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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JANET SIHLER, Individually and On
Behalf of All Others Similarly Situated;
CHARLENE BAVENCOFF, Individually
and On Behalf of All Others Similarly,

Plaintiffs,

v.

THE FULFILLMENT LAB, INC;
RICHARD NELSON; BEYOND
GLOBAL, INC.; BRIGHTREE
HOLDINGS CORP.; BMOR GLOBAL
LLC; DAVID FLYNN; RICKIE JOE
JAMES,

Defendants.

Case No.: 20cv1528-LL-DDL

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR COURT APPROVAL
OF PROPOSED CLASS NOTICE
PLAN**

[ECF No. 194]

Before the Court is Plaintiffs’ Motion for approval of their proposed class notice plan. ECF No. 194. No opposition to the Motion was filed. The Court deems the Motion suitable for determination on the papers submitted and without oral argument. *See* S.D. Cal. CivLR 7.1(d)(1). For the reasons discussed below, the Motion is **GRANTED IN PART AND DENIED IN PART.**

1 **I. BACKGROUND**

2 On March 7, 2022, Plaintiffs filed the operative complaint, which is their Second
3 Amended Complaint, alleging Defendants are involved in a fraudulent online scheme in
4 which they allegedly use fake celebrity and magazine endorsements, as well as
5 misrepresentations about price and limited availability, to induce customers into
6 purchasing weight-loss pills branded as “Ultra Fast Keto Boost,” “Instant Keto,” or
7 “InstaKeto” (collectively “Keto Products”). ECF No. 120 ¶¶ 8–14, 65–105. Defendants
8 allegedly charge customers more than they agreed to pay, make it difficult or impossible
9 to return the products or receive a refund, and operate “false front” websites to mislead
10 banks and credit card companies investigating chargebacks. *Id.* Plaintiffs allege the
11 following causes of action against Defendants: (1) violation of California’s Consumer
12 Legal Remedies Act (“CLRA”), (2) violation of California’s False Advertising Law
13 (“FAL”), (3) violation of the unfair and fraudulent prongs of California’s Unfair
14 Competition Law (“UCL”), (4) violation of the unlawful prong of California’s UCL, and
15 (5) civil Racketeer Influenced and Corrupt Organizations Act (“RICO”) violations.
16 *Id.* ¶¶ 234–474.

17 On June 23, 2023, two classes were certified and defined as the following:

18 (1) A nationwide class for the RICO claim consisting of all consumers in the
19 United States who, within the applicable statute of limitations period until the
20 date notice is disseminated, were billed for shipments of either three bottles
or five bottles of Ultra Fast Keto Boost, InstaKeto, or Instant Keto.

21 (2) A California subclass for the state law causes of action consisting of all
22 consumers in California who, within the applicable statute of limitations
23 period until the date notice is disseminated, were billed for shipments of either
24 three bottles or five bottles of Ultra Fast Keto Boost, InstaKeto, or Instant
Keto.

25 ECF No. 183 at 24.

26 Plaintiffs developed the proposed notice plan in consultation with Epiq Class Action
27 and Claims Solutions, Inc. (“Epiq”) and its business unit Hilsoft Notifications (“Hilsoft”),
28 which they expect will reach at least 90% of the members of the class. ECF No. 194 at 2;

1 ECF No. 194-3, Declaration of Cameron R. Azari (“Azari Decl.”), ¶¶ 3, 12. Plaintiffs based
2 their proposed notice plan on the Federal Judicial Center’s guidelines for class notice.
3 ECF No. 194 at 2. Plaintiffs will send direct email notice to class members at the email
4 addresses provided by class members when ordering Keto Products. *Id.* at 3. If an email is
5 undeliverable, the notice administrator will correct any errors and attempt to resend the
6 email. *Id.* If the second attempt is unsuccessful, the notice administrator will send direct
7 notice via a postcard mailed first class through the United States Postal Service to the
8 address provided by the class member when ordering Keto Products. *Id.* Both the email
9 and postcard notices will direct class members to a website created and maintained by Epiq,
10 which will provide additional information about this case and access to copies of select
11 court filings. *Id.* at 3–4. The email, mail, and website notices will also include a post office
12 box and email address allowing class members to contact the administrator with questions,
13 as well as a toll-free number that will provide recorded answers to frequently asked
14 questions. Azari Decl. ¶¶ 18, 19. The content of the proposed email notice, mail notice, and
15 website notice was corrected by Plaintiffs at the Court’s request and submitted on
16 October 18, 2023. ECF No. 205.

17 **II. LEGAL STANDARD**

18 When a class action is certified under Federal Rule of Civil Procedure 23(b)(3), as
19 is the case here, “the court must direct to class members the best notice that is practicable
20 under the circumstances, including individual notice to all members who can be identified
21 through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). “The notice must clearly and
22 concisely state in plain, easily understood language” the following: (1) the nature of the
23 action; (2) the definition of the class certified; (3) the class claims, issues, or defenses;
24 (4) that a class member may enter an appearance through an attorney if desired; (5) that the
25 court will exclude any member from the class who requests exclusion; (6) the time and
26 manner for requesting exclusion; and (7) the binding effect of a class judgment on members
27 under Federal Rule of Civil Procedure 23(c)(3). *Id.* Although reasonable efforts must be
28 made to reach all class members, there is no requirement that each class member actually

1 receive notice. *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 595–96
2 (N.D. Cal. 2020) (citing *Silber v. Mabon*, 18 F.3d 1449, 1453–54 (9th Cir. 1994)).

3 **III. DISCUSSION**

4 **A. Content of the Notices**

5 The Court generally finds the content of the proposed corrected email notice, mail
6 notice, and website notice conveys the information required by Federal Rule of Civil
7 Procedure 23(c)(2)(B) in plain neutral language with a few exceptions. First, to clarify to
8 class members whether they fit into the class definition, the notices should include the
9 appropriate specific date range of purchases that satisfies the statute of limitations. At
10 minimum, the email notice and website notice should add this clarification. Specifically,
11 the “Who is a Class Member?” section of the email notice [ECF No. 205-1 at 2] and
12 question No. 10 of the website notice that asks, “Am I part of this Class?” [ECF
13 No. 205-1 at 11] should also explain what the phrase “within the applicable statute of
14 limitations period until the date notice is disseminated” means in terms of specific dates.
15 The postcard notice [ECF No. 205-1 at 5] should include this clarification if space permits.

16 Second, question No. 11 of the website notice that asks, “Are any purchasers of Ultra
17 Fast Keto Boost, InstaKeto or Instant Keto not included in the Class?” includes an
18 explanation that does not fit the class definitions. ECF No. 205-1 at 11. The class
19 definitions include consumers who “were *billed* for shipments of either three bottles or five
20 bottles” of the Keto Products, but the explanation for question No. 11 states that consumers
21 who did not “buy” a three- or five-product bundle are not part of the class. *Id.* It further
22 states as an example that a person who “bought” a single bottle of a Keto Product is not a
23 class member. *Id.* The Court notes that there is a difference between being billed for a
24 product and buying a product, and this explanation needs to be corrected to fit the class
25 definitions.

26 Third, the email address of the administrator should be consistently disclosed. It is
27 included in the proposed email and mail notices, but it is absent from the website notice.
28 Question No. 22 that asks, “Are more details available?” should include the email address.

1 *Id.* at 13. Question No. 12 that states, “I’m still not sure if I am included” should include
2 reference to the email address listed in Question No. 22. *Id.* at 11.

3 Finally, the deadline and method for class members to opt out of the class action
4 should be consistent across the notices. In the email and mail notices, the method of opting
5 out is by letter or email sent “45 days after Notice.” ECF No. 205-1 at 5, 16. However, the
6 website notice states that the method of being excluded is to mail the exclusion request in
7 the form of a letter—with no mention of email—that is postmarked by a specific date that
8 will be determined.¹ *Id.* at 7, 12. The parties must decide if exclusions sent by email are
9 appropriately binding and whether to propose permitting them. The Court strongly prefers
10 that a specific date be set as the deadline for class members to opt out. Relatedly, Plaintiffs
11 shall propose to the Court a specific deadline for Plaintiffs’ counsel to obtain and file all
12 opt out/exclusion notices with the Court. Additionally, for clarification, the Court requires
13 that the instructions for opting out that directs class members to “stat[e] that you want to
14 be excluded from *Sihler et al. v. The Fulfillment Lab Inc., et al.*” also include the case
15 number and district. *See id.* at 12.

16 **B. Notice Plan**

17 The Court finds the proposed notice plan is reasonably calculated to reach class
18 members through individual notice and inform them of the certification of the class action.
19 Because class members purchased the Keto Products online, the use of email addresses
20 provided by purchasers of the Keto Products as the primary contact and addresses provided
21 by purchasers as the secondary contact is well-suited to reach a majority of class members.
22 The case-specific website, toll-free number for answers to frequently asked questions, and
23 contact information for the administrator provided in the notices will provide additional
24

25
26 ¹ The proposed website notice also states, “You may also get an Exclusion Request form
27 at the website, www.website.com.” It appears that the Exclusion Request will be a
28 hyperlink. The Court interprets that the Exclusion Request will be a form that class
members may print out, but must still fill out, sign, and mail as directed.

1 information to class members. Plaintiffs estimate the number of class members to exceed
2 290,000 and to be geographically dispersed across the United States. ECF No. 194 at 5.
3 Given the size and dispersed location of the class and the method of purchase, the Court
4 finds the proposed notice plan is the best notice that is practicable under the circumstances.
5 *See Gaston v. Fabfitfun, Inc.*, No. 2:20-cv-09534-RGK-E, 2021 U.S. Dist. LEXIS 147383,
6 at *24-25 (C.D. Cal. Apr. 2, 2021) (approving notice plan of email address, postcard if
7 email is undeliverable, and website); *Brown v. Directv*, No. CV 13-1170-DMG (Ex),
8 2020 U.S. Dist. LEXIS 151283, at *3-5 (C.D. Cal. July 23, 2020) (same).

9 **IV. CONCLUSION**

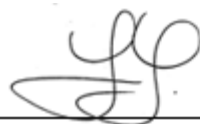
10 For the reasons set forth above, the Court **GRANTS IN PART AND DENIES IN**
11 **PART** Plaintiffs' Motion for approval of their proposed class notice plan as follows:

12 1. The Court approves the method of notice.
13 2. Plaintiffs must revise the content of the notices to correct the deficiencies
14 noted by the Court above and submit a Second Motion for Court Approval of Proposed
15 Class Notice Plan ("Second Motion") on or before **November 22, 2023**. The Second
16 Motion must contain exhibits of the red-lined revisions made to the notices. Plaintiffs must
17 meet and confer with Defendants regarding the proposed revisions, make a good faith effort
18 to agree on them, and indicate in the Second Motion whether Defendants plan to oppose
19 the revised proposed content of the notices.

20 3. Any opposition to the Second Motion must be filed on or before
21 **November 30, 2023**.

22 **IT IS SO ORDERED.**

23 Dated: November 7, 2023

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26 Honorable Linda Lopez
27 United States District Judge
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