

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV19-00993 JAK (JEMx)

Date September 29, 2023

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 PLAINTIFFS’ MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT (DKT. 79); AND PLAINTIFFS’ MOTION FOR ATTORNEYS’ FEES AND COSTS AND ENHANCEMENT AWARDS (DKT. 77)

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;
- vii. violation of New York General Business Law (“GBL”) § 349; and
- viii. violation of GBL § 350.

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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 for Preliminary Approval”). Dkt. 65. The Motion for Preliminary Approval was taken under submission on July 4, 2021. Dkt. 66. On September 19, 2022, an order issued granting the Motion for Preliminary Approval (“Preliminary Approval Order”). Dkt. 74.

On December 5, 2022, Plaintiffs filed a Motion for Attorneys’ Fees, Costs, Expenses, and Service Awards (the “Motion for Attorney’s Fees”). Dkt. 77. On January 9, 2023, Plaintiffs filed a Motion for Final Approval of Class Action Settlement (“Motion for Final Approval”). Dkt. 79. On the same date, Defendants filed a Notice of Non-Opposition to the Motion for Attorney’s Fees. Dkt. 78.

A hearing on the Motion for Final Approval and the Motion for Attorney’s Fees (collectively, the “Motions”) was held on January 30, 2023, and the Motions were taken under submission. Dkt. 81.

For the reasons stated in this Order, the Motions are **GRANTED**.

II. Summary of Settlement Agreement and Notice

A. Class Definitions

The settlement agreement (“Settlement Agreement” (Dkt. 65-2)) 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 persons 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.” Settlement Agreement ¶ 7.

The “Class Period” is defined as “from July 1, 2017 up to and including May 31, 2019.” *Id.* ¶ 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 allegedly 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. Summary of the Settlement Agreement and Preliminary Approval Amount

The Preliminary Approval Order includes a detailed summary of the Settlement Agreement. Dkt. 74 at 4-9. The monetary terms of the Settlement Agreement are summarized in the following table:

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Description of Amount	Amount	Percent
Gross Cash Settlement Amount	\$2,500,000.00	100%
Enhancement Award to Class Representatives	(\$25,000.00)	1%
Estimated Attorney's Fees Award to Class Counsel	(\$763,817.20) ¹	30.6%
Litigation Costs and Expenses	(\$21,358.64) ²	0.9%
Third Party Administrator Costs	(\$400,000.00)	16%
Net Cash Settlement Amount	\$1,289,824.16	51.6%
Cash Value of Vouchers	\$3,000,000³	-

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

C. Settlement Administration and Final Requested Amounts

The Settlement Agreement provides for the allocation of up to \$400,000 for the cost of settlement administration. Settlement Agreement ¶ 44. The Preliminary Approval Order observed that Plaintiffs had not submitted evidence supporting a basis for the administrative costs of \$400,000. Dkt. 74 at 32. Consequently, it determined that the matter of settlement administration costs would be reviewed de novo in connection with the Motion for Final Approval. *Id.* at 33.

Heffler Claims Group (“Heffler”), now known as Kroll Settlement Administration (“Kroll”),⁴ was appointed as the settlement administrator (the “Settlement Administrator”), *Id.* at 32, and anticipates seeking expenses “in excess of \$400,000.” Dkt. 79-3 ¶ 9. Kroll proposes that “[o]nce the Claim Deadline has passed and the total number of Claim Forms is known, Kroll will assess the amount of work required to finalize the claims process and distributions and will provide the Parties and the Court with a revised estimate of Settlement Administration Expenses for approval to complete work on the administration.” *Id.*

The Settlement Agreement provides for an incentive award for each of the five Class Representatives: Andre Galvan, Lucinda Lopez, Barbara Trevino, Thu Thuy Nguyen, Robert Meyer and Jamelia Harris. Settlement Agreement ¶ 50; Dkt. 65-2 at 27. The Preliminary Approval Order preliminarily approved an incentive award of \$2500 for each Class Representative. Dkt. 74 at 20. In the Final Approval Motion and the Attorney’s Fees Motion, there is a renewed request for the approval of an incentive award of \$2500 for each Class Representative. Dkt. 77 at 31.

An award of attorney’s fees in the range of \$620,000 to \$697,000 was approved in the Preliminary Approval Order, without prejudice to an additional award for the amount of fees incurred between the issuance of the Preliminary Approval Order and any order of final approval. Dkt. 74 at 32. The Preliminary Approval Order instructed that, in connection with any motion for final approval, Plaintiffs’

¹ This figure represents the amount requested in the Motion for Preliminary Approval. See Dkt. 74 at 3-4.

