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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**

9
10 RICHARD WINTERS and JAKE
GRUBER, individually and on behalf
of all others similarly situated,

11
12 Plaintiffs,

13 v.

14 TWO TOWNS CIDERHOUSE, INC,

15 Defendant.

Case No. 20-cv-00468-BAS-BGS

**ORDER GRANTING MOTION FOR
ATTORNEYS' FEES, COSTS, AND
INCENTIVE AWARD**

(ECF No. 23)

16 On March 12, 2020, Plaintiff Richard Winters filed a putative class action complaint
17 for violations of California unfair competition law, pursuant to Calif. Bus. & Prof. Code
18 §§ 17200 et seq. and §§ 17500 et seq. against Two Towns Ciderhouse, Inc. ("2 Towns").
19 (Compl., ECF No. 1.) Plaintiff amended that complaint twice, adding claims for a violation
20 of California Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 et seq. and a violation
21 of Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq.,
22 and adding Jake Gruber as a named Plaintiff. (ECF Nos. 11, 18.) The gist of the allegations
23 is that Defendant intentionally labeled its drink products with false and misleading claims
24 that they contain no artificial flavors when the products contained artificial Malic Acid
25 (DL-Malic Acid) instead of non-artificial L-Malic Acid. (Compl. ¶ 1.)

26 Plaintiffs file an unopposed Motion for Final Approval of Class Action Settlement.
27 (ECF No. 24.) The terms of the Settlement are summarized in this Court's Order granting
28 final approval filed simultaneously with this Order.

1 Plaintiffs’ counsel also filed a Motion for Attorneys’ Fees, Costs and Incentive
2 Award requesting \$246,250 in attorneys’ fees; \$7,907.96 reimbursement for costs;
3 \$250,000 for the costs of administering the class, particularly for providing notice to the
4 class; and incentive awards of \$5,000 for named Plaintiff Jake Gruber and \$7,500 for
5 named Plaintiff Richard Winters. (ECF No. 23.) Defendant does not oppose the request.

6 The Court held a hearing on the issue on May 10, 2021. At the hearing, Plaintiffs’
7 counsel amended the cost request to \$7,376.66.

8 After reviewing the time sheets and considering the arguments of counsel both oral
9 and written, the Court concludes that the requested amounts are reasonable and **GRANTS**
10 the Motion. (ECF No. 23.)

11 **I. LEGAL STANDARD**

12 Courts have an independent obligation to ensure that the attorneys and class
13 representative fees awarded, like the settlement amounts, are reasonable. *In re Bluetooth*
14 *Headsets Products Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). Where a settlement
15 produces a common fund for the benefit of the entire class, the courts have the discretion
16 to employ a “percentage of recovery method.” *Id.* at 942. Typically, courts calculate 25%
17 of the fund as a “benchmark” for a reasonable fee award. *Id.* Injunctive relief should
18 generally be excluded from the value of the common fund when calculating attorneys’ fees
19 because most often the value of the injunctive relief is not measurable. *Staton v. Boeing*
20 *Co.*, 327 F.3d 938, 945–46 (9th Cir. 2003).

21 “The 25% benchmark rate, although a starting point for analysis, may be
22 inappropriate in some cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir.
23 2002). Thus, courts are encouraged to cross-check this method by employing the “lodestar
24 method” as well. *In re Bluetooth*, 654 F.3d at 949.

25 In the “lodestar method,” the Court multiplies the number of hours the prevailing
26 party reasonably expended by a reasonable hourly rate for the work. *Id.* at 941. The hourly
27 rate may be adjusted for the experience of the attorney. *Id.* “Time spent obtaining an
28 attorneys’ fee in common fund cases is not compensable because it does not benefit the

1 Plaintiff class.” *In re Washington Public Power Supply System Secs. Litig.*, 19 F.3d 1291,
2 1299 (9th Cir. 1994). The resulting amount is “presumptively reasonable.” *In re*
3 *Bluetooth*, 654 F.3d at 949. However, “the district court . . . should exclude from the initial
4 fee calculation hours that were not ‘reasonable expended.’” *Sorenson v. Mink*, 239 F.3d
5 1140, 1146 (9th Cir. 2001) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983)).
6 The Court may then adjust this presumptively reasonable amount upward or downward by
7 an appropriate positive or negative multiplier reflecting a whole host of reasonableness
8 factors including the quality of the representation, the complexity and novelty of the issues,
9 the risk of nonpayment, and, foremost in considerations, the benefit achieved for the class.
10 *In re Bluetooth* at 942.

