UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV17-00616 JAK (PLAx)	Date	February 11, 2020
Title	Nicholas Miller, et al. v. Wise Company, Inc.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Cheryl Wynn	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, EXPENSES AND SERVICE AWARDS (DKT. 57);**

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ENTRY OF JUDGMENT (DKT. 58)

I. Introduction

On February 15, 2017, Nicholas Miller ("Miller") and Jeffrey Borneman ("Borneman") (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, brought this class action against Wise Company Inc. ("Wise," or "Defendant") in the Riverside County Superior Court. Complaint, Dkt. 1-1. The claims advanced in the Complaint are based on Defendant's alleged false advertising and unfair business practices in connection with its sale of certain food products. The Complaint advances the following causes of action: (i) violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750, *et seq.*; (ii) false advertising in violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (iii) unlawful business practices in violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (iv) fraudulent business practices in violation of the UCL; (v) unfair business practices in violation of the UCL; and (vi) declaratory relief. On March 30, 2017, Defendant removed this action. Dkt. 1.

On February 8, 2018, the parties reached a settlement. Dkt. 36; *see* Dkt. 40-2, Ex.1 (the "Settlement"). On March 30, 2018, Plaintiffs filed an unopposed Motion for Preliminary Approval of Class Action Settlement ("Preliminary Approval Motion"). Dkt. 40. The Preliminary Approval Motion sought the following: (i) conditional certification of the settlement class ("Class"); (ii) the appointment of Plaintiffs as class representatives ("Class Representatives"); (iii) the appointment of Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP, Michael D. Braun of the Braun Law Group, P.C., and Andrew Kierstead of the Law Offices of Andrew Kierstead as class counsel ("Class Counsel"); (iv) preliminary approval of the terms of the Settlement; (v) approval of the proposed claim form; (vi) appointment of Kurtzman Carson Consultations as settlement administrator ("KCC," or the "Settlement Administrator"); (vii) approval of the proposed notice plan; and (viii) scheduling of a final fairness hearing. *Id*. at 2–4. The matter was taken under submission, and an order issued on November 26, 2018 that granted the Preliminary Approval Motion (the "Preliminary Approval Order"). Dkt. 47.

On May 10, 2019, Plaintiffs filed a Motion for Award of Attorneys' Fees, Costs, Expenses and Service Awards ("Fee Motion" (Dkt. 57)), and on June 20, 2019, Plaintiffs filed a Motion for Final Approval of Class Action Settlement and Entry of Judgment ("Final Approval Motion" (Dkt. 58)) (collectively, the "Motions"). On June 24, 2019, Defendant filed an opposition to the Fee Motion (Dkt. 60), but did not oppose the Final Approval Motion. On July 1, 2019, Plaintiffs filed a reply in support of the Fee Motion. Dkt. 61.

A hearing on both the Fee Motion and the Final Approval Motion was conducted on July 15, 2019. A ruling on the Motions was deferred, because the Settlement Administrator had not completed the processing of claims. As a result, the final and complete data relevant to both motions was unavailable. Dkt. 64. The parties were ordered to file a joint report as to the status of the processing of remaining claims. *Id.* Thereafter, the Motions would be taken under submission. *Id.*

On August 14, 2019, the parties submitted a joint report ("Supplemental Joint Report" (Dkt. 65)), which included a declaration by a representative of the Settlement Administrator, H. Jake Hack ("Hack Declaration" (Dkt. 65 at 5-7)). The Supplemental Joint Report and Hack Declaration stated that the Settlement Administrator had completed the processing of claim forms, and provided final figures about the number of claims and the amount of the settlement payment. *Id.* at 1–3, 6–7.

For the reasons stated in this Order, the Fee Motion is **GRANTED IN PART**. Defendant shall pay $539,400.00 in attorney's fees, $52,725.26 in litigation costs, and $1000 to both Borneman and Miller as incentive payments for their service as Class Representatives. The Final Approval Motion is **GRANTED**.

II. Summary of Settlement, Notice, and Claims

A copy of the Settlement was filed in connection with the Preliminary Approval Motion. Dkt. 40-2, Ex.1. The principal terms of the Settlement, the corresponding notice provided to members of the Class, and the claims filed by members of the Class with the Settlement Administrator are next addressed.

A. Class Definition

The Class is defined as "all persons who purchased one or more Eligible Products for shipment to California during the period February 15, 2013 through December 31, 2017." Dkt. 40-2 at 19. The Class is comprised of customers who purchased an Eligible Product[1] directly from Defendant ("Known Customers"), and customers who purchased an Eligible Product through a retailer or distributor other than Defendant ("Unknown Customers"). *Id.* at 18–19; *see* Dkt. 47 at 4. The Settlement excludes from the Class "(1) the current and former employees, officers and directors of [Defendant] and its agents, subsidiaries, parents, successors, predecessors, and assigns; (2) the judge to whom this case is assigned and the judge's immediate family; and (3) any person who executes and files a timely request for exclusion from the Class." Dkt. 40-2 at 19.

B. The Class Period

[1] "Eligible Products" are defined as "Long-Term Food Kits manufactured and distributed by [Defendant]." Dkt. 40-2 at 17-18. A list of Eligible Products is set forth in the Settlement, *id.*, and in the Preliminary Approval Order (Dkt. 47 at 3).

The Class Period, which applies to the purchases of Eligible Products, is from February 15, 2013 through December 31, 2017. *Id.* at 19.

C. Notice and Payments to Class Members

The Settlement provides that to receive a payment, a member of the Class must submit a claim form ("Claim Form" (Dkt. 58-3)) within 75 days of the date upon which notice is first provided to the Class (the "Claim Period"). Dkt. 40-2 at 29. The Settlement provides that Known Customers will be provided a summary of their relevant purchases during the Class Period and each will be asked to verify on the Claim Form that he or she is the person who made those purchases. *Id.* at 41-42. Unknown Customers will be asked to submit a Claim Form in which each declares that he or she purchased an eligible product during the Class Period. *Id*.

The Settlement provides for the payments in the amount of 20% of the purchase price paid by each Class member for all Eligible Products, as identified on the Claim Form that is submitted by that Class member. *Id*. at 21. Payments to eligible Class members are to be distributed by the Settlement Administrator and will range from $15 to $1400 for each purchased product. *See id.* at 67; *see also* Dkt. 58-3. The Settlement also provides that Settlement funds will be paid by checks sent to Class members, but that if a check is not timely negotiated, those funds will be distributed as a *cy pres* award to Public Health Advocates or another nonprofit organization approved by the Court. Dkt 40-2 at 29.

Following the Preliminary Approval Order, on or before March 12, 2019, KCC established a website where potential Class members could download a Claim Form and other documents. Dkt. 58-3 ¶ 4. On or before the same date, KCC established a toll-free telephone number that Class members could call to request a Claim Form. *Id*. ¶ 5. KCC also mailed Claim Forms to 18,367 physical addresses, sent 26,006 email notices, and provided indirect notice to potential Class members through internet banner advertisements on various social media platforms. *Id.* ¶¶ 6–7. Members of the Class were also notified of their right to object to the terms of the Settlement or to opt out of the Class. *Id.* ¶¶ 4–12.

The Claim Period began on March 12, 2019, and ended on May 28, 2019. *Id*. ¶¶ 4, 11. The Settlement Administrator received 4885 Claim Forms. Hack Declaration ¶ 3. 3426 of them were deemed eligible for payments; 1459 were deemed ineligible. *Id.* ¶ 4. Of the 3426 eligible Claim Forms, 3391 were submitted by Known Customers who purchased products directly from Wise, and 35 were submitted by Unknown Customers who purchased Wise products through third-parties. *Id.* ¶ 4. With respect to the ineligible Claim Forms, 1265 had insufficient proof or claims as to uncovered products, 15 were untimely, and 179 were duplicative of other Claim Forms. *Id.* However, the Settlement Administrator determined that 4 of the 15 late Claim Forms were otherwise eligible, and Defendant agreed to pay those claims. *Id.* ¶ 5. In sum, 3430 claims were approved, whose total amount is $522,387.66. *Id.* The Settlement Administrator provided a random sample of 300 claims for Class Counsel to review. *Id.* ¶ 6. Class Counsel have not reported any errors or inaccuracies discovered in that review. *Id.*

D. Injunctive Relief

The Settlement requires Defendant to change its website and packaging of Food Kits to eliminate any statement or suggestion, through words, graphics or otherwise, that the Food Kits contain an "X Day" or

"X Month" supply. Dkt. 40-2 at 21. This change to the packaging is subject to "a soft conversion and sell-through of then-existing products and inventory contained in current [non-compliant] packaging." *Id.* at 21–22. Defendant is not required to destroy any inventory that it has produced already. *Id.* at 22. Defendant is permitted to represent that its products contain an "X Day Supply" in the future provided that the daily supply of such products contain at least 2000 calories or another figure consistent with the recommended daily intake values adopted by the U.S. Department of Agriculture. *Id.*

Plaintiffs represent that Defendant has already "materially modified" its website and marketing. Dkt. 58-1 at 6. Defendant confirms that it is now using new packaging that conforms to the terms of the Settlement. Declaration of Grant Gooder ("Gooder Decl."), Dkt. 59 ¶ 7.

E. Release of Claims

The Settlement provides that Plaintiffs and Class members "shall release and forever discharge any and all direct, individual, or class claims, rights or causes of action or liabilities whatsoever, whether known or unknown, whether accrued or unaccrued, and whether arising under federal, state, local, statutory, common or any other law, rule, or regulation that were or could have been asserted against [Defendant] and its present and former owners, officers, directors, employees, parents, predecessors, successors and assigns . . . predicated upon the facts alleged in the Action." Dkt. 40-2 at 20. This release does not apply to "claims for personal injuries." *Id.*

F. Incentive Awards

The Settlement permits each of the two named Plaintiffs to apply to the Court for an incentive award up to $3000. Dkt. 40-2 at 30. Each has applied for an award of that amount.

G. Attorney's Fees and Costs

The Settlement provides that Class Counsel are entitled to an award of reasonable attorney's fees and costs. *Id.* However, the parties did not agree upon either an amount, a floor or a ceiling. *Id.* As noted, the parties dispute the amount of an appropriate fee award.

H. Settlement Administration Costs

The Settlement provides that Defendant shall pay all costs for administering and implementing the Settlement, in an amount not to exceed $110,000. Dkt. 40-2 at 27–28. KCC estimates the cost of administration to be "no more than $90,152." Dkt. 58-3 ¶ 14.

III. Analysis

A. Class Certification

The Preliminary Approval Order included a detailed analysis of the bases for certification of the Class. Dkt. 47 at 6–16. It is incorporated here by this reference. As noted, KCC received 3426 eligible claims, and 4 late-filed ones that were otherwise eligible, and that Defendant has agreed to pay. This confirms the analysis as to numerosity in the Preliminary Approval Order. There have been no other material

changes to any of the information relevant to the application of the factors that are used to determine whether the certification of a class is appropriate under Fed. R. Civ. P. 23. Therefore, for the reasons stated in the Preliminary Approval Order, the Final Approval Motion is **GRANTED** as to certification of the Class.

B. Final Approval of the Settlement Agreement

1. Legal Standards

Fed. R. Civ. P. 23(e) requires a two-step process in considering whether to approve the settlement of a class action. *First*, a court must make a preliminary determination whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (quoting *Staton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir. 2003)). *Second,* if preliminary approval is granted, Class members are notified, and any objections by members of the Class are reviewed. *Third*, a court determines whether final approval of the settlement should be granted by applying several criteria. At the final approval stage, a court must consider "the fairness of a settlement as a whole, rather than assessing its individual components." *Lane v. Facebook, Inc.*, 696 F.3d 811, 818–19 (9th Cir. 2012) (citing *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1026 (9th Cir.1998)).

The following non-exclusive factors are among those that may be considered during both the preliminary and final approval processes:

(1) the strength of the plaintiff's case;
(2) the risk, expense, complexity, and likely duration of further litigation;
(3) the amount offered in settlement;
(4) the extent of discovery completed and the stage of the proceedings;
(5) the experience and views of counsel;
(6) any evidence of collusion between the parties; and
(7) the reaction of the class members to the proposed settlement.

See In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 458–60 (9th Cir. 2000) (quoting *Hanlon*, 150 F.3d at 1026).[2]

[2] Fed. R. Civ. P. 23(e) was amended in 2018 to correspond better with the considerations that had been used by federal courts to evaluate class action settlements. Pursuant to the revised rule, a court must consider whether:

(A) the class representatives and class counsel have adequately represented the class;
(B) the proposal was negotiated at arm's length;
(C) the relief provided for the class is adequate, taking into account:
(i) the costs, risks, and delay of trial and appeal;
(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
(iii) the terms of any proposed award of attorney's fees, including timing of payment; and
(iv) any agreement required to be identified under Rule 23(e)(3); and
(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). As the comments of the Advisory Committee explain, "[t]he goal of [the] amendment [was] not to displace any factor" that would have been relevant prior to the amendment, but rather to address

Each factor does not necessarily apply to every class action settlement, and others may also be considered. For example, courts often consider whether the settlement is the product of arm's length negotiations. *See Rodriguez v. W. 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.") (internal citations omitted). As noted, the ultimate question is whether the settlement is "fair, adequate, and free from collusion." *Hanlon*, 150 F. 3d at 1027.

2. Application

a) In General

The Preliminary Approval Order considered the relevant factors and concluded that the strength of the Plaintiffs' case, the extent of discovery completed, the experience and views of Class Counsel, and the lack of evidence of collusion all weighed in favor of granting approval. Dkt. 47 at 12–15. That discussion is incorporated here by this reference.

b) Reaction of the Class Members

As noted, members of the Class were provided with the opportunity to object to the Settlement or to opt out of the Class. Dkt. 58-3 ¶¶ 4–12.

Because the Eligible Products were sold both directly and through third-party retailers, the precise size of the Class is unknown. The parties estimate that there are at least 20,000 Class members, but not more than 21,270 consumers given the number of Eligible Products that were sold during the relevant time period. Dkt. 45 at 2. There have been no objections made by any Class members, but three of them have elected to opt out. Dkt. 58-3 ¶ 9. This reflects an opt-out rate of less than 1%.

A low proportion of opt-outs and objections "indicates that the class generally approves of the settlement." *In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 456 (C.D. Cal. 2014) (citing cases); *see also In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,* 221 F.R.D. 523, 528–29 (C.D. Cal. 2004)) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.").

The reasonably large proportion of Class members who submitted Claim Forms also confirms that the Settlement is reasonable. 3430 Class members have submitted Claim Forms that presented valid claims. This represents at least 16.1% of the Class, assuming a maximum potential Class size of 21,270. The reasonableness of the 16.1% participation rate is consistent with Ninth Circuit decisions and those by other district courts in the Ninth Circuit. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1130 (9th Cir. 2017) ("It is not unusual for only 10 or 15% of the class members to bother filing claims."

inconsistent "vocabulary" that had arisen among the circuits and "to focus the court and the lawyers on the core concerns" of the fairness inquiry. Advisory Committee Comments to 2018 Amendments to Rule 23. Accordingly, the revision does not call for an analysis that is materially different than the one that was used in the Preliminary Approval Order.

(quoting Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119 (2007)); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015) (1.18 million claims out of 35 million class members found to be reasonable); *In re Toys R Us-Del., Inc.*, 295 F.R.D. at 468 n.134 (3% claim filing rate reasonable); *Santos v. Camacho*, No. CIV. 04-00006, 2008 WL 8602098, at *23 (D. Guam. Apr. 23, 2008) (collecting cases).

As stated in the Preliminary Approval Order, "if claims were timely submitted for all [eligible] sales, Defendant would pay cash rebates totaling $1,384,684.54 to the Class." Dkt. 47 at 13 (estimate based on data provided by parties, Dkt. 40-2 at 81–87). The $522,387.66 settlement amount is approximately 37.7% of that $1.38 million estimate. This provides further support for the view that the Class members who elected to take the time to submit claims were those who had purchased expensive Eligible Products. Those Class members have the greatest financial interest in this litigation and responded favorably to the Settlement.

For these reasons, this factor weighs in favor of approval of the Settlement.

c) Amount of the Settlement

"The amount offered in settlement is generally considered to be the most important considerations of any class settlement." *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1011 (E.D. Cal. 2019) (internal citation omitted); *accord Bayat v. Bank of the W.,* No. C-13-2376-EMC, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015) (collecting cases) ("The [amount offered in Settlement] is generally considered the most important, because the critical component of any settlement is the amount of relief obtained by the class.").

The Settlement Agreement is unusual because the total amount that is paid is affected largely by the value of the valid claims submitted by Class members. Each Class member is to recover 20% of the purchase price for each Eligible Product. Defendant also agreed to pay for attorney's fees, costs, settlement administration costs and enhancement awards.

The Preliminary Approval Order discussed in detail the amount of the Settlement and concluded that "the overall amount offered. . . is reasonable" on an individual basis. Dkt. 47 at 13. The Order acknowledged that, in the course of this litigation, Defendant contested both the propriety of certifying the Class and whether Wise had made certain misrepresentations in its marketing materials. *Id*. It also noted that Wise argued that the accuracy of its nutrition labels barred Plaintiffs' claims. *Id*. (citing Dkt. 40-1 at 12). After significant discovery had been completed, these positions and other matters caused the parties to reach an agreement on the appropriate amount of the settlement. *Id.* at 12, 14. Given the risk of non-recovery, a 20% recovery on an individual basis was reasonable.

On an aggregate basis, Class members whose claims represent about 37.7% of the maximum possible settlement amount submitted claims. This will result in a payment of $522,387.66 to the Class as a whole. This represents a significant recovery. As noted above, Plaintiffs also obtained an agreement that, through injunctive relief, will address and prevent future harm similar to what has been alleged in this action.

For these reasons, the settlement amount is reasonable.

d) Effectiveness of Efforts to Provide Notice

The proposed notice to Class members was submitted with the Settlement. *See* Dkt. 40-2, Exs. A, B-1, B-2, and B-5. The Preliminary Approval Order included a detailed analysis of why the proposed notice was sufficient. Dkt. 47 at 15–16. It is incorporated here by this reference. As required by the Settlement, KCC sent notices to Known Customers either by courier or email, which included information about how to submit a Claim Form. Dkt. 58-3 ¶ 3. As discussed above, KCC also established a website and a toll-free number that Class members could use to learn how to file a claim. *Id*. ¶¶ 4-5. KCC also provided indirect notice to Class members through internet banner advertisements on several social media platforms *Id.* ¶ 7; *see id.* Ex. A. These actions are sufficient to meet the "robust digital notice campaign to reach Class Members, including Unknown Customers" required by the Preliminary Approval Order. Dkt. 47 at 16.

As discussed above, the precise size of the Class is unknown. The parties report that there are more than 20,000 Class members, and that the size of the Class is no more than 21,270 consumers, because there were 21,270 eligible products sold. Dkt. 45 at 2. 16,562 of those products were sold directly to Known Consumers, and 4708 were sold by third-party retailers to Unknown Consumers. *Id.* at 2–3.

As also discussed above, the Settlement Administrator received 4,885 claim forms. 3426 of them were valid and timely. 3391 were submitted by Known Customers, and 35 were submitted by Unknown Customers. Of the 1459 invalid or untimely forms, 179 were duplicative, 1265 were ineligible due to insufficient proof of purchase or because they sought reimbursement for ineligible products and 15 were submitted late. *Id.* at 2.

As discussed above, the claim rate was within the range expected in class action settlements of this type. This provides support for a finding that the notice effected by the Settlement Administrator was sufficient. However, purchases by Unknown Consumers comprised 22.1% of sales of the Eligible Products, but their claims represented about 1.0% of those that were submitted in a proper and timely manner. This is evidence that the efforts to provide notice to Unknown Consumers through a website, Internet banner advertisements, and advertisements on social media platforms were not a great success. However, there is no showing that this rate of response by customers who are difficult to identify is unusual in the context of a class action proceeding. Thus, this factor does not weigh against final approval.

e) Class Representatives and Class Counsel

The Preliminary Approval Order included a detailed analysis of the suitability of Miller and Borneman as representatives of the Class. Dkt. 47 at 15. It also discussed the qualifications of Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP, Michael D. Braun of the Braun Law Group, P.C., and Andrew Kierstead of the Law Offices of Andrew Kierstead as Class Counsel. Dkt. 47 at 15. That discussion is incorporated here by this reference. There have been no material changes that affect this analysis. Therefore, for the reasons stated in the Preliminary Approval Order, the approval of the Settlement by the Class Representatives and Class Counsel also supports granting the Final Approval Motion.

* * *

For the foregoing reasons, the Final Approval Motion is **GRANTED**.

C. Attorney's Fees and Costs

1. Legal Standards

Attorney's fees and costs "may be awarded in a certified class action where so authorized by law or the parties' agreement." *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 941 (9th Cir. 2011). However, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount*." Id.*; *see also* Fed. R. Civ. P. 23(h). "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have [been] obtained." *Staton*, 327 F.3d at 964. Thus, a district court must "assure itself that the fees awarded in the agreement were not unreasonably high, so as to ensure that the class members' interests were not compromised in favor of those of class counsel." *Id.* at 965.

Courts have discretion to choose either a lodestar method or a "percentage method" to determine an appropriate fee award in a class action. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). A court may also choose one method and perform a cross-check by using the other. *See, e.g.*, *Staton*, 327 F.3d at 973.

"The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth Headset Prods. Liability Litig.,* 654 F.3d at 941 (citing *Staton*, 327 F.3d at 965.). After the lodestar amount is determined, a trial court "may adjust the lodestar upward or downward using a 'multiplier' based on factors not subsumed in the initial calculation of the lodestar." *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000) (internal citations omitted). A court has discretion to "adjust the lodestar upward or downward using a multiplier that reflects a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Stetson v. Grissom*, 821 F.3d 1157, 1166-67 (9th Cir. 2016) (internal quotation marks and citation omitted).

2. Application

Plaintiffs and members of the Class have been represented by Mark A. Chavez and Nance F. Becker of Chavez & Gertler LLP (the "Chavez Firm"), Michael Braun of the Braun Law Group. P.C. (the "Braun Firm"), and Andrew Kierstead of the Law Offices of Andrew Kierstead (the "Kierstead Firm"). Miller and Borneman were also personally represented by Riddick and Huron (collectively, the Chavez Firm, Braun Firm, Kierstead Firm, Riddick and Huron are referred to as "Class Counsel"). The Settlement provides that Class Counsel is entitled to an award of "reasonable" attorney's fees and costs for their work on this action. As noted, no amount or range for such an award is provided in the Settlement. Dkt.

40-2 at 30.

Class Counsel request an award of $966,453.75 in attorney's fees. Dkt. 57 at 2. This figure was calculated by the lodestar method. Plaintiffs contend that this is the "primary method for establishing the amount of reasonable attorney's fees in cases where 'the responsibility to pay attorney fees is statutorily or otherwise transferred from the prevailing plaintiff or class to the defendant.'" Dkt. 57-1 at 12–13 (citing *Lealao v. Beneficial Cal. Inc.*, 82 Cal. App. 4th 19, 26 (2000) (internal quotations omitted)). Class Counsel further represent that "the court should award . . . an enhanced lodestar" by applying an upward multiplier of 1.5 to "reflect the excellent results achieved, the substantial risk of non-recovery, the novelty of the issues, the public interest nature of the claims, and the quality of representation." *Id.* at 14, 22.

The lodestar calculation is summarized in the following table:

Tasks	**Hours**	**Fees**
Case Planning, Organization & Strategy	155.55	$103,263.50
Class Certification	42.50	$31,875.00
CMC Appearance & Preparation	19.30	$14,475.00
Depositions	45.30	$36,355.00
Ex Parte, Attorneys Fees, etc.	56.50	$38,515.00
Experts	37.05	$28,315.00
Legal and Other Research	74.15	$50,948.00
Discovery	77.10	$47,200.00
Settlement & Approval Motions	121.90	$87,716.00
Motion for Preliminary Approval, Declarations and Exhibits	258.50	$ 205,640.00
TOTAL	**887.85**	**$ 644,302.50**

Dkt. 57-3 at 51.

Charts submitted by Class Counsel also summarize the hours spent by each attorney in performing the work listed in the prior table:

Attorney	**Rate**	**Year Admitted**	**Firm**	**Hours**	**Fees**
Chavez	$850-$900	1979	Chavez	195.1	$167,300.00
Becker	$750-$800	1981	Chavez	395.7	$300,825.00
Gertler	$695	1983	Chavez	14.5	$10,077.50
Gildor	$825	2002	Chavez	2.2	$1,815.00
Legal Assistants (Raden and Ford)	$225	N/A	Chavez	52.4	$11,790.00
Subtotal				659.9	$491,807.50
Braun	$700	1993	Braun	158.95	$111,265.00
Kierstead	$640	1987	Kierstead	32.0	$20,480.00

Riddick	$550	2004	N/A	33.0	$18,150.00
Huron	$650	1998	N/A	4.0	$2,600.00
TOTAL				**887.85**	**$644,302.50**

Dkt. 57-1 at 16.

Defendant does not dispute that the lodestar method is appropriate to calculate attorney's fees. However, Defendant contends that "a reasonable fee is significantly less than the motion requests" because many of the fees requested are duplicative, and "there is [no] justification for rewarding the 'efforts' of attorneys who performed no meaningful role in the case." Dkt. 60 at 3. Specifically, Defendant argues that the work performed by the Braun Firm is duplicative or unreasonable. Defendant contests, *inter alia*, the "61.75 hours . . . researching, drafting, and revising the 18 page, 5 count complaint Ms. Becker [of the Chavez Firm] eventually signed." Dkt. 60 at 4. Defendant notes that the "same complaint and underlying research took up at least 17.5 hours of Mr. Kierstead's time. . . and well over 20 hours of time of attorneys at Chavez & Gertler, according to their time records." *Id.* Defendant contends that "these time entries preclude any argument that this process was efficient and lacking overlap or duplication of efforts." *Id.*

Defendant also argues that Plaintiffs should not be compensated for time spent on the Fee Motion. Defendant also disputes the amount attributed to Riddick and Huron, calling it "downright unconscionable" because neither entered an appearance in the case. *Id*. at 2–3.

Defendant also disputes the request for a multiplier. It contends that Plaintiffs cannot demonstrate an "excellent benefit" for members of the Class. *Id*. at 5. Defendant represents that "Plaintiffs have submitted no evidence that there was any degree of consumer confusion about the description of [Defendant]'s products." *Id.* Consequently, Defendant characterizes Plaintiff's case as "represent[ing] a solution in search of a problem." *Id*. Defendant asserts that the alleged "'value' created by the case was obviously much more apparent to the lawyers than to the vast majority of [C]lass members." *Id.*

a) Hourly Rates

In determining a reasonable hourly rate, "[t]he fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan v. Multnomah Cty.*, 815 F.2d 1258, 1263 (9th Cir. 1987) (internal citations omitted).

Eight attorneys provided services in connection with this litigation. Four are from the Chavez Firm, which also seeks compensation for work performed by two legal assistants. The following information has been provided by these attorneys:

- Mark A. Chavez ("Chavez") is a co-founder of the Chavez Firm. Dkt. 57-3 ¶ 4. He states that his hourly rate was $900 during 2019, and $850 prior to that. He graduated from Stanford Law School in 1979, and has practiced at the Department of Justice and certain law firms. *Id.* ¶ 5. Most of his time in private practice has centered on class action litigation. *Id.* ¶ 8.
- Nance F. Becker ("Becker") is a partner at the Chavez Firm. *Id.* ¶ 13. She has an hourly rate of $800 in 2019, and $750 prior to that. She graduated from Stanford Law School and was

admitted to the California Bar in 1981. *Id.* ¶ 15. She has experience in complex commercial, consumer rights, civil rights and class action litigation. *Id.* ¶ 14.

- Jonathan E. Gertler ("Gertler") is a co-founder of the Chavez Firm. *Id.* ¶ 19. His hourly rate is $825. He graduated from the University of California, Hastings School of Law in 1983, and he has extensive experience in trial, consumer protection and class action litigation. *Id.* ¶¶ 19–20.
- Dan L. Gildor ("Gildor") is a partner at the Chavez Firm. *Id.* ¶ 16. His hourly rate is $695. He graduated from the University of Berkeley School of Law in 2002. He has worked as a litigator for more than 12 years at public interest organizations and at the Chavez Firm. *Id.*
- Two legal assistants from the Chavez Firm were assigned to work on this matter. *Id.* ¶ 23. Each has an hourly rate of $225. Chavez states that these legal assistants are "highly experienced," but does not offer additional evidence as to the reasonableness of the $225 hourly rate *Id.*.

The other four attorneys are as follows:

- Michael D. Braun ("Braun") is the principal of the Braun Firm. Dkt. 57-2 ¶ 1. He has an hourly rate of $700. He was admitted to the California Bar in 1993, and he focuses on complex civil and class action litigation. *Id.* ¶¶ 1, 4, 9.
- Andrew J. Kierstead ("Kierstead") is the owner of the Kierstead Firm. He has an hourly rate of $640. He has practiced complex litigation for 27 years, including 18 years of class action litigation. Dkt. 57-3 Ex. A
- Jason Riddick ("Riddick"), graduated from the University of California Berkeley School of Law in 2005. Dkt. 57-4 ¶ 1. He has an hourly rate of $550. He focuses on business litigation. *Id.* ¶ 2.
- Jeffrey Huron ("Huron"), has been a member of the California bar since 1988. Dkt. 57-5 ¶ 1. He has an hourly rate of $650.

These submissions provide adequate support for the appropriateness of the hourly rates charged by Class Counsel. Thus, based on the evidence that has been presented, as well as the Court's familiarity with hourly rates that are charged within this District, the proposed rates are within the range of reasonableness.

b) Hours Worked

A trial court should deny a request for attorney's fees to the extent that is based on work by counsel that is duplicative or unreasonable. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("The district court [] should exclude from [an] initial fee calculation hours that were not 'reasonably expended.'"); *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) ("The fundamental purpose of the fee award is to compensate the attorney for his efforts. The first task for the trial court judge, therefore, is determining the amount of time reasonably expended."). The fee applicant bears the burden of proving that the requested fees are reasonable, *Ackerman v. W. Elec. Co.*, 643 F. Supp. 836, 862 (N.D. Cal. 1986), *aff'd,* 860 F.2d 1514 (9th Cir. 1988). Thus, the documentation submitted in support of a fee application "should be sufficient to satisfy the court, or indeed a client, that the hours expended were actual, non-duplicative and reasonable and to apprise the court of the nature of the activity and the claim on which the hours were spent." *Id.* (internal citations omitted).

Class Counsel represent that collectively they have worked 887.85 hours in connection with this action. Dkt. 57-3, Chavez Decl., Ex. C. The billing records and summary charts submitted by Plaintiffs identify

work performed on particular tasks on an attorney-by-attorney basis, multiplied by their respective hourly rates. *Id*. Plaintiffs provide more details about these entries in addressing Defendant's argument that the hours worked by the Braun Firm, the Kierstead Firm, Riddick and Huron were duplicative or unnecessary. Dkt. 61 at 5–7.

A review of the hours worked shows that the total amount is not reasonable in light of the nature of the issues presented, the tasks completed, the number of attorneys who performed the work, as well as the experience of the attorneys who performed it. This assessment is based on a review of the filings in this matter, including the Final Approval Motion and the Preliminary Approval Motion, as well as the presentations at hearings in this matter. This assessment is also based on the Court's substantial experience with assessing requests for the award of attorney's fees in a wide range of cases. As summarized in the tables that follow, the requested hours reflect that too many attorneys were performing certain tasks, and that more time was recorded than reasonably necessary to complete certain tasks. These determinations are confirmed by the high hourly rates that are applied. Attorneys who charge such rates have substantial experience that permits them to perform their work efficiently.

As the tables also reflect, an award for reasonable work performed on the Fee Motion is appropriate. It is well established that "an attorney fee award should ordinarily include compensation for all hours reasonably spent, including those relating solely to [attorney's fees]." *Ketchum v. Moses,* 24 Cal. 4th 1122, 1133, (2001). Thus, the lodestar is not reduced to eliminate those hours worked in connection with the Fee Motion.

In light of the foregoing, the lodestar calculation is adjusted as follows:

Task 1: Case Planning, Organization & Strategy

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	43.5	30	25,500.00
Becker (2017-2018)	Chavez	750	36.7	20	15,000.00
Jonathan E. Gertler	Chavez	825	0.3	0	0.00
Dan L. Gildor	Chavez	695	1.8	0	0.00
Legal Assistant	Chavez	225	22.4	22.4	5,040.00
Braun	Braun	700	19.85	10	7,000.00
Kierstead	Kierstead	640	12	6	3,840.00
Riddick	N/A	550	17	5	2,750.00
Huron	N/A	650	2	2	1,300.00
Subtotal			**155.55**	**95.4**	**60,430.00**

Task 2: Class Certification

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	ED CV17-00616 JAK (PLAx)	Date	February 11, 2020
Title	Nicholas Miller, et al. v. Wise Company, Inc.		

Becker (2017-2018)	Chavez	750	42.5	42.5	31,875.00
Subtotal			**42.5**	**42.5**	**31,875.00**

Task 3: CMC Appearance & Preparation

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Becker (2017-2018)	Chavez	750	19.3	15	11,250.00
Subtotal			**19.3**	**15.0**	**11,250.00**

Task 4: Depositions

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	23.8	23.8	20,230.00
Becker (2017-2018)	Chavez	750	21.5	21.5	16,125.00
Subtotal			**45.3**	**45.3**	**36,355.00**

Task 5: Ex Parte, Attorneys Fees, Etc.