² This figure represents the amount requested in the Motion for Preliminary Approval. See Dkt. 74 at 3-4.

³ The Settlement Agreement provides that Defendants will provide 1.5 million vouchers valued between \$2.00 and \$2.49. See Dkt. 65-1 at 6.

⁴ Heffler was acquired by Duff & Phelps in July 2019, and in April 2021, Heffler changed its name to Kroll Settlement Administration LLC. Dkt. 79-2 at 1 n.2.

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counsel shall “submit more detailed evidence in support of 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.” *Id.* Plaintiffs now seek approval of an award of fees in the amount of \$825,000.

Plaintiffs state that the Preliminary Approval Order failed to include the value of the vouchers offered to Settlement Class Members in calculating the monetary value of the settlement. Dkt. 77-1 at 14. They argue that, for purposes of the percentage method of calculating attorney’s fees, “the percentage of the benefit must be calculated against the value of both the cash and voucher portion of the Settlement Fund.” *Id.* Thus, they contend that the total value of the settlement should include the value of the vouchers, and should be calculated to be \$5.5 million.

An award of litigation costs of \$21,358.64 was deemed reasonable in the Preliminary Approval Order. Dkt. 74 at 32. Plaintiffs now seek an award of costs of \$21,541.02. Dkt. 77-1 at 31.

D. Notice to Class Members

Timely notice to the Class was provided by the Settlement Administrator. Declaration of Jeanne C. Finegan (“Finegan Decl.”), Dkt. 79-2 ¶ 3. The plan to provide notice to Class Members (“Notice Plan”) included the following elements:

- Online display banner advertising targeted to reach Class Members;
- Keyword Search advertising targeted to Class Members;
- Social media advertising through Facebook, Instagram, and Twitter; and
- A press release distributed over PR Newswire’s US1 Newswire.

Id. ¶ 6.

The implementation of the Notice Plan commenced on October 19, 2022, and ended on November 18, 2022. *Id.* ¶ 3. The Settlement Administrator used online advertising to target ads “to potential Smashburger customers via mobile devices located within 10 miles around Smashburger locations across the country,” as well as to individuals who visited the Settlement Website. *Id.* ¶ 8. Additionally, the Settlement Administrator used Google keyword search engine advertising “to target ads to people searching for information on topics including Smashburger settlement, Smashburger class action, Smashburger Triple Double, Smashburger locations, and other similar terms.” *Id.* ¶ 11.

The Settlement Administrator also targeted Class Members through several methods of social media advertising. These included using Facebook and Instagram to target users who have “liked” or “followed” Smashburger pages, in addition to “adults 18 to 54 with a college education or higher in states with Smashburger location.” *Id.* ¶ 12. The Settlement Administrator also “utilized Twitter to target people who follow @Smashburger or have expressed an interest in #Smashburger.” *Id.* ¶ 13.

In addition to advertising on social media, the Settlement Administrator issued a press release over PR Newswire’s US1 Newswire on October 19, 2022. *Id.* ¶ 16. The press release resulted in approximately 293 news mentions. *Id.* Additionally, the Settlement Administrator “caused the Summary Notice to be sent to the 977,271 email addresses on file for Class Members.” *Id.* ¶ 5.

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The Notice Plan generated “[o]ver 48 million online display, search and social media impressions were delivered across multiple exchanges, including across the social media platforms Facebook, Instagram, and Twitter.” *Id.* ¶ 7. It is estimated that 81.8% of targeted Class Members were reached by the Notice Plan. *Id.* ¶ 18. This exceeds the initial estimated reach of 80%. *Id.* ¶ 4.

E. CAFA Notice

CAFA requires that defendants serve notice on appropriate federal and state officials of a proposed class action settlement within ten days of the filing of a motion for preliminary approval. 28 U.S.C. § 1715(b). The Motion for Preliminary Approval was filed on March 1, 2021. The CAFA Notice was mailed on March 10, 2021. Declaration of Frank Ballard (“Ballard Decl.”), Dkt. 77-5 ¶ 6. The Settlement Administrator mailed the required CAFA Notice and accompanying materials to the Attorney General of the United States and to 56 state and territorial Attorneys General. *Id.*

III. Analysis

A. Class Certification

The Preliminary Approval Order analyzed whether conditional certification of the Settlement Class was appropriate. Dkt. 74 at 9-14. That analysis, which is incorporated here by this reference, resulted in granting the Preliminary Approval Motion. The analysis of these factors and the resulting outcome have not changed. Therefore, the Final Approval Motion is **GRANTED** as to certification of the Settlement Class.

B. Final Approval of the Settlement Agreement

1. Legal Standards

Rule 23(e) requires a two-step process in considering whether to approve the settlement of a class action. Fed. R. Civ. P. 23(e). *First*, in the preliminary approval process, a court must make a preliminary determination as to whether the proposed settlement “is fundamentally fair, adequate, and reasonable.” *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003)). At this stage, “the settlement need only be potentially fair.” *Id.*

Second, if preliminary approval is granted, class members are notified and invited to make any objections. Upon reviewing the results of that notification, a court makes a final determination as to whether an agreement is “fundamentally fair, adequate, and reasonable.” *See Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

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 v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), are among those that may be considered during both the preliminary and final approval processes:

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- (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 consider 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.

The recently 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 class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment;
 - and
 - (iv) any agreement required to be identified under Rule 23(e)(3);⁵ 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* Advisory Committee Comments to 2018 Amendments to Rule 23, Subdivision (e)(2). As the comments of the Advisory Committee explain, “[t]he goal of [the] amendment [was] not to displace any factor” that would have been relevant prior to the amendment, but rather to address 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.*

⁵ 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.”

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2. Application

The Preliminary Approval Order analyzed many of the relevant factors. See Dkt. 74 at 16-19. None of the facts and circumstances as to any of them has changed since that time. However, because the Settlement Administrator has completed the notice process, the reaction of Class Members to the Settlement Agreement may now be considered in evaluating whether it is fair and appropriate.

As of December 2, 2022, the Settlement Administrator had received 538,934 claim forms,⁶ but no timely opt-outs or objections. A low proportion of opt-outs and objections “indicates that the class generally approves of the settlement.” *In re Toys R Us-Delaware, Inc. – Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 456 (C.D. Cal. 2014) (collecting cases); see also *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (quoting *Nat’l Rural Telecomms. Coop.*, 221 F.R.D. at 528-29) (“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.”). Therefore, this factor weighs in favor of final approval.

Because there have been no material changes in any of the relevant circumstances since the Preliminary Approval Order, the same determinations are warranted at this time with respect to the fairness analysis. Therefore, the distribution of the Gross Settlement Fund in the manner set forth in the Preliminary Approval Order is approved subject to the terms of this Order.

C. Incentive Award

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

An incentive award of \$2500 is requested for each of the five Class Representatives. Dkt. 77-1 at 31. The Preliminary Approval Order approved an enhancement award up to this amount for each named Plaintiff, provided that a final determination would be made based on a review of any new evidence

⁶ As of December 2, 2022, Kroll had received 246 claim forms by mail and 892,204 claim forms electronically. Supplemental Declaration of Scott M. Fenwick (“Fenwick Decl.”), Dkt. 79-3 ¶ 8. Kroll believes that this higher-than-anticipated number of claim forms “is the result of suspicious online claim filing activity,” and states that it will further analyze and validate these claim forms in light of that concern. *Id.*

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proffered in connection with the motion for final approval as well as any responses by Class Members. Dkt. 74 at 20.

Plaintiffs present evidence in support of their request for incentive awards that is similar to what was presented in connection with the Motion for Preliminary Approval. In connection with the Motion for Attorney’s Fees, Plaintiffs provide a declaration by Marc G. Reich (“Reich Decl.”), counsel for Plaintiffs, stating that he worked closely with four of the five Class Representatives, and each of them spent approximately 10 to 20 hours on this case. Dkt. 77-3 ¶ 8. In connection with the Motion for Preliminary Approval, Plaintiffs provided a supplemental declaration by Timothy Fisher (“First Suppl. Fisher Decl.”) stating that each of the five Class Representatives estimated that he or she had spent approximately 15 to 20 hours on this case. Based on the most recent declaration in support of incentive awards, an award of \$2500 would result in an hourly rate between \$125 and \$250.

Because there has been no material change in circumstances since the Preliminary Approval Motion, an incentive award of \$2500 to each named Plaintiff remains fair and reasonable. In light of the work performed, an incentive award of \$2500 is approved.

D. Fee and Cost Award

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. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). However, “courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount.” *Id.* “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.