11 The court may find a fee request is excessive but that there is no further evidence
12 class counsel betrayed class interests for its own benefit, and thus uphold the agreement,
13 while lowering the fee award. *Id.*

14 “[I]ncentive awards that are intended to compensate class representatives for work
15 undertaken on behalf of a class are fairly typical in class actions cases” and “do not, by
16 themselves, create an impermissible conflict between class members and their
17 representative[.]” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir.
18 2015). Nonetheless, the Court has an obligation to assure that the amount requested is fair.
19 *In re Bluetooth*, 654 F.3d at 941. “The propriety of incentive payments is arguably at its
20 height when the award represents a fraction of the class representative’s likely damages . .
21 . . . But we should be more dubious of incentive payments when they make the class
22 representative whole, or (as here) even more than whole.” *In re Dry Pampers Litig.*, 724
23 F.3d 713, 722 (6th Cir. 2013).

24 **II. ANALYSIS**

25 **A. Attorneys’ Fees**

26 Turning first to the percentage-of-recovery method, the Court notes that the
27 \$246,250 is 25% of the total class settlement of \$985,000. This amount is generally
28 reasonable. *See Paul, Johnson, Alston and Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir.

1 1989) (ordinarily 25% of the settlement fund for attorneys' fees is the benchmark and
2 awards range from 20–30% of the fund created).

3 But the Court additionally cross-checks the request by evaluating the amount under
4 a lodestar method. The Court finds the hours detailed by Plaintiffs' counsel were
5 reasonable and necessary for this case. (*See* Decl. of Todd M. Friedman in supp. of Pls.'
6 Mot. for Attorneys' Fees and Costs ("Friedman Decl."), ECF No. 23-1.) Additionally, the
7 hourly attorneys' fees of \$375 to \$750 are reasonable for this district. *See McCurley v.*
8 *Royal Seas Cruises*, No. 17-cv-986-BAS-AGS, 2020 WL 7074948 (S.D. Cal. Dec. 3, 2020)
9 (approving similar hourly rates for these attorneys; the Laffey Matrix (6/19–5/31/20) listing
10 comparable hourly rates for attorneys with these attorneys' experience level). Plaintiffs
11 also submit fees of \$195/hour for their in-house chemistry expert who holds a master's
12 degree in chemistry. The Court also finds this is reasonable.

13 Using this lodestar calculation, Mr. Friedman submits bills that total \$183,590.
14 However, this calculation includes hours for "anticipated future hours" without explaining
15 what future hours are anticipated.¹ In addition, the attorneys include time spent drafting
16 the attorneys' fee motion which is not recoverable. *See In re: Washington Public Power*,
17 19 F.3d at 1288.² Thus, the Court finds the appropriately billed amount is \$146,985
18 (\$183,590 less \$27,500 for future hours and less \$9,105 for drafting the fee motion).

19 When this amount is used to cross-check the 25% of the settlement amount
20 requested, the Court finds the \$246,250 requested is actually 1.675 more than the amount
21 billed. In the context of this case, the Court finds a lodestar of 1.675 is not unreasonable
22 or out of the realm of multipliers other courts have awarded. *See, e.g., Vizcaino*, 290 F.3d
23 at 1043 (upholding a lodestar multiplier cross-check of 3.65); *Kelly v. Wengler*, 822 F.3d
24

25 ¹ Mr. Friedman lists ten "anticipated future hours" at \$750/hour or \$7,500; Mr. Bacon lists 25
26 "anticipated future hours" at \$650/hour or \$16,250; and Mr. Perry lists ten "anticipated future hours" at
27 \$375 or \$3,750, for a total of \$27,500.

28 ² Mr. Friedman details 4.6 hours at \$750/ hour or \$3,450 for his work on the fee motion. Mr.
Bacon details 8.7 hours at \$650/hour or \$5,655 for his work on the fee motion. Thus, the total billed for
the fee motion is \$9,105.

1 1085, 1093, 1105 (9th Cir. 2016) (affirming lodestar multipliers of 2.0 and 1.3); *In re*
2 *Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 572 (9th Cir. 2019) (finding
3 multipliers of 1.22 and 1.55 to be “modest or in-line with others we have affirmed”). A
4 multiplier of 1.675 is appropriate in this case because of the contingent nature of the
5 litigation and the fact that counsel assumed the risk, including fronting the costs, of the
6 litigation. Additionally, counsel achieved the ultimate goal of getting Defendant to omