UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV 18-07480 JAK (MRWx)	Date	November 16, 2023
Title	Michael Lavigne et al. v. Herbalife, LTD., 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 ATTORNEYS' FEES AND COSTS (DKT. 399); PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT (DKT. 401)**

I. Introduction

On September 18, 2017, this action was filed in the Southern District of Florida. Dkt. 1. The original named plaintiffs were eight individuals who were distributors, or spouses of distributors, of Herbalife, a multi-level marketing business. *Id.* ¶¶ 2, 147-202. The following Defendants were named at that time: Herbalife, Ltd.; Herbalife International, Inc.; Herbalife International of America, Inc. (collectively, the "Herbalife Defendants"); and 44 high-ranking Herbalife distributors (the "Individual Defendants"). *Id.* ¶¶ 203-327.

On December 14, 2017, the Herbalife Defendants and the Individual Defendants moved to compel arbitration of Plaintiffs' claims or, in the alternative, to transfer the claims to the Central District of California. Dkts. 62-63. On August 23, 2018, the motions were granted in part as to the claims against the Herbalife Defendants, and arbitration was compelled as to the claims of four of the plaintiffs. Dkt. 106. The claims of the other four plaintiffs -- Jeff Rodgers, Patricia Rodgers, Jennifer Ribalta and Izaar Valdez ("Plaintiffs") -- were transferred to this District, pursuant to the choice-of-law provision in the applicable Herbalife distributor agreements. *Id.* The claims against the Individual Defendants were severed and maintained in the Southern District of Florida. Dkt. 106 at 2.

The Individual Defendants appealed the order regarding arbitration, and the Eleventh Circuit affirmed. *Lavigne v. Herbalife, Ltd.*, 967 F.3d 1110, 1121 (11th Cir. 2020). Parallel litigation proceeded in Florida after the decision. That litigation has been stayed pending final approval of this settlement agreement, "with the intention of dismissing the Florida Action should this Court finally approve the parties' proposed class Settlement." Dkt. 384 at 14.

On September 28, 2018, the Herbalife Defendants moved to dismiss Plaintiffs' claims. Dkt. 142. On October 22, 2019, the Motion to Dismiss was granted without prejudice. Dkt. 196.

On November 12, 2019, Plaintiffs filed a First Amended Complaint ("FAC"), which is the operative one. Dkt. 202. The FAC only advances claims against Herbalife International of America, Inc. ("Defendant" or "Herbalife"). *Id.* They are as follows:

1. Conducting the Affairs of a Racketeering Enterprise -- RICO 18 U.S.C. § 1962(C);
2. Conspiracy to Conduct the Affairs of a Racketeering Enterprise -- 18 U.S.C. § 1962(D);
3. Violation of California's Unfair Competition Law -- Cal. Bus. & Prof. Code §§ 17200 et seq.; and
4. Negligent Misrepresentation.

Id. These claims arise from alleged misrepresentations made by Herbalife to its distributors regarding the financial benefits that they would receive from attending its "Circle of Success" events. *Id.* ¶¶ 1-11.

On November 26, 2019, Herbalife filed a Motion to Dismiss Amended Complaint. Dkt. 208. Plaintiffs opposed the motion on December 23, 2019 (Dkt. 219), and Herbalife replied on January 6, 2020 (Dkt. 222). On November 25, 2019, Plaintiffs filed a Motion for Class Certification. Dkt. 207. Herbalife opposed the Motion for Class Certification on December 20, 2019 (Dkt. 218), and Plaintiffs replied on January 13, 2020 (Dkt. 234). A hearing on the Motion to Dismiss Amended Complaint and the Motion for Class Certification was held on February 24, 2020, and the matters were taken under submission. Dkt. 261. On April 7, 2021, Herbalife withdrew the Motion to Dismiss Amended Complaint. Dkt. 350.

On February 15, 2021, Herbalife filed a Motion for Summary Judgment. Dkt. 322. Plaintiffs opposed the motion on March 8, 2021 (Dkt. 339), and Herbalife replied on March 22, 2021 (Dkt. 340). The hearing on that motion was continued several times as the parties discussed a potential settlement. *See, e.g.*, Dkt. 357; Dkt. 364; Dkt. 373; Dkt. 375; Dkt. 377; Dkt. 379; Dkt. 382. Because they reached an agreement, the Motion for Summary Judgment became moot.

On May 27, 2022, Plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement (the "Preliminary Approval Motion"). Dkt. 384. Through the Preliminary Approval Motion, Plaintiffs sought the following:

1. Conditional class certification;
2. Preliminary approval of the settlement agreement ("Settlement Agreement");
3. Approval of the proposed notice ("Notice");
4. Appointment of Plaintiffs as class representatives ("Class Representatives");
5. Appointment of Plaintiffs' counsel as class counsel ("Class Counsel");
6. Appointment of A.B. Data as claims administrator ("Claims Administrator");
7. Stay of all non-settlement related proceedings in this action pending a determination on the motion for final approval of the Settlement Agreement; and
8. Scheduling of a hearing on final approval of the class action settlement.

