plus two additional in-person meetings and multiple additional settlement negotiations via telephone and e-mail. This factor – the time and effort spent on the settlement negotiations– militates in favor of preliminary approval of the Settlement because it strongly indicates that there was no collusion in the result achieved. *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d. 95, 107 (D. Mass. 2000) ("[t]here is generally a presumption in favor of settlement '[i]f the parties negotiated at arm's length and conducted sufficient discovery.'") (quoting *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009)). "When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F. 3d 1041, 1043 (1st Cir. 1996).

Moreover, Plaintiff's Counsel also have significant experience in class action litigation, including consumer litigation involving M. G. L. c. 93A and other similar consumer protection statutes, and have negotiated many other substantial class action settlements throughout the country. The presence of able and experienced counsel is an important factor supporting settlement approval. *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 602 F. Supp. 2d 277, 282 (D. Mass. 2009) (citing "the quality of counsel on both sides" and the fact that "settlement negotiations have been conducted diligently and at arms-length"). *See also Bezdek v. Vibram USA, Inc.*, 79 F. Supp. 3d 324,

[17] Indeed, as discussed above, one carrier has brought a declaratory judgment action against KT in this Court, and has obtained a partial summary judgment, supporting its denial of coverage. *The Cincinnati Ins. Co. v. KT Health Holdings,LLC, et al.*, No. 16-11722-FDS (D. Mass.) (ECF No. 58) (March 27, 2017).

348 (D. Mass. 2015) ("I find that the parties had a sufficient understanding of the merits of the case in order to engage in informed negotiations, particularly where plaintiffs' counsel are skilled and experienced in consumer class action litigation").

Third, the fact that the Settlement provides for a prompt payment to claimants favors approval of the settlement. *See Teachers' Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004) ("[T]he proposed Settlement provides for payment to Class Members now, not some speculative payment of a hypothetically larger amount years down the road. Given the obstacles and uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no recovery.").

Finally, the Parties agreed to the terms of the Settlement after conducting formal and informal discovery. There is a presumption in favor of a proposed settlement when the parties have conducted sufficient discovery to allow them to investigate the pertinent factual and legal issues and to assess the merits of their respective cases. *City P'ship*, 100 F.3d at 1043; *Rolland v. Celluci*, 191 F.R.D. 3, 6 (D. Mass. 2000). In this case, Plaintiff's counsel were not only provided sufficient discovery by Defendants such that Plaintiff could assess the extent to which Defendant's practices were unlawful, but Class Counsel also investigated the claims against Defendants prior to filing suit and prior to settlement negotiations. As a result of all of these efforts, Plaintiff was able to develop the facts concerning Defendants' potential liability necessary to engage in settlement discussions, and the Parties and their counsel were capable of making well-informed decisions regarding the Settlement.

The Settlement easily meets the standard for preliminary approval.

II. The Proposed Class Should Be Preliminarily Certified

In granting preliminary settlement approval, the Court should also preliminarily certify the Class for purposes of the Settlement.

In order to maintain a class action, Plaintiff must demonstrate that the class meets all four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *See Smilow v. Southwestern Bell Mobile Sys*., 323 F.3d 32, 38 (1st Cir. 2003). In addition, the case must fit into one or more of the categories enumerated in Rule 23(b). *See Mack v. Suffolk County,* 191 F.R.D. 16, 22 (D. Mass. 2000).

A. The Prerequisites Of Rule 23(a) Are Satisfied.

1. The Settlement Class Is Sufficiently Numerous.

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1); *see Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 325 (D. Mass. 1997). Courts in this district have typically held that a "40-person class is 'generally found to establish numerosity.'" *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 307 (D. Mass. 2004); *see also McAdams v. Mass. Mut. Life Ins. Co.*, 2002 WL 1067449, at *3 (D. Mass. May 15, 2002). According to information provided by Defendants, more than 9 million units of KT Tape were sold during the Class Period, resulting in more than a sufficient number of Class Members. Joinder of all Class Members is impractical, and, accordingly, the numerosity standard is met in this case.

2. There Are Common Questions Of Law And Fact.

Rule 23(a)(2) requires the existence of questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). This "commonality" requirement "is satisfied if common questions of law or fact exist and class members' claims are not in conflict with one another." *Mack*, 191 F.R.D. at 23. The commonality requirement "does not require that class members' claims be identical," *id.,* and "[a] single common legal or factual issue can suffice." *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003) (citation omitted).

As Judge Woodlock found in *Bezdek,* "the core issues of fact and law in this case regarding alleged misrepresentation of health benefits are common to all class members and present a need for combined treatment." *Id.,* 79 F. Supp. 3d at 338. *See also In re M3 Power Razor System Mktg. and Sales Practice Litig.*, 270 F.R.D. 45, 54 (D. Mass. 2010) (describing the "common core questions [] at the heart of [the] litigation" as "whether Gillette misrepresented the capabilities of the M3P razor to the potential class, whether the potential class members sustained ascertainable damages from such conduct, and if so, in what amount.").[18] The core issues here are essentially the same—i.e., whether Defendants misrepresented the pain-relieving and injury-preventing benefits of KT Tape, whether Class members sustained damages as a result, and the appropriate measure of damages.

3. Plaintiff's Claims Are Typical Of Those Of The Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a). "As with the commonality requirement, the typicality requirement does not mandate that the claims of the class representative be identical to those of the absent class members." *Swack v. Credit Suisse First*

[18] The Court went on to note that those common issues "are sufficient to meet the threshold of Rule 23(a)(2), and indicate that class certification could be beneficial to the expeditious resolution of this dispute." *Id.*

Boston, 230 F.R.D. 250, 260 (D. Mass. 2005). Where the class representatives' injuries "arise from the same events or course of conduct as do the injuries that form the basis of the class claims, and when the plaintiff's claims and those of the class are based on the same legal theory," the typicality requirement is satisfied. *Swack*, 230 F.R.D. at 260. Here, Plaintiffs' claims and the claims of other Class Members are based on the same event (purchase of KT Tape based on misleading labeling and advertising), and the legal theories of recovery are the same for all Class members (unfair and deceptive conduct in violation of c. 93A, untrue and misleading advertising, in violation of c. 266, § 91, and unjust enrichment of KT in the form of revenues it received for sales of KT Tape).[19]

4. Plaintiff And Class Counsel Will Fairly And Adequately Protect The Interests Of The Class.

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court must measure the adequacy of representation by two standards: (1) whether the plaintiff's counsel are qualified, experienced, and generally able to conduct the litigation; and (2) whether the class representative has interests antagonistic to those of the class. *See In re Transkaryotic Therapies, Inc. Sec. Litig.,* 2005 WL 3178162, at *4 (D. Mass. Nov. 28, 2005).

It is clear that Plaintiff is an adequate representative of the Class, and that his counsel has adequately represented the interests of the Class. There is no conflict between Plaintiff and other Class Members. In fact, Plaintiff's claims and legal theories are the same as those that would be asserted by other Class Members.

Plaintiff's Counsel are highly experienced in class action and other consumer litigation,

[19] *See In re M3 Power Razor*, 270 F.R.D. at 55; *Bezdek*, 79 F. Supp. 3d at 338-339.

as demonstrated by the accompanying declarations of counsel and the attached resumes.[20]

B. The Class's Claims Satisfy The Prerequisites Of Rule 23(b)(3).

Rule 23(b)(3) authorizes class certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Common Legal And Factual Questions Predominate.

"The predominance standard can be met even if some individual issues arise in the course of litigation, because 'Rule 23 (b)(3) requires merely that common issues predominate, not that all issues be common to the class.'" *M3 Power Razor*, 270 F.R.D. at 56 (quoting *Smilow v. Southwestern Bell*, 323 F. 3d 32, 39 (1st Cir. 2003)). *See also In re Transkaryotic Therapies*, 2005 WL 3178162, at *2 ("where . . . common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.") (citation omitted). As the Court in *M3 Power Razor* noted:

> The dominant common questions include whether Gillette's advertising was false or misleading, whether the company's conduct violated the statutory and/or common law causes of action delineated in the Amended Complaint, and whether the class members suffered damages as a result of this conduct. Even if state consumer statutes or other state causes of action differ in arguably material ways, common questions, not individual issues, predominate among and within each state's legal regimes.[21]