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	15	12	10,200.00
Becker (2017-2018)	Chavez	750	30.5	25	18,750.00
Legal Assistant	Chavez	225	10	10	2,250.00
Kierstead	Kierstead	640	1	1	640.00
Subtotal			**56.5**	**48.0**	**31,840.00**

Task 6: Expert

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	5.4	3	2,550.00
Becker (2017-2018)	Chavez	750	31.4	31.4	23,550.00
Braun	Braun	700	0.25	0	0.00
Subtotal			**37.05**	**34.4**	**26,100.00**

Task 7: Legal and Other Research

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee

Chavez (2017-2018)	Chavez	850	7.9	5	4,250.00
Gertler	Chavez	825	1.9	0	0.00
Becker (2017-2018)	Chavez	750	4.7	2	1,500.00
Gildor	Chavez	695	1.9	0	0.00
Braun	Braun	700	30.5	30	21,000.00
Kierstead	Kierstead	640	14.25	10	6,400.00
Riddick	N/A	550	11	10	5,500.00
Huron	N/A	650	2	2	1,300.00
Subtotal			**74.15**	**59.0**	**39,950.00**

Task 8: Discovery

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	4.8	3	2,550.00
Becker (2017-2018)	Chavez	750	40.2	40.2	30,150.00
Legal Assistant	Chavez	225	20	20	4,500.00
Braun	Braun	700	12.1	10	7,000.00
Subtotal			**77.1**	**73.2**	**44,200.00**

Task 9: Pleadings & Motions

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	18.3	12	10,200.00
Becker (2017-2018)	Chavez	750	12.8	10	7,500.00
Gildor	Chavez	695	10.8	10	6,950.00
Braun	Braun	700	71.75	65	45,500.00
Kierstead	Kierstead	640	3.25	0	0.00
Riddick	N/A	550	5	0	0.00
Subtotal			**121.9**	**97**	**70,150.00**

Task 10: Settlement & Approval Motions

Attorney	Law Firm	Rate	Hours Requested	Hours Awarded	Fee
Chavez (2017-2018)	Chavez	850	47.1	45	38,250.00
Chavez (2019)	Chavez	900	29.3	25	22,500.00

Becker (2017-2018)	Chavez	750	75.1	70	52,500.00
Becker (2019)	Chavez	800	81	75	60,000.00
Braun	Braun	700	24.5	20	14,000.00
Kierstead	Kierstead	640	1.5	0	0.00
Subtotal			**258.5**	**235**	**187,250.00**
Total			**887.85**	**744.80**	**539,400.00**

c) The Fee Multiplier

The lodestar may be adjusted by a multiplier based on factors including "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." *Graham v. DaimlerChrysler Corp*., 34 Cal. 4th 553, 579 (2004), *as modified* (Jan. 12, 2005). However, the "most critical factor [in determining whether to apply a multiplier] is the degree of success obtained" for the members of the Class. *See Hensley*, 461 U.S. at 436; *accord Parkinson v. Hyundai Motor Am.,* 796 F. Supp. 2d 1160, 1174–75 (C.D. Cal. 2010) ("The benefit obtained for the class has been cited as the factor bearing the most weight or the determinative factor in the decision of whether to apply a lodestar."). "[W]hether or not to apply such a multiplier is within the Court's discretion." *Create-A-Card, Inc. v. Intuit, Inc*., No. C 07-06452 WHA, 2009 WL 3073920, at *3 (N.D. Cal. Sept. 22, 2009) (citing *Hanlon*, 150 F.3d at 1029).

Plaintiffs argue that each of the *Graham* factors supports a multiplier of 1.5. Dkt. 57-1 at 22. Defendant responds that "this case does not merit a multiplier" because the Settlement will not produce a sufficient benefit to Class members, particularly considering that "Plaintiff's fee request is almost certainly more than the amount of money that will be paid out in allowed claims." Dkt. 60 at 5–6.

One *Graham* factor weighs in favor of the application of a multiplier. The action was taken on a contingency basis. Thus, Plaintiffs' counsel took on a substantial financial risk in representing the Class. However, the other *Graham* factors are either neutral or weigh against the use of a multiplier. *First,* there is no showing that Plaintiffs' counsel exhibited extraordinary skill in this action that would warrant an award that exceeds their respective hourly rates. *See Ketchum*, 24 Cal. 4th at 1138 (The skill factor, "in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar."). *Second*, there is no evidence that the eight counsel who worked on this matter gave up other opportunities in order to work as counsel in this action.[3] Moreover, the discovery in this action was not voluminous, and there was no motion practice other than the present ones. *Third*, none of the legal issues in this action was particularly novel or difficult. *Finally*, the relief obtained on behalf of the Class, including the injunctive relief, is limited. Indeed, even after the downward adjustments to the lodestar calculation, the fee award is greater than the total monetary recovery to the Class. If the attorney's fees in this action were to be paid from a common fund, the lodestar amount would constitute a fee award in excess of 50% on a percentage basis -- a far cry from the 25% "benchmark" fee award that courts in the Ninth Circuit find presumptively reasonable in common-fund settlements. *In re*

[3] Braun stated that "taking on each case requires us to forgo other financial opportunities." Dkt. 57-2 ¶ 11. This vague statement does not support the application of a multiplier.

Bluetooth Headset Prod. Liab. Litig., 654 F.3d at 942. The injunctive relief also adds value in that it is designed to prevent future harm to consumers. But, that additional value is not sufficient to warrant the multiplier.

For these reasons, the totality of the circumstances does not warrant the application of the requested multiplier of the lodestar amount.

d) Whether the Excessive Fee Request Raises Concerns About the Fairness, Adequacy, and Reasonableness of the Class Action Settlement

The Ninth Circuit has observed that "[e]ven when technically funded separately, the class recovery and the agreement on attorneys' fees should be viewed as a 'package deal.'" *Id.* at 948–49 (internal citation omitted). Where the parties agree to a settlement in which class counsel is to receive a "disproportionate distribution," the proposed fee award is a "subtle" indication that there might be a conflict of interest between that counsel and members of the class. *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). In such instances, a court should "examine the negotiation process with even greater scrutiny than is ordinarily demanded." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 949.

Given these standards, a further assessment of the modified fee award has been made. It considered the arm's length negotiation process and two mediation sessions that resulted in the Settlement, including that adequate discovery preceded it and that the Class Representatives attest that they advocated on behalf of the members of the Class. The review also considered the amount of the initial fee request, that the Defendant could and did oppose the fee request as allowed by the Settlement, the amount of the award, and the fairness, adequacy, and the overall reasonableness of the Settlement to members of the Class.

