

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALEX ANG, et al.,
Plaintiffs,
v.
BIMBO BAKERIES USA, INC.,
Defendant.

Case No. [13-cv-01196-HSG](#)

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, ATTORNEYS' FEES, AND INCENTIVE AWARDS

Re: Dkt. No. 241

Pending before the Court is the parties' joint motion for final approval of class action settlement and for attorneys' fees, costs, and for an incentive award for the two named Plaintiffs. See Dkt. No. 241. The Court held a final fairness hearing on August 27, 2020. See Dkt. No. 248. For the reasons detailed below, the Court **GRANTS** final approval. The Court also **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' request for attorneys' fees, costs, and incentive awards.

I. BACKGROUND

A. Factual Background

Plaintiffs Alex Ang and Lynn Streit bring this consumer class action against Defendant Bimbo Bakeries, Inc. alleging that Defendant misbranded its baked goods. See generally Dkt. No. 40 ("SAC"). Plaintiffs allege that Defendant owns and has distributed products under various brands, including Arnold, Ball Park, Bimbo, Boboli, Brownberry, Earthgrains, Entenmann's, Francisco, Freihofer's, Marinela, Mrs. Baird's, Oroweat, Sara Lee, Stroehmann, Thomas', and Tia Rosa. See *id.* at ¶ 1. According to the complaint, many of Defendant's products are sold with false, misleading, and deceptive labeling. Specifically, Plaintiffs allege that they purchased food products manufactured and sold by Defendant that improperly: (1) applied the American Heart

1 Association’s “Heart-Check Mark” without acknowledging that the mark is a paid endorsement;
2 (2) labeled products as a “good” or “excellent source of whole grain”; (3) labeled products as
3 “bread,” even though they contained added coloring; and (4) labeled products as “100% Whole
4 Wheat,” even though they were made with non-whole wheat flour. See *id.* at ¶ 4; see also Dkt.
5 No. 58 (Order Granting in Part Motion to Dismiss Amended Complaint, narrowing products at
6 issue).

7 Based on these allegations, Plaintiffs sought injunctive relief and statutory damages,
8 alleging violations of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code
9 §§ 17200 et seq.; the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code §§ 17500
10 et seq.; and the Consumers Legal Remedies Act (“CLRA”), Cal. Civil Code §§ 1750 et seq. See
11 SAC at ¶¶ 32–40. Plaintiffs also sought to represent four separate classes corresponding to these
12 violations that include all California consumers who bought the same products (or products
13 substantially similar to the products that they purchased) at any time from March 18, 2009, to the
14 present. See Dkt. No. 102.

15 **B. Procedural History**

16 This case has a lengthy history. Plaintiffs initially filed this action on March 18, 2013. See
17 Dkt. No. 1. Plaintiffs filed the operative second amended complaint on November 4, 2013. See
18 Dkt. No. 40. On March 13, 2014, the Court granted in part Defendant’s motion to dismiss the
19 SAC, narrowing the claims for which Plaintiffs could seek relief. See Dkt. No. 58. On March 31,
20 2016, the Court stayed this action pending the resolution of third-party appeals involving legal
21 questions at issue in this case. Dkt. No. 164. On January 5, 2018, in response to an order to show
22 cause, Dkt. No. 171, the parties jointly moved to lift the stay, Dkt. No. 172, and the Court granted
23 the request, Dkt. No. 174. On August 31, 2018, the Court granted Plaintiffs’ motion for class
24 certification as to all four classes under Federal Rule of Civil Procedure 23(b)(2). See Dkt. No.
25 186 (“Class Certification Order”). However, the Court denied certification of a damages class
26 under Rule 23(b)(3). *Id.* at 18, 28. The Court appointed named Plaintiffs as the Class
27 Representatives and appointed Fleischman Law Firm, PLLC and Barrett Law Group, P.A. as co-
28 lead counsel, and Pratt & Associates as local counsel (collectively, “Class Counsel”). *Id.* at 28–

1 29.

2 On July 31, 2019, the parties engaged in an all-day mediation. See Dkt. No. 217 at 4.
3 Through these efforts, the parties reached settlement, formally executing the settlement agreement
4 in December 2019. *Id.*; see also Dkt. No. 217-2, Ex. 1. Plaintiffs then filed an unopposed motion
5 for preliminary settlement approval on December 13, 2019. See Dkt. No. 217.

6 During the hearing on the motion for preliminary settlement approval, the Court raised
7 several concerns about the scope of the proposed release and the lack of notice to absent class
8 members. See Dkt. No. 225. As initially drafted, the release contained claims that the Court did
9 not certify in its Class Certification Order. See *id.* at §§ 1.2, 8.2. Moreover, although absent class
10 members would be giving up significant legal rights under the proposed settlement, the parties
11 argued that notice was not required because of the nature of the injunctive relief. See Dkt. No. 217
12 at 7–8. The Court provided the parties with several opportunities to address these concerns. See
13 Dkt. Nos. 223, 227, 230. However, the parties appeared reluctant to provide absent class members
14 with meaningful notice of the terms of the settlement, and the Court ultimately denied the motion
15 for preliminary approval on this basis. See Dkt. No. 232. On April 17, 2020, the parties filed a
16 renewed motion for preliminary approval, which included a revised settlement agreement and a
17 revised notice plan. See Dkt. No. 235. As discussed in more detail in Section II.A.ii.b.1 below,
18 the parties agreed to issue a press release about the settlement and provide further notice on Class
19 Counsel and Defendant’s websites. *Id.* The Court granted the renewed motion on April 28, 2020.
20 See Dkt. No. 236. Following the final fairness hearing, and at the Court’s request, Defendant filed
21 a supplemental declaration attaching the press release. See Dkt. No. 249.

22 **C. Revised Settlement Agreement**

23 In response to concerns that the Court raised regarding the scope of the release, the parties
24 entered into a revised settlement agreement. See Dkt. No. 235-2, Ex. A (“SA”). The key terms of
25 the parties’ revised settlement are as follows:

26 Class Definition: The Settlement Class mirrors the Court’s Class Certification Order, and
27 is defined as:

28 All persons or entities who or that made purchases in California of

any [Defendant] products identified in the Class Certification Order.

SA § 1.7

Settlement Benefits: The settlement agreement provides for injunctive relief, explaining that Defendant has made the following changes to product labeling and formulations:

Product Name	Changes Made
Oroweat Dark Rye Bread	<ul style="list-style-type: none"> Color removed
Oroweat Sweet Hawaiian Bread	<ul style="list-style-type: none"> Color removed
Bimbo Original Toasted Bread	<ul style="list-style-type: none"> Color removed
Bimbo Double Fiber Toasted Bread	<ul style="list-style-type: none"> Color removed
Thomas' Cinnamon Raisin Swirl Toasting Bread	<ul style="list-style-type: none"> Color removed
Thomas' 100% Whole Wheat Bagels	<ul style="list-style-type: none"> Soy flour removed from ingredients list
Thomas' 100% Whole Wheat English Muffins	<ul style="list-style-type: none"> Soy flour removed from ingredients list
Thomas' Plain Bagel Thins	<ul style="list-style-type: none"> American Heart Association ("AHA") Heart Check Mark removed
Thomas' Everything Bagel Thins	<ul style="list-style-type: none"> AHA Heart Check Mark removed
Bimbo 100% Whole Wheat Tortillas	<ul style="list-style-type: none"> Discontinued
Sahara 100% Whole Wheat Pita Pockets	<ul style="list-style-type: none"> Soy flour removed from ingredients list Product discontinued
Thomas' 100% Whole Wheat Mini Bagels	<ul style="list-style-type: none"> Soy flour removed from ingredients list Product discontinued
Thomas' 100% Whole Wheat Bagel Thins	<ul style="list-style-type: none"> AHA Heart Check Mark removed Soy flour removed from ingredients list Product discontinued
Sara Lee 100% Whole Wheat Bread (Classic 100% Whole Wheat Bread)	<ul style="list-style-type: none"> Soy flour removed from ingredients list "Good source of whole grain" claim removed Brand was divested and is no longer controlled by BBUSA in California
Sara Lee Soft & Smooth Whole Grain White Bread	<ul style="list-style-type: none"> "Good source of whole grain" claim removed Brand was divested and is no longer controlled by BBUSA in California
Sara Lee Soft & Smooth 100% Whole Wheat Bread	<ul style="list-style-type: none"> "Good source of whole grain" claim removed Brand was divested and is no longer controlled by BBUSA in California

See *id.* at § 4.4. Defendant further agrees that for a period of two years from the effective date of the settlement, Defendant will advise a designated representative of Class Counsel of any changes

1 to these products' labels as soon as practicable as they relate to:

- 2 • For the "Whole Grain" Products: Any labeling statement that a product is a "good source
- 3 of whole grain" or an "excellent source of whole grain";
- 4 • For the "100% Whole Wheat" Products: Any change to the product formulation to include
- 5 "soy flour" as an ingredient;
- 6 • For the "Added Coloring" Products: Any change to the product formulation to include
- 7 "coloring" as an ingredient.

8 See SA at § 4.7. Class Counsel will then have 15 days from the date of the notice to inform
9 Defendant of any objection to that labeling change. Id. at § 4.8.

10 Release: The parties agree to release:

11 any and all causes of action, suits, claims, liens, demands, judgments,
12 indebtedness, costs, damages, obligations, attorneys' fees (except as
13 provided for in this Agreement), losses, claims, controversies,
14 liabilities, demands and all other legal responsibilities in any form or
15 nature, whether known or unknown, asserted or unasserted, under or
16 pursuant to any statute, regulation, common law or equity, which have
17 been brought or could have been brought, are currently pending or
18 were pending, or are ever brought in the future (1) on behalf of the
19 Class, for injunctive, declaratory or other equitable relief that arise
20 out of or in any way relate, directly or indirectly, to the Injunctive
21 Relief Claims¹ prior to the Settlement Effective Date and/or (2) on
22 behalf of Plaintiffs, that arise out of or in any way relate, directly or
23 indirectly, to the Individual Claims² prior to the Settlement Effective
24 Date. Nothing in this Agreement will be considered a waiver of any
25 claims by Plaintiffs or Class Members that arise entirely after the
26 Effective Date. Plaintiffs and Class Counsel expressly promise and
27 warrant that they are not aware of any such claims at this time of this
28 Settlement Agreement.

21 SA at § 8.1. Following entry of final judgment, all class members:

22 shall release and forever discharge [Defendant] . . . from any and all
23 manner of action, causes of action, claims, demands, rights, suits,
24 obligations, debts, contracts, agreements, promises, liabilities,
25 damages, charges, losses, costs, expenses and fees, of any nature
26 whatsoever, known or unknown, in law or equity, fixed or contingent,
27 for injunctive, declaratory or other equitable relief relating to or
28 arising out of the Injunctive Relief Claims.

1 "Injunctive Relief Claims" means any Claims for injunctive, declaratory or other equitable relief
2 that were certified for class treatment in the Class Certification Order." SA at § 1.14.

2 "Individual Claims" means any Claims brought by or that could have been brought by Plaintiffs
3 on their own behalves in their individual capacities." SA at § 1.13.

1 SA at § 8.2. And following entry of final judgment, the named Plaintiffs:

2 shall release and forever discharge [Defendant] . . . from any and all
3 manner of action, causes of action, claims, demands, rights, suits,
4 obligations, debts, contracts, agreements, promises, liabilities,
5 damages, charges, losses, costs, expenses and fees, of any nature
6 whatsoever, known or unknown, in law or equity, fixed or contingent,
7 relating to or arising out of the Individual Claims.

8 SA at § 8.3. In addition, the parties:

9 expressly waive and relinquish, to the fullest extent permitted by law,
10 the provisions, rights and benefits of section 1542 of the California
11 Civil Code, and any other similar provision under federal or state law.
12 Section 1542 provides:

13 A GENERAL RELEASE DOES NOT EXTEND TO
14 CLAIMS, THAT THE CREDITOR OR RELEASING
15 PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN
16 HIS OR HER FAVOR AT THE TIME OF EXECUTING
17 THE RELEASE AND THAT, IF KNOWN BY HIM OR
18 HER, WOULDHAVE MATERIALLY AFFECTED HIS OR
19 HER SETTLEMENT WITH THE DEBTOR OR
20 RELEASED PARTY.

21 Id. at § 8.4.

22 Settlement Payment: Defendant agrees that as part of the settlement, it shall make
23 available \$325,000 that must be used, pending Court approval, to compensate Class Counsel for
24 attorneys’ fees and costs, and for incentive payments to the Class Representatives for their service
25 in this case. SA at § 4.14. No monetary relief is available to the class.

26 Incentive Award: Plaintiffs as Class Representatives may apply for incentive awards of no
27 more than \$10,000 each, subject to Court approval. SA at § 4.14.

28 Attorneys’ Fees and Costs: Class Counsel may file an application for attorneys’ fees not to
exceed \$325,000, subject to Court approval. SA at § 4.14.

29 **II. DISCUSSION**

30 **A. Final Settlement Approval**

31 **i. Class Certification**

32 Here, the settlement class is coextensive with the Class Certification Order, including “[a]ll
33 persons or entities who or that made purchases in California of any [Defendant] products
34 identified in the Class Certification Order.” See SA § 1.7. Because no facts that would affect the

1 Court’s reasoning have changed since the Court’s Class Certification Order and since the Court
2 preliminarily approved the settlement on April 28, 2020, this order incorporates by reference its
3 prior analysis under Rules 23(a) and (b) as set forth in the Class Certification Order. See Dkt. No
4 186.

5 **ii. The Settlement**

6 **a. Legal Standard**

7 “The claims, issues, or defenses of a certified class may be settled . . . only with the court’s
8 approval.” Fed. R. Civ. P. 23(e). The Court may finally approve a class settlement “only after a
9 hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2); *Officers*
10 *for Justice v. Civil Serv. Comm’n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th
11 Cir. 1982) (“The district court’s role in evaluating a proposed settlement must be tailored to fulfill
12 the objectives outlined above. In other words, the court’s intrusion upon what is otherwise a
13 private consensual agreement negotiated between the parties to a lawsuit must be limited to the
14 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
15 overreaching by, or collusion between, the negotiating parties . . .”). To assess whether a
16 proposed settlement comports with Rule 23(e), the Court “may consider some or all” of the
17 following factors: (1) the strength of plaintiff’s case; (2) the risk, expense, complexity, and likely
18 duration of further litigation; (3) the risk of maintaining class action status throughout the trial;
19 (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the
20 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental
21 participant; and (8) the reaction of the class members to the proposed settlement. *Rodriguez v.*
22 *West Publ’g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); see also *Hanlon*, 150 F.3d at 1026. “The
23 relative degree of importance to be attached to any particular factor” is case specific. *Officers for*
24 *Justice*, 688 F.2d at 625.

25 In addition, “[a]dequate notice is critical to court approval of a class settlement under Rule
26 23(e).” *Hanlon*, 150 F.3d at 1025. As discussed below, the Court finds that the proposed
27 settlement is fair, adequate, and reasonable, and that Class Members received adequate notice.

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b. Analysis

1. Adequacy of Notice

Under Federal Rule of Civil Procedure 23(e), the Court “must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). The Court has “broad power and discretion vested in it by [Rule 23]” to determine the contours of appropriate class notice. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). Although Rule 23 requires that reasonable efforts be made to reach all class members, it does not require that each class member actually receive notice. See *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (noting that the standard for class notice under Rule 23(c)(2)(B) is “best practicable” notice, not “actually received” notice). Moreover, “[i]f the names and addresses of class members cannot be determined by reasonable efforts, notice by publication is sufficient to satisfy the requirements of the due process clause and Rule 23.” *Jermyn v. Best Buy Stores, L.P.*, No. 08 CIV. 00214 CM, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317–18 (1950)).

The Court finds that the notice and notice plan previously approved by the Court was implemented and complies with Rule 23. See Dkt. No. 236 at 11–12. The Court ordered the parties to: (1) issue a joint press release regarding the settlement; (2) post the proposed notice and key case documents on Class Counsel’s public websites; (3) post the proposed notice on the “Media Inquiries” section of Defendant’s public website, where it generally posts product recall information, with links to key case documents; and (4) in accordance with the Class Action Fairness Act, notify the United States and California Attorneys General of the settlement. *Id.* The notice was published by the May 29, 2020, deadline, as anticipated. See Dkt. No. 241 at 7–8; see also Dkt. No. 238.

The Court notes that Mr. Edward W. Orr objected to the motion for final settlement approval, and suggested that the parties failed to include the requisite notice on Defendant’s website. See Dkt. Nos. 244, 245. However, the Court was able to confirm independently that Defendant included a working link to the notice on its website. And during the hearing, defense counsel confirmed that the form and placement of this link had remained the same over the course

1 of the notice period.³ The Court acknowledges that the placement of the link could have been
2 more conspicuous on Defendant’s website. And were this the only notice to absent Class
3 Members, the Court likely would find it insufficient. Nevertheless, the parties also issued a press
4 release regarding the settlement on May 29, 2020, through GlobeNewswire, a global press release
5 distribution service, for distribution in California. See Dkt. No. 249 at ¶ 3, & Ex. A. It provided
6 the name of the lawsuit and case number; the nature of the parties’ settlement, including how the
7 settlement may affect Class Members’ rights; an explanation that Class Members may object to
8 the settlement and the date by which they may do so; the date of the final fairness hearing; and a
9 direct link to Defendant’s website, where people could go for more information, including case
10 documents. See *id.*, Ex. A. The press release was distributed to various news outlets throughout
11 California, and was even picked up by some out-of-state news outlets. See *id.* at ¶¶ 4–6, & Exs.
12 B–C. The press release is also one of the first results when searching for “Bimbo Bakeries
13 Settlement” on Google search. See *id.* at ¶ 7. Although the precise reach of the press release is
14 unknown, GlobeNewswire estimated the potential reach of the press release as over 121 million
15 people. See *id.*, Ex. B. In light of these facts, the Court finds that the parties have sufficiently
16 provided the best practicable notice to the Class Members.

17 **2. Fairness, Adequacy, and Reasonableness**

18 Having found the notice procedures adequate under Rule 23(e), the Court next considers
19 whether the entire settlement comports with Rule 23(e).

20 **a. Strength of Plaintiffs’ Case and Litigation Risk**

21 Approval of a class settlement is appropriate when plaintiffs must overcome significant
22 barriers to make their case. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D.
23 Cal. 2010). Courts “may presume that through negotiation, the Parties, counsel, and mediator
24 arrived at a reasonable range of settlement by considering Plaintiff’s likelihood of recovery.”
25 *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-1365-CW, 2010 WL 1687832, at *9 (N.D.
26

27 ³ Counsel also explained during the hearing that when they learned that Mr. Orr indicated that he
28 had trouble accessing the case documents online, they sent him physical copies to review, and said
they were available to answer any questions he might have.

1 Cal. Apr. 22, 2010). Additionally, difficulties and risks in litigating weigh in favor of approving a
2 class settlement. Rodriguez, 563 F.3d at 966. “Generally, unless the settlement is clearly
3 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
4 uncertain results.” Ching v. Siemens Indus., Inc., No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4
5 (N.D. Cal. June 27, 2014) (quotations omitted).

6 The Court finds that the settlement is reasonable in light of the substantial risk Plaintiffs
7 would face in litigating the case given the nature of the asserted claims. Plaintiffs allege that
8 certain of Defendants’ products had misleading labels, intended to increase sales by implying that
9 they were healthier or of better quality than competing products. However, Defendant disagrees
10 and intended to show that its labels were not misleading and class members did not suffer injury.
11 Additionally, Defendant intended to argue that Plaintiffs lack standing to pursue injunctive relief
12 because they did not purchase the products that contained the allegedly misleading labels. See
13 Dkt. No. 241 at 13. In reaching a settlement, however, Plaintiffs have ensured at least a
14 moderately favorable recovery for the class. See Rodriguez, 563 F.3d at 966 (finding litigation
15 risks weigh in favor of approving class settlement). Accordingly, these factors weigh in favor of
16 approving the settlement. See Ching, 2014 WL 2926210, at *4 (favoring settlement to protracted
17 litigation).

18 **b. Settlement Terms**

19 The terms of the settlement are another factor weighing in favor of approval. In the Class
20 Certification Order, the Court did not certify any class for monetary damages, and were the case to
21 proceed to trial, the class could only recover injunctive relief. The settlement here includes
22 changing the labels and, in some instances, the ingredients, of several of Defendant’s baked goods.
23 See SA at §§ 4.4–4.8. Class Counsel will also be notified any time within the next two years if
24 Defendant makes a relevant change to their labels. *Id.* Given the scope of the certified classes,
25 therefore, this settlement accomplishes much if not all of what Plaintiffs could have achieved at
26 trial. This result falls within the range of reasonableness. See, e.g., *In re Ferrero Litig.*, No. 11-
27 CV-00205-H-KSC, 2012 WL 2802051, at *4 (S.D. Cal. July 9, 2012), *aff’d*, 583 F. App’x 665
28 (9th Cir. 2014) (“Defendant agreed to modify the product label to address the fundamental claim

1 raised in Plaintiffs’ complaint . . .”).

2 **c. Reaction of Class Members**

3 The reaction of the Class Members also supports final approval. “[T]he absence of a large
4 number of objections to a proposed class action settlement raises a strong presumption that the
5 terms of a proposed class settlement action are favorable to the class members.” *Nat’l Rural*
6 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); *In re LinkedIn*
7 *User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) (“A low number of opt-outs and
8 objections in comparison to class size is typically a factor that supports settlement approval.”).

9 Here, the class notice, which was served in accordance with the method approved by the
10 Court, advised Class Members of the requirements to object to the settlement. Class notice was
11 posted on the websites and the press release issued by May 29, 2020, and Class Members had until
12 July 31, 2020, to file any objections. See Dkt. Nos. 236, 238. As noted above, only Mr. Orr filed
13 an objection. See Dkt. Nos. 244, 245. The Court finds that the minimal objections in comparison
14 to the size of the class indicate overwhelming support among the Class Members and weigh in
15 favor of approval. See, e.g., *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir.
16 2004) (affirming settlement where 45 of approximately 90,000 class members objected);
17 *Rodriguez v. West Publ. Corp.*, Case No. CV05–3222 R, 2007 WL 2827379, at *10 (C.D. Cal.
18 Sept. 10, 2007) (finding favorable class reaction where 54 of 376,301 class members objected).

19 **d. Objections to the Settlement**

20 “In determining whether to finally approve a class action settlement, the Court considers
21 whether there are any objections to the proposed settlement and, if so, the nature of those
22 objections.” *Moore v. Verizon Commc’ns Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *9
23 (N.D. Cal. Aug. 28, 2013). “The mere fact that there are objections to the settlement does not
24 necessitate disapproval; instead, the Court must evaluate the objections to determine whether they
25 suggest serious reasons why the proposed settlement might be unfair.” *Nwabueze v. AT & T Inc.*,
26 No. C 09-01529 SI, 2013 WL 6199596, at *6 (N.D. Cal. Nov. 27, 2013).

27 As noted above, Mr. Orr first argued that notice was inadequate. See Dkt. Nos. 244, 245.
28 But the Court finds that the notice in this case met the requirements of Rule 23(e)(1). See Section

1 II.A.ii.b.1. Rule 23 only requires all reasonable efforts to direct notice to absent class members, and
2 not all class members must receive notice for it to be found adequate. See, e.g., Reiter, 442 U.S. at
3 345; Silber, 18 F.3d at 1454. Here, in addition to posting notice on Class Counsel’s and Defendant’s
4 website, the parties also issued a press release regarding the settlement that is estimated to have
5 reached approximately 121 million people. See Dkt. No. 249 at ¶ 3, & Ex. A–B. Counsel also
6 appears to have gone beyond what was required under Rule 23 and the Court’s preliminary approval
7 order by sending Mr. Orr physical copies of the relevant case documents.

8 From what the Court can discern, Mr. Orr also raised concerns that under the settlement,
9 absent Class Members would release monetary claims. However, the release in the amended
10 Settlement Agreement only includes injunctive relief claims. See SA at § 8.1. Absent class
11 members still retain their right to independently pursue claims for monetary relief. Thus, having
12 considered Mr. Orr’s objections in detail, the Court denies the objections and finds that they do not
13 require rejecting the settlement.

14 * * *

15 After considering and weighing the above factors, the Court finds that the settlement
16 agreement is fair, adequate, and reasonable, and that the settlement Class Members received
17 adequate notice. Accordingly, the motion for final approval of the class action settlement is
18 **GRANTED.**

19 **B. Attorneys’ Fees and Costs**

20 In the same motion, Class Counsel asks the Court to approve an award of \$325,000 in
21 attorneys’ fees and costs. See Dkt. No. 241 at 17–24.

22 **i. Legal Standard**

23 “In a certified class action, the court may award reasonable attorney’s fees and nontaxable
24 costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). Here,
25 Plaintiffs brought claims under California law, including the UCL, FAL, and CLRA. They
26 therefore also seek attorneys’ fees under California law. Under the CLRA, “the court shall award
27 court costs and attorney’s fees to a prevailing plaintiff.” Cal. Civ. Code § 1780(e). And under
28 California’s Private Attorney General Statute, an award of attorneys’ fees for “successful”

1 plaintiffs is proper if “(1) plaintiffs’ action has resulted in the enforcement of an important right
2 affecting the public interest; (2) a significant benefit, whether pecuniary or nonpecuniary, has been
3 conferred on the general public or a large class of persons; and (3) the necessity and financial
4 burden of private enforcement are such as to make the award appropriate.” *Press v. Lucky Stores*,
5 34 Cal. 3d 311, 317–18 (1983) (quotations omitted); Cal. Code Civ. P. § 1021.5.

6 In a case like this one involving state law claims, state law also governs the calculation of
7 attorneys’ fees. See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The Court
8 may also look to federal authority for guidance in awarding attorneys’ fees. See *Apple Computer,*
9 *Inc. v. Superior Court*, 126 Cal. App. 4th 1253, 1264 n.4 (2005) (“California courts may look to
10 federal authority for guidance on matters involving class action procedures.”). Courts generally
11 apply the lodestar method in class actions governed by California law. See *Lealao v. Beneficial*
12 *California, Inc.*, 82 Cal. App. 4th 19, 26 (Cal. Ct. App. 2000); see *Meister v. Regents of Univ. of*
13 *California*, 67 Cal. App. 4th 437, 448–49 (Cal. Ct. App. 1998) (“[T]he California Supreme Court
14 intended its lodestar method to apply to a statutory attorney’s fee award unless the statutory
15 authorization for the award provided for another method of calculation.”). Similarly, under federal
16 law, “in injunctive relief class actions, courts often use a lodestar calculation because there is no
17 way to gauge the net value of the settlement or any percentage thereof.” *Hanlon*, 150 F.3d at
18 1029. “Under the lodestar method, a court need not determine the ‘value’ of particular injunctive
19 relief because fees are calculated through an assessment of time expended on the litigation,
20 counsel’s reasonable hourly rate and any multiplier factors such as contingent representation or
21 quality of work.” *In re Ferrero Litigation*, 583 Fed. App’x 665, 668 (9th Cir.2014). Courts may
22 then reduce or enhance the lodestar by applying a multiplier to account for the complexity of the
23 action, as well as other factors such as the quality of representation and the risk of nonpayment.
24 *Hanlon*, 150 F.3d at 1029.

25 **ii. Analysis**

26 Class Counsel asserts that Plaintiffs are prevailing parties in this action because they
27 achieved their objective of addressing what they considered Defendant’s misleading labeling
28 practices. Dkt. No. 241 at 18. Class Counsel further states that the full lodestar total for the work

1 completed in this action would be \$987,531.73, based on 2,178 hours spent by seventeen lawyers
 2 and paralegals in litigating this class action multiplied by counsel’s proposed hourly rates, as of
 3 December 12, 2019, when they filed the motion for preliminary approval. See *id.* at 19–23; see
 4 also Dkt. No. 241-1 through 24-8, Exs. 1–8. They also explain that they have incurred \$89,456.65
 5 in expenses. See Dkt. No. 241 at 19. However, Class Counsel has agreed to accept a reduced
 6 lodestar of \$325,000. See *id.* at 22. Class Counsel submitted declarations and provided charts that
 7 document their hourly rates, the number of hours claimed, and the total fee request for each
 8 attorney involved in the litigation. See Dkt. Nos. 24-2 through 24-8, Exs. 1–8. Their requested
 9 fees represent approximately 33% of their lodestar. See Dkt. No. 241 at 22.