Similarly, in *In re Lupron*, Judge Stearns noted:

> differences in the state consumer protection laws . . . do not pose a serious obstacle to certification. *See in re Prudential Ins. Litig.*, 148 F. 3d at 315 ("Courts have expressed a willingness to certify nationwide classes on the ground that relatively minor differences in state law could be overcome at trial by grouping similar state laws

[20] *See* discussion in Section IV below regarding the appointment of Class Counsel.
[21] *See also Bezdek*, 70 F. Supp. 3d at 341 ("[b]y employing a broad definition of the class that includes individuals who purchased FiveFingers footwear during the relevant time period for any reason (other than for resale), the settlement provides relief to the broadest class of individuals to whom relief would potentially be available").

> together and applying them as a unit."); *Mowbray*, 208 F. 3d at 292, 296-297 (variation twenty states' laws concerning reliance, waiver, and statutes of limitations did not cause did not cause individual issues to predominate). In any event, the issue is one of manageability, which is not a consideration in the certification of a settlement class. *See Amchem*, 521 U.S. at 620, 117 S. Ct. 2231.

The same common questions (i.e., whether KT's labeling and advertising were false or misleading, whether Defendants' conduct violated the statutes and common law principles at issue, and whether the Class members suffered damages as a result of such conduct) are at the core of this case, and they are also predominant here. Indeed, these issues are the "core questions in this case," and they "are common to all class members." *Bezdek*, at 340.

For these reasons, certification of the nationwide class here is appropriate. *See In re Pharmaceutical. Industry Average Wholesale Price Litig.*, 588 F. 3d at 41 (expanding the class to include residents of nine additional states was proper, because "[i]n the settlement. [defendant] bargained for 'total peace' to resolve all remaining claims against it"). The same is true here.[22]

2. A Class Action Is Superior To Other Methods Of Adjudication.

Rule 23(b)(3)'s superiority requirement is directed at promoting the efficient, practical, and economical use of resources by the Court and the parties in litigation. "Rule 23 has to be read to authorize class action[s] in some set of cases where seriatim litigation would promise such modest recoveries as to be economically impracticable." *Gintis v. Bouchard Transp. Co.*, 596 F. 3d 64, 66-67 (1st Cir. 2010). "Where there are thousands of class members, each of whom have small individual claims that may not be worth pursuing independently, a class action is the only feasible mechanism for resolving the dispute efficiently." *Bezdek*, at 342. Here, too, the size of Class members' individual claims against Defendants, together with the disproportionate cost of

[22] *See also Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1022-1023 (9th Cir. 1998) ("the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims").

individualized litigation, make it unlikely that the vast majority of Class Members would be able to seek relief without class certification.

Accordingly, the requirements of Rule 23(b)(3) are satisfied, and the Court should preliminarily certify this action as a class action on behalf of the proposed Class.

III. The Notice Plan Should Be Approved.

A. The Proposed Form And Content Of The Proposed Notices Are Sufficient.

In order to afford class members the opportunity to object to a proposed class-wide settlement or opt-out of the class, reasonable notice must be provided to those class members. *Durett,* 896 F.2d at 604. Where a proposed settlement is coupled with a request for class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure, class notice must meet the requirements of both Rules 23(c)(2) and 23(e). The content of a class notice is governed by Rule 23(c)(2)(B), which requires that the notice:

> clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Here, the Notices will advise Class members of the essential terms of the Settlement. The Summary Notice (Settlement Agreement, Exhibit G) will provide Class members with a summary of the Settlement terms and Class members will be directed to a more detailed notice, (the Class Notice) posted on the settlement website (Settlement Agreement, Exhibit B). The Class Notice sets forth the detailed procedure to object to the Settlement or to opt out of the Class and provides specifics on the date, time and place of the Fairness Hearing. *See* Pastor Dec.,¶ 29. The Summary Notice will be provided by email, where possible, and there will

also be a direct mail (postcard) notice (where a mailing address, but no email address, is available). In addition, there will be a robust program of electronic notice, with links to the settlement website for access to the full Class Notice. Pastor Dec., ¶¶ 27-29 (citing Fellows Decl.).

