

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

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

T. Jackson

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings: (IN CHAMBERS) ORDER RE PLAINTIFF’S MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION SETTLEMENT (DKT. 65)****I. Introduction**

On February 8, 2019, Andre Galvan (“Galvan”) brought this putative class action against Smashburger IP Holder LLC, and Smashburger Franchising LLP (collectively, “Defendants” or “Smashburger”) and Jollibee Foods Corporation. Complaint, Dkt. 1. On March 18, 2019, Galvan filed a First Amended Complaint (the “FAC”), in which Lucinda Lopez (“Lopez”) was added as a plaintiff and Jollibee Foods Corporation was removed as a defendant. Dkt. 16. On May 16, 2019, this action was consolidated with *Trevino v. Smashburger IP Holder, LLC, et al.*, No. LA 19-cv-02794-JAK (JEMx), for pretrial purposes. Dkt. 28. On July 24, 2019, Galvan, Lopez, Barbara Trevino (“Trevino”), Thu Thuy Nguyen (“Nguyen”), Robert Meyer (“Meyer”), and Jamelia Harris (“Harris”) (collectively, “Plaintiffs”) filed a Consolidated Amended Class Action Complaint. Dkt. 41. On August 22, 2019, Plaintiffs filed a Second Amended Consolidated Class Action Complaint (the “SAC”), which is the operative one. Dkt. 45.

The SAC advances the following causes of action, which arise from Smashburger’s alleged misrepresentation of the amount of beef in their “Triple Double Burgers” (Dkt. 65-1 at 6):

- (i) breach of express warranty;
- (ii) violations of California Consumers Legal Remedies Act (“CLRA”), California Civil Code §§ 1750 *et seq.*;
- (iii) violations of California’s Unfair Competition Law (“UCL”), California Business and Professions Code (Cal. Bus. & Prof. Code) §§ 17200 *et seq.*;
- (iv) violation of California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500 *et seq.*;
- (v) fraud;
- (vi) unjust enrichment;

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No.	LA CV19-00993 JAK (JEMx)	Date	September 19, 2022
Title	In re: Smashburger IP Holder, LLC, et al.		

(vii) violation of New York General Business Law (“GBL”) § 349; and

(viii) violation of GBL § 350.

Dkt. 45 ¶¶ 37–95.

After engaging a mediation, the parties filed a notice of settlement on November 24, 2020. Dkt. 62. On March 1, 2021, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement (the “Motion”). Dkt. 65. The Motion was supported by the following: a memorandum (Dkt. 65-1); a declaration by Plaintiffs’ counsel (Dkt. 65-2); a copy of the settlement agreement (the “Settlement Agreement” (Dkt. 65-2 at 7–46); a copy of the “Claim Form” (Dkt. 65-2 at 68–70); a proposed summary form of notice to class members (the “Summary Notice” (Dkt. 65-2 at 101–102)); a proposed long-form notice to class members (the “Proposed Notice” (Dkt. 65-2 at 87–99)); and submissions in support of a request for the award of attorney’s fees to Plaintiffs’ counsel (Dkt. 65-2 at 108–143).

Through the Motion, Plaintiff seeks the following:

1. Preliminary approval of the Settlement Agreement;
2. Approval of the Proposed Notice;
3. Appointment of Plaintiffs as class representatives;
4. Appointment of Plaintiffs’ counsel as class counsel;
5. Appointment of Heffler Claims Group as the settlement administrator; and
6. Scheduling a hearing on a motion for final approval of the class action settlement.

The Motion was taken under submission on July 4, 2021. Dkt. 66. On July 26, 2022, Plaintiff filed a supplemental Declaration of L. Timothy Fisher (“Supp. Fisher Decl.”) in support of the Motion. Dkt. 72. For the reasons stated in this Order, the Motion is **GRANTED**.

## II. Background

### A. The Parties

Defendants Smashburger IP Holdings LLC and Smashburger Franchising LLC operate the Smashburger chain, which “is a worldwide fast-casual hamburger restaurant chain with more than 370 corporate and franchise-owned restaurants in 37 states and 9 countries.” Dkt. 45 ¶¶ 5, 17. Smashburger “offers unique burgers in each city where its restaurants are located, but serves its Triple Double Burgers” at all of its locations. *Id.* ¶ 5.

Galvan is a California resident who purchased approximately ten Triple Double Burgers in California during the two-year period before the filing of the SAC. *Id.* ¶ 18. Before Galvan purchased Triple Double Burgers, he allegedly “saw, read, and relied on the representation made on Smashburger’s menu and advertising materials that the burger in fact contained ‘Double the Beef’ as Smashburger’s regular Classic Smash™ burger.” *Id.*

Lopez is a California resident who purchased approximately 15–20 Triple Double Burgers in California during the two-year period before the filing of the SAC. *Id.* ¶ 19. Lopez allegedly relied on Smashburger’s menu and advertising materials in deciding to purchase Triple Double Burgers. *Id.*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

Trevino is a California resident who purchased at least one Triple Double Burger in California during the two-year period before the filing of the SAC. *Id.* ¶ 20. Trevino allegedly relied on Smashburger's menu and advertising materials in deciding to purchase the Triple Double Burgers. *Id.*

Nguyen is a California resident who purchased approximately six Triple Double Burgers in California during the two-year period before the filing of the SAC. *Id.* ¶ 21. Nguyen allegedly relied on Smashburger's menu and advertising materials in deciding to purchase the Triple Double Burgers. *Id.*

Meyer is a New York resident who purchased approximately 25 Triple Double Burgers in New York during the two-year period before the filing of the SAC. *Id.* ¶ 22. Meyer allegedly relied on Smashburger's menu and advertising materials in deciding to purchase the Triple Double Burgers. *Id.*

Harris is a California resident who purchased at least one Triple Double Burger in California during the two-year period before the filing of the SAC. *Id.* ¶ 23. Harris allegedly relied on Smashburger's menu and advertising materials in deciding to purchase the Triple Double Burger. *Id.*

## B. Allegations in the SAC

The SAC alleges that Defendants sell the Triple Double Burger, which contains three slices of cheese and two beef patties, at each of its locations. Dkt. 45 ¶¶ 5-6.

Defendants allegedly advertise their Triple Double Burgers as "triple the cheese & double the beef in every bite." Dkt. 45 ¶ 5. It is alleged that Defendants have used "Double the Beef" taglines to advertise the Triple Double Burger on many occasions. In a press release dated July 11, 2017, for example, Smashburger's Co-Founder and Chief Executive Tom Ryan allegedly stated that the Triple Double Burger contains "[d]ouble the juicy, caramelized beef," that it provides "three times the cheese and double the beef in every bite," and that it is "Smashburger's beefiest [. . .] burger to date." *Id.* ¶ 7. It is alleged that Smashburger has also used "Double the Beef" taglines in menus and displays at its restaurants, on the homepage of its website and in social media and television advertisements. *Id.* ¶¶ 8–11. The SAC alleges that Smashburger's "Double the Beef" taglines are likely to influence, and did influence, the purchasing decisions of consumers. *Id.* ¶ 14.

It is alleged that, contrary to the statements in Smashburger's advertising, the Triple Double Burger does not contain "double the beef" of Smashburger's regular-sized burgers, including the Classic Smash™. *Id.* ¶ 13. It is alleged that the two patties inside the Triple Double Burger "together contain the same amount of beef as a single patty" in the Company's regular-sized burgers. *Id.* It is alleged that Smashburger advertisements with the "Double the Beef" tagline "actually deceived and had the tendency to deceive a substantial segment of Smashburger's customers into thinking that [the] Triple Double Burger contain[s] twice the amount of beef as Smashburger's regular sized burgers." *Id.* ¶ 15. It is further alleged that Smashburger knew or should have known that its "Double the Beef" taglines were false and misleading when it adopted and used them. *Id.* ¶ 16.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

**III. Summary of the Terms of the Settlement****A. Class Definition**

The Settlement Agreement defines the “Class” as “all persons in the United States and United States Territories who purchased and/or consumed one or more of the Subject Products during the Class Period.” Settlement Agreement ¶ 7, Dkt. 65-2 at 13. The following are excluded from the Class: “(a) Defendants and their employees, principals, officers, directors, agents, affiliated entities, legal representatives, successors and assigns; (b) the judges to whom the Action has been or is assigned and any members of their immediate families; (c) those who purchased the Subject Products for the purpose of re-sale; and (d) all persons who have filed a timely Request for Exclusion from the Class.” *Id.*

The “Class Period” is defined as “from July 1, 2017 up to and including May 31, 2019.” Settlement Agreement ¶ 10. The “Subject Products” are defined as all hamburgers sold by Smashburger with any name that uses the phrase “Triple Double,” and that this includes the Triple Double, Bacon Triple Double, French Onion Triple Double, and Pub Triple Double. *Id.*, Dkt. 65-2 at 8.

The Class includes “hundreds of thousands of consumers who purchased the Triple Double Burgers” from a Smashburger location within the Class Period. Dkt. 65-1 at 21.

**B. Payment to Putative Class Members****1. Gross Settlement Amount**

The Settlement Agreement provides for the payment by Defendant of a “Gross Settlement Amount” of \$2,500,000 in cash (“Cash Settlement Fund”) and “1.5 million vouchers with a current value of between approximately \$2.00 and \$2.49 per voucher each, or over \$3,000,000 in total vouchers,” in exchange for release of all claims advanced in this action. Settlement Agreement ¶ 40; Dkt. 65-1 at 6., Plaintiffs contend that the total value of the settlement is at least \$5.5 million. Declaration of L. Timothy Fisher (“Fisher Decl.”), Dkt. 65-2 at 3 ¶ 4.

**2. Deductions from the Gross Settlement Amount****a) Overview**

The parties propose to allocate the Cash Settlement Fund as follows:

Description of Amount	Amount	Percent
<b>Gross Cash Settlement Amount</b>	<b>\$2,500,000.00</b>	<b>100%</b>
Enhancement Award to Class Representatives	(\$25,000.00)	1%
Estimated Attorneys’ Fees Award to Class Counsel	(\$763,817.20) <sup>1</sup>	30.6%

<sup>1</sup> To date, Plaintiffs have incurred \$717,646.14 in attorney’s fees. See Supp. Fisher Decl. Exs. A-C. Plaintiffs’ Counsel anticipate spending an additional 100 hours on this matter. Fisher Decl. Ex. 7. For purposes of this

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

Litigation Costs and Expenses	(\$21,358.64)	0.9%
Third Party Administrator Costs	(\$400,000.00)	16%
<b>Net Cash Settlement Amount</b>	<b>\$1,289,824.16</b>	<b>51.6%</b>

See Settlement Agreement ¶¶ 40, 44, 50; Fisher Decl. ¶¶ 10–12; Supp. Fisher Decl. Exs. A–C.

b) Class Representatives' Incentive Awards

The Settlement Agreement provides for an incentive award for each of the Class Representatives of up to \$5000 to be paid from the Cash Settlement Fund. Settlement Agreement ¶ 50; Dkt. 65-2 at 27. As noted, there are five class representatives: Galvan, Lopez, Nguyen, Meyer and Harris. Dkt. 65-1 at 6.

c) Settlement Administration Costs

The Settlement Agreement provides that Heffler Claims Group ("Heffler") will act as the settlement administrator (the "Third Party Administrator"). Settlement Agreement ¶ 32. The Settlement Agreement also provides that the payment to the Third Party Administrator from the Cash Settlement Fund will not exceed \$400,000. *Id.* ¶ 44. The notice and claims administration program is "designed to achieve at least 80% reach." *Id.* If costs of notice and claims administration exceed the stated amount, the Settlement Administrator will file a motion seeking approval of any additional amounts. *Id.*

d) Attorney's Fees

The Settlement Agreement provides that Plaintiffs' Counsel will request an award of attorney's fees and expenses from the Cash Settlement Fund, which shall not exceed \$2,500,000. Settlement Agreement ¶ 51. The Settlement Agreement also provides that Defendants will not have the right to challenge the right of Class Counsel to claim Attorney's fees and expenses, but will have the right to challenge their amount. *Id.*

3. Calculation of Individual Settlement Payments

The Settlement Agreement provides for the distribution of cash payments and product vouchers to participating Class Members:

Class Members who (a) execute and submit a valid Claim Form on or before the Claim Deadline; and (b) attest under the penalty of perjury that they purchased or consumed one or more of the Subject Products during the Class Period and comply with all other conditions and requirements specified herein, may opt to receive either a cash award or a product voucher (but not both) as follows:

(a) Cash Award Option: The relief to be provided to each Authorized Claimant who (i) submits a valid Claim Form on or before the Claim Deadline pursuant to the terms and conditions of this Agreement, and (ii) opts to receive a cash award, which is a \$4.00 cash award for each Subject Product the Authorized Claimant purchased or consumed during the Class

Order, the estimated attorney's fees are calculated with the assumption that the same distribution of work will occur as to future work by the three firms. See Supp. Fisher Decl. Exs. A–C.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

Period, up to a maximum of five (5) claims (or \$20.00 in cash) per household without proof of purchase.

(b) Product Voucher Option: The relief to be provided to each Authorized Claimant who (i) submits a valid Claim Form on or before the Claim Deadline pursuant to the terms and conditions of this Agreement, and (ii) opts to receive a product voucher award in lieu of the cash award described in section (a) above, is a product voucher. The product vouchers will be fully and freely transferrable. The product vouchers will entitle the bearer of the voucher, upon the purchase of a regularly-priced entrée at a company owned Smashburger-branded restaurant, to either: a) upgrade a single beef hamburger to a double beef hamburger for no additional cost; or b) get a small fountain drink for no additional cost. Authorized Claimants may elect to receive up to 10 product vouchers. Currently, an upgrade from a single beef hamburger to a double beef hamburger generally costs approximately \$2.00, and a small fountain drink generally costs approximately \$2.49. To the extent that all vouchers are not claimed, then a donation of the residual amount of the vouchers will be made to a charitable organization as described below. Authorized Claimants may elect to receive up to 10 product vouchers. Currently, an upgrade from a single beef hamburger to a double beef hamburger generally costs approximately \$2.00, and a small fountain drink generally costs approximately \$2.49. To the extent that all vouchers are not claimed, then a donation of the residual amount of the vouchers will be made to a charitable organization.

*Id.* ¶ 41.

The vouchers will be “subject to reasonable measures to prevent fraud, duplicating or counterfeiting,” and will “be redeemable at any Smashburger-branded, company owned restaurant (but will not be redeemable at any franchisee-owned restaurant).” *Id.* ¶ 41(b). The vouchers will be “fully and freely transferable.” Dkt. 65-1 at 7.

## C. Notice and Payment Plan

1. In General

The Settlement Agreement provides a process for notifying Class Members of the settlement. *Id.* ¶¶ 44–49; see also Dkt. 65-1 at 25–27. A copy of the Proposed Notice is attached to the Settlement Agreement as “Exhibit E.” Dkt. 65-2 at 87–99.

The Settlement Administrator will “develop a notice and claims administration program . . . designed to achieve at least 80% reach.” Settlement Agreement ¶ 44. The Settlement Administrator will reach at least 80% of the members of the Class by utilizing “direct notice and publication media notice through online display, search, social media and a press release with cross-device targeting on desktop and mobile, a settlement website and a toll-free number.” February 5, 2021 Declaration of Jeanne C. Finegan (“Finegan Decl.”), Dkt. 65-3 ¶ 3; see also Dkt. 65-1 at 27. Notice through internet and social media banner advertisements will create more than 32 million individual impressions. Finegan Decl. ¶ 25; Dkt. 65-1 at 27. The Settlement Administrator will provide direct notice by e-mail to approximately 1,700,000 Class Members for whom Defendants have e-mail addresses. Finegan Decl. ¶ 15; Settlement Agreement ¶ 44; Dkt. 65-1 at 27. This direct notice will be “run through a spam grading system to ensure the least amount of spam blocking possible.” Finegan Decl. ¶¶ 15–16.



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

The Notice summarizes the terms of the Settlement Agreement. Dkt. 65-2 at 87–99. The Notice describes how the share of the Net Settlement Amount of each Class Member will be calculated. *Id.* at 90–91. The Notice also provides each Class Member with information on how to request a claim form by the toll-free number, as well as information on how to submit a claim by mail, or electronically at [www.burgersettlement.com](http://www.burgersettlement.com). *Id.* at 93.

The Settlement Agreement provides that, within 14 calendar days of an order granting preliminary approval, Defendant will pay the Settlement Administrator the \$2,500,000 cash component of the settlement. Settlement Agreement ¶ 41(c). Defendant will provide the Settlement Administrator with product vouchers no later than 15 calendar days before the award issuance date, and the vouchers will expire no earlier than two years after the award issuance date. *Id.* All Class Members who submit claim forms will be sent cash awards or product vouchers or, alternatively, a letter explaining the rejection of their claim forms, within forty-five (45) days of the award issuance date. *Id.* Cash awards to class members will be in the form of a check, or electronically through Paypal or Zelle. *Id.*

The Third Party Administrator will be responsible for “(a) printing, e- mailing, mailing or otherwise arranging for the mailing of the Class Notice in response to Class Members’ requests; (b) making any mailings required under the terms of this [Settlement] Agreement; (c) establishing the Settlement Website; (d) establishing a toll-free voice line to which Class Members may refer for information about the Action and the Settlement; (e) receiving and maintaining any Class Member correspondence regarding requests for exclusion and objections to the Settlement; (f) forwarding inquiries from Class Members to Class Counsel or their designee for a response, if warranted; (g) establishing a post office box for the receipt of Claim Forms, exclusion requests, and any correspondence; (h) reviewing Claim Forms according to the review protocols agreed to by the Parties and standards set forth in this Agreement; and (i) otherwise implementing and/or assisting with the claim review process and payment of the claims.” *Id.* ¶ 60.

## 2. Opt-Outs and Objections

Class Members will be notified that they may participate, object to, or opt out of the Settlement Agreement. Proposed Notice, Dkt. 65-2 at 96–98; Settlement Agreement ¶ 45(b)–(c); Dkt. 65-1 at 26.

To receive a cash payment or product voucher, a Class Member must submit a Claim Form on or before the Claim Deadline. Settlement Agreement ¶ 41. Any Class Member who receives notice but does not submit a claim form or opt out “will not be entitled to receive any relief” under the Settlement Agreement “but will be bound” by the Agreement and “will be barred from bringing any action in any forum (state or federal)” against Defendants concerning the Released Claims. Settlement Agreement ¶ 64; see *also* Proposed Notice, Dkt. 65-2 at 91.

To opt out, a Class Member must submit a “Request for Exclusion” to the Settlement Administrator by the Opt-Out Date. Settlement Agreement ¶ 79; see *also* Proposed Notice, Dkt. 65-2 at 94–95. A Request for Exclusion must include the Class Member’s full name, current address and signature, a clear statement communicating an intent to be excluded from the Class, and the case name and number. Settlement Agreement ¶ 79; see *also* Proposed Notice, Dkt. 65-2 at 94–95.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

To object, a Class Member must file a written objection with the Court by the Objection Deadline and provide a copy of the written objection to the Settlement Administrator with a copy to Class Counsel and Defense Counsel. *Id.* ¶ 77; see *also* Proposed Notice, Dkt. 65-2 at 97. A written objection must include the following: (i) the objector's full name, current address and signature; (ii) a written statement of objection(s) and the basis for each; (iii) a statement of whether the Class Member intends to appear at the fairness hearing; (iv) an attestation that the Class Member purchased and/or consumed one or more of the Subject Products during the Class Period and details regarding the products purchased including the date and location of purchase; and (v) the case name and number. Settlement Agreement ¶ 77; see *also* Proposed Notice, Dkt. 65-2 at 97.

The Settlement Agreement provides that the Objection Deadline and Opt-Out Date will be set in an order issued by the Court. Settlement Agreement ¶¶ 20–21.

## D. Release of Claims

The Settlement Agreement provides for a general release of claims against Defendants by Class Members upon the Effective Date. Settlement Agreement ¶ 54. "Released Claims" are defined as follows:

Any and all claims, demands, rights, damages, obligations, suits, debts, liens, and causes of action under common law or statutory law (federal, state, or local) of every nature and description whatsoever, monetary, injunctive, or equitable, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including Unknown Claims as of the Notice Date by Plaintiffs and all Class Members (and Plaintiffs' and Class Members' respective heirs, guardians, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that: (i) were asserted or that could have been reasonably asserted in the Action against the Released Parties (as hereinafter defined), or any of them, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the Action (including, but not limited to, alleged violations of the CLRA, UCL, FAL, NYGBL or similar laws of any state or United States territory, and alleged claims for injunctive relief, breach of warranty, breach of the implied warranty of merchantability, negligent misrepresentation, fraud, and unjust enrichment); or (ii) were asserted or that could have been reasonably asserted by any Class Member against the Released Parties (as hereinafter defined), or any of them, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to, including all claims for monetary, injunctive, or equitable relief that relate in any way to communications, disclosures, representations, statements, claims, nondisclosures and/or omissions, packaging, advertising, labeling, and/or marketing of or concerning the Subject Products.

*Id.* ¶ 27.

The Settlement Agreement also provides that Class Members



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No.	LA CV19-00993 JAK (JEMx)	Date	September 19, 2022
Title	In re: Smashburger IP Holder, LLC, et al.		

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shall be deemed to have expressly, knowingly, and voluntarily waived any and all provisions, rights, benefits conferred by Section 1542 of the California Civil Code, and any statute, rule, and legal doctrine similar, comparable, or equivalent to Section 1542, which provides as follows: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

*Id.* ¶ 54. However, Class Members “are not releasing any claims for personal injuries.” *Id.*

E. CAFA Notice

The Settlement Agreement provides that “[t]he Settlement Administrator shall coordinate with the Parties to provide notice” to public officials as required by 28 U.S.C. § 1715. Settlement Agreement ¶ 74; Dkt. 65-1 at 27.

IV. Analysis

A. Class Certification

1. Legal Standards

The first step in considering whether preliminary approval of the Settlement Agreement should be granted is to determine whether a class can be certified. “[T]he Ninth Circuit has taught that a district court should not avoid its responsibility to conduct a rigorous analysis because certification is conditional: Conditional certification is not a means whereby the District Court can avoid deciding whether, at that time, the requirements of the Rule have been substantially met.” *Arabian v. Sony Elecs., Inc.*, No. 05-CV-1741-WQH, 2007 WL 627977, at \*2 n.3 (S.D. Cal. Feb. 22, 2007) (quoting *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974)). “When, as here, the parties have entered into a settlement agreement before the district court certifies the class, reviewing courts ‘must pay undiluted, even heightened, attention to class certification requirements.’” *Staton v. Boeing Co.*, 327 F.3d 938, 952–53 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).

That the parties have reached a settlement “is relevant to a class certification.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). Consequently, when

[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

proceedings as they unfold.

*Id.* at 620 (internal citations omitted). “In the context of a request for settlement-only class certification, the protection of absentee class members takes on heightened importance.” *Gallego v. Northland Grp. Inc.*, 814 F.3d 123, 129 (2d Cir. 2016) (citing *Amchem Prods.*, 521 U.S. at 620).

The first step for class certification is to determine whether the proposed class meets each of the requirements of Fed. R. Civ. P. 23(a). *Dukes*, 564 U.S. at 350–51; *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). These are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a)(1)–(4). Further, “Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.” *Dukes*, 564 U.S. at 350. If these four prerequisites are met, the proposed class must meet one of the requirements of Fed. R. Civ. P. 23(b). *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Plaintiffs rely on Rule 23(b)(3). See Dkt. 65-2 at 23–25. It provides, in relevant part, that a class proceeding “may be maintained” if “questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b).

2. Application

a) Fed. R. Civ. P. 23(a) Requirements

(1) Numerosity

Rule 23(a)(1) requires that a class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “[I]mpracticability” does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining all members of the class.” *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (quoting *Advert. Specialty Nat’l Ass’n v. FTC*, 238 F.2d 108, 119 (1st Cir. 1956)). Although there is no specific numeric requirement, courts generally have found that a class of at least 40 members is sufficient. See *Rannis v. Recchia*, 380 F. App’x 646, 651 (9th Cir. 2010); *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009).

Plaintiffs estimate that the Settlement Class has “hundreds of thousands of consumers who purchased the Triple Double Burgers.” Dkt. 65-1 at 21. This is sufficient to satisfy the numerosity requirement.

(2) Commonality

Rule 23(a)(2) provides that a class may be certified only if “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality requires a showing that the “class members have suffered the same injury,” *Dukes*, 564 U.S. at 349–50 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)), and “does not mean merely that they have all suffered a violation of the same provision of law,” *id.* at 350. The class claims must “depend on a common contention” that is “of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* “Rule

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule.” *Hanlon*, 150 F.3d at 1019. In assessing commonality, “even a single common question will do.” *Dukes*, 564 U.S. at 359 (internal quotation marks omitted). In general, the commonality element is satisfied where the action challenges “a system-wide practice or policy that affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

Plaintiffs’ claims arise out of alleged false advertising of Defendants’ Triple Double Burger products. Dkt. 65-1 at 22–23. Plaintiffs contend that there are common questions as to whether Defendants mislabeled their Triple Double Burgers by stating that they contained “double the beef” of Smashburger’s regular-sized burgers. *Id.* Plaintiffs also contend that “all of the legal theories asserted” are common to all Class Members. *Id.* at 23.

Commonality does not require “that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact,” class treatment of which will “generate common answers apt to drive the resolution of the litigation.” *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (internal citations omitted). Plaintiffs have identified at least one significant question of law or fact that is common to the class. For this reason, the commonality requirement is satisfied.

(3) Typicality

The typicality requirement is met if the “representative claims are ‘typical,’” *i.e.*, “if they are reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. Representative claims “need not be substantially identical.” *Id.* The test of typicality is whether “other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon*, 976 F.2d at 508 (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). Like commonality, typicality is construed permissively. *Hanlon*, 150 F. 3d at 1020. The commonality and typicality requirements of Rule 23(a) tend to merge. *Dukes*, 564 U.S. at 349 n.5.

The claims of the five named Plaintiffs are typical of those of the Class because each saw the same allegedly false or misleading labels and each allegedly suffered the same resulting injury. Dkt. 65-1 at 22–23. Further, typicality is present even when putative class members suffered different levels of injury. *See Armstrong*, 275 at F.3d at 869.

For these reasons, the typicality requirement is satisfied.

(4) Adequacy of Lead Plaintiffs and Class Counsel

Rule 23(a)(4) requires that the “representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 1020. “Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

and absentees.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011). “Adequacy of representation also depends on the qualifications of counsel.” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1007 (9th Cir. 2018) (citing *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982), *abrogated on other grounds by Valentino*, 97 F.3d 1227 (9th Cir. 1996)). “[T]he named representative’s attorney [must] be qualified, experienced, and generally capable to conduct the litigation . . . .” *Id.* (quoting *Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1323 (9th Cir.), *vacated on other grounds* 459 U.S. 810 (1982)).

There is no evidence that either Plaintiffs or their counsel have any conflicts of interest with other Class Members. Plaintiffs state that their counsel “have vigorously and competently pursued the Class Members’ claims” through “investigation” and “arm’s-length settlement negotiations.” Dkt. 65-1 at 23. Plaintiffs also state that, together with Lead Counsel, they “have advanced and will continue to advance and fully protect the common interests of all members of the Class.” *Id.*

Plaintiffs argue that Lead Counsel “have extensive experience and expertise in prosecuting complex Class Actions” and in “product liability[] and consumer fraud litigation.” Dkt. 65-1 at 23 (citing Firm Resume, Dkt. 65-2 at 108–133). L. Timothy Fisher of Bursor & Fisher, P.A. has been in practice for nearly 24 years, and that throughout that time, his practice has centered on nutritional labeling, health care, telecommunications, corporate governance, unfair business practices and consumer fraud. Firm Resume, Dkt. 65-2 at 113. Fisher has been counsel in five class action jury trials during his career, including several cases that resulted in large recoveries. *Id.* Blair Reed, another attorney at Bursor & Fisher that has spent significant time on this matter, has been in practice for approximately four years and has worked on complex business litigation and consumer class actions. *Id.* at 130.