10 As an initial matter, the Court finds that Class Counsel’s lodestar calculation is inflated and
 11 contains duplicative and unreasonable time. See *Jankey v. Poop Deck*, 537 F.3d 1122, 1132 (9th
 12 Cir. 2008) (directing courts to exclude from a fee request any hours that are “excessive, redundant,
 13 or otherwise unnecessary”). The Court notes that it has concerns that the case was overstaffed
 14 with seventeen lawyers billing time, and that this led to inefficient or duplicative work. Class
 15 Counsel’s block billing, however, obscures the potential extent of any inefficiency. Still, the
 16 Court has found claims in the itemized billing records for significant time spent discussing the
 17 case via intraoffice and administrative meetings, emails, and phone calls with co-counsel. The
 18 Ninth Circuit has indicated that the Court has discretion to discount such time. See *Terry v. City*
 19 *of San Diego*, 583 Fed. Appx. 786, 790–91 (9th Cir. 2014) (permitting reductions for time counsel
 20 spent conferring among themselves and co-counsel editing each other’s briefs because this time
 21 could be considered duplicative). The Court therefore finds that the lodestar should be reduced by
 22 ten percent to account for this duplication.

23 Moreover, having reviewed the billing records in detail, the Court finds substantial time
 24 was billed for clerical tasks such as “filing, transcript, and document organization time,” which the
 25 Ninth Circuit has stated are not compensable, regardless of who completes them. See *Nadarajah*
 26 *v. Holder*, 569 F.3d 906, 921 (9th Cir. 2009). The Court details these entries below:

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Dawn Garrison	7/4/2013	Save and print motion to dismiss; calendar	\$100	.2	\$20
Dawn Garrison	8/14/2013	Print and save statement of recent decision	\$100	.2	\$20
Dawn Garrison	8/15/2013	Print and save statement of recent decision	\$100	.2	\$20
Pierce F. Gore	9/16/2013	Ordered transcript; emailed with counsel regarding hearing transcript	\$650	.3	\$195
Tyler Van Put	2/6/2014	Printed and compiled binder of filings	\$350	3.00	\$1,050
Tyler Van Put	2/7/2014	Printed discovery documents; saved to system	\$350	.6	\$210
Tyler Van Put	2/10/2014	Updated binders with discovery materials; printed documents	\$350	.6	\$210
Tyler Van Put	2/25/2014	Scanned and emailed proof of service; updated database	\$350	.2	\$70
Tyler Van Put	3/13/2014	Filed and FedExed courtesy copy	\$350	.3	\$105
Tyler Van Put	3/17/2014	Printed and prepared courtesy copy of recent filing; printed document report	\$350	.3	\$105
Tyler Van Put	3/27/2014	Printed materials for review; arranged for court reporter	\$350	1.3	\$455
Michael Park	4/15/2014	Made binders for hearing	\$350	3.5	\$1,225
Tyler Van Put	1/7/2015	Traveled to appellate division and got certificate of service	\$350	1.3	\$455
Tyler Van Put	1/8/2015	Filed Pro Hac Vice Motion on ECF	\$350	.6	\$210
Tyler Van Put	1/30/2015	Prepared FedEx Package; brought package to FedEx	\$350	.3	\$105

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Michael Park	2/19/2015	Put together filing for courtesy copies	\$350	3.0	\$1,050
Tyler Van Put	4/1/2015	Printed and prepared exhibits; compiled in folders and boxed for deposition	\$350	2.9	\$1,015
Tyler Van Put	4/7/2015	Downloaded and saved files	\$350	.1	\$35
Nanci-Taylor Maddux	4/8/2015	Scheduled flights and hotel	\$150	1	\$150
Nanci-Taylor Maddux	4/9/2015	Downloaded, saved, and circulated deposition and exhibits	\$150	.3	\$45
Michael Park	4/14/2015	Arranged for printing of latest production; loaded production onto server	\$350	.5	\$175
Michael Park	4/20/2015	Pulled filing	\$350	.5	\$175
Nanci-Taylor Maddux	4/20/2015	Sent unredacted documents to counsel	\$150	.4	\$60
Nanci-Taylor Maddux	4/20/2015	Sent binders of courtesy copies to Judge	\$150	7	\$1,050
Nanci-Taylor Maddux	4/21/2015	Changed flight and hotel reservation	\$150	.3	\$45
Nanci-Taylor Maddux	4/21/2015	Rescheduled hotel and flight	\$150	.7	\$105
Nanci-Taylor Maddux	4/22/2015	Scheduled flight	\$150	.4	\$60
Tyler Van Put	7/25/2019	Printed mediation materials and created binders; arranged to ship	\$350	1.3	\$455
Tyler Van Put	7/29/2019	Printed, copied, and organized materials for mediation	\$350	.4	\$140
Tyler Van Put	11/12/2019	Searched for template for settlement agreement motion; updated database	\$350	.3	\$105
Tyler Van Put	11/14/2019	Printed materials re class certification for review	\$350	.2	\$70

				TOTAL	\$9,190
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Because these represent purely clerical tasks, they should not be factored into Class Counsel’s lodestar.

Class Counsel has also block billed substantial time for travel. Courts in this district have frequently reduced travel time by half to create a reasonable rate. See, e.g., *In re Washington Public Power Supply Sys. Sec. Lit.*, 19 F.3d 1291, 1298–99 (9th Cir. 1994) (finding the district court did not err in reducing attorney travel time by half where the “attorneys generally billed the entire duration of the time spent in transit”); see also *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 6903, 2020 WL 2086368, at *8 (N.D. Cal. Apr. 30, 2020). Here, Class Counsel often block billed for travel to and participation in a hearing or deposition, without differentiating between the travel and substantive components. In the absence of an explanation regarding what time was spent traveling versus attending the hearing, the Court finds that a reduction in this time of fifty percent is appropriate under the circumstances.

Name	Date	Task	Rate	Hours	Total
Brad Silverman	9/9/2013	Prepared for hearing; traveled to California	\$550	11.50	\$6,325
Brad Silverman	9/11/2013	Prepared for hearing; legal research; travel	\$550	11	\$6,050
Pierce F. Gore	9/11/2013	Met with B. Silverman re preparation for motion to dismiss hearing and case management conference; attended motion to dismiss hearing and case management conference; travel between	\$650	5.80	\$3,770

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		San Jose and San Francisco; email and phone calls			
Brad Silverman	9/12/2013	Traveled to New York	\$550	8	\$4,400
Pierce F. Gore	2/12/2014	Attended hearing on Defendant's second motion to dismiss; meeting with B. Silverman; travel between San Jose and San Francisco	\$850	5.80	\$3,770
Pierce F. Gore	4/16/2014	Prepared for hearing on discovery dispute joint report; travel between San Jose and San Francisco	\$850	5.80	\$4,930
Pierce F. Gore	5/1/2014	Prepared for case management conference; attended case management conference; travel between San Jose and San Francisco	\$850	3.80	\$3,230
Brian Herrington	3/20/2015	Traveled to DC; defended deposition; traveled home	\$475	9.6	\$4,560
Brian Herrington	3/31/2015	Traveled to Boston for deposition	\$475	6.8	\$3,230
Brian Herrington	4/1/2015	Defended deposition and traveled to Jackson	\$475	12.2	\$5,795
Brad Silverman	4/2/2015	Deposition and related travel	\$550	10.5	\$5,775
Brian	5/5/2015	Traveled to San	\$475	13.4	\$6,365

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Herrington		Francisco for class certification hearing; prepared for same			
Pierce F. Gore	5/6/2015	Met with co-counsel regarding prep for hearing; attended class certification motion; email with co-counsel regarding hearing; travel between San Jose and San Francisco	\$850	8.5	\$7,225
Pierce F. Gore	8/20/2015	Prepared for hearing on defendant's spoliation; attended motion hearing; travel between Corte Madera and San Francisco; emailed and phone call with co-counsel regarding hearing	\$850	3.8	\$3,230
Pierce F. Gore	2/6/2018	Attended case management conference; travel between Corte Madera and Oakland	\$850	2.8	\$2,380
Pierce F. Gore	4/12/2018	Attended class certification hearing; travel between Corte Madera and Oakland	\$850	2.8	\$2,380
Pierce F. Gore	10/2/2018	Attended class certification hearing; travel	\$850	3.8	\$3,230

		between Corte Madera and Oakland			
Joshua Glatter	7/29/2019	Traveled to San Francisco re mediation and reviewed mediation papers	\$550	3.00	\$1,650
				TOTAL	\$78,295
				Reduced by 50%	\$39,147.50

The Court further notes that there were some entries for time reviewing court filings after the Court granted a stay in this case, at which point there were no new filings. To the extent Class Counsel had new counsel who needed to get up to speed join the case, this underscores the Court’s concern that having so many attorneys working on this case led to duplicative efforts.

Name	Date	Task	Rate	Hours	Total
Julia Sandler	4/20/2016	Reviewed court filings and motion papers	\$400	2.10	\$840
Julia Sandler	4/21/2016	Reviewed court filings	\$400	21.40	\$560
				TOTAL	\$1,400

The Court therefore reduces Class Counsel’s lodestar by \$148,490.67, and calculates Class Counsel’s lodestar as \$839,041.06.

The Court understands that Class Counsel is not seeking to recover the full lodestar amount. Still, the Court has concerns about Class Counsel’s requested fees in light of Class Counsel’s role in protecting the interests of absent Class Members and the results actually achieved in this settlement. As the Ninth Circuit has explained, “[t]hough the lodestar figure is presumptively reasonable, the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues

1 presented, and the risk of nonpayment. In *re* Bluetooth Headset Prod. Liab. Litig, 654 F.3d 935,
2 941–42 (9th Cir. 2011) (quotations and internal citations omitted). “Foremost among these
3 considerations . . . is the benefit obtained for the class.” *Id.* “Thus, where the plaintiff has
4 achieved ‘only limited success,’ counting all hours expended on the litigation—even those
5 reasonably spent—may produce an excessive amount, and the Supreme Court has instructed
6 district courts to instead ‘award only that amount of fees that is reasonable in relation to the results
7 obtained.’” *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)).