For these reasons, the amount of the fee request does not raise concerns about fairness or a potential conflict of interest for Class Counsel.

* * *

For the foregoing reasons, the Fee Motion is **GRANTED IN PART** as to the request for approval of the proposed award of attorney's fees.

e) Costs

Class Counsel also submitted records showing litigation expenses of $52,725.26, with $50,549.74 expended by the Chavez Firm and $2,175.52 expended by the Braun Firm. Dkt. 57-1 at 26; Chavez Decl. ¶¶ 47–49; Dkt. 57-3 at 71. These costs include expert fees, mediation fees, filing fees, as well as costs associated with depositions, filing, and copying and printing. The Settlement provides that "Plaintiffs are entitled to an award of . . . costs and expenses in an amount to be determined by the Court." Dkt. 40-2 at 30. Defendant "does not object to the award of out of pocket expenses requested" by Plaintiffs. Dkt. 60 at 3. There is no showing or suggestion that the expenses incurred were excessive or unnecessary. Rather, all are ones commonly and necessarily incurred in the litigation of claims like those asserted in this action.

For these reasons, the Fee Motion is **GRANTED** as to the requested award of costs.

D. Incentive Awards

1. Legal Standards

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." *Radcliffe v. Experian Info. Sols. Inc*., 715 F.3d 1157, 1163 (9th Cir. 2013) (citations omitted). Although incentive payments are typical in class action cases, their award is within the trial court's discretion. *Rodriguez*, 563 F.3d at 958 (citation omitted); *accord In re Mego*, 213 F.3d at 458, 463. In determining whether to approve such awards, courts consider "the risk to the class representative in commencing suit, both financial and otherwise; [] the notoriety and personal difficulties encountered by the class representative; [] the amount of time and effort spent by the class representative; [] the duration of the litigation and; [] the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." *Van Wranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995); *see also Staton*, 327 F.3d at 977 (internal quotation omitted) (Courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [] the amount of time and effort the plaintiff expended in pursuing the litigation [] and reasonable fears of [] retaliation.").

2. Application

The Settlement permitted each of the Plaintiffs to apply for an award of an incentive payment up to $3000. *See* Dkt. 40-2 at 30. Miller and Borneman each applied for an award of $3000. Each states that he "efficiently litigated this proceeding" and that each "devote[d] over 20 hours of their time." Dkt. 57-1 at 28; Dkt. 57-6 at 3; Dkt. 57-7 at 3. Moreover, Plaintiffs argue that they "risked the possibility of an adverse cost award and contributed a very valuable public service by calling [Defendant] to account for its misleading and potentially dangerous advertising." Dkt. 57-1 at 28.

In its opposition to the Fee Motion, Defendant argues that "the named plaintiffs [should] receive no 'incentive' payment, and instead accept the same benefits under the [S]ettlement as the rest of the class." Dkt. 60 at 3. Defendant contends that Plaintiffs' decision to pursue this case is "not exactly the kind of behavior that should be incentivized," given Defendant's money-back guarantee that was available to members of the Class before this litigation commenced and Plaintiffs' decision to commence this action rather than seek an informal resolution of their claims. *Id*. at 2. Plaintiffs respond that a failure to compensate them would be inconsistent with the terms of the Settlement, and that Borneman and Miller each deserves an incentive award because they "fulfill[ed] their function of fairly and adequately representing the class." Dkt. 61 at 12.

Borneman and Miller spent 22 and 27 hours, respectively, during the two years that this matter was pending. They worked on tasks such as "consultation with counsel" and "review[ing] and approv[ing the Settlement] agreement." Dkt. 57-7 at 3. They represented the Class adequately. However, neither was deposed, nor is there is any specific evidence of what role each played in the decision to bring this action. Plaintiffs also have not presented any evidence that their participation has impeded their ability to work or seek particular employment. There is also no evidence that Defendant threatened to retaliate

against them financially or otherwise.

Based on a review of the totality of the circumstances, incentive payments of $1000 each to Borneman and Miller are warranted. This reflects fair compensation for their time, i.e, at an hourly rate in the range of $40 to $45, and recognition of the amounts that will be recovered by members of the Class.

For these reasons, the Fee Motion is **GRANTED IN PART** as to the request for incentive awards.

E. Settlement Administration Costs

The Settlement provides that Defendant shall pay all costs for administering and implementing the Settlement, in an amount not to exceed $110,000. Dkt. 40-2 at 27–29. KCC estimates the cost of administration to be "no more than $90,152." Dkt. 58-3 ¶ 14. The cost is reasonable given the large number of Class members, the corresponding number of claims, and the difficulty in identifying the members of the Class who did not make purchases directly from Defendant.

For these reasons, the Final Approval Motion is **GRANTED** as to the request that Defendant pay the Settlement Administrator all costs for administering and implementing the Settlement, in an amount that is no more than $110,000 based on evidence provided by the Settlement Administrator.

IV. Conclusion

For the reasons stated in this Order, the Final Approval Motion is **GRANTED**, and the Fee Motion is **GRANTED IN PART**. Defendant shall pay $539,400.00 in attorney's fees, to be allocated among them as stated in Section III.C.2.b of this Order; $52,725.26 in litigation costs to Class Counsel, to be allocated by that counsel according to the costs, if any, each incurred; and $1000 each to Borneman and Miller as incentive payments for their service as Class Representatives. Defendant shall also pay to the Settlement Administrator all costs for administering and implementing the Settlement, in an amount not to exceed $110,000. Within 14 days of the issuance of this Order, and after conferring with counsel for Defendant to determine if there is an agreement as to the form of the proposed judgment, Class Counsel shall lodge a proposed judgment that is consistent with this Order, and provide for the dismissal of this action with prejudice. Defendant shall file any objection to the form of the proposed judgment within 10 days after it is lodged.

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