For purposes of preliminary approval, the proposed award of attorney’s fees and incentive awards for Plaintiffs appear reasonable. The proposed fee and incentive awards are not so disproportionate to the relief provided to the Class to warrant a finding that Plaintiffs and counsel are not adequate representatives. *Cf. Staton*, 327 F.3d at 975–78 (rejecting incentive awards to 29 class representatives of up to \$50,000 each). Issues about the attorney’s fees and incentive award are more appropriately addressed when considering whether the Proposed Settlement Agreement is reasonable and fair. See *id.* at 958 (“Although we later question whether the settlement agreement . . . was the result of disinterested representation, that question is better dealt with as part of the substantive review of the settlement than under the Rule 23 inquiry. Otherwise, the preliminary class certification issue can subsume the substantive review of the class action settlement.”).

The Settlement Agreement resulted from arms-length negotiations in which an experienced neutral was involved. Fisher Decl. ¶ 3.

For these reasons, the adequacy requirement is met for the purposes of conditional certification of the Class.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

b) Requirements of Fed. R. Civ. P. 23(b)(3)

(1) Predominance

“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623. The predominance analysis assumes that the Rule 23(a)(2) commonality requirement has already been established, *Hanlon*, 150 F.3d at 1022, and “focuses on whether the ‘common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,’” *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 557 (9th Cir. 2019) (quoting *Hanlon*, 150 F.3d at 1022). “An individual question is one where ‘members of a proposed class will need to present evidence that varies from member to member,’ while a common question is one where ‘the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.’” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting 2 William Rubenstein, *Newberg on Class Actions* § 4:50, at 196–97 (5th ed. 2012)). Where the issues of a case “require the separate adjudication of each class member’s individual claim or defense, a Rule 23(b)(3) action would be inappropriate.” *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778 at 535–39 (2d ed. 1986)).

“Predominance is not, however, a matter of nose-counting. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (internal citations omitted). “Therefore, even if just one common question predominates, ‘the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately.’” *In re Hyundai*, 926 F.3d at 557–58 (quoting *Tyson Foods, Inc.*, 577 U.S. at 453–54).

Further, the requirements of Fed. R. Civ. P. 23(b)(3) “must be considered in light of the reason for which certification is sought—litigation or settlement . . . .” *Id.* at 558. A class may be certifiable for settlement even though it “may not be certifiable for litigation” where “the settlement obviates the need to litigate individualized issues that would make a trial unmanageable.” *Id.*

As noted in the previous discussion of commonality and typicality, Plaintiffs’ claims center on alleged harm that resulted from Defendants’ representations regarding the Double Triple Burger products. Common questions are presented as to whether these representations were misleading and caused harm to consumers. These questions predominate over any individual issues that have been presented, and do not turn on an assessment of individual facts. Although awards to claimants will be calculated based on the number of Subject Products purchased, “damage calculations alone cannot defeat certification,” even if individual issues predominate. *Levy v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013); see also *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167–68 (9th Cir. 2014). “[A]s long as an efficient mechanism exists to calculate damages on a classwide basis, the existence of potential individualized damages will not defeat the predominance requirement.” *Aichele v. City of Los Angeles*, 314 F.R.D. 478, 496 (C.D. Cal. 2013). Such a mechanism has been proposed here.

For the foregoing reasons, common issues of law and fact predominate for purposes of Fed. R. Civ. P.



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

23(b)(3).

(2) Superiority

Rule 23(b)(3) requires a showing that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). This issue is evaluated by considering the following factors: “(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.” *Id.*

The benefits of resolving the claims at issue in a class action outweigh the interest of any Class Member who could pursue and control an individual action. Plaintiffs estimate that there are “hundreds of thousands” of Class Members, Dkt. 65-1 at 21, and that the potential maximum value of the class claims is approximately \$6,706,809, Fisher Decl. ¶ 6. Individually, Class Members may not have an incentive to bring individual actions due to the relatively small amount of recovery they could obtain, *i.e.*, as little as the price of a single Triple Double Burger product. The potential recovery for any individual Class Member is modest in light of the cost of pursuing an individual claim, as well as the risk as to the outcome of such litigation. Given the low individual recovery amount, it would be inefficient for each Class Member to pursue an individual claim. *Amchem Prods.*, 521 U.S. at 617 (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive to any individual to bring a solo action . . . . A class action solves this problem . . . .” (internal quotation marks and citation omitted)).

Nothing suggests that the management of this action has been, or will be, difficult. Moreover, that the parties have reached a settlement would obviate any potential management issues. For these reasons, the factors presented by Fed. R. Civ. P. 23(b)(3) support certification of a settlement class as the superior means to resolve this action.

\* \* \*

For the foregoing reasons, it has been shown that the Putative Class should be conditionally certified for the purpose of settlement.

## B. Preliminary 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*, 327 F.3d at 952). In the second step, which occurs after preliminary approval, notification to class members, and the compilation of information as to any objections by class members, a court determines whether final approval of the settlement should be granted. See, *e.g.*, *id.*



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

At the preliminary stage, “the settlement need only be *potentially fair*.” *Id.* This is due, in part, to the policy preference for settlement, particularly in the context of complex class action litigation. See *Officers for Just. v. Civil Serv. Comm’n of City and Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) (“[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . .”).

As the Ninth Circuit has explained:

[T]he court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

*Id.*

In evaluating fairness, 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). A court is to consider and evaluate several factors as part of its assessment of a proposed settlement. The following non-exclusive factors, which originally were described in *Hanlon*, 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).

Each factor does not necessarily apply to every settlement, and other factors may be considered. For example, courts often assess whether the settlement is the product of arms-length negotiations. See *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (“We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.”). As noted, in determining whether preliminary approval is warranted, a court is to decide whether the proposed settlement has the potential to be deemed fair, reasonable and adequate in the final approval process. *Acosta*, 243 F.R.D. at 386.

Amended Fed. R. Civ. P. 23(e) provides further guidance as to the requisite considerations in evaluating whether a proposed settlement is fair, reasonable and adequate. A court must consider whether:

- (A) the class representatives and Plaintiff’s counsel have adequately represented the class;

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

- (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);<sup>2</sup> and
- (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The factors set forth in Fed. R. Civ. P. 23(e) distill the considerations historically used by federal courts to evaluate class action settlements. See Fed. R. Civ. P. 23(e) advisory committee's note to 2018 amendment. 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 inconsistent "vocabulary" that had arisen among the circuits and "to focus the court and the lawyers on the core concerns" of the fairness inquiry. *Id.*

## 2. Application

- a) Whether the Class Representatives and Plaintiff's Counsel Have Adequately Represented the Putative Class

The prior discussion confirms that Plaintiffs and their counsel have adequately represented the Class and are well-positioned to continue do so after preliminary approval.

The substantial efforts by counsel and the corresponding progress in pursuing the claims in this action since the time it was filed in February 2019 also provide support for the adequacy of representation. "The extent of the discovery conducted to date and the stage of the litigation are both indicators of [Class] Counsel's familiarity with the case and of Plaintiffs having enough information to make informed decisions." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008); see also *Nat'l Rural Telecomm. Coop. v. DirecTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (quoting 5 *Moore's Federal Practice* § 23.85[2][e] (Matthew Bender 3d ed.)) ("A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case.").

Counsel have actively and extensively litigated this matter. They have "conducted extensive research, discovery, and investigation during the prosecution of this action including," (i) exchanging requests for production and interrogatories; (ii) reviewing over 14,500 documents produced by Defendants, including documents concerning its financial condition, (iii) reviewing files from the trademark case filed against Smashburger, entitled *In-N-Out Burgers v. Smashburger IP Holder LLC and Smashburger Franchising LLC*, Case No. 8:17-cv-01474; (iv) retaining a damages expert, who analyzed Defendants'

<sup>2</sup> Fed. R. Civ. P. 23(e)(3) provides that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal."

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

sales information and worked with Plaintiffs' Counsel to develop a potential damages model; and (v) engaging in substantial arm's-length settlement negotiations. Fisher Decl. ¶¶ 2–3. Therefore, there is sufficient information for them to have made informed decisions about this action and its settlement.

This factor weighs in favor of preliminary approval of the Settlement Agreement.

## b) Whether the Settlement Was Negotiated at Arm's Length

The Ninth Circuit has explained that courts “ha[ve] long deferred to the private consensual decision of the parties.” *Rodriguez*, 563 F.3d at 965. They will evaluate the settlement process as well as the terms and conditions of the agreement to assure that “the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties.” *Id.* (quoting *Hanlon*, 150 F.3d at 1027). Three factors may raise concerns of collusion: (1) “when counsel receive[s] a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded”; (2) “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of attorneys’ fees separate and apart from class funds”; and (3) “when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (internal quotation marks and citations omitted).