8 First, the Court repeatedly had to intervene to ensure that the rights of absent Class
9 Members were protected in this settlement. In the initial settlement agreement that Class Counsel
10 entered into, the release contained claims, including monetary relief claims, that the Court did not
11 certify in its Class Certification Order. See Dkt. No. 225 at §§ 1.2, 8.2 (releasing Defendant from
12 all claims, known or unknown, relating to and arising out of “all allegations, demands and
13 assertions in the SAC and any other filings or documents in the Class Action regarding the alleged
14 improper labeling of any of the Products”). Class Counsel also agreed with Defendant that notice
15 to absent Class Members was not required. See Dkt. No. 217 at 7–8. In other words, Class
16 Counsel approved a settlement in which absent Class Members would be giving up significant
17 legal rights without any notice. Only at the Court’s urging did the parties revise the settlement
18 agreement. See Dkt. No. 222-1, Ex. A. Class Counsel also continued to urge that notice was not
19 required to absent Class Members because the settlement only provided injunctive relief, and
20 Class Members would not be able to “opt out.” See Dkt. Nos. 222, 226. Yet as the Court
21 repeatedly explained, notice in this case was about giving absent Class Members the opportunity
22 to understand how their rights would be affected by the proposed settlement; object to the
23 settlement if they believed it insufficient; and weigh in on the anticipated motions for attorneys’
24 fees and incentive awards for the named Plaintiffs. See Dkt. No. 232; see also Fed. R. Civ. P.
25 23(h)(1). The Court thus initially denied the motion for preliminary approval on this basis. See
26 Dkt. No. 232. Of course, part of the Court’s role is to protect the rights of absent Class Members,
27 but Class Counsel obviously has a similar obligation. And yet Class Counsel failed to adequately
28 account for those rights without the Court’s repeated urging.

1 Second, it is unclear how much of the results achieved here were actually motivated by this
2 litigation. Of the sixteen different products whose labels purportedly changed as part of the
3 settlement, Defendant either discontinued or divested seven of the products. See SA at § 4.4. Any
4 “change” in these labels thus has illusory value, as the products are no longer available or within
5 Defendant’s control. The labels actually only changed for four of the nine products still owned by
6 Defendant, by removing soy flour from the ingredients list for two products and by removing the
7 AHA Heart Check Mark from two others. *Id.* And added color was removed as an ingredient
8 from five products, although the label did not change. *Id.* During the final fairness hearing,
9 however, Defense counsel confirmed that some of the decisions to alter the ingredients and labels
10 on their products were based in part on Defendant’s independent business decisions, rather than on
11 this litigation. It is thus difficult for the Court to adequately assess how much of the relief owed to
12 Plaintiffs’ efforts in this case and what the actual value of the relief is to the class. See *In re*
13 *Bluetooth*, 654 F.3d at 945, & n.8 (raising concerns about the disproportionate fees where
14 injunctive relief was sought but the value of that relief was unclear, and defendant had made
15 several voluntary changes).

16 Even assuming that Defendant made all these changes based on this litigation, these nine
17 products represent less than one-third of the products that Plaintiffs identified in the operative
18 complaint. See SAC at ¶¶ 193–194, 197–198, 202–203, 225–226.

19 For all of these reasons, the Court concludes that a reduction in attorneys’ fees is
20 appropriate in light of Class Counsel’s performance and the results achieved in this case. The
21 Court reduces Class Counsel attorneys’ fees to approximately one-third of the revised lodestar
22 calculated above, and thus **GRANTS IN PART** attorneys’ fees and costs in the amount of
23 \$225,000.

24 **C. Incentive Awards**

25 Lastly, Class Counsel also requests an incentive award of \$5,000 for each of the Named
26 Plaintiffs. Dkt. No. 241 at 24–25. District courts have discretion to award incentive fees to named
27 class representatives. See *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000).
28 However, the Court shares the Ninth Circuit’s concern that “if class representatives expect

1 routinely to receive special awards in addition to their share of the recovery, they may be tempted
2 to accept suboptimal settlements at the expense of the class members whose interests they are
3 appointed to guard.” See *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003); *Radcliffe v.*
4 *Experian Information Sols. Inc.*, 715 F.3d 1157, 1163–64 (9th Cir. 2013) (noting that the Ninth
5 Circuit has “expressed disapproval of these incentive agreements” and that “in some cases
6 incentive awards may be proper but . . . awarding them should not become routine practice”).
7 Indeed, the Ninth Circuit has cautioned that “district courts must be vigilant in scrutinizing all
8 incentive awards to determine whether they destroy the adequacy of the class representatives”
9 *Radcliffe*, 715 F.3d at 1165 (quotations omitted). This is particularly true where “the proposed
10 service fees greatly exceed the payments to absent class members.” *Id.*

11 The Court has concerns about the requested incentive awards in a case in which absent
12 Class Members are receiving no monetary awards at all, and where the actual value of the
13 injunctive relief is questionable. Thus, if the Court were to grant the named Plaintiffs’ request for
14 incentive awards, Plaintiffs Alex Ang and Lynn Streit would be receiving drastically preferential
15 treatment as compared to the other Class Members. And as the Court noted above, the Court
16 repeatedly had to intervene to ensure that absent Class Members’ rights were protected. The Court
17 has some questions as to whether named Plaintiffs took seriously their charge to protect the
18 interests of absent Class Members, and the Court cannot sanction this grossly disproportionate
19 request, especially where the results obtained were so modest. The Court accordingly **DENIES**
20 the request for incentive awards in its entirety.

21 **III. CONCLUSION**


22 Overall, the Court is left with the firm conviction that by far the main beneficiaries of this
23 long-running yet underwhelming case were the attorneys. From the outset, the theory of the case,
24 and the named Plaintiffs’ ability to credibly articulate it, were far from impressive. And the
25 resulting relief obtained for the class is similarly unimpressive. Nevertheless, controlling
26 precedent requires approval of this settlement, and the Court accordingly **GRANTS** final
27 approval. For the reasons set out above, the Court further **GRANTS IN PART** Class Counsel’s
28 request for attorneys’ fees and costs in the amount of \$225,000 and **DENIES** the request for

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incentive awards for named Plaintiffs. The parties are directed to implement this Final Order and the settlement agreement in accordance with the terms of the settlement agreement. The parties are further directed to file a stipulated final judgment within 21 days from the date of this order.

IT IS SO ORDERED.

Dated: 9/29/2020


HAYWOOD S. GILLIAM, JR.
United States District Judge