B. The Manner of Providing Notice is Sufficient

In terms of the manner of providing notice, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the Proposal," while Rule 23(c)(2)(B) requires the notice to be the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." "Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members," and "[f]or those whose names and addresses cannot be determined by reasonable efforts, notice by publication will suffice under Rule 23(c)(2) and under the due process clause." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 232 (D.N.J. 1997); *see also id.* at 231 ("[D]ue process does not require actual notice, but rather a good faith effort to provide actual notice.").

The procedure for disseminating the proposed Notices in this case satisfies these requirements and complies with the requirements of due process. Class Members for whom Defendants have a valid email (or street) address will receive notice by Email (or mail), with a link or reference to the web address to access the Class Notice. The notice will also be disseminated via a robust program of electronic notice, including a targeted mix of desktop and mobile banner notification advertisements placed on selected websites; notification advertisements on social media; and paid keyword search advertisements through search engines, directed primarily to an audience of athletes and consumers engaged in an active

lifestyle.[23] Similar notice programs have been approved by courts in many cases, including in *Bezdek* (in which the notice program provided for: individual notice by e-mail or mail, where addresses were available; banner advertisements on social media, selected websites and online networks, and a mobile network; and a settlement website). *See id.* at 334-335.

IV. Plaintiff's Counsel Should Be Approved As Class Counsel.

Rule 23(g) governs the standards and framework for appointing class counsel for a certified class, and sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(2). The Court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). Applying these factors, Plaintiff's counsel easily qualify for appointment as Class Counsel here, as demonstrated by the work they have done in this case and the settlement they have achieved, and by the information contained in the declarations of counsel submitted herewith.[24]

V. Proposed Schedule Of Events

In connection with preliminary approval of the Settlement, the Court should set a date for the Fairness Hearing, as well as the following additional dates and deadlines. The Preliminary Approval Order establishes the following schedule:

[23] All of these advertisements will contain a link to the settlement website.
[24] *See* Declarations of David Pastor, Preston W. Leonard and Nathan Zipperian.

Dates	**Events**	**Settlement Agreement Citation**
10 days after filing of Motion for Preliminary Approval	Defendants will send the notice specified in 28 U.S.C. § 1715 to each appropriate state and federal official	Settlement Agreement, § IV.B.1.h.
7 days after the entry of the Preliminary Approval Order	Defendants will provide all available Class member email addresses and street addresses to Class Action Settlement Administrator	Settlement Agreement, § IV.B.1.a.
7 days after the entry of the Preliminary Approval Order	Defendants will pay sum of $80,000 to Settlement Administrator for media acquisition costs	Settlement Agreement, § III. E.2.
14 days after entry of the Preliminary Approval Order	Settlement Administrator will send Notice by email (or U.S. Mail) to each reasonably identifiable Class member's last known email address (or street address) reasonably obtainable from KT.	Settlement Agreement § IV.B.1.b, c.
14 days after entry of the Preliminary Approval Order	Settlement Administrator will post the Class Notice on the Settlement website.	Settlement Agreement § IV.B.1.f.
14 days after entry of the Preliminary Approval Order	Settlement Administrator will commence electronic notice program, as described in the Settlement Administrator's Declaration	Settlement Agreement, § IV.B.1.e.
7 days before the Objection Deadline	Plaintiff to file application for award of attorneys' fees and expenses and Plaintiff's incentive award	
21 days before the Fairness Hearing	Deadline for Class Members to mail requests for exclusion to Settlement Administrator and deadline for Class members to file written objections with the Court	Settlement Agreement § V.A., VI.A.

14 days before the Fairness Hearing	All papers in support of settlement approval to be filed	
14 days before the Fairness Hearing	Settlement Administrator will prepare and Plaintiff will file with the Court a declaration confirming that the Class Notice has been provided in accordance with the Settlement Agreement	Settlement Agreement § IV.A.3.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed Settlement; preliminarily certify the proposed Class for settlement purposes; approve the form and manner of giving notice as proposed; approve the schedule for the final settlement approval process and set a date for the Fairness Hearing; and enter the accompanying proposed Preliminary Approval Order.

Dated: May 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent via U.S. first class mail to those indicated as non-registered participants on May 25, 2017.

/s/ David Pastor
David Pastor