Id. at 2-3.

On October 21, 2022, Plaintiffs filed a Motion for Class Counsel's Attorney Fees, Reimbursement of Expenses and Service Awards ("Initial Fee Motion"). Dkt. 392. A hearing on the Preliminary Approval Motion and the Initial Fee Motion was held on October 24, 2022, and the matters were taken under submission. Dkt. 393. The Preliminary Approval Motion was granted on April 6, 2023 (the "Preliminary Approval Order"). Dkt. 396. Because the Preliminary Approval Order and this one raised many of the same issues, it is incorporated here by this reference.

On June 19, 2023, Plaintiff filed a second Motion for Attorneys' Fees and Costs (the "Fee Motion"). Dkt. 399. On September 8, 2023, Plaintiff filed a Motion for Final Approval of Class Action Settlement (the "Final Approval Motion"). Dkt. 401.

A hearing on the Fee Motion and Final Approval Motion was held on October 16, 2023, and the matters were taken under submission. For the reasons stated in this Order, both the Fee Motion and the Final Approval Motion are **GRANTED**, subject to certain modifications in the requested relief that are addressed in this Order.

II. Background

A. The Parties

The FAC alleges that Herbalife is a multi-level marketing operation. Dkt. 202 ¶ 4. Herbalife and "approximately 100 leadership level members of its President's Team" (the "Featured Speakers") allegedly produce and then sell access to Herbalife-related events, which are marketed as the "Circle of Success." Dkt. 202 ¶¶ 1-6, 212. Plaintiffs are individuals who allegedly attended Herbalife events. *Id.* ¶¶ 163-193. They seek to represent a putative class of those who attended such events, but did not attain any corresponding financial success. *Id.* ¶¶ 8, 161.

Patricia and Jeff Rodgers allegedly attended "almost every" Circle of Success event between 2011 and 2015 and spent more than $100,000 on Herbalife matters, including "at least $20,000 . . . directly from their participation in the Circle of Success event cycle." *Id.* ¶¶ 172-174. Izaar Valdez allegedly spent more than $3500 on Circle of Success events in 2014, and more than $10,000 purchasing products for "qualification." *Id.* ¶ 181. Jennifer Ribalta was allegedly selected to become a member of the "event 'Production Team.' " *Id.* ¶ 186. This position required her to pay to attend events at which she also worked. *Id.* Ribalta allegedly spent more than $10,000 attending Herbalife events. *Id.* ¶ 193.

B. Other Allegations in the FAC

The FAC alleges that at Herbalife's events, Herbalife distributors, and others who are recruited to attend, were continually told, "If you go to all the events, you qualify for everything -- you will get rich." *Id.* ¶ 7. The FAC alleges that Circle of Success events are presented on a yearly cycle, and include three large-scale events for which each attendee is required to pay up to $120. *Id.* ¶ 61. The large-scale events allegedly include "Leadership Development Weekends" and "Extravaganzas," produced and ticketed by Herbalife, as well as "January Spectaculars," sponsored and ticketed by Herbalife prior to 2014. *Id.* ¶¶ 82-96.

During each year, Herbalife allegedly presented eight local Success Training Seminars ("STS"), and charged up to $50 to each attendee. *Id.* ¶ 63, 67. The STS and post-2014 January Spectaculars were allegedly ticketed by a "shifting list of top distributor-related entities and individuals." *Id.* ¶¶ 76-77, 88. Herbalife allegedly collaborated on event production, and reviewed in advance the materials that would be presented to attendees. *Id.* ¶¶ 156, 159. The FAC alleges that Herbalife and the Featured Speakers profited from the sale of event tickets. *Id.* ¶ 157-158. It alleges that Herbalife compensates certain high-ranking Featured Speakers for their appearances at events. *Id.* ¶ 157.

The FAC alleges that Herbalife promoted the Circle of Success and distributed training materials regarding event production by mail and wire. *Id.* ¶¶ 79, 97-114. STS promotional materials allegedly included testimonials by purportedly successful Herbalife distributors. *Id.* ¶¶ 115-117. The FAC alleges that similar testimonials were also presented as the central feature at Circle of Success events. *Id.* ¶ 53. At each event, attendees were allegedly told that the key to success is to continue to attend every future event; this would result in an annual, per person cost of more than $600. *Id.* ¶¶ 124-139. It is also alleged that attendees were encouraged to buy non-refundable tickets for future events. *Id.* ¶ 81.

The FAC alleges that Herbalife publishes "speaker guidelines" that require those who speak at all Herbalife events to include income disclaimers "as required," and substantiate earnings claims "that cannot easily be obtained from BizWorks," including claims such as "I make more money now than I did as a mechanic." *Id.* ¶¶ 64-65; *see* Ex. 5, Dkt. 202-6 at 2-3 (requiring speakers to submit PowerPoint presentations or "talking points" for Herbalife's review prior to presenting the content at an event). It is alleged that Herbalife has not enforced these guidelines. *Id.* ¶ 66.

The FAC alleges that the "Herbalife business opportunity" includes selling Herbalife products and recruiting new participants. *Id.* ¶¶ 21, 23. It is alleged that, through the Herbalife business opportunity as well as the event system, Herbalife distributors can rise through a sequence of compensation levels based on the dollar amount of their purchases of Herbalife products and their success in recruiting new distributors. *Id.* ¶¶ 140-143. "Qualification" for new levels allegedly entitles distributors to benefits. *Id.* However, "qualification" also allegedly refers to purchases made specifically to attain recognition within the Circle of Success. *Id.* ¶¶ 144-155. Distributors are allegedly encouraged to "qualify for everything," with many of the rewards for qualification tied to participation in events. *Id.* ¶¶ 151-155. Based on this system, it is alleged that Distributors are "locked in a cycle of mandatory monthly purchases" in order to benefit from the perks of qualification. *Id.* ¶ 158.

III. Summary of Settlement Agreement

The primary terms of the Settlement Agreement (Dkt. 383) are summarized in the following discussion.

A. Class Definition

The Settlement Agreement defines the "Settlement Class" as follows:

> All U.S. Herbalife distributors who purchased tickets to at least two Herbalife Events during the Class Period," excluding "past and present members of Herbalife's Chairman's Club and Founder's Circle to the extent those individuals were members of Herbalife's President's Team or above throughout the Class Period, including their spouses, heirs, predecessors, successors, representatives, alter egos, or assigns. Also excluded are any U.S. Herbalife distributors who have previously executed a release of the claims that are the subject matter of this litigation.

Id. ¶¶ 1.16, 1.16.1.

The "Class Period" is defined as "beginning January 1, 2009, through and including the date the Preliminary Approval Order is entered." *Id.* ¶ 1.5.

B. Payment to Putative Class Members

1. Gross Settlement Amount

The Settlement Agreement provides for the establishment of a non-reversionary "Settlement Fund" in the amount of $12,500,000 ("Gross Settlement Amount"). *Id.* ¶ 4.1.

2. Deductions from the Gross Settlement Amount

a) Overview

The parties allocated the Settlement Fund as follows: $840,270 for third-party administrator costs; $4,166,667 for attorneys' fees; $337,926 for litigation costs and expenses; and a total incentive award in the amount of $78,000, with $30,000 each to be allocated to Rodgers and Ribalta, and $18,000 to be allocated to Valdez. Dkt. 399 at 2. The following table summarizes these proposed allocations.

Description of Amount	Amount	Percent
Gross Settlement Amount	**$12,500,000**	**100%**
Enhancement Awards to Class Representatives	$78,000	0.6%
Attorneys' Fees Award	$4,166,667	33.3%
Litigation Costs and Expenses	$337,926	2.7%
Third Party Administrator Costs	$840,270	6.7%
Net Settlement Fund	**$7,077,138**	**56.7%**

b) Class Representatives' Incentive Awards

The Settlement Agreement provides that "[t]he Court may award reasonable incentive compensation to the Named Plaintiffs for their service in the case, which shall come from the Settlement Fund." Dkt. 383 ¶ 10.3. As noted, the Fees Motion requests a total incentive award of $78,000, with $30,000 allocated to each of Rodgers and Ribalta, and $18,000 allocated to Valdez. Dkt. 399 at 2.

c) Settlement Administration Costs

The Settlement Agreement provides that A.B. Data will administer notice of the settlement. Dkt. 383 ¶ 1.3. At the hearing on the Preliminary Approval Motion, Plaintiffs represented that the estimated cost of settlement administration would be $417,000. The Final Approval Motion states that the settlement administration costs exceeded that amount by $423,000, due to an unexpected increase in postage fees. Dkt. 401 at 25-26. The Final Approval Motion requests a total disbursement of $840,267 to the Administrator as to all costs. *Id.*

d) Attorney's Fees

The Settlement Agreement does not state the specific amount of an award of attorney's fees to counsel for the Class. It provides that "Plaintiffs' Counsel may apply to the Court at the Settlement Hearing for

an award of attorneys' fees and reimbursement of their expenses and costs from the Settlement Fund in an amount to be determined by the Court as a percentage of the entire value of settlement . . . ." Dkt. 383 ¶ 10.1. The Notice states that Class Counsel's attorney's fee request will not exceed 33.33% of the Gross Settlement Amount, which is $4,166,667. Dkt. 383-1 at 10.

The Final Approval Motion requests an award of $4,166,666 in attorney's fees. Dkt. 401 at 26. It also requests a payment of $337,926 for the reimbursement of litigation costs and expenses. *Id.* at 27.

3. Calculation of Individual Settlement Payments

The net settlement amount will be distributed among members of the Settlement Class ("Settlement Class Members") based on the number of Herbalife event tickets each purchased. First, "[e]ach Settlement Class Member shall be informed by the Claims Administrator as to the Herbalife Corporate Events for which that Settlement Class Member purchased tickets according to Herbalife's records." Dkt. 383 ¶ 4.2.1. Settlement Class Members may then "claim additional Herbalife Events for which the Settlement Class Member purchased tickets" if the Member certifies certain information about any such events. *Id.* ¶ 4.2.2.

After amounts from the Gross Settlement Fund have been allocated to settlement administration costs, attorney's fees, costs and incentive awards, the Claims Administrator is to calculate the remaining Net Settlement Amount. *Id.* ¶ 4.2.3. That amount will then be allocated to members of the Class based on the total number of Herbalife Event tickets purchased by Authorized Claimants[1] (the "Per Event Award"). *Id.*

Each Authorized Claimant will then be entitled to receive a Per Event Award based on each event for which they purchased a ticket. *Id.* ¶ 4.2.4. Payments made to each Claimant are subject to a payment ceiling of 150% of the total amount that Claimant spent on tickets. *Id.*

The Settlement Agreement provides that the "total amount of payments allocated to Authorized Claimants may not exceed the amount of the Net Settlement Fund." *Id.* ¶ 4.2.5. If the total amount of payments allocated to Authorized Claimants exceeds the amount of the Net Settlement Fund, the amount of the Per Event Award will be reduced according to a graduated scale. *Id.* A Claimant's Per Event Award will be reduced according to the number of events for which the Claimant purchased tickets. *Id.* The amount each receives will be calculated by applying the following scale:

(a) 2 to 5 Herbalife Events: Per Event Award.
(b) 6 to 10 Herbalife Events: 75 percent of Per Event Award for the tickets purchased for this subset of events.
(c) 11 to 15 Herbalife Events: 50 percent of Per Event Award for the tickets purchased for this subset of events.
(d) 16-plus Herbalife Events: 25 percent of Per Event Award for the tickets purchased for this subset of events.

[1] The Settlement Agreement defines "Authorized Claimant" as "a Settlement Class Member who submits a timely and valid Claim Form to the Claims Administrator or is otherwise authorized to receive benefits under this Settlement Agreement." *Id.* ¶ 1.2.

Id. The Agreement further provides that if the total amount of payments allocated to Claimants exceeds the amount of the Net Settlement Fund under the above scale, "cash awards shall be paid to Authorized Claimants on a pro rata basis." *Id.* ¶ 4.2.6.

4. Non-Monetary Relief

The Settlement Agreement provides that Herbalife will adopt changes to its corporate policies that will continue for no less than three years from the issuance of the order of final approval or "such earlier date as Herbalife shall elect to implement them." *Id.* ¶ 5.1.1. The corporate changes are as follows:

> 5.1.2 Herbalife shall amend its U.S. Rules of Conduct and Distributor Policies to indicate that U.S. event attendance is not mandatory and does not guarantee financial success.
>
> 5.1.3 Herbalife shall amend its U.S. Rules of Conduct and Distributor Policies to indicate that representations made by distributors that U.S. event attendance is mandatory or that it guarantees financial success are prohibited.
>
> 5.1.4 U.S. Herbalife Corporate Event flyers, and the portion of Herbalife's website promoting U.S. STS events, shall include a disclaimer that U.S. event attendance is not mandatory and does not guarantee financial success.
>
> 5.1.5 Herbalife shall amend its U.S. Rules of Conduct and Distributor Policies to provide that ticket purchases for U.S. Herbalife Corporate Events shall be refundable via the company's existing buyback procedure pursuant to its Gold Standard Guarantee.
>
> (a) Additionally, Herbalife shall also allow distributors to cancel their U.S. Herbalife Corporate Event ticket purchases within 24 hours of purchase.
>
> 5.1.6 Herbalife distributors shall be precluded from purchasing more than two tickets per distributorship for any given U.S. Herbalife Corporate Event.

Id. ¶¶ 5.1.2-5.1.6.

C. Release of Claims

The Settlement Agreement provides for a release of claims against Defendants and related parties by Class Members upon the Effective Date. *Id.* ¶ 8.1. The release is as follows:

> As of the Effective Date and in consideration of this Settlement Agreement and the benefits extended to the Settlement Class, Herbalife Nutrition Ltd., Herbalife International, Inc., and Herbalife International of America, Inc., and each of their present and former, direct and indirect, subsidiaries, parents, affiliates, unincorporated entities, divisions, groups, officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, assignees, successors, insurers, indemnitees, attorneys, transferees, and/or representatives, as well as any non-Settlement Class Members who spoke at, presented at, planned, or promoted any Herbalife Event or sold tickets to any Herbalife Event during the Class Period (collectively, the

> "Released Parties") shall be released and forever discharged by (i) the Named Plaintiffs, for themselves and as the representatives of each Settlement Class Member; (ii) each Settlement Class Member on behalf of himself or herself or itself; and (iii) their respective present and former, direct and indirect, subsidiaries, parents, affiliates, unincorporated entities, divisions, groups, officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, assignees, successors, insurers, indemnitees, attorneys, transferees, spouses, and/or representatives (collectively, the "Releasing Parties") from all claims, demands, rights, liabilities, suits, or causes of action, known or unknown, that were or could have been asserted in the Action that are based upon, arise out of, or relate to Herbalife Events, whether organized by Herbalife or independent distributors ("Released Claims").

Id.

The Release also provides:

> The Released Claims include any unknown claims that reasonably could have arisen out of the same facts alleged in the Action that the Settlement Class Members do not know or suspect to exist in their favor at the time of the release, which, if known by them, might have affected their settlement with, and release of, the Released Parties or might have affected their decision not to object to this Settlement. With respect to the Released Claims only, the Settlement Class Members stipulate and agree that, upon the Effective Date, the Settlement Class Members shall be deemed to have, and by operation of the Final Judgment shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of Section 1542 of the California Civil Code, or any other similar provision under federal or state law, which provides:
>
> > 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. ¶ 8.2.

D. Notice and Payment Plan

1. Individual Notice

Notice of the settlement was administered by A.B. Data (the "Administrator"). Declaration of Eric Miller ("Miller Decl."), Dkt. 401-2 ¶ 2. On April 11, 2023, Defendant's counsel provided the Administrator with a list of the names and contact information for 2,841,430 U.S. Herbalife distributors during the Class Period (the "Class List"). *Id.* ¶ 3. The Administrator conducted a National Change of Address search to determine the most recent address for each person on the Class List. *Id.* ¶ 4. Thereafter, on May 19, 2023, the Administrator mailed the court-approved notice to the 463,187 U.S. Herbalife distributors with mailing addresses on the Class List, but for which there were no known email addresses. *Id.* ¶ 5. In

addition, beginning on May 8, 2023, and concluding on May 19, 2023, the Administrator sent the notice by email to the 2,347,562 U.S. Herbalife distributors whose email addresses were provided on the Class List. *Id.* ¶ 6.

A total of 597,183 emails and 181,803 mailed notices were returned to the Administrator as deliverable. *Id.* ¶ 7, 9. In response to the undelivered emails, the Administrator sent new notices via mail to 596,611 individuals for whom mailing addresses were available. *Id.* ¶ 7. In response to the undelivered mailed notices, the Administrator re-mailed notices to 108,610 individuals for whom forwarding addresses were available. *Id.*

2. 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 Preliminary Approval Motion was filed on May 27, 2022. Dkt. 384. The CAFA Notice was mailed on June 6, 2022. Dkt. 401-2 ¶ 10. The Settlement Administrator served the required notice and accompanying materials on the appropriate official of each State and the appropriate federal official. *Id.* ¶¶ 10-11.

3. Website and Toll-Free Number

On May 5, 2023, the Administrator established a case-dedicated website for this action at the URL www.herbalifeclassactionsettlement.com. *Id.* ¶ 12. The website provided summary information in English and Spanish, as well as copies of important documents, including the Preliminary Approval Motion, the Settlement Agreement and the Preliminary Approval Order. *Id.* The website also provided "information concerning the current status of the Settlement, the claim-, exclusion-, and objection-filing deadlines, contact information for Class Counsel, and the date and time of the Court's Final Approval Hearing." *Id.* As of September 8, 2023, the website had been viewed over 150,000 times. *Id.*

On May 5, 2023, the Administrator opened the toll-free number 1-866-217-4455 to the public. *Id.* ¶ 13. The line featured recorded information about the Settlement Agreement as well as answers to frequently asked questions. *Id.* The line also allowed callers to speak with a live customer service representative in English or Spanish. *Id.* As of September 8, 2023, the line had received 2787 calls. *Id.*

4. Results

The Notice informed Settlement Class Members that requests for exclusion from the settlement were required to be submitted on or before August 4, 2023. *Id.* ¶ 14. As of September 8, 2023, one Settlement Class Member had objected to the settlement, and three Settlement Class Members had opted out of the settlement. *Id.* ¶¶ 14-15. Of the three members who opted out of the settlement, one also submitted a claim, rendering that member's request for exclusion void pursuant to the terms of the Settlement Agreement. Dkt. 401 at 9.

The Notice also informed Settlement Class Members that each was required to submit a claim form on or before August 4, 2023, to be eligible to recover monetary relief from the settlement. *Id.* ¶ 16. As of September 8, 2023, the Administrator had received 164,790 completed claim forms. *Id.* ¶ 17. After the

Administrator processed those forms, removed claimants who did not meet the criteria set forth in the Class Definition and applied filters to screen for automated computer programs and other false or fraudulent claims, 37,643 claims remained. *Id.* ¶¶ 19-22. The Administrator estimates that, after further review, the number of qualified claimants will be between 4009 and 37,643, with the range of ticket expenditures totaling between $5,726,383 and $10,685,336. *Id.* ¶ 23.

IV. Analysis

A. Class Certification

The Preliminary Approval Order analyzed whether conditional certification of the Settlement Class was appropriate. Dkt. 396 at 9-18. That analysis, which has already been incorporated by reference, was the basis for granting conditional certification of the Settlement Class. The analysis, and the resulting outcome, have not changed. *See* Dkt. 401 at 17. 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 (9th Cir. 1998), 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 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 Plaintiff's 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);[2] 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 id.* 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. Advisory Committee Comments to 2018 Amendments to Rule 23.

2. Application

The Preliminary Approval Order addressed many of the relevant factors. Dkt. 396 at 20-23. None of the facts and circumstances as to any of the factors has changed since the issuance of the Preliminary Approval Order. However, because the Administrator has completed the notice process, the reaction of Settlement Class Members to the proposed settlement may now be considered in evaluating whether it is fair and appropriate.

[2] 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."

Of the 37,643 claim forms that passed the Administrator's initial round of review, only one claimant objected to the settlement, and three claimants opted out of the settlement. Dkt. 401-2 ¶¶ 14-15. Of the three who opted out, one submitted a claim, which made the request for exclusion void pursuant to the terms of the Settlement Agreement. Dkt. 401 at 9.

This result reflects a low proportion of opts outs and objections, which "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) ("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." (quoting *Nat'l Rural Telecomms. Corp. v. DirecTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004))).

The one objection that was received does not demonstrate that the settlement is unfair or unreasonable. The objection, submitted by Flor Garcia Ochoa (the "Ochoa Objection"), concerns allegations of stolen and misused royalties that do not relate to, or reflect any objection about, the Settlement Agreement and its terms. Dkt. 401-2 at 25-26. Instead, the objection alleges that Ochoa's royalties were stolen or manipulated due to discrepancies in her distribution identification number. *Id.* The objection demands reimbursement of those royalties and an expungement/erasure of Ochoa's ex-partner from her distribution identification number. *Id.* These allegations do not raise issues as to whether the Settlement Agreement is fair, adequate and reasonable. Instead, they concern an apparent dispute between Ochoa and her partner as to certain property rights. Moreover, the objection does not dispute Ochoa's inclusion in the class definition or assert entitlement to terms different than those afforded to all class members. For these reasons, the Ochoa Objection is overruled and does not weigh against final approval.

For the foregoing reasons, there have been no material changes with respect to any of the relevant circumstances since the issuance of the Preliminary Approval Order. Therefore, the same determinations are warranted at this time with respect to the fairness analysis. Consequently, the distribution of the settlement funds in the manner set forth in the Preliminary Approval Order is approved.

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

The Final Approval Motion renews Plaintiffs' requests for incentive awards of $30,000 for Rodgers, $30,000 for Ribalta and $18,000 for Valdez. Dkt. 401 at 27-28. The Preliminary Approval Order approved incentive awards in the range of $20,000 to $30,000 for Rodgers and Ribalta, and an incentive award in the range of $12,000 to $18,000 for Valdez. Dkt. 396 at 24. This determination was based on Plaintiffs' active role in assisting Class Counsel; the number of hours spent on the case; the five-year period that this action has been pending; and the declared effects on Plaintiffs' personal lives. *Id.*

Counsel argue that "[w]hile the requested incentive awards and hourly rates are atypically high," they are warranted because "each of the class representatives not only made contributions to the class typical of other class representatives" but "also had the added burden of being ostracized by and isolated from their friends and family for being one of the select few to stand up and do something about the harms alleged in this action." Dkt. 399 at 29-30. Counsel contend that this unusual burden warrants exceptional relief. *Id.* Counsel further state that the requested awards, if approved, would result in an hourly rate of $100-120 for Ribalta and Rodgers, and $120 for Valdez. *Id.* at 29. Counsel argue that such rates are not unusually high and are regularly approved by district courts in this Circuit. *Id.* (citing *Etter v. Thetford Corp.*, CV-14-06759-JLS, 2016 WL 11745096, at *21 (C.D. Cal. Oct. 24, 2016) ($100 per hour); *In re Am. Apparel, Inc. S'holder Litig.*, CV-10-06352-MMM, 2014 WL 10212865, at *31 (C.D. Cal. July 28, 2014) ($120 per hour)).

Plaintiffs have made important contributions to this case and have had some detrimental personal consequences as a result of their involvement. *See* Dkt. 392-3 at 3; Dkt. 392-4 at 3; Dkt. 392-5 at 3.. Moreover, Plaintiffs' requested fee awards reflect fair rates of compensation for the overall hours and efforts Plaintiffs have invested in this matter since becoming involved in 2017. However, compensation at the level Plaintiffs request remains unwarranted given the work performed, the parallel claims of risk and injury, and the resulting hourly rates. Therefore, based on a consideration of all the relevant factors, awards of $28,500 to Rodgers, $28,500 to Ribalta and $17,100 to Valdez are appropriate and approved.

D. Settlement Administration Costs

At the hearing on the Preliminary Approval Motion, Class Counsel represented that the estimated cost of settlement administration by the Administrator was $417,000. Dkt. 396 at 52. The Preliminary Approval Order approved the appointment of the Administrator and requested that Plaintiffs submit evidence supporting the amount requested for settlement administration costs. *Id.*

Plaintiffs now request total settlement administration costs of $840,267, an amount that is more than twice the amount estimated at the Preliminary Approval Hearing. Dkt. 401 at 25-26. The Administrator states that Plaintiffs' original estimate assumed that approximately 2.7 million notices would be sent by email, at a cost of approximately $0.0002 each, and that approximately 270,000 notices would be sent by First Class Mail, at a cost of approximately $0.55 each. Dkt. 401-2 ¶ 25. The Administrator states that the Class List provided by Defendants' counsel ultimately included 2.3 million records with email addresses, and more than 460,000 records that required notice by First Class Mail. *Id.* After sending an

additional 596,911 notices by First Class Mail to recipients whose initial notices by email had bounced back, the Administrator sent a total of 1.1 million notices by First Class Mail. *Id.* The Administrator represents that these costs and additional out-of-pocket expenses relating to the claims website and toll-free phone number also contributed to its overall costs of $840,267. *Id.* The Administrator verifies its request with invoices that collectively, total that amount. Ex. G, Dkt. 401-2 at 33-37.

Although the Administrator's cost of settlement administration is high, and substantially larger than Plaintiffs' original estimate, it is not unprecedented for large class sizes and high postage costs to result in high administration fees.. *See, e.g.*, *Farrar v. Workhorse Grp., Inc.*, No. 21-CV-02072-CJC, 2023 WL 5505981, at *9 (C.D. Cal. July 24, 2023) (approving settlement administration costs of $925,000 in light of "the large number of notices sent and claims received" and "unexpectedly high demand for mail rather than email notice"); *In re Anthem, Inc. Data Breach Litig.,* No. 15-MD-02617-LHK, 2018 WL 3960068, at *8 (N.D. Cal. Aug. 17, 2018) (approving settlement administration costs of $23 million, or 20% of the settlement fund, where that amount was largely "attributable to postage for mailing notice"); *In re Carrier IQ,* No. 12-MD-02330-EMC, 2016 WL 4474366, at *6 (N.D. Cal. Aug. 25, 2016) (approving settlement administration costs of $655,500 where "the cost of notice was high" based on the need to contact class members through various kinds of electronic media). Plaintiffs' explanation of their administration costs is therefore reasonable. Moreover, notice by mail "is typically the preferred form of notification because of its efficacy." *In re Anthem,* 2018 WL 3960068, at *8. For that reason, it was reasonable for the Administrator to provide notice via First Class Mail -- albeit at a more expensive rate -- to all recipients who either did not have email addresses or whose purported email addresses generated email bounce-backs. *See* Dkt. 401-2 ¶ 25.

In addition, the notice plan implemented by the Administrator was reasonably successful based on the high number of claim forms that were received and the large number of views and calls at the website and toll-free number that the Administrator established. *See id.* ¶¶ 12, 13, 17. Based on these indicators of claimant awareness about the settlement, Plaintiffs' substantial costs of providing "notice to the class can reasonably be considered a benefit to the class." *Staton*, 327 F.3d at 975. Accordingly, an award of $840,269.81 for the cost of settlement administration is appropriate and approved.

E. Attorney's Fees and Costs

1. Legal Standards

Attorney's fees and costs "may be awarded in a certified class action where so authorized by law or the parties' agreement;" 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." *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 941; *see also* Fed. R. Civ. P. 23(h). "If fees are unreasonably high, the likelihood is that the defendant obtained an economically beneficial concession with regard to the merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have [been] obtained." *Staton*, 327 F.3d at 964.

A district court must "assure itself that the fees awarded in the agreement [are] not unreasonably high, so as to ensure that the class members' interests [are] not compromised in favor of those of class counsel" or class representatives. *Id.* at 965. Among the factors that may be considered in assessing the reasonableness of a requested fee award are the following: (i) whether the results achieved were

exceptional; (ii) risks of continued litigation; (iii) non-monetary benefits conferred by the litigation; (iv) customary fees for similar cases; (v) the contingent nature of the fee and financial burden imposed on counsel; and (vi) the reasonable expectations of counsel, based on the circumstances of the case and the range of fee awards based on common funds of comparable size. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002).

To evaluate the reasonableness of a request for an award of attorney's fees in a class action, a district court has discretion to choose between a lodestar method and the "percentage method". *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010); *see also Hanlon*, 150 F.3d at 1029. 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%. *Staton*, 327 F.3d at 968. However, awards that deviate from the benchmark have been approved. *See Paul, Johnson, Alston & Hunt v. Graulty*, 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 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,* 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). A court has discretion to "adjust the lodestar upward or downward using a multiplier that reflects a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Stetson v. Grissom*, 821 F.3d 1157, 1166-67 (9th Cir. 2016) (internal quotation marks and citation omitted).

2. Application

a) Preliminary Approval

The Preliminary Approval Motion requested an attorneys' fees award of $4,166,666, representing 33.33% of the settlement amount of $12,500,000. Dkt. 392 at 13. Plaintiffs argued that this amount was consistent with this Circuit's "percentage-of-the-fund" approach and contended that an upward adjustment from the 25% benchmark was warranted in light of the factors identified in *Vizcaino*, i.e., the results achieved, the risks of litigation, customary fees in similar cases, the contingent nature of the case and the burden carried by counsel and their reasonable expectations. *Id.* at 19-20; *see Vizcaino*,

290 F.3d at 1048-50. Plaintiffs argued that their requested amount also comported with the lodestar method because it represented a negative multiplier of .91 from their total attorneys' fees of $4,564,849. *Id.* at 21. That figure was based on a total of 9840 hours of work by 11 attorneys. *Id.*

The Preliminary Approval Order analyzed Plaintiffs' request under both the percentage method and the lodestar method. First, the Preliminary Approval Order considered the *Vizcaino* factors and concluded that, taking into consideration all of the relevant factors, an award above the 25% benchmark could be warranted. Dkt. 396 at 25-26. The Preliminary Approval Order then applied a lodestar cross-check and found that issues were raised with regard to the number of hours spent on certain tasks, as well as the number of attorneys who worked on certain tasks. *Id.* at 33-42. For example, the Preliminary Approval Order noted that substantial hours were recorded for certain tasks, with limited information as to why this work was necessary. *Id.* at 42. Based on a review of the records of Class Counsel and all other information that was provided, the Preliminary Approval Order found that a downward adjustment of $629,043 to the lodestar was warranted, i.e., from $4,564,849 to $3,935,807. *Id.*

Based on its percentage and lodestar analyses, the Preliminary Approval Order preliminary approved a fee award in the range of $3,125,000 (representing 25% of the settlement amount) to $4,166,166 (representing 33.33% of the settlement amount). That award was without prejudice to de novo review in connection with a motion for final approval in which additional evidence was presented as to the work performed.

b) Final Approval

The Final Approval Motion renews Plaintiffs' request for an attorney's fees award of $4,166,166, which is at the top of the range approved in the Preliminary Approval Order. Dkt. 399 at 9. Plaintiffs' counsel argue, as they did in support of the Preliminary Approval Motion, that a 33.33% fee is reasonable under the "percentage-of-the-fund method." *Id.* at 16. With respect to the lodestar approach, Plaintiffs' counsel do not contest the Preliminary Approval Order's downward adjustment to the lodestar. *Id.* at 22. Instead, they accept that adjustment and argue that a 1.058 multiplier -- which would return the lodestar to the original $4,166,166 fee Plaintiffs requested -- is appropriate. *Id.*

Plaintiffs then provide the following new considerations in support of this multiplier and their request:

- The time necessary to resolve many of the tasks in this litigation was increased due the bifurcation of the claims in two separate judicial districts. For example, to secure testimony and documents from the Individual Defendants, Class Counsel pursued a Rule 45 action in the Southern District of Florida.
- The time necessary to obtain discovery was increased due to aggressive positions taken by defense counsel in both Florida and California. Defense counsel initially refused to produce documents while their motions to dismiss were pending. Documents that were ultimately produced were the result of "dozens of hours meeting, conferring, and corresponding and, in many instances, briefing and arguing motions to compel."
- Further complicating discovery was the need for travel and litigation in states outside the fora. Class Counsel visited different locations in Florida, California and Oklahoma to pursue in-person depositions and litigate discovery disputes.

- Class Counsel incurred substantial hours taking and defending 40 depositions, including eight expert depositions. Preparation for these depositions was complex and time-consuming in light of the high volume of discovery that was involved.

Id. at 24-26.

These considerations, while relevant, are consistent with past arguments provided by Plaintiffs and do not substantially alter the conclusions reached in the Preliminary Approval Order. As noted in that order, a percentage-based award of up to 33.33% could be warranted in light of all the relevant factors in this litigation, including the results achieved, the length of the litigation, the risk involved and the bifurcated nature of the action. Dkt. 396 at 25-26. However, when viewed together with the lodestar method, the evidence Plaintiffs provide does not offer sufficient weight to support an upward adjustment to the proffered $4,166,166 lodestar. Dkt. 399 at 2; Dkt. 392 at 13. Instead, an award of $4,000,000 is warranted in light of the analysis conducted in the Preliminary Approval Order, and the evidence Plaintiffs have presented. That award represents 32% of the total settlement fund. Therefore, an attorneys' fees award of $4,000,000 is appropriate and approved.

F. Litigation Costs and Expenses

Class Counsel request final approval of $337,926.03 in litigation costs and expenses. Dkt. 401 at 27. The Preliminary Approval Order deemed this amount reasonable. Dkt. 396 at 51-52. Plaintiffs' counsel have provided a log of expenses that is sufficient to support the appropriateness and reasonableness of the claimed costs. Dkt. 392-1, Ex. 5. Therefore, Plaintiffs' request for litigation costs and expenses is approved.

V. Conclusion

For the reasons stated in this Order, both the Fees Motion and the Final Approval Motion are **GRANTED**. The final settlement amounts are summarized in the following table.

Description of Amount	Amount	Percent
Gross Settlement Amount	**$12,500,000**	**100%**
Enhancement Awards to Class Representatives	$74,100	0.6%
Attorneys' Fees Award	$4,000,000	32%
Litigation Costs and Expenses	$337,926	2.7%
Third Party Administrator Costs	$840,270	6.7%
Net Settlement Fund	**$7,247,704**	**58.0%**

IT IS SO ORDERED.

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