There is no evidence of any fraud, overreaching or collusion among the parties. They engaged in settlement negotiations with the assistance of Jill Sperber, an experienced, private neutral. Dkt. 65-1 at 10; Fisher Decl. ¶ 3. The settlement negotiations were extensive. The parties participated in two full days of mediation with Ms. Sperber—February 6, 2020 and May 7, 2020. Fisher Decl. ¶ 3. Only “after more than eight months of intense negotiations” did the parties reach a settlement on October 8, 2020. *Id.*

Both the cash settlement fund and vouchers are non-reversionary. Settlement Agreement ¶ 40. Insufficient or excess cash funds will be reduced or increased, respectively, on an equal pro rata basis. *Id.* ¶ 42. Insufficient vouchers will result in a pro rata reduction in the number of vouchers per person and excess vouchers “will be donated to the Boys and Girls Club, or some other charitable organization chosen by the Defendants, subject to the Court’s approval.” *Id.* ¶ 43.

Approximately 50.7% of the Gross Cash Settlement Amount is to be allocated to the Settlement Class Members. See Settlement Agreement ¶¶ 40, 44, 50; Fisher Decl. ¶¶ 10–12; Supp. Fisher Decl. Exs. A–C. This does not take into account the value of the 1.5 million vouchers that will be available to Class Members. Dkt. 65-1 at 6. The anticipated attorney’s fee award of approximately \$785,175.84<sup>3</sup> is substantial, but the amount is not so disproportionate to the total recovery to suggest collusion. The amount of the fee award will be discussed in greater detail below and evaluated again in connection with the anticipated motion for final approval.

<sup>3</sup> To date, Plaintiffs have incurred \$717,646.14 in attorney’s fees. See Supp. Fisher Decl. Exs. A–C. Plaintiffs’ Counsel anticipate spending an additional 100 billable hours on this matter. Fisher Decl. Ex. 7. Assuming, for the purposes of this Order only, that the same distribution of work will apply to future work by the three firms, attorney’s fees will total approximately \$785,175.84. See Supp. Fisher Decl. Exs. A–C.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

For these reasons, this factor supports preliminary approval of the settlement.

## c) Whether the Relief Provided for the Class Is Adequate

(1) Strength of Plaintiffs' Claims, and the Costs, Risks and Delays of Trial and Appeal

It is “well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair.” *Officers for Just.*, 688 F.2d at 628. “The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.” *Id.* at 625. “Estimates of a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).” *In re Toys “R” Us-Delaware, Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014); *see also Rodriguez*, 563 F.3d at 965 (“In reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for settlements by considering the likelihood of a plaintiffs’ or defense verdict, the potential recovery, and the chances of obtaining it, discounted to the present value.”).

Plaintiffs estimate that the total potential recovery for Class Members’ claims at trial would be between \$1,380,783 and \$6,706,809. Fisher Decl. ¶ 6; Dkt. 65-1 at 14. The Gross Cash Settlement Fund of \$2,500,000 is 37% of the \$6,706,809 maximum potential recovery calculated by Plaintiff’s expert for Class Members’ claims. Dkt. 65-1 at 14. Defendants have agreed to provide 1.5 million vouchers—each of which is valued between \$2.00 and \$2.49 each for a total of approximately \$3,000,000—to Class Members, who will have the option of selecting either a cash award or voucher. Dkt. 65-1 at 6. Plaintiffs contend that this result “is an outstanding opportunity to obtain significant relief at this state in the litigation . . . . The Settlement also abrogates the risks that might prevent [the class] from obtaining relief. *Id.*

Plaintiffs have provided a sufficient basis to find that the Gross Settlement Amount represents adequate consideration when viewed in light of the costs, risks and delays associated with further litigation in this long-pending matter. Those risks include “failing to certify a class, having summary judgment granted against Plaintiffs, or losing at trial.” Dkt. 65-1 at 14. Indeed, Defendants continue “vigorously [to] deny Plaintiffs’ allegations and assert that neither Plaintiffs nor the Class suffered any harm or damages” and that “their advertising campaign was not false or misleading and that Plaintiff would be unable to certify any class.” Fisher Decl. ¶ 6.

These considerations support the conclusion that the amount offered for the Gross Settlement Amount is reasonable. Therefore, this factor weighs in favor of preliminary approval.

(2) Effectiveness of Any Proposed Method of Distributing Relief to the Class

The proposed method of distributing relief to the Class is fair. The notification process, including a settlement website, emailed notices, and targeted internet and social media banner ads estimated to reach at least 80% of the Settlement Class should be effective. *See Settlement Agreement* ¶¶ 44, Finegan Decl. ¶¶ 3, 15-16; Dkt. 65-1 at 26–27. In addition, the expected timeline for payment under the

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

Settlement Agreement is reasonable. Dkt. 65-1 at 26. Therefore, this factor weighs in favor of preliminary approval.

(3) Terms of Any Proposed Award of Attorney's Fees

The Settlement Agreement provides that attorney's fees and expenses ordered by the Court will be the only compensation for Class Counsel that will be paid from the Cash Settlement Fund. Settlement Agreement ¶ 51. The reasonableness of attorney's fees and litigation costs submitted in connection with the Motion are addressed below. Under the Settlement Agreement, any fees and costs not awarded will be included in the Net Settlement Amount and will not revert to the Defendant. *Id.* This also supports approval of the Settlement Agreement.

d) Whether the Proposal Treats Putative Class Members Equitably Relative to Each Other

The Settlement Agreement provides that the Net Settlement Amount will be allocated among all Class Members on a pro-rata basis. Dkt. 65-1 at 17. The method of calculating the award to each Class Member is fair and reasonable. Accordingly, this factor weighs in favor of preliminary approval.

\* \* \*

A consideration of the applicable factors demonstrates that the Settlement is sufficiently fair, reasonable and adequate to warrant preliminary approval. Accordingly, the Motion is **GRANTED** as to the request that the Settlement be preliminarily approved.

C. Incentive Awards

1. Legal Standards

"[N]amed plaintiffs . . . are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. To determine the reasonableness of incentive awards, the following factors may be considered:

- 1) The risk to the class representative in commencing suit, both financial and otherwise;
- 2) the notoriety and personal difficulties encountered by the class representative;
- 3) the amount of time and effort spent by the class representative;
- 4) the duration of the litigation; and
- 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

*Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

2. Application

As noted, the Settlement Agreement provides for an incentive award of up to \$5000 to each of the five named Plaintiffs. Settlement Agreement ¶ 50; see also Supp. Fisher Decl. ¶ 11. Plaintiffs' counsel declares that each of the named Plaintiffs spent approximately 15 to 20 hours in that role. Supp. Fisher Decl. ¶ 11. If the proposed amount were approved, it would result in an hourly rate between \$250 and



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

\$333.

Such enhancements “are particularly appropriate where the ‘class representative[] remain[s] fully involved and expended considerable time and energy during the course of the litigation.” *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, at \*4 (D. Or. Nov. 13, 2006)). Plaintiffs’ counsel asserts that “[t]hroughout the litigation, [the named Plaintiffs] regularly consulted with [counsel] to . . . discuss strategy” and “actively assisted” in the “pre-suit investigation by sharing information about their experience with purchasing Triple-Double burgers from Smashburger.” Supp. Fisher Decl. ¶ 11. The named Plaintiffs “assisted in drafting the complaints and reviewing the complaints for accuracy before they were filed” and were “instrumental throughout the long settlement process.” *Id.* Plaintiffs’ counsel attests that the named Plaintiffs “were determined to ensure the Class obtained the best settlement possible under the circumstances” and, as a result of their dedication and efforts, a “significant benefit” as been conferred on the Class. *Id.*

In light of the work performed and the hours worked, an incentive award of \$2500 is approved for the purposes of this Motion. A final determination of the amount will be made in connection with the anticipated motion for final approval and based on a review of any new evidence that is proffered as well as any responses by Class Members.

## D. Attorney’s Fees

1. Legal Standards

Attorney’s fees and costs “may be awarded . . . where so authorized by law or the parties’ agreement.” *In re Bluetooth Headset Prods.*, 654 F.3d at 941. 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.* “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.

District courts have discretion to choose between a lodestar method and the percentage method to evaluate the reasonableness of a request for an award of attorney’s fees in a class action. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). A court may also choose one method and then perform a cross-check with the other. *See, e.g., Staton*, 327 F.3d at 973.

When using the percentage method, a court examines what percentage of the total recovery is allocated to attorney’s fees. Usually, the Ninth Circuit applies a “benchmark award” of 25%. *Id.* at 968. However, awards that deviate from the benchmark have been approved. *See Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 272 (9th Cir. 1989) (“Ordinarily, . . . fee awards [in common fund cases] range from 20 percent to 30 percent of the fund created.”); *Schroeder v. Envoy Air, Inc.*, No. CV-16-4911-MWF-KSx, 2019 WL 2000578, at \*7 (C.D. Cal. May 6, 2019) (internal citations omitted) (“[T]he ‘benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

hours devoted to the case or other relevant factors,” including “(1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases.”)

“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.*, 654 F.3d at 941. 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). Such factors “includ[e] 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) (quoting *In re Bluetooth Headset Prods.*, 654 F.3d at 941–42).

The attorney’s fees requested in this action are assessed by applying both the lodestar and the percentage methods.

## 2. Application

When the Motion was filed, Plaintiffs’ Lead Counsel declared that Plaintiffs had incurred approximately \$644,000 in attorney’s fees (26% of the \$2.5 million Cash Settlement Fund) and approximately \$17,500 in litigation costs. See Fisher Decl. ¶¶ 10–11. Plaintiffs’ Counsel anticipated spending approximately 100 more hours on the matter between then and a final approval, if one were issued. *Id.* ¶ 12. In response to a prior directive, Plaintiffs’ Lead Counsel provided additional evidence regarding the amount of requested attorney’s fees on July 26, 2022. Plaintiffs have now incurred approximately \$696,287.50 in attorney’s fees (27.9% of the \$2.5 million Cash Settlement Fund) and approximately \$21,358.64 in litigation costs. See Supp. Fisher Decl. Exs. A–C.

Three law firms represent Plaintiffs: Bursor & Fisher, P.A (“Bursor”); Reich, Radcliffe & Hoover LLP (“Reich”); and Ahdoot & Wolfson, PC (“Ahdoot”). Fisher Decl. ¶ 2. L. Timothy Fisher of Bursor & Fisher submitted two declarations in support of the Motion. See *generally id.*; Supp. Fisher Decl. Accompanying Fisher’s supplemental declaration are exhibits providing detailed records of the time billed and work performed in this action for each of Plaintiffs’ three firms as well as the hourly rates for each of the firms’ attorneys and legal assistants. See Supp. Fisher Decl. Ex. A–C, Dkt. 72 at 12–25.

Plaintiffs’ Counsel plan to file a motion for attorney’s fees for consideration at the final approval hearing, Settlement Agreement ¶ 14, and will arrange for the motion to be posted to the Settlement Website, *id.* ¶ 45(d). Accordingly, the issue whether the proposed attorney’s fees are acceptable is not ripe for final adjudication at this stage. However, to provide information that is useful to Class Members in considering whether to object to the Settlement Agreement, it is useful to address them. That analysis shows that the amount of fees requested at this time are within a reasonable range.

### a) Whether This Is a Coupon Settlement Under the Class Action Fairness Act

Under CAFA, attorney’s fees awarded in class action “coupon” settlements “shall be based on the value

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

to class members of the coupons that are redeemed.” 28 USC § 1712(a). Plaintiffs argue that the settlement in this action should not be deemed a “coupon” settlement because the proposed voucher is “freely transferable” and is “more akin to a voucher than a coupon.” *Id.* at 18-19 (citing *Seebrook v. Children's Place Retail Stores, Inc.*, 2013 WL 6326487, at \*1 (N.D. Cal. Dec. 4, 2013); *In re Toys R US-Delaware, Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litigation*, 295 F.R.D. 438, 459 n.95 (C.D. Cal. 2014); *Foos v. Ann, Inc.*, 2013 WL 5352969, at \*2 (S.D. Cal. Sept. 24, 2013)). Plaintiffs also argue that this action is not a “coupon” settlement because Class Members have the option to choose either a cash award or a voucher. Dkt. 65-1 at 18 (citing *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 952 (9th Cir. 2015); *Seebrook*, 2013 WL 6326487, at \*1; and *Cody v. SoulCycle Inc.*, 2017 WL 6550682, at \*7 (C.D. Cal. Oct. 3, 2017)).

CAFA does not clearly define a “coupon” for settlement purposes. However, courts have distinguished between “coupons,” which provide “*discount[s]* on merchandise or services offered by the defendant,” and “vouchers,” which provide “*free merchandise or services.*” *Foos v. Ann, Inc.*, 2012 WL 5352969, at \*2 (2013) (emphasis in original); *In re Toys R US*, 295 F.R.D. at 459 n.95. Thus, a voucher has been deemed “more like a gift card or cash where there is an actual cash value, is freely transferable and does not require class members to spend additional money in order to realize the benefits of the settlement.” *Foos*, 2012 WL 5352969, at \*2.

It is appropriate to adopt this approach. Although the vouchers provided to Class Members are freely transferable, they are properly deemed “coupons” because they require Class Members to make additional expenditures in order to receive the value. See Fisher Decl. ¶ 4 (“The product vouchers will entitle the bearer of the voucher, *upon the purchase of a regularly-priced entrée . . .*, to either a) upgrade a single beef hamburger to a double beef hamburger for no additional cost; or b) get a small fountain drink for no additional cost.” (emphasis added)). The voucher option is, in effect, a discount of between \$2.00 and \$2.49 on a future meal purchase at a Smashburger restaurant. See *id.* (upgrading a single beef hamburger to a double beef hamburger costs approximately \$2.00 and a small fountain drink costs approximately \$2.49). Discounts on a defendant’s merchandise are generally considered coupons. *Foos*, 2012 WL 5352969, at \*2; see also *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 951 (discounts “require class members to hand over more of their own money before they can take advantage of the coupon, and they often are only valid for select products or services”).

This action is not a “coupon” settlement subject to CAFA’s limitations on contingent fees because Class Members have the option to choose a cash award instead of a Smashburger product voucher. See *Foos*, 2013 WL 5352969, at \*3 (“[H]aving a coupon *option* does not necessarily transform a class action settlement into a coupon settlement under CAFA” (emphasis added)); *Seebrook*, 2013 WL 6326487, at \*1 (same); *Cody*, 2017 WL 6550682, at \*7 (settlement was not a “coupon” settlement where class members had the option to receive the “cash-equivalent” of reinstated exercise classes “without spending any money of their own or receiving any ‘discount’ ”). Therefore, the attorney’s fee award is not properly based on the value of redeemed product vouchers.

## b) Percentage Approach

As noted, the attorney’s fees incurred by Plaintiffs to date represent approximately 27.9% of the \$2.5 million Cash Settlement Fund. See Supp. Fisher Decl. Exs. A–C. Plaintiffs’ Counsel previously declared that they anticipate spending an additional 100 hours on the Motions for Approval of Settlement,

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

objections and class member inquiries, and post approval and any appellate work. See Fisher Decl. Ex. 7, Dkt. 65-2 at 143. Assuming, for the purpose of this Order only, that the same distribution of work will apply to future work by the three firms, the final total for attorney's fees would be approximately \$763,817.20, or 30.6% of the Cash Settlement Fund. See Supp. Fisher Decl. Exs. A–C.

This allocation would slightly exceed the 25% “benchmark award” in the Ninth Circuit; nonetheless, an attorney's fees award exceeding the benchmark is not *per se* unreasonable. An upward adjustment from the benchmark may be warranted in light of the results achieved, the risks of litigation, non-monetary benefits conferred by the litigation, customary fees in similar cases, the contingent nature of the fee, the burden carried by counsel, or the reasonable expectations of counsel. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50. Here, for example, the parties propose to supplement the \$2.5 million Cash Settlement Fund with 1.5 million vouchers that will be available to all Class Members, who may opt to receive up to ten vouchers (one for every Triple Double product purchased during the Class Period up to a maximum of ten). See Fisher Decl. Ex. C (Claim Form), Dkt. 65-2 at 69.

Favorable results were obtained for the Class. This is significant in light of the risk to Plaintiffs' counsel that there may not have been any recovery in the event that Defendant prevailed at trial. See Fisher Decl. ¶ 6 (“Defendants would no doubt present a vigorous defense at trial, and there is no assurance that the Class would prevail . . .”).

Plaintiff's counsel devoted significant time to this matter. This action has been pending since February 2019. See Compl., Dkt. 1. Plaintiff's counsel has presented evidence that the litigation involved substantial investigation, the exchange of extensive written discovery and the analysis of more than 14,500 pages of documents, as well as protracted settlement negotiations. Fisher Decl. ¶¶ 2–3.

For the reasons stated, the attorney's fees submitted by Plaintiffs' counsel to date appear reasonable.

## c) Lodestar Cross-Check

The following table summarizes the rates and hours submitted by Plaintiffs' counsel to date for each firm and attorney:

Firm	Attorney	Position	Hourly Rate	Current Hours	Current Lodestar	Firm Future Hours <sup>4</sup>	Firm Avg. Rate	Future Lodestar	Total Hours	Total Lodestar
Bursor & Fisher, P.A.	L. Timothy Fisher	P	\$1000	216.2	\$216,200.00	62.0	\$600	\$37,200.00	701.5	\$420,942.50
	Neal J. Deckant	P	\$775	2.2	\$1,705.00					
	Yeremey Krivoshey	P	\$725	0.3	\$217.50					
	Blair Reed	A	\$425	316.1	\$134,342.50					

<sup>4</sup> For purposes of this Motion, future firm hours and weighted average hourly rates are based on an assumption that the same distribution of work will apply to future work by the three firms. See Fisher Decl. ¶ 12 (estimating 100 hours on future matters); Supp. Fisher Decl. Exs. A–C.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

	Brittany Scott	A	\$375	4.5	\$1,687.50					
	Jenna L. Gavemann	SA	\$325	1	\$325.00					
	Emma Blake	SA	\$325	3.1	\$1,007.50					
	Angeli Patel	SA	\$325	1.5	\$487.50					
	Debbie Schroeder	SLSS	\$300	23.3	\$6,990.00					
	Molly Sasseen	SLSS	\$300	46.9	\$14,070.00					
	Judy Fontanilla	LSS	\$275	23.4	\$6,435.00					
	Amy Michel-Arce	LSS	\$275	1.0	\$275.00					
Adhoot & Wolfson, PC	Tina Wolfson	P	\$950	73.7	\$70,015.00	20.9	\$750	\$15,675.00	236.3	\$177,185.00
	Robert Adhoot	P	\$950	8.9	\$8,455.00					
	Theodore Maya	P	\$750	0.8	\$600.00					
	Bradley King	P	\$650	121.1	\$78,715.00					
	Jessielle Fabian	A	\$350	10.0	\$3,500					
	Samantha Benson	PA	\$250	0.9	\$225.00					
Reich Radcliffe & Hoover LLP	Marc G. Reich	P	\$875	153.2	\$134,050.00	17.1	\$857	\$14,654.70	193	\$165,689.70
	Adam T. Hoover	P	\$775	18.8	\$14,570.00					
	Byron S. Ahn	OC	\$575	4.2	\$2,415.00					
<b>TOTAL</b>				1031.1	\$696,287.50	100		\$67,529.70	<b>1131.1</b>	<b>\$763,817.20</b>

P = Partner, A = Associate, SA = Summer Associate, SLSS = Senior Litigation Support Specialist, LSS = Litigation Support Specialist, PA = Paralegal, OC = Of Counsel)

Supp. Fisher Decl. Exs. A–C, Dkt. 72 at 12–25; Fisher Decl. Ex. 7, Dkt. 65-2 at 143.

The data submitted reflects that Plaintiffs' Counsel have worked a total of 1031.1 hours on this matter with a corresponding fee amount of \$696,287.50. This would reflect an average hourly rate of \$675.29.

(1) Whether the Rates Claimed Are Reasonable

L. Timothy Fisher of Bursor & Fisher submitted a supplemental declaration in support of the proposed hourly rates. See Supp. Fisher Decl. ¶¶ 7–9. Fisher asserts that “[e]ach of the firms representing Plaintiffs have extensive experience litigating class actions” and “will provide additional details

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

regarding their experience with their motion for attorneys' fees[.]” *Id.* ¶ 7.

A review has been conducted of the fee requests as well as the detailed descriptions of the work performed by each attorney. Part of that review has been an assessment of the quality and nature of the work performed by the attorneys during the course of the litigation as well as the rates charged by counsel in this District and the corresponding skills and experience of such counsel. In light of the foregoing factors, the proposed hourly rates are deemed reasonable at this stage for purposes of the lodestar analysis with the exception of rates over \$700/hour. With respect to these rates, a reduction of 10% is warranted for the purposes of calculating the lodestar given that very little evidence has been provided to support of these hourly rates.<sup>5</sup>

(2) Whether the Hours Charged Are Reasonable

As required by the Standing Order, Plaintiffs' Counsel have provided the following tables summarizing the hours worked on this matter:

Task 1: Pre-Suit Investigation & Pleadings				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$1,000	5.4	\$5,400.00
	Neal J. Deckant (P)	\$775	0	\$0.00
	Yeremey Krivoshey (P)	\$725	0	\$0.00
	Blair Reed (A)	\$425	11.4	\$4,845.00
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	1.5	\$487.50
	Debbie Schroeder (SLSS)	\$300	1.3	\$390.00
	Molly Sasseen (SLSS)	\$300	7.9	\$2,370.00
	Judy Fontanilla (LSS)	\$275	0	\$0.00
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$950	11.9	\$11,305.00
	Robert Ahdoot (P)	\$950	4.6	\$4,370.00
	Theodore Maya (P)	\$750	0	\$0.00
	Bradley King (P)	\$650	28.1	\$18,265.00
	Jessielle Fabian (A)	\$350	0	\$0.00
	Samantha Benson (PA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$875	38.5	\$33,687.50
	Adam T. Hoover (P)	\$775	2.5	\$1,937.50

<sup>5</sup> Fisher declares that “comparable hourly rates have been found reasonable by various courts for reasonably comparable services,” but does not provide sufficiently detailed information regarding either the experience of Plaintiffs' Counsel or the other cases in which the rates proposed here have been approved. Supp. Fisher Decl. ¶¶ 7–8.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 1			113.0	\$83,057.50

Task 2: Case Management				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$1000	24.5	\$24,500.00
	Neal J. Deckant (P)	\$775	0	\$0.00
	Yeremey Krivoshey (P)	\$725	0.3	\$217.50
	Blair Reed (A)	\$425	37.5	\$15,937.50
	Brittany Scott (A)	\$375	2.7	\$1,012.50
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	9.6	\$2,880.00
	Molly Sasseen (SLSS)	\$300	7	\$2,100.00
	Judy Fontanilla (LSS)	\$275	0.6	\$165.00
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$950	16.3	\$15,485.00
	Robert Ahdoot (P)	\$950	1.2	\$1,140.00
	Theodore Maya (P)	\$750	0.8	\$600.00
	Bradley King (P)	\$650	21.1	\$13,715.00
	Jessielle Fabian (A)	\$350	9.8	\$3,430.00
	Samantha Benson (PA)	\$250	0.9	\$225.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$875	8.5	\$7,437.50
	Adam T. Hoover (P)	\$775	1.3	\$1,007.50
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 2			142.1	\$89,852.50

Task 3: Leadership				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$1000	29.9	\$29,900.00
	Neal J. Deckant (P)	\$775	0	\$0.00
	Yeremey Krivoshey (P)	\$725	0	\$0.00
	Blair Reed (A)	\$425	29.3	\$12,452.50
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	3.1	\$930.00



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

	Molly Sasseen (SLSS)	\$300	17.3	\$5,190.00
	Judy Fontanilla (LSS)	\$275	2.7	\$742.50
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$950	11.4	\$10,830.00
	Robert Ahdoot (P)	\$950	1.4	\$1,330.00
	Theodore Maya (P)	\$750	0	\$0.00
	Bradley King (P)	\$650	30.2	\$19,630.00
	Jessielle Fabian (A)	\$350	0.2	\$70.00
	Samantha Benson (PA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$875	16.3	\$14,262.50
	Adam T. Hoover (P)	\$775	0.7	\$542.50
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 3			142.5	\$95,880.00

Task 4: Discovery				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$1000	16.6	\$16,600.00
	Neal J. Deckant (P)	\$775	0	\$0.00
	Yeremey Krivoshey (P)	\$725	0	\$0.00
	Blair Reed (A)	\$425	43.9	\$18,657.50
	Brittany Scott (A)	\$375	0.3	\$112.50
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	1.6	\$480.00
	Molly Sasseen (SLSS)	\$300	0	\$0.00
	Judy Fontanilla (LSS)	\$275	5.9	\$1,622.50
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$950	6.0	\$5,700.00
	Robert Ahdoot (P)	\$950	0	\$0.00
	Theodore Maya (P)	\$750	0	\$0.00
	Bradley King (P)	\$650	21.3	\$13,845.00
	Jessielle Fabian (A)	\$350	0	\$0.00
	Samantha Benson (PA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$875	22.0	\$19,250.00
	Adam T. Hoover (P)	\$775	3.0	\$2,325.00
	Byron S. Ahn (OC)	\$575	4.2	\$2,415.00
Subtotals for Task 4			124.8	\$81,007.50

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

<b>Task 5: Settlement</b>				
<b>Firm</b>	<b>Attorney or Paralegal</b>	<b>Rate</b>	<b>Hours</b>	<b>Fee</b>
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$1000	139.8	\$139,800.00
	Neal J. Deckant (P)	\$775	2.2	\$1,705.00
	Yeremey Krivoshey (P)	\$725	0	\$0.00
	Blair Reed (A)	\$425	194.0	\$82,450.00
	Brittany Scott (A)	\$375	1.5	\$562.50
	Jenna L. Gavemann (SA)	\$325	1.0	\$325.00
	Emma Blake (SA)	\$325	3.1	\$1,007.50
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	7.7	\$2,310.00
	Molly Sasseen (SLSS)	\$300	14.7	\$4,410.00
	Judy Fontanilla (LSS)	\$275	14.2	\$3,905.00
	Amy Michel-Arce (LSS)	\$275	1.0	\$275.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$950	28.1	\$26,695.00
	Robert Ahdoot (P)	\$950	1.7	\$1,615.00
	Theodore Maya (P)	\$750	0	\$0.00
	Bradley King (P)	\$650	20.4	\$13,260.00
	Jessielle Fabian (A)	\$350	0	\$0.00
	Samantha Benson (SA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$875	67.9	\$59,412.50
	Adam T. Hoover (P)	\$775	11.3	\$8,757.50
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 5			508.6	\$346,490.00

Exs. A–C to Supp. Fisher Decl.

Based on a review of the tables and corresponding time records, and in light of the expertise stated by Plaintiffs' Counsel in support of the hourly rates, certain exclusions from the time charges, and other modest downward adjustments to the time charges, are warranted. These adjustments, as well as the 10% reduction in hourly rates that exceed \$700, are reflected in the tables and corresponding calculations that follow. Some of the downward adjustments are the result of duplicative work by attorneys, or the inefficiency of having certain attorneys work only very briefly. Collectively, these adjustments result in a reduction of the lodestar by \$74,334.75, to \$621,952.75.

<b>Task 1: Pre-Suit Investigation &amp; Pleadings</b>				
<b>Firm</b>	<b>Attorney or Paralegal</b>	<b>Rate</b>	<b>Hours</b>	<b>Fee</b>
	L. Timothy Fisher (P)	\$900	5.4	\$4,860.00

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

Bursor & Fisher, P.A.	Neal J. Deckant (P)	\$698	0	\$0.00
	Yeremey Krivoshey (P)	\$653	0	\$0.00
	Blair Reed (A)	\$425	11.4	\$4,845.00
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	0	\$0.00
	Molly Sasseen (SLSS)	\$300	7.9	\$2,370.00
	Judy Fontanilla (LSS)	\$275	0	\$0.00
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$855	11.9	\$10,174.50
	Robert Ahdoot (P)	\$855	0	\$0.00
	Theodore Maya (P)	\$675	0	\$0.00
	Bradley King (P)	\$650	28.1	\$18,265.00
	Jessielle Fabian (A)	\$350	0	\$0.00
	Samantha Benson (PA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$788	38.5	\$30,318.75
	Adam T. Hoover (P)	\$698	0	\$0.00
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 1			103.2	\$70,833.25

Task 2: Case Management				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$900	24.5	\$22,050.00
	Neal J. Deckant (P)	\$698	0	\$0.00
	Yeremey Krivoshey (P)	\$653	0	\$0.00
	Blair Reed (A)	\$425	37.5	\$15,937.50
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	9.6	\$2,880.00
	Molly Sasseen (SLSS)	\$300	0	\$0.00
	Judy Fontanilla (LSS)	\$275	0.6	\$165.00
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$855	16.3	\$13,936.50
	Robert Ahdoot (P)	\$855	0	\$0.00
	Theodore Maya (P)	\$675	0	\$0.00

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. LA CV19-00993 JAK (JEMx)

Date September 19, 2022

Title In re: Smashburger IP Holder, LLC, et al.

Reich Radcliffe & Hoover LLP	Bradley King (P)	\$650	21.1	\$13,715.00
	Jessielle Fabian (A)	\$350	9.8	\$3,430.00
	Samantha Benson (PA)	\$250	0.9	\$225.00
	Marc G. Reich (P)	\$788	8.5	\$6,693.75
	Adam T. Hoover (P)	\$698	0	\$0.00
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 2			128.8	\$79,032.75

Task 3: Leadership				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$900	29.9	\$26,910.00
	Neal J. Deckant (P)	\$698	0	\$0.00
	Yeremey Krivoshey (P)	\$653	0	\$0.00
	Blair Reed (A)	\$425	29.3	\$12,452.50
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	0	\$0.00
	Molly Sasseen (SLSS)	\$300	17.3	\$5,190.00
	Judy Fontanilla (LSS)	\$275	2.7	\$742.50
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$855	11.4	\$9,747.00
	Robert Ahdoot (P)	\$855	0	\$0.00
	Theodore Maya (P)	\$675	0	\$0.00
	Bradley King (P)	\$650	30.2	\$19,630.00
	Jessielle Fabian (A)	\$350	0.2	\$70.00
	Samantha Benson (PA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$788	16.3	\$12,836.25
	Adam T. Hoover (P)	\$698	0	\$0.00
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 3			137.3	\$87,578.25

Task 4: Discovery				
Firm	Attorney or Paralegal	Rate	Hours	Fee
	L. Timothy Fisher (P)	\$900	16.6	\$14,940.00

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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Bursor & Fisher, P.A.	Neal J. Deckant (P)	\$698	0	\$0.00
	Yeremey Krivoshey (P)	\$653	0	\$0.00
	Blair Reed (A)	\$425	43.9	\$18,657.50
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	1.6	\$480.00
	Molly Sasseen (SLSS)	\$300	0	\$0.00
	Judy Fontanilla (LSS)	\$275	5.9	\$1,622.50
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
Adhoot & Wolfson, PC	Tina Wolfson (P)	\$855	0	\$0.00
	Robert Ahdoot (P)	\$855	0	\$0.00
	Theodore Maya (P)	\$675	0	\$0.00
	Bradley King (P)	\$650	21.3	\$13,845.00
	Jessielle Fabian (A)	\$350	0	\$0.00
	Samantha Benson (PA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$788	22	\$17,325.00
	Adam T. Hoover (P)	\$698	0	\$0.00
	Byron S. Ahn (OC)	\$575	4.2	\$2,415.00
Subtotals for Task 4			115.5	\$69,285.00

Task 5: Settlement				
Firm	Attorney or Paralegal	Rate	Hours	Fee
Bursor & Fisher, P.A.	L. Timothy Fisher (P)	\$900	139.8	\$125,820.00
	Neal J. Deckant (P)	\$698	0	\$0.00
	Yeremey Krivoshey (P)	\$653	0	\$0.00
	Blair Reed (A)	\$425	194	\$82,450.00
	Brittany Scott (A)	\$375	0	\$0.00
	Jenna L. Gavemann (SA)	\$325	0	\$0.00
	Emma Blake (SA)	\$325	0	\$0.00
	Angeli Patel (SA)	\$325	0	\$0.00
	Debbie Schroeder (SLSS)	\$300	0	\$0.00
	Molly Sasseen (SLSS)	\$300	14.7	\$4,410.00
	Judy Fontanilla (LSS)	\$275	14.2	\$3,905.00
	Amy Michel-Arce (LSS)	\$275	0	\$0.00
	Tina Wolfson (P)	\$855	28.1	\$24,025.50

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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Adhoot & Wolfson, PC	Robert Ahdoot (P)	\$855	0	\$0.00
	Theodore Maya (P)	\$675	0	\$0.00
	Bradley King (P)	\$650	20.4	\$13,260.00
	Jessielle Fabian (A)	\$350	0	\$0.00
	Samantha Benson (SA)	\$250	0	\$0.00
Reich Radcliffe & Hoover LLP	Marc G. Reich (P)	\$788	67.9	\$53,471.25
	Adam T. Hoover (P)	\$698	11.3	\$7,881.75
	Byron S. Ahn (OC)	\$575	0	\$0.00
Subtotals for Task 5			490.4	\$315,223.50

The attorney's fees submitted by Plaintiff's Counsel to date would represent a lodestar multiplier enhancement of 1.12 ( $\$696,287.50 / \$621,952.75 = 1.12$ ). This is taken into account in setting the range of attorney's fees that are approved presently, with the final determination of the amount of the award reserved for the anticipated motion for final approval. That range is between \$620,000 to \$697,000; provided, however, this will not preclude an additional award for the amount of fees incurred between the issuance of this Order, and any order of final approval.

d) Conclusion on Attorney's Fees

The evidence submitted in connection with Plaintiffs' Motion for Preliminary Approval shows that, to date, the attorney's fees submitted by Plaintiffs' counsel are within a reasonable range. However, in connection with any motion for final approval of the settlement, Plaintiffs' Counsel shall submit more detailed evidence in support the claimed hourly rate for each attorney as well as a detailed description of the tasks performed in connection with this action that is in conformance with the Standing Order.

E. Litigation Costs

Plaintiffs' Counsel provide evidence that \$21,358.64 in litigation costs have been incurred. Supp. Fisher Decl. Exs. A–C. These costs are appropriate and reasonable for purposes of preliminary approval. The final award of costs will be determined in connection with the anticipated motion for final approval and based on the supplemental evidence proffered in support of that motion.

F. Appointment of Settlement Administrator

As noted, the parties seek approval of Heffler as the Third Party Administrator. Fisher Decl. ¶ 7. The parties "selected Heffler through a competitive bidding process and Plaintiff solicited bids from three settlement administrators." *Id.* The Settlement Agreement provides for an estimated settlement administration budget not to exceed \$400,000 designed to achieve 80% reach. Settlement Agreement ¶ 44. The Settlement Agreement also provides that if the costs of notice and claims administration exceeds \$400,000, Heffler will file a motion for approval of any additional fees and costs. *Id.* Jeanne C. Finegan of Heffler has filed a declaration in support of the Motion for Preliminary approval detailing the proposed notice program as well as her experience and qualifications. See Finegan Decl. Based on the evidence presented, Heffler appears to be an adequate administrator.

Plaintiffs have not submitted evidence describing the basis for administrative costs of \$400,000.



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

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Therefore, the matter will be reviewed de novo in connection with the anticipated motion for final approval. In support of that motion the parties shall provide evidence as to the basis for administrative costs of up to \$400,000.

## G. Class Notice

1. Legal Standards

Rule 23(e)(1)(B) requires that a court “direct notice in a reasonable manner to all class members who would be bound by” a proposed class settlement. Fed. R. Civ. P. 23(e)(1)(B). Notice is satisfactory if it “generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)).

2. Application

As stated, the Proposed Notice summarizes the terms of the Settlement Agreement, advises each of the Class Members of the choice between a cash award or voucher option and provides a website URL and toll-free phone number that Class Members can use to contact the Third Party Administrator. See Proposed Notice, Dkt. 65-2 at 86–102. It also instructs Class Members how to file objections or to opt out of the settlement. *Id.* The Proposed Notice satisfies the requirements of Rule 23(e)(1)(B).

V. Conclusion

For the reasons stated in this Order, the Motion is **GRANTED**. Within seven days of the issuance of this Order, Plaintiffs shall file a statement with the following proposed deadlines: Notice Date, Commencement of the Internet Advertising Portion of Class Notice, Establishment of Settlement Website and Toll-Free Telephone Number, Claim Deadline, Objection Deadline and Opt-Out Date. Plaintiffs shall file a motion for final approval of the class action settlement on or before December 2, 2022. A hearing on that anticipated motion is set for January 30, 2023, at 8:30 a.m.; provided, however, the hearing date may be advanced based on whether the motion is filed prior to December 2, 2022.

IT IS SO ORDERED.

Initials of Preparer

TJ