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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SHAVONDA HAWKINS, on behalf
12 of herself and all others similarly
13 situated,

Plaintiff,

14 v.

15 THE KROGER COMPANY,

16 Defendant.
17

Case No.: 15cv2320 JM (AHG)

**ORDER ON FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
MOTION FOR ATTORNEYS' FEES,
COSTS, AND INCENTIVE AWARD**

18
19 Presently before the court is Plaintiff Shavonda Hawkins' Motion for Final
20 Approval of Class Action Settlement (Doc. No. 350) and Motion for Attorneys' Fees,
21 Costs, and Incentive Award (Doc. No. 349). A hearing was held on January 31, 2022.
22 (Doc. No. 355). For the reasons set forth on the record and as explained in more detail
23 below, Plaintiff's Motions are **GRANTED**.

24 **I. BACKGROUND**

25 This action arises from the labeling of Kroger breadcrumbs. Plaintiff purchased
26 Kroger breadcrumbs in San Diego about six times per year from 2000 to July of 2015.
27 (Compl. ¶¶ 16, 71-72). Beginning in 2008, the front label of the breadcrumbs read "0g
28 Trans Fat." (Doc. No. 275-1 at 56-57). On the back of the breadcrumbs, the nutrition

1 fact label read “Trans Fat 0g” and included partially hydrogenated vegetable oil (“PHO”)
 2 as an ingredient. (*See* Doc. No. 275-1 at 281-87). Because the breadcrumbs contained
 3 PHO, they contained “trace amounts” of trans fat. (Doc. No. 275 at 12).

4 On October 15, 2015, Plaintiff filed a putative class action alleging violations of
 5 California’s False Advertising Law (“the FAL”), Cal. Bus. & Prof. Code § 17500 *et. seq.*,
 6 Unfair Competition Law (“the UCL”), *id.* § 17200 *et. seq.*, and Consumers Legal
 7 Remedies Act (“the CLRA”), Cal. Civ. Code. §§ 1750 *et seq.* Plaintiff also brought
 8 claims for breach of the implied warranty of merchantability and breach of express
 9 warranty. (Compl. ¶¶ 122-187).

10 On March 17, 2016, the court granted Kroger’s first motion to dismiss. (Doc. No.
 11 19). On November 16, 2018, the Ninth Circuit reversed and remanded the case. (Doc.
 12 No. 27). On February 8, 2019, Kroger filed a second motion to dismiss (Doc. No. 34)
 13 which the court denied (Doc. No. 40).

14 On January 21, 2020, Plaintiff filed a motion for class certification. (Doc. No. 89).
 15 On November 9, 2020, the court certified the following class:

16 All citizens of California who purchased, between January 1,
 17 2010 and December 31, 2015, Kroger Bread Crumb[s]
 18 containing partially hydrogenated oil and the front label claim
 19 “0g Trans Fat.”

20 (Doc. No. 263 at 38). On December 29, 2020, the court denied Kroger’s motion to
 21 reconsider the court’s class certification order. (Doc. No. 323). On January 13, 2021,
 22 Kroger filed a petition for permission to appeal the court’s class certification order to the
 23 Ninth Circuit (Doc. No. 334) which was denied (Doc. No. 338).

24 On November 20, 2020, the Parties filed cross-motions for summary judgment.
 25 (Doc. Nos. 275, 277). On January 11, 2021, the court issued an order granting-in-part
 26 and denying-in-part the Parties’ motions. (Doc. No. 332). Specifically, the court:
 27 (1) granted Kroger’s motion as to Plaintiff’s use claim under the unlawful prong of the
 28 UCL; (2) denied Kroger’s motion as to Plaintiff’s use claim under the unfair prong of the

1 UCL; (3) denied Kroger's motions as to Plaintiff's labeling claims; and (4) denied
2 Kroger's motion as to Plaintiff's express and implied warranty claims. (Doc. No. 332 at
3 22).

4 On February 12, 2021, the Parties attended a Mandatory Settlement Conference
5 before Magistrate Judge Allison H. Goddard. (Doc. No. 336). Following the conference,
6 Judge Goddard issued a Mediator's Proposal, which the Parties accepted on February 26,
7 2021. (Doc No. 337 at 1).

8 On April 20, 2021, Plaintiff filed a motion for preliminary approval of the class
9 settlement. (Doc. No. 343). The court held a hearing on Plaintiff's preliminary approval
10 motion on June 21, 2021. (Doc. No. 345). On July 2, 2021, the court granted Plaintiff's
11 preliminary approval motion. (Doc. No. 346). The court conditioned its approval,
12 however, on the Parties submitting a Revised Notice Plan to address concerns the court
13 had with the Parties' plan of using Facebook advertisements targeting women over the
14 age of 25 as the "primary method" of class notification. *Id.* at 9-10. In response, the
15 Parties submitted a Revised Notice Plan on July 21, 2021 (Doc. No. 347) which the court
16 approved with modifications on July 28, 2021 (Doc. No. 348).

17 On August 2, 2021, Plaintiff filed a Motion for Attorneys' Fees. (Doc. No. 349).
18 On October 4, 2021, Plaintiff filed a Motion for Final Approval. (Doc. No. 350). On
19 October 20, 2021, the court issued an order resetting the final approval hearing, in light of
20 28 U.S.C. § 1715's notice requirement. (Doc. No. 351 at 2). The court also requested
21 clarification from Plaintiff regarding: (1) whether an amendment was actually made to
22 the Settlement Agreement; and (2) the exact *pro rata* distribution to each individual class
23 member. (Doc. No. 351 at 3). Plaintiff submitted a supplemental brief addressing these
24 issues on November 1, 2021. (Doc. No. 352).

25 A final approval hearing was held on January 31, 2022. (Doc. No. 355).

26 **II. SETTLEMENT AGREEMENT TERMS**

27 The Parties have submitted a Class Action Settlement Agreement with
28 approximately sixteen pages of substantive terms. (Doc. No. 350-2 at 1-4 ("Weston

1 Decl. I’), Ex. A (“Settlement Agreement”)). The Settlement Agreement requires Kroger
2 to fund a \$780,000 cash settlement fund. (Agreement, § 4). \$79,635 of this fund will be
3 allocated to notice and administrative expenses, consisting of: (1) \$49,635 to be paid to
4 the Settlement Administrator after preliminary approval to cover expenses associated
5 with the class notice and claims processing and (2) \$30,000 to be paid after final approval
6 for costs associated with postage and check printing. *Id.*, § 7.A.

7 The Agreement estimates class members will be entitled to a recovery of:
8 (1) \$17.50 for undocumented claims; or (2) up to \$100 for claims documented by
9 receipts. *Id.*, § 4.¹ Each class member’s share shall be increased or reduced on a *pro rata*
10 basis based on whether the combined monetary value of valid claims exceeds the
11 settlement fund after administrative expenses are deducted. *Id.* None of the settlement
12 fund will revert to Kroger; instead, any funds remaining after distribution are to be paid
13 by the Settlement Administrator in a *cy pres* payment to the American Heart Association.
14 *Id.* Within ninety days from final approval, Kroger is required to make a separate one-
15 time *cy pres* payment of \$21,000 to the American Heart Association. *Id.*, § 5.

16 In exchange for their *pro rata* share, all class members are deemed to release
17 Kroger from any claims relating to the “manufacturing, formulation, preparation,
18 handling, distribution, advertising, marketing, packaging, sale, labeling, promotion, and
19 ingredients of Kroger Bread Crumbs[.]” *Id.*, § 8. The release does not extend to personal
20 injury claims “resulting from a defect in Kroger Bread Crumbs or packaging[.]”
21 *Id.*, § 8.C.

22 Additionally, the Agreement permits the named Plaintiff to move the court for an
23 incentive award of up to \$7,000 and for Class Counsel to move for up to \$400,000 in fees
24 and costs. *Id.*, § 10. Kroger agrees not to oppose this application or take any steps to
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27 ¹ In its Supplemental Briefing, Class Counsel represents no class member submitted a
28 claim documented by grocery store receipts, so this provision had no effect. (Doc. No.
352-1 at ¶ 6).

1 encourage objectors, provided these limits are not exceeded. *Id.* The settlement is
2 structured such that attorneys’ fees and the class award will be paid separate from the
3 common fund. *Id.*

4 **III. FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

5 **A. Class Certification**

6 Before approving the settlement itself, the court’s “threshold task is to ascertain
7 whether the proposed settlement class satisfies the requirements of Rule 23(a) of the
8 Federal Rules of Civil Procedure applicable to class actions, namely: (1) numerosity,
9 (2) commonality, (3) typicality, and (4) adequacy of representation.” *Hanlon v. Chrysler*
10 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In addition, the court must determine
11 whether “the action is maintainable under Rule 23(b)(1), (2), or (3).” *Dunleavy v. Nadler*
12 *(In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 462 (9th Cir. 2000) (quoting *Amchem*
13 *Prod., Inc., v. Windsor*, 521 U.S. 591, 614 (1997)).

14 In the present case, the court has already certified a class under Rule 23(b)(3).
15 (See Order on Motion for Class Certification, Doc. No. 263 at 38 (certifying class of
16 “[a]ll citizens in California who purchased, between January 1, 2010 and
17 December 31, 2015, Kroger Bread Crumb[s] containing partially hydrogenated oil and
18 the front label claim ‘0g Trans Fat.’”). The court subsequently approved an amended
19 definition of the class that excludes: “(a) persons or entities who purchased Kroger Bread
20 Crumbs for the purpose of resale or distribution; (b) persons who timely and properly
21 exclude themselves from the Class, as provided in the Settlement Agreement; (c) Kroger
22 and any of its officers, directors, agents, representatives, employees, or other persons
23 associated with Kroger, and (d) any judicial officer hearing this Litigation.” (Doc. No.
24 346 at 5).

25 The court is not aware of any new facts which would alter its conclusion. For
26 these reasons, the court reaffirms its prior certification of the Settlement Class and its
27 prior appointments of The Weston Firm as Class Counsel, and Plaintiff Shavonda
28 Hawkins as the Class Representative.

1 **B. Legal Standard for Final Approval**

2 Federal Rule of Civil Procedure 23(e) provides “[t]he claims, issues, or defenses of
3 a certified class . . . may be settled, voluntarily dismissed, or compromised only with the
4 court's approval.” Fed. R. Civ. P. 23(e). The Rule “requires the district court to
5 determine whether a proposed settlement is fundamentally fair, adequate and
6 reasonable.” *Id.* at 1026. In making this determination, the court is required to “evaluate
7 the fairness of a settlement as a whole, rather than assessing its individual components.”
8 *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012). Because a “settlement is
9 the offspring of compromise, the question we address is not whether the final product
10 could be prettier, smarter or snazzier, but whether it is fair, adequate and free from
11 collusion.” *Hanlon*, 150 F.3d at 1027.

12 A court considers several factors in determining whether a proposed settlement is
13 “fair, reasonable, and adequate” under Rule 23(e), including: “the strength of plaintiffs’
14 case; the risk, expense, complexity, and likely duration of further litigation; the risk of
15 maintaining class action status throughout the trial; the amount offered in settlement; the
16 extent of discovery completed, and the stage of the proceedings; the experience and
17 views of counsel; the presence of a governmental participant; and the reaction of the
18 class members to the proposed settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th
19 Cir. 2003) (quoting *Molski v. Gleic* , 318 F.3d 937, 953 (9th Cir. 2003)). This is not an
20 “exhaustive list of relevant considerations.” *Officers for Justice v. Civil Serv. Com.*,
21 688 F.2d 615, 625 (9th Cir. 1982). “The relative degree of importance to be attached to
22 any particular factor will depend upon and be dictated by the nature of the claims
23 advanced, the types of relief sought, and the unique facts and circumstances presented by
24 each individual case.” *Id.*

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1 In addition to the *Hanlon* factors, the 2018 amendments to Rule 23 established a
2 uniform set of factors courts consider when determining whether a settlement is “fair,
3 reasonable, and adequate,” including whether:

4 (A) the class representatives and class counsel have adequately
5 represented the class;

6 (B) the proposal was negotiated at arm's length;

7 (C) the relief provided for the class is adequate, taking into
8 account:

9 (i) the costs, risks, and delay of trial and appeal;

10 (ii) the effectiveness of any proposed method of
11 distributing relief to the class, including the
12 method of processing class-member claims;

13 (iii) the terms of any proposed award of attorney's
14 fees, including timing of payment; and

15 (iv) any agreement required to be identified
16 under Rule 23(e)(3); and

17 (D) the proposal treats class members equitably relative to each
18 other.

19 Fed. R. Civ. P. 23(e)(2); *see Perks v. Activehours, Inc.*, No. 5:19-CV-05543-BLF,
20 2021 WL 1146038, at *4 (N.D. Cal. Mar. 25, 2021).

21 “The notes of the Advisory Committee explain that the enumerated, specific
22 factors added to Rule 23(e)(2) are not intended to ‘displace’ any factors currently used by
23 the courts, but instead aim to focus the court and attorneys on ‘the core concerns of
24 procedure and substance that should guide the decision whether to approve the
25 proposal.’” *In re Extreme Networks, Inc. Sec. Litig.*, No. 15-CV-04883-BLF, 2019 WL
26 3290770, at *6 (N.D. Cal. July 22, 2019). “Accordingly, the [c]ourt applies the
27 framework set forth in Rule 23 with guidance from the Ninth Circuit’s precedent[.]” *Id.*

28 When reviewing a proposed settlement, the court’s primary concern remains “the
protection of those class members, including the named plaintiffs, whose rights may not

1 have been given due regard by the negotiating parties.” *Officers*, 688 F.2d at 624.
2 Ultimately, “[i]n most situations, unless the settlement is clearly inadequate, its
3 acceptance and approval are preferable to lengthy and expensive litigation with uncertain
4 results.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.
5 Cal. 2004).

6 **1. Adequacy of Notice**

7 “Adequate notice is critical to court approval of a class settlement[.]” *Hanlon*,
8 150 F.3d at 1025. In its prior Orders (Doc. Nos. 346 and 348), the court approved the
9 Parties’ proposed notification plan—subject to the court’s modifications—and authorized
10 Classaura LLC to act as the Settlement Administrator.

11 In support of the Final Approval Motion, Plaintiff submits the Declaration of Gajan
12 Retnasaba, a partner at Classaura. (Doc. No. 350-3 at 1-5 (“Retnasaba Decl.”)). Mr.
13 Retnasaba informs the court that Classaura setup a dedicated toll-free number, e-mail
14 address, and website on August 9 and August 13, 2021. *Id.* at ¶¶ 11-13. The website
15 includes general information about the instant matter, key case filings, and other details,
16 including the deadlines to file a claim, opt-out, submit an objection, and the date of the
17 Fairness Hearing. *Id.* at ¶ 12. The website was visited 39,738 times. *Id.* The dedicated
18 line received 126 calls and 37 voicemails were answered. *Id.* at ¶ 11. 71 e-mails were
19 received and answered. *Id.* at ¶ 13.

20 In addition, Kroger provided Classaura with a list of Kroger’s California-based
21 Club Card members who had purchased Kroger Bread Crumbs within the last twelve
22 months. *Id.* at ¶ 8. The list contained: (1) 91,495 unique e-mail addresses; and
23 (2) 52,591 unique mailing addresses (for Club Card members for whom an e-mail address
24 was not available). *Id.* at ¶¶ 8-9. Appropriate e-mail and direct mail notices were sent to
25 these addresses. *Id.* The e-mails contained a link to the settlement website. *Id.* at ¶ 8.
26 Of the e-mails sent, 34,412 recipients opened the e-mail and 10,753 recipients clicked the
27 provided link and visited the settlement website. *Id.*

1 Classaura also published a class notice in the San Diego Uptown Examiner and
2 USA Today’s “San Francisco” and “Los Angeles” editions. *Id.* at ¶ 3. In addition, on
3 August 15, 2021, Classaura began an online advertising campaign on Facebook targeting
4 adults residing in California over the age of eighteen. *Id.* at ¶ 4. Mr. Retnasaba declares
5 the campaign generated 8,713,061 impressions reaching 8,322,923 unique users.
6 *Id.* at ¶¶ 5-6. Classaura further made submissions to ClassActionRebates.com and
7 TopClassActions.com—two “leading website[s] that collect and publicize class
8 notices[.]” *Id.* at ¶ 7.

9 Finally, on August 16, 2021, Classaura sent an informational press release using
10 the PR Newswire’s US1 National Newswire providing a summary of the settlement. *Id.* at
11 ¶ 10. Mr. Retnasaba declares the press release was picked up by at least 103 media
12 outlets. *Id.*

13 As of October 4, 2021, Classaura has received 16,769 valid claims, no objections,
14 and 5 requests for exclusion. (Doc. No. 350-1 at 13; Retnasaba Decl. at ¶¶ 14-15).
15 Given the above, the court finds the Class Notice provided in this case was the best
16 practicable and adequate to satisfy the requirements of Rule 23 and due process.

17 **2. Compliance with Class Action Fairness Act**

18 Class Counsel’s declaration, submitted in support of Plaintiff’s Final Approval
19 Motion, states Mr. Weston provided notice of the settlement pursuant to 28 U.S.C.
20 § 1715, on October 1, 2021. (Weston Decl. I at ¶ 25). Although untimely under 28
21 U.S.C. § 1715(b), the Parties’ late notice is not fatal to the final approval of their class
22 action settlement. *See Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 973 (E.D.
23 Cal. 2012) (“[N]umerous courts [have found] that late mailing of notices to state and
24 federal officials under [the Class Action Fairness Act (“CAFA”)] is not fatal to approval
25 of settlements.”). Instead, the court finds the *substance* of the requirements—to provide
26 federal and state officials sufficient notice and opportunity to be heard—has been
27 satisfied here.

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1 **3. Strength of Plaintiff’s Case; Risk of Further Litigation; and Risk**
2 **of Maintaining Class Action Settlement**

3 The preferable nature of settlement over the uncertainties, expense, and length of
4 litigation, means that “[w]hen assessing the strength of plaintiff’s case, the court does not
5 reach any ultimate conclusions regarding the contested issues of fact and the law that
6 underlie the merits of this litigation.” *Four in One Co. v. S.K. Foods, L.P.*, No. 2:08-CV-
7 3017 KJM EFB, 2014 WL 4078232, at *7 (E.D. Cal. Aug. 14, 2014) (quotations
8 omitted). Similarly, “a proposed settlement is not to be judged against a speculative
9 measure of what might have been awarded in a judgment in favor of the class.” *Nat’l*
10 *Rural Telecomms. Coop*, 221 F.R.D. at 526.

11 In this case, to succeed on the merits, Plaintiff must prove that: (1) Kroger’s use of
12 PHO in its breadcrumbs was unfair under the UCL; (2) Kroger’s product labeling violates
13 the UCL, FAL, and CLRA; and (3) Kroger breached implied and express warranties.
14 (See Doc. No. 332 at 22). Kroger denies all of Plaintiff’s allegations and asserts several
15 defenses to liability, suggesting vigorous and costly litigation if the action proceeds to
16 trial. (Agreement, § 2; Doc. No. 332 at 19-21).

17 Settlement in this case was reached only after over five years of protracted, heavily
18 contested litigation, including an appeal to the Ninth Circuit. See Docket. The inherent
19 risk of further litigation in this matter is well-known to all involved. Proceeding to trial
20 presents very real risks of an unfavorable decision on the merits and/or on resulting
21 appeals. Even if Plaintiff were to prevail at trial, Plaintiff would still be required to
22 expend considerable additional time and resources that may potentially outweigh any
23 additional recovery obtained through successful litigation. Continued litigation would
24 further delay payment to Class Members and increase the amount of attorneys’ fees. All
25 in all, the court finds these risks weigh in favor of settlement.

26 **4. The Amount Offered in Settlement**

27 “Basic to the process [of evaluating settlements] is the need to compare the terms
28 of the compromise with the likely rewards of litigation.” *Protective Comm. for Indep.*

1 *Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968). Here, the
2 Settlement Agreement authorizes a recovery of \$780,000—minus \$79,635 in costs
3 associated with administering the settlement. (Agreement, §§ 4, 7.A). Class Counsel
4 contends this relief compares favorably to total California sales of Kroger Bread Crumbs
5 during the class period, which totaled about \$ 2 million. (Doc. No. 350-1 at 12). The
6 settlement is fully *pro rata*—each class member is expected to receive \$41.77. *Id.* at 18.²
7 In this case, the amount offered to each individual class member strikes the court as fair,
8 reasonable and adequate, especially in light of the \$2-\$3 purchase price of Kroger Bread
9 Crumbs. (Doc. No. 343-1 at 15). In light of the above, and the court’s experience with
10 consumer class actions, the court finds this factor weighs in favor of settlement.

11 **5. Extent of Discovery and State of Proceedings**

12 A court should focus on whether the “parties have sufficient information to make
13 an informed decision about settlement.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at
14 459 (quoting *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998); *see*
15 *also Onitverso v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014) (“A settlement that
16 occurs in an advanced stage of the proceedings indicates the parties carefully investigated
17 the claims before reaching a resolution.”).

18 Here, as already stated, the Parties have been litigating this case for over five years,
19 including an appeal to the Ninth Circuit. *See* Docket. Both Parties have engaged in
20 formal and informal discovery, including multiple depositions. Weston Decl. I at ¶¶ 3-
21 13. In addition, the Parties have engaged in lengthy informal settlement negotiations and
22 attended multiple settlement conferences at different stages of this litigation. (Weston
23 Decl. I at ¶¶ 14-15; Doc. Nos. 57, 114, 336). In light of these facts, the court is
24 comfortable finding the Parties possess “sufficient information to make an informed
25

26 ² In its supplemental briefing, Mr. Weston informs the court the Settlement Administrator
27 was instructed to round the settlement checks up—with any additional funds to be paid
28 by the Mr. Weston’s firm as a *de minimis* unreimbursed litigation cost. (Doc. No. 352-1
at ¶ 5).

1 decision about settlement.” *Linney*, 151 F.3d at 1239. Accordingly, this factor weighs in
2 favor of settlement.

3 **6. Experience of Counsel**

4 “The recommendations of plaintiffs’ counsel should be given a presumption of
5 reasonableness.” *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D.
6 Cal. 2008) (citing *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Here,
7 Class Counsel provided a declaration detailing their experience in prosecuting consumer
8 class actions. Weston Decl. I, Ex. B. Mr. Weston attests the proposed resolution
9 embodied in the Parties’ settlement “was the product of heavily contested arms’ length
10 negotiation” and the Parties “invested substantial time and effort to work through initially
11 incompatible settlement postures and overcome vigorous disagreements.” Weston Decl. I
12 at ¶¶ 14-15. It is Mr. Weston’s belief the settlement is fair and reasonable. *Id.* at ¶ 16. In
13 light of the foregoing, and according proper weight to the judgment of counsel, the court
14 finds this factor weighs in favor of the settlement.

15 **7. Reaction of Class Members**

16 “It is established that the absence of a large number of objections to a proposed
17 class action settlement raises a strong presumption that the terms of a proposed class
18 settlement are favorable to the class members.” *Nat’l Rural Telecomm. Coop., Inc.*,
19 221 F.R.D. at 529 (citations omitted). Here, no objections to the settlement have been
20 received—although five requests for exclusion were submitted. (Doc. No. 350-1 at 13;
21 Retnasaba Decl. at ¶ 15). The absence of an objection “is compelling evidence that the
22 Proposed Settlement is fair, just, reasonable, and adequate.” *Id.* at 529. The court finds
23 this factor weighs in favor of settlement.

24 **8. Signs of Collusion**

25 In addition to evaluating the fairness of the settlement terms, the court must be
26 watchful for “subtle signs” that “class counsel have allowed pursuit of their own self-
27 interests and that of certain class members to infect the negotiations.” *Jones v. GN*
28 *Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*, 654 F.3d 935, 947

1 (9th Cir. 2011). In *Bluetooth*, the Ninth Circuit identified three possible signs of
2 collusion: (1) “when counsel receives a disproportionate distribution of the settlement, or
3 when the class receives no monetary distribution but class counsel are amply rewarded”;
4 (2) “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of
5 attorneys’ fees”; and (3) “when the parties arrange for fees not awarded to revert to
6 defendants rather than be added to the class fund[.]” 654 F.3d at 947. In *Briseño v.*
7 *Henderson*, 998 F.3d 1014, 1024 (9th Cir. 2021), the Ninth Circuit made clear that courts
8 should consider these factors even if settlement is proposed after class certification.

9 In this case, the first sign of collusion is arguably not present here. The total
10 amount Kroger has agreed to pay to settle this case is \$1,208,500—the sum of the
11 \$780,000 settlement fund, \$400,000 request for attorneys’ fees and costs, \$7,000
12 incentive payment, and \$21,000 *cy pres* payment. (Settlement Agreement, §§ 4, 10).
13 The amount of attorneys’ fees and costs Kroger agreed not to contest is \$400,000.
14 *Id.*, § 10. If the court were to award the maximum requested attorneys’ fees and costs—
15 this would constitute 33% of the constructive common fund. And while 33.3% is higher
16 than the typical Ninth Circuit benchmark, it is considerably lower than the 83.2% that
17 was at issue in *Bluetooth*. *Bluetooth*, 654 F.3d at 945 (“[W]e are concerned that the
18 amount awarded was 83.2% of the total amount defendants were willing to spend to settle
19 the case.”).

20 The second sign of collusion, however, is clearly present. The Parties’ Settlement
21 Agreement contains a “clear sailing” provision whereby Kroger agrees not to contest the
22 amount of fees and costs awarded, as long as the award falls below the \$400,000
23 negotiated ceiling. *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 529 (1st Cir.
24 1991) (“In general, a clear sailing agreement is one where the party paying the fee agrees
25 not to contest the amount to be awarded by the fee-setting court so long as the award falls
26 beneath a negotiated ceiling.”). “The very existence of a clear sailing provision increases
27 the likelihood that class counsel will have bargained away something of value to the
28 class.” *Bluetooth*, 654 F.3d at 948 (quoting *Weinberger*, 925 F.2d at 525). “[W]hen

1 confronted with a clear sailing provision” the court has “a heightened duty to peer into
2 the provision and scrutinize closely the relationship between attorneys’ fees and benefit
3 to the class, being careful to avoid awarding ‘unreasonably high’ fees simply because
4 they are uncontested.” *Id.* at 948.

5 The third sign of collusion is also present in this case. While there is no explicit
6 reversionary provision in the Settlement Agreement, the Agreement is structured such
7 that attorneys’ fees are paid separate from the common fund. Agreement, § 10. Thus, the
8 Agreement suggests Kroger will retain the difference between the negotiated fee cap and
9 any award of fees the court makes below that amount. As the Ninth Circuit has stated, “a
10 kicker arrangement reverting unpaid attorneys’ fees to the defendant rather than to the
11 class amplifies the danger of collusion already suggested by a clear sailing provision.”
12 *Bluetooth*, 654 F.3d at 949.

13 Despite the presence of both a clear sailing and kicker provision, the court is
14 persuaded by the value that the Settlement Agreement provides to class members that
15 these indications of collusion do not warrant invalidating the agreement as a whole. In
16 addition, the court also credits the fact that the Parties resolved this case only after
17 multiple settlement conferences overseen by Magistrate Judge Goddard attended by
18 experienced counsel. (Doc. Nos. 114; 336). Settlement was only achieved upon the
19 Parties’ acceptance of Judge Goddard’s Mediator’s Proposal. (Doc. No. 337).

20 The court can, therefore, put “a good deal of stock” in the fact that the settlement
21 was “the product of an arms-length, non-collusive negotiated resolution.” *Rodriquez v.*
22 *West Publishing Group*, 563 F.3d 948, 965 (9th Cir. 2009); *see G. F. v. Contra Costa*
23 *Cty.*, No. 13-CV-03667-MEJ, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) (“The
24 assistance of an experienced mediator in the settlement process confirms that the
25 settlement is non-collusive.”) (quotation omitted).

26 Ultimately, although there are signs of possible collusion, the court finds the other
27 factors favoring approval and the process by which this settlement was reached is
28

1 adequate to allow the court to conclude there is insufficient evidence of collusion to
2 warrant denying the Final Approval Motion in its entirety.

3 **9. Balancing of Factors**

4 “Ultimately, the district court's determination is nothing more than ‘an amalgam of
5 delicate balancing, gross approximations and rough justice.’” *Officers for Justice*,
6 688 F.2d at 625 (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 468 (2d Cir. 1974)).
7 “[I]t must not be overlooked that voluntary conciliation and settlement are the preferred
8 means of dispute resolution. This is especially true in complex class action litigation[.]”
9 *Id.* Having considered the relevant factors, the court finds the settlement fundamentally
10 fair, adequate, and reasonable.

11 **IV. MOTION FOR ATTORNEY’S FEES, COSTS, AND INCENTIVE AWARD**

12 The court turns next to Plaintiff’s Motion for Attorneys’ Fees, Costs, and Incentive
13 Award. (Doc. No. 349). Pursuant to the terms of the Parties’ Settlement Agreement,
14 Class Counsel requests \$400,000 in attorneys’ fees and costs. (Doc. No. 349 at 2;
15 Settlement Agreement, § 10). Class Counsel further requests a \$7,000 incentive payment
16 be awarded to named Plaintiff Shavonda Hawkins. *Id.* As agreed, Kroger does not
17 object to or oppose Plaintiff’s Motion. *See* Docket; Settlement Agreement, § 10. The
18 court addresses each of Class Counsel’s requests below.

19 **A. Attorneys’ Fees and Costs**

20 **1. Legal Standard**

21 Federal Rule of Civil Procedure 23(h) permits a court to award reasonable
22 attorneys’ fees “authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h).
23 However, “courts have an independent obligation to ensure that the award, like the
24 settlement itself, is reasonable, even if the parties have already agreed to an amount.”
25 *Bluetooth*, 654 F.3d at 941.

26 In a diversity action under CAFA, federal courts apply state law when determining
27 both the right to fees and the method of calculating them. *See Mangold v. Cal. Pub.*
28 *Utilities Comm’n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (“Existing Ninth Circuit precedent

1 has applied state law in determining not only the right to fees, but also in the method of
2 calculating fees.”); *see also Figueroa v. Cap. One, N.A.*, No. 18CV692 JM(BGS), 2021
3 WL 211551, at *9 (S.D. Cal. Jan. 21, 2021).

4 California courts “recognize two methods for calculating attorney fees in civil class
5 actions: the lodestar/multiplier method and the percentage of recovery method.”
6 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001). “The percentage
7 method calculates the fee as a percentage share of a recovered common fund or the
8 monetary value of plaintiffs’ recovery.” *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th
9 480, 489 (2016). “The lodestar method, or more accurately the lodestar-multiplier
10 method, calculates the fee ‘by multiplying the number of hours reasonably expended by
11 counsel by a reasonable hourly rate.’” *Id.*

12 2. Lodestar Calculation

13 “The fee setting inquiry in California ordinarily begins with the ‘lodestar.’” *PLCM*
14 *Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000) (“California courts have consistently
15 held that a computation of time spent on a case and the reasonable value of that time is
16 fundamental to a determination of an appropriate attorneys’ fee award.”).

17 In support of their fee request, Class Counsel submitted a lodestar calculation of
18 \$1,061,821 based on 2,905.4 hours of work. (Doc. No. 349-1 at 15). This lodestar figure
19 is based on the below table provided by Class Counsel, supported by billing records:

20 Timekeeper	Rate Requested	Total Hours	Lodestar
21 Gregory S. Weston	\$650	886.8	\$576,420.00
22 Andrew C. Hamilton	\$305	32.1	\$9,790.50
23 Conor Trombetta	\$305	198.8	\$60,634.00
24 Senior Paralegals	\$235	1,616.6	\$379,901.00
25 Junior Paralegals	\$205	171.1	\$35,075.50
26 Totals		2,905.4	\$1,061,821.00

27 (Doc. Nos. 349-1 at 26; 349-2, Ex. 3).

1 The court first considers whether the requested hourly rates are reasonable. “In
2 determining a reasonable hourly rate, the district court should be guided by the rate
3 prevailing in the community for similar work performed by attorneys of comparable skill,
4 experience, and reputation.” *Chalmers v. Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir.
5 1986). The party requesting fees bears the burden “to produce satisfactory evidence” the
6 requested rates are reasonable. *Blum v. Stenson*, 465 U.S. 886, 904 (1984).

7 In this case, Class Counsel submits evidence of: (1) decisions issued by other
8 courts in this circuit in which Class Counsel was awarded fees based on similar rates;
9 (2) survey data; and (3) the blended rates other courts in this circuit have approved as
10 compared to the blended rate in this action. (Doc. Nos. 349-1 at 15-18; 349-2 at 1-8
11 (“Weston Decl. II”) at ¶¶ 12-27). Mr. Weston also outlined his experience and
12 qualifications, as well as those of his associates, Mr. Hamilton and Mr. Trombetta.
13 Weston Decl. II at ¶¶ 3-5. Based on this evidence, and the court’s knowledge of
14 prevailing rates in the San Diego legal market, the court finds the billing rates requested
15 by Class Counsel are reasonable.

16 The court next turns to whether the number of hours expended by Mr. Weston, his
17 associates, and his paralegals, were reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424,
18 434 (1983) (“The district court also should exclude from this initial fee calculation hours
19 that were not ‘reasonably expended.’”). “The fee applicant bears the burden of
20 documenting the appropriate hours expended in the litigation and must submit evidence
21 in support of those hours worked.” *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir.
22 1994).

23 In this case, Class Counsel claims the number of hours expended totals 2,905.4
24 comprising: (1) 1,117.7 hours of attorney time (the majority of which was expended by
25 Mr. Weston); and (2) 1,787.7 hours of paralegal time. Weston Decl. II at ¶ 8, Table 1. In
26 support, Class Counsel submits billing records documenting the amount of time spent by
27 each timekeeper on individual tasks. (Doc. No. 349-3, Ex. 3). Mr. Weston further
28 represents prior to the submission of these numbers to the court, he performed a detailed

1 review of all of the raw timesheets in this case to identify errors, duplicates, and other
2 instances where the hours billed should have been either reduced or struck. Weston Decl.
3 II at ¶ 9. As a result of this review, Mr. Weston states he struck 129 time entries and
4 reduced time in another 80 entries. *Id.*

5 The court is all too familiar with the contentious nature of this litigation and is
6 confident a more cooperative and civil discourse between the Parties could have avoided
7 unnecessary filings and numerous discovery disputes. Nonetheless, the court has
8 conducted a thorough review of the timesheets submitted and determines that although
9 there are some areas of concern—including a number of vague and block-billed entries—
10 in general, the hours billed “appropriately reflects the degree of time and effort
11 expended” by Class Counsel. *Laffitte*, 1 Cal. 5th at 505.

12 Multiplying the time expended by the rates approved, Plaintiff’s lodestar is
13 \$1,061,821. Weston Decl. II at ¶ 8. When determining a reasonable fee in a class action,
14 the lodestar figure is “presumptively reasonable.” *Bluetooth*, 654 F.3d at 941. Because
15 Class Counsel is requesting attorneys’ fees lower than the base lodestar, Class Counsel’s
16 request translates essentially to a negative multiplier. “[A] multiplier below 1.0 is below
17 the range typically awarded by courts and is presumptively reasonable.” *Wong v. Arlo*
18 *Techs., Inc.*, No. 5:19-CV-00372-BLF, 2021 WL 1531171, at *11 (N.D. Cal. Apr. 19,
19 2021); *see also Covillo v. Specialtys Cafe*, No. C-11-00594 DMR, 2014 WL 954516, at
20 *7 (N.D. Cal. Mar. 6, 2014) (“Plaintiffs’ requested fee award is approximately 65% of
21 the lodestar, which means that the requested fee award results in a so-called negative
22 multiplier, suggesting that the percentage of the fund is reasonable and fair.”).

23 3. Percentage Cross-Check

24 Although the lodestar “may be a perfectly appropriate method of fee calculation,”
25 the Ninth Circuit has “encouraged courts to guard against an unreasonable result by
26 cross-checking their calculations against a second method.” *Bluetooth*, 654 F.3d at 944.
27 “Just as the lodestar method can confirm that a percentage of recovery amount does not
28 award counsel an exorbitant hourly rate, the percentage-of-recovery method can likewise

1 be used to assure that counsel’s fee does not dwarf class recovery.” *Id.* at 945 (quotation
2 omitted).

3 Here, the constructive common fund in this case totals \$1,208,500, comprising the:
4 (1) \$780,000 settlement fund; (2) \$400,000 request for attorneys’ fees and costs;
5 (3) \$7,000 request for an incentive payment; and (4) \$21,000 *cy pres* payment. (Doc. No.
6 349 at 2; Settlement Agreement, §§ 4-5). This amount constitutes the “total amount
7 defendants were willing to spend to settle the case.” *Bluetooth*, 654 F.3d at 945
8 (including allotment for attorneys’ fees, incentive awards, *cy pres* award, and other fees
9 in calculation of constructive common fund). The request for \$400,000 in fees, therefore,
10 represents 33% of the constructive common fund, which is higher than the 25%
11 benchmark typically used by the Ninth Circuit. *Id.* at 942 (“[C]ourts typically calculate
12 25% of the fund as the ‘benchmark’ for a reasonable fee.”).

13 Although a 33% award is on the higher end of the range of approved awards in this
14 circuit, “other courts have approved comparable awards in the appropriate
15 circumstances.” *Rabin v. PricewaterhouseCoopers LLP*, No. 16-CV-02276-JST, 2021
16 WL 837626, at *8 (N.D. Cal. Feb. 4, 2021) (collecting cases). The court takes into
17 consideration, for example, that the constructive common fund in this case is relatively
18 small. Cases with a relatively small fund, *i.e.* under \$10 million, will “often result in
19 fees above 25%.” *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D.
20 Cal. 2008); *Alvarez v. Farmers Ins. Exch.*, No. 3:14-CV-00574-WHO, 2017 WL
21 2214585, at *3 (N.D. Cal. Jan. 18, 2017) (“Fee award percentages generally are higher in
22 cases where the common fund is below \$10 million.”). In addition, neither Kroger (as
23 expected) nor any class member filed an objection.

24 The court does not find this to be a case where Class Counsel’s requested award
25 would “yield windfall profits for class counsel in light of the hours spent on the case[.]”
26 *Bluetooth*, 654 F.3d at 942. Instead, the court finds the amount of fees requested is
27 reasonable.

28 ///

1 **4. Costs**

2 Attorneys are entitled to recover “those out-of-pocket expenses that would
3 normally be charged to a fee paying client.” *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th
4 Cir. 1994) (quotation omitted). Class Counsel asserts they have incurred \$6,942.57 in
5 costs over the course of the litigation, broken down into: (1) \$905 in filing fees;
6 (2) \$1,348.25 for court reporters and deposition transcripts; (3) \$2,450 in expert witness
7 fees; (4) \$40.55 in postage; (5) \$645.05 in printing services; (6) \$45 in process server
8 fees; and (7) \$1,508.72 in travel expenses. (Doc. No. 349-1 at 23, 26). No objections
9 have been made to these costs.³ In this case, the court finds Class Counsel’s litigation
10 expenses are reasonable and approves the request for costs.

11 **B. Incentive Award**

12 Although “incentive awards are fairly typical in class action cases,” they are
13 discretionary. *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009).
14 “Generally, when a person joins in bringing an action as a class action he has disclaimed
15 any right to a preferred position in the settlement.” *Staton*, 327 F.3d at 967 (quotation
16 omitted). The purpose of incentive awards, therefore, is “to compensate class
17 representatives for work done on behalf of the class, to make up for financial or
18 reputational risk undertaken in bringing the action, and, sometimes, to recognize their
19 willingness to act as a private attorney general.” *Rodriguez*, 563 F.3d at 958-59.
20 However, “district courts must be vigilant in scrutinizing all incentive awards to
21 determine whether they destroy the adequacy of the class representatives.” *Radcliffe v.*
22 *Experian Info. Solutions Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013).

23 Class Counsel requests that \$7,000 be awarded to Plaintiff Hawkins in this case.
24 In support, Class Counsel contends Plaintiff “persevered for over five years,” expending
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27 ³ As a point of clarification, Class Counsel is not requesting an *additional* \$6,942.57 in
28 costs on top of attorneys’ fees. Instead, Class Counsel’s request for costs is incorporated
into the \$400,000 fee request. (Doc. No. 349 at 2).

1 time: (1) sitting for a deposition covering personal topics; (2) assisting in written
2 discovery; and (3) attending multiple court conferences. (Doc. No. 349-1 at 24).
3 Plaintiff did not submit a declaration in support of the request.

4 Given Plaintiff’s level of involvement, the number of years this case has been
5 pending, and the fact that the amount requested is consistent with those typically awarded
6 as incentive payments, the court finds Plaintiff’s request to be reasonable. *See Khoja v.*
7 *Orexigen Therapeutics, Inc.*, No. 15-CV-00540-JLS-AGS, 2021 WL 5632673, at *12
8 (S.D. Cal. Nov. 30, 2021) (approving incentive award of \$9,230); *In re Regulus*
9 *Therapeutics Inc. Sec. Litig.*, No. 3:17-CV-182-BTM-RBB, 2020 WL 6381898, at *8
10 (S.D. Cal. Oct. 30, 2020) (“Incentive awards typically range from \$2,000 to \$10,000.”)
11 (quotation omitted); *Mauss v. NuVasive, Inc.*, No. 13CV2005 JM (JLB), 2018 WL
12 6421623, at *10 (S.D. Cal. Dec. 6, 2018) (finding reimbursement award of \$7,500 to be
13 reasonable). For these reasons, the court approves Plaintiff’s requested incentive award
14 of \$7,000.

15 **C. Settlement Administration Costs**

16 Finally, the Settlement Agreement authorizes the deduction of up to \$79,635 in
17 notice and administration costs incurred by the Settlement Administrator. (Doc. No. 350-
18 1 at 12; Settlement Agreement, § 4). No objections have been made to these expenses.
19 Although the court determines these administration costs may have been excessive in
20 view of the Parties’ *original* notice plan, the court must also take into account the
21 additional notice measures ordered by the court and subsequently implemented by the
22 Settlement Administrator—including at least one additional newspaper publication and
23 the mailing or e-mailing of Kroger Club Card Members. (Doc. Nos. 348 at 2-4;
24 Retnasaba Decl. at ¶¶ 3, 8-9). In light of the added expense of these additional
25 procedures, the court finds the Settlement Administrator’s expenses reasonable. The
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1 court, therefore, approves the requested administration expenses in the amount of
2 \$79,635.⁴

3 For the foregoing reasons, the court **GRANTS** Plaintiff's fee motion.

4 **V. CONCLUSION**

5 In accordance with the foregoing, the court **ORDERS** as follows:

6 1. The court **GRANTS** Plaintiff's Final Approval Motion (Doc. No. 350) and
7 Motion for Attorneys' Fees, Costs, and Incentive Award (Doc. No. 349).

8 2. The Parties are **DIRECTED** to implement the Settlement according to its
9 terms and conditions.

10 3. The court **APPROVES** the Settlement Administration costs in the amount
11 of **\$79,635**, to be paid from the common fund, to Classaura LLC, deducted by an
12 appropriate amount in order to satisfy the two late-mailed claims.

13 4. The court **APPROVES** Class Counsel's request for an award of attorneys'
14 fees and costs in the amount of **\$400,000**.

15 5. The court **APPROVES** an incentive award to Plaintiff Shavonda Hawkins
16 in the amount of **\$7,000**.

17 6. This Order applies to all claims or causes of action settled under the
18 Settlement Agreement and binds all Class Members who did not affirmatively opt-out of
19 the Settlement Agreement by submitting a timely and valid request for exclusion.

20 7. The Class Members who timely filed a request to opt out of the settlement
21 are excluded from the class.

22 8. The court retains continuing jurisdiction over this settlement solely for the
23 purposes of enforcing the agreement, addressing settlement administration matters, and
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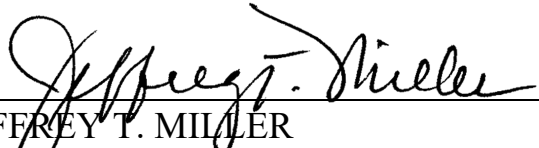
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27 ⁴ At the hearing, Plaintiff's counsel represented that they had received two late-mailed
28 claims, and that these claims would be paid through appropriate deductions to the final
amount paid to the Settlement Administrator.

1 addressing such post-judgment matters as may be appropriate under Court rules and
2 applicable law.

3 9. Judgment is entered on the terms set forth above. The Clerk of Court shall
4 close the case.

5 **IT IS SO ORDERED.**

6 DATED: February 4, 2022

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9 JEFFREY T. MILLER
10 United States District Judge
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