2. Application

Class Counsel requests an allocation of \$825,000 from the Gross Cash Settlement amount for attorney’s fees. Dkt. 77 at 2. This amount exceeds the range of \$620,000 to \$697,000 that was approved in the Preliminary Approval Order. Dkt. 77 at 32. The Preliminary Approval Order directed Plaintiffs’ Counsel to “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.” *Id.* It also stated that a final determination of the amount of the award was reserved for the motion for final approval. *Id.*

Class Counsel have devoted additional time to this matter since the issuance of the Preliminary Approval Order. The First Supplemental Fisher Declaration was filed in support of the Motion for Preliminary Approval. At the time the declaration was filed, Bursor & Fisher identified 639.5 hours as the time worked to date; Reich, Radcliffe & Hoover identified 176.2 hours, and Ahdoot & Wolfson identified 215.4 hours. First Suppl. Fisher Decl., Dkt. 72, Exs. A-C.

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In connection with the Motion for Final Approval, Bursor & Fisher has identified 693.6 hours worked to date; Reich, Radcliffe & Hoover has identified 190.2 hours; and Ahdoot & Wolfson has identified 219.8 hours. Dkt. 77-1 at 20-21.

a) Percentage Approach

Plaintiffs argue that, for purposes of attorney’s fees, the calculation of the total value of the settlement should include both the cash settlement fund and the voucher settlement fund. Dkt. 77-1 at 13-14. The Preliminary Approval Order included only the value of the cash settlement fund in calculating the percentage of the benefit to the Class. Dkt. 74 at 22-23. This calculation resulted in a total value of \$2.5 million. Plaintiff’s proposed calculation method would result in a total settlement fund value of \$5.5 million. If the total settlement value is deemed \$5.5 million, Plaintiffs’ requested attorney’s fees of \$825,000 would represent 15% of the total value. If the total settlement value is calculated at \$2.5 million, Plaintiffs’ requested fees would represent 33% of the total value.

Under the terms of the Settlement Agreement, Defendant has committed to providing \$2,500,000 in cash and 1.5 million vouchers worth between \$2.00 and \$2.49 per voucher. Settlement Agreement ¶ 40. Each Class Member may choose between receiving a cash payment or a voucher. Both the cash settlement fund and the vouchers are non-reversionary. The Preliminary Approval Order concluded that the vouchers provided to Class Members are properly deemed “coupons,” because they require Class Members to make additional expenditures to receive the value of the voucher. See Dkt. 74 at 22. Nonetheless, it concluded that the settlement was not a “coupon” settlement within the meaning of CAFA because Class Members have the option to choose a cash award instead of a voucher. Therefore, the settlement was deemed not subject to the CAFA limitations on contingent fees for “coupon” settlements.

Because consumers have the option to choose between a cash award and a voucher, and because the coupons are ones that require a purchase, Plaintiffs have not demonstrated that the value of the vouchers should be added to the calculation of the total value of the settlement. It is possible that all Class Members may elect to receive a cash payment rather than a voucher, and such a result may affect the amount of the pro rata payments. Plaintiffs have not presented data or evidence as to what has happened historically in similar circumstances where a choice between vouchers and cash payments has been presented to Class Members, or as to the actual value that has been generated for the Class through the voucher option.

For these reasons, Plaintiffs have not shown that the value of the settlement should be calculated differently than in the Preliminary Approval Order. Thus, Plaintiffs’ requested fee award of \$825,000 represents 33% of the total value of the settlement. The Preliminary Approval Order concluded that an estimated final award of 30.6% appeared reasonable. Dkt. 74 at 23. An upward adjustment to 33% is not a sufficient difference that it changes the prior analysis, nor is it one that would require a renotification of the Class, none of whom objected or opted out following the prior notice. Therefore, the fees requested are a reasonable percentage of the settlement for the reasons stated in the Preliminary Approval Order. See Dkt. 74 at 22-23.

b) Lodestar Cross-Check

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Class Counsel provide two bases for their request for an upward departure from the fee award range approved in the Preliminary Approval Order. *First*, they have submitted additional hours worked since the Preliminary Approval Order issued. *Second*, they have presented additional evidence to support the reasonableness of their previously-submitted hourly rates and hours worked, to which the Preliminary Approval Order made modest downward adjustments. Dkt. 74 at 28-32.

(1) Reasonableness of Rates Charged

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

Bursor & Fisher, P.A. - In re Smashburger IP Holder Hours Summary Through 11/29/2022			
Total Lodestar			
ATTORNEY	HOURS	RATE	TOTAL
L. Timothy Fisher (LTF)	246.5	\$1,000	\$246,500.00
Jennifer S. Rosenberg (JSR)	1.9	\$875	\$1,662.50
Neal J. Deckant (NJD)	2.2	\$775	\$1,705.00
Yeremey Krivoshey (YOK)	0.3	\$725	\$217.50
Blair Reed (BER)	316.1	\$425	\$134,342.50
Brittany Scott (BSS)	4.6	\$375	\$1,725.00
Jenna L. Gavemann (JLG)	1.0	\$325	\$325.00
Emma Blake (EFB)	3.1	\$325	\$1,007.50
Angeli Patel (AP)	1.5	\$325	\$487.50
Joshua Wilner (JRW)	4.5	\$325	\$1,462.50
Shinhye Choi (SC)	1.9	\$325	\$617.50
Debbie Schroeder (DLS)	27.3	\$300	\$8,190.00
Rebecca Richter (RSR)	0.1	\$300	\$30.00
Molly Sasseen (MCS)	46.9	\$300	\$14,070.00
Judy Fontanilla (JMF)	34.7	\$275	\$9,542.50
Amy Michel-Arce (ASM)	1.0	\$275	\$275.00
TOTAL	693.6		\$422,160.00
Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022			
ATTORNEY	HOURS	RATE	TOTAL
Tina Wolfson	75.4	\$950	\$71,630.00

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Robert Ahdoot	8.9	\$950	\$8,455.00
Theodore Maya	0.8	\$750	\$600.00
Bradley King	123.8	\$650	\$80,470.00
Jessielle Fabian	10	\$350	\$3,500.00
Samantha Benson	0.9	\$250	\$225.00
TOTAL	219.8		\$164,880.00
Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022			
ATTORNEY	HOURS	RATE	TOTAL
Marc G. Reich, Esq. (MGR)	167.2	\$875	\$146,300.00
Adam T. Hoover (ATH)	18.8	\$775	\$14,570.00
Byron S. Ahn (BSA)	4.2	\$575	\$2,415.00
TOTAL	190.20		\$163,285.00
TOTAL ALL FIRMS	1103.6		\$750,325.00

As shown, Plaintiffs' Counsel has worked a total of 1103.6 hours on this matter, with a total, corresponding lodestar of \$750,325.

The Preliminary Approval Order concluded that the hourly rates of Class Counsel were reasonable, with the exception of rates above \$700/hour. Dkt. 74 at 25. Because Plaintiffs' Counsel had provided insufficient evidence to support these rates, the Preliminary Approval Order concluded that a reduction of these rates by 10% was warranted for purposes of calculating the lodestar. *Id.*

Plaintiffs' Counsel have now proffered additional evidence to support the rates in excess of \$700 an hour. Plaintiffs' Counsel provides evidence regarding market rates for attorneys in the Los Angeles area. See Fisher Decl., ¶ 30, Ex. 3. The evidence includes surveys, including one compiled by Wolters Kluwer, with the market rates of litigation attorneys. *Id.* Plaintiffs also cite several cases from this District in which rates between \$700 to \$1,000 for senior attorneys have been approved for reasonably comparable services. See Dkt. 77-2 ¶ 29.

With respect to attorney's fees requested by Bursor & Fisher, Fisher states that he received his J.D. in 1997 and founded Bursor & Fisher in 2011. Fisher Decl. ¶¶ 16-17. Bursor & Fisher have served as trial counsel in six class actions, and have been successful in all of them. *Id.* ¶ 18. Fisher has also "been counsel to class action plaintiffs in dozens of cases in jurisdictions throughout the United States." *Id.* ¶ 19. The firm resume for Bursor & Fisher is attached as Exhibit 1 to the Fisher Declaration. *Id.*, Ex. 1. The resume includes information about the experience of the other Bursor & Fisher attorneys claiming rates in excess of \$700: Jennifer S. Rosenberg, Neal J. Deckant, and Yeremey Krivoshey. *Id.* Deckant is a partner who has been an attorney since 2011, and Krivoshey is a partner who has been an attorney since 2013 and has "secured over \$200 million for class members in consumer class

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settlements” since 2017. *Id.* Rosenberg is not included in the firm resume, but the table in Exhibit 2 to the Fisher Declaration states that she is an associate who has been an attorney since 1985. *Id.*, Ex. 2.

Fisher states that “[g]iven Bursor & Fisher’s unique experience and track record of success winning 6 of 6 class action trials, my hourly rate is set at \$1,000.00, which is the same rate that my firm charges to clients who retain us on an hourly basis.” Fisher Decl. ¶ 31. Fisher cites several recent federal cases that have found his firm’s rates reasonable, including one in 2022 in the Central District finding that rates between \$250/hour and \$1000/hour “reasonable compared to other awards in California courts.” *Kaupelis v. Harbor Freight Tools USA, Inc.*, 2022 WL 2288895, at *9 (C.D. Cal. Jan. 12, 2022).

With respect to fees requested by Reich Radcliffe & Hoover, Marc G. Reich provides a declaration (“Reich Decl.”) as to the experience of attorneys at the firm. Reich Decl., Dkt. 77-3. Reich states that he performed most of the work in this matter, and was assisted at times by Adam Hoover and Byron Ahn. *Id.* ¶ 3. Reach also states that the rates of Reich Radcliffe & Hoover were recently deemed reasonable by a court in this District, based on an hourly rate of \$875 for Reich and \$775 for Hoover. *Id.* ¶ 6. The firm’s resume states that Reich founded the firm in 1999, and it details the numerous class action suits for which the firm has been sole lead counsel. *Id.*, Ex. A. Hoover is a partner and has been an attorney since 2005, and Ahn has been an attorney since 2012. *Id.*

With respect to the fees requested by Ahdoot & Wolfson (“AW”), Tina Wolfson provides a declaration (“Wolfson Decl.”) regarding the firm’s experience. Wolfson Decl., Dkt. 77-4. Wolfson and Ahdoot founded AW in 1998, and it is now “a nationally recognized law firm that specializes in complex and class action litigation, with a focus on privacy rights, consumer fraud, anti-competitive business practices, employee rights, defective products, civil rights, and taxpayer rights.” *Id.* ¶ 14. AW has served as lead counsel in “numerous complex consumer class actions.” *Id.* ¶ 15. Wolfson cites several cases that have “awarded AW attorneys’ fees at rates that are comparable to the rates applicable to this matter.” *Id.* ¶ 32; *see, e.g., Alvarez, et al. v. Sirius XM Radio, Inc.*, Case No. 2:18-08605-JVS-SS (C.D. Cal Feb. 9, 2021). Wolfson attaches surveys and reports of market rates for attorney’s fees that “show[] that the rates claimed by AW are well within the range of rates found reasonable for other law firms.” *Id.* ¶ 34.

The evidence proffered by Plaintiffs supports a determination that certain adjustments from the hourly rates adopted in the Preliminary Approval Order for purposes of the lodestar calculation should be made. The following modified reasonable hourly rates are adopted: \$950 for L. Timothy Fisher, \$725 for Neal J. Deckant, \$700 for Yeremey Krivoshey, \$950 for Tina Wolfson, \$875 for Robert Ahdoot, \$750 for Theodore Maya, \$825 for Marc G. Reich, and \$788 for Jennifer S. Rosenberg. For all other attorneys, the rates adopted in the Preliminary Approval Order are retained.

(2) Reasonableness of Hours Worked

Plaintiffs’ Counsel also provide summary tables of their total hours worked by task for each firm, including hours worked before and after preliminary approval. These tables are presented below.

Bursor & Fisher, P.A. - In re Smashburger IP Holder Hours Summary Through 11/29/2022				
ATTORNEY	RATE	TASK	HOURS	TOTAL

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L. Timothy Fisher (LTF)	\$1000	Pre-Suit and Pleadings	5.4	\$246,500.00
		Case Management	24.5	
		Leadership	29.9	
		Discovery	16.6	
		Settlement	170.1	
Jennifer S. Rosenberg (JSR)	\$875	Pre-Suit and Pleadings	0.0	\$1,662.50
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	1.9	
Neal J. Deckant (NDJ)	\$775	Pre-Suit and Pleadings	0.0	\$1,705.00
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	2.2	
Yeremey O. Krivoshey (YOK)	\$725	Pre-Suit and Pleadings	0.0	\$217.50
		Case Management	0.3	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	0.0	
Blair E. Reed (BER)	\$425	Pre-Suit and Pleadings	11.4	\$134,342.50
		Case Management	37.5	
		Leadership	29.3	
		Discovery	43.9	
		Settlement	194.0	
Brittany S. Scott (BSS)	\$375	Pre-Suit and Pleadings	0.0	\$1,725.00
		Case Management	2.7	
		Leadership	0.0	
		Discovery	0.3	
		Settlement	1.6	
Jenna L. Gavemann (JLG)	\$325	Pre-Suit and Pleadings	0.0	\$325.00
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	1.0	
Emma Blake (EFB)	\$325	Pre-Suit and Pleadings	0.0	\$1,007.50
		Case Management	0.0	
		Leadership	0.0	

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		Discovery	0.0	
		Settlement	3.1	
Angeli Patel (AP)	\$325	Pre-Suit and Pleadings	1.5	\$487.50
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	0.0	
Joshua Wilner (JRW)	\$325	Pre-Suit and Pleadings	0.0	\$1,462.50
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	4.5	
Shinhye Choi (SC)	\$325	Pre-Suit and Pleadings	0.0	\$617.50
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	1.9	
Debbie Schroeder (DLS)	\$300	Pre-Suit and Pleadings	1.3	\$8,190.00
		Case Management	9.6	
		Leadership	3.1	
		Discovery	1.6	
		Settlement	11.7	
Rebecca Richter (RSR)	\$300	Pre-Suit and Pleadings	0.0	\$30.00
		Case Management	0.0	
		Leadership	0.0	
		Discovery	0.0	
		Settlement	0.1	
Molly Sasseen (MCS)	\$300	Pre-Suit and Pleadings	7.9	\$14,070.00
		Case Management	7.0	
		Leadership	17.3	
		Discovery	0.0	
		Settlement	14.7	
Judy Fontanilla (JMF)	\$275	Pre-Suit and Pleadings	0.0	\$9,542.50
		Case Management	0.6	
		Leadership	2.7	
		Discovery	5.9	
		Settlement	25.5	
Amy Michel-Arce (ASM)	\$275	Pre-Suit and Pleadings	0.0	\$275.00

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	Case Management	0.0
	Leadership	0.0
	Discovery	0.0
	Settlement	1.0

Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022

Total Lodestar				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Tina Wolfson	Partner	75.4	\$950	\$71,630.00
Robert Ahdoot	Partner	8.9	\$950	\$8,455.00
Theodore Maya	Partner	0.8	\$750	\$600.00
Bradley King	Partner	123.8	\$650	\$80,470.00
Jessielle Fabian	Associate	10.0	\$350	\$3,500.00
Samantha Benson	Paralegal	0.9	\$250	\$225.00
		219.8		\$164,880.00
			Expenses:	\$1,063.16
			Total:	\$165,943.16

Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022

Pre-Suit & Pleadings				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Tina Wolfson	Partner	11.9	\$950	\$11,305.00
Robert Ahdoot	Partner	4.6	\$950	\$4,370.00
Bradley King	Partner	28.1	\$650	\$18,265.00
		Total:	44.6	\$33,940.00

Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022

Case Management				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Tina Wolfson	Partner	16.3	\$950	\$15,485.00
Robert Ahdoot	Partner	1.2	\$950	\$1,140.00
Theodore Maya	Partner	0.8	\$750	\$600.00
Bradley King	Partner	21.1	\$650	\$13,715.00
Jessielle Fabian	Associate	9.8	\$350	\$3,430.00
Samantha Benson	Paralegal	0.9	\$250	\$225.00

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Total:		50.1		\$34,595.00
Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022				
Leadership				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Tina Wolfson	Partner	11.4	\$950	\$10,830.00
Robert Ahdoot	Partner	1.4	\$950	\$1,330.00
Bradley King	Partner	30.2	\$650	\$19,630.00
Jessielle Fabian	Associate	0.2	\$350	\$70.00
Total:		43.2		\$31,860.00
Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022				
Discovery				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Tina Wolfson	Partner	6.0	\$950	\$5,700.00
Bradley King	Partner	21.3	\$650	\$13,845.00
Total:		27.3		\$19,545.00
Ahdoot & Wolfson, PC - In re Smashburger IP Holder Hours Summary Through 11/30/2022				
Settlement				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Tina Wolfson	Partner	29.8	\$950	\$28,310.00
Robert Ahdoot	Partner	1.7	\$950	\$1,615.00
Bradley King	Partner	23.1	\$650	\$15,015.00
Total:		54.6		\$44,940.00

Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022				
Total Lodestar				
ATTORNEY	TITLE	HOURS	RATE	TOTAL
Marc G. Reich, Esq. (MGR)	Partner	167.2	\$875	\$146,300.00
Adam T. Hoover (ATH)	Partner	18.8	\$775	\$14,570.00
Byron S. Ahn (BSA)	Associate	4.2	\$575	\$2,415.00
		190.2		\$163,285.00
			Expenses:	\$105.88

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				Total:	\$163,390.88
Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022					
Pre-Suit & Pleadings					
ATTORNEY	TITLE	HOURS	RATE	TOTAL	
Marc G. Reich, Esq. (MGR)	Partner	38.5	\$875	\$33,687.50	
Adam T. Hoover (ATH)	Partner	2.5	\$775	\$1,937.50	
Total:		41.0		\$35,625.00	
Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022					
Case Management					
ATTORNEY	TITLE	HOURS	RATE	TOTAL	
Marc G. Reich, Esq. (MGR)	Partner	8.5	\$875	\$7,437.50	
Adam T. Hoover (ATH)	Partner	1.3	\$775	\$1,007.50	
Total:		9.8		\$8,445.00	
Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022					
Leadership					
ATTORNEY	TITLE	HOURS	RATE	TOTAL	
Marc G. Reich, Esq. (MGR)	Partner	16.3	\$875	\$14,262.50	
Adam T. Hoover (ATH)	Partner	0.7	\$775	\$542.50	
Total:		17.0		\$14,805.00	
Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022					
Discovery					
ATTORNEY	TITLE	HOURS	RATE	TOTAL	
Marc G. Reich, Esq. (MGR)	Partner	22.0	\$875	\$19,250.00	
Adam T. Hoover (ATH)	Partner	3.0	\$775	\$2,325.00	
Byron S. Ahn (BSA)	Associate	4.2	\$575	\$2,415.00	
Total:		29.2		\$23,990.00	
Reich Radcliffe & Hoover LLP - In re Smashburger IP Holder Hours Summary Through 12/2/2022					
Settlement					
ATTORNEY	TITLE	HOURS	RATE	TOTAL	
Marc G. Reich, Esq. (MGR)	Partner	81.9	\$875	\$71,662.50	
Adam T. Hoover (ATH)	Partner	11.3	\$575	\$6,497.50	

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Total:	93.2		\$78,160.00
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Considering the additional hours that Plaintiffs’ counsel have spent on this matter since the preliminary approval process, and applying the modified, reasonable rates that have been adopted in this Order, an additional lodestar amount of approximately \$50,000 is warranted since preliminary approval. Applying the adjusted rates to Plaintiffs’ counsel’s work before preliminary approval results in an adjusted lodestar of approximately \$645,000. These calculations result in a total lodestar of approximately \$695,000.

Based on a consideration of the range that was preliminarily approved in the Preliminary Approval Order, as well as the appropriateness of the application of a multiplier in light of the risks undertaken and results obtained by counsel, as well as the additional evidence that has been presented in connection with the Motions, it is determined that an award of attorney’s fees in the amount of \$775,000 is reasonable.

c) Litigation Costs

Plaintiffs submit litigation expenses of \$21,541.02. Fisher Decl., Ex. 13. These expenses only slightly exceed those of \$21,358.64 that were deemed reasonable in the Preliminary Approval Order. Dkt. 74 at 32. Plaintiffs provide a log of expenses that is sufficient to support the appropriateness and reasonableness of the claimed costs. Fisher Decl., Ex. 13. Therefore, Plaintiff’s request for litigation costs is approved.

E. Settlement Administration Costs

The Preliminary Approval Order stated that because Plaintiffs had not submitted evidence supporting the basis for administrative costs of \$400,000, the matter would be reviewed de novo in connection with the motion for final approval. Dkt. 74 at 33.

Plaintiffs have provided a declaration by Scott M. Fenwick stating that the Settlement Administrator received approximately four times as many claims as anticipated, and, therefore, requires more time to validate claim forms and send payments. Fenwick Decl. ¶ 9. The declaration, filed on January 9, 2023, states that once the claims deadline of January 17, 2023 has passed and the total number of claims is known, the Settlement Administrator “will assess the amount of work required to finalize the claims process and distributions and will provide the Parties and the Court with a revised estimate of Settlement Administration Expenses for approval to complete work on the administration.” *Id.* The Settlement Administrator now expects the settlement administration costs to exceed the originally-estimated \$400,000. The settlement administration cost award is approved; provided, however, within 10 days of the issuance of this Order, evidence shall be submitted as to those costs. Based on a review of that evidence, a determination will be made whether any adjustment to the \$400,000 amount is warranted.

IV. Conclusion

For the reasons stated in this Order, the Motions are **GRANTED**.

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Within ten days of the issuance of this Order, after meeting and conferring, counsel for the parties shall submit a proposed judgment in this matter. If the parties cannot reach an agreement on the form of the judgment, then within the same ten-day period, Plaintiffs shall lodge a proposed judgment, and Defendants shall file any objections to it, as well as a redline version that shows the proposed modifications.

Initials of Preparer

_____ : _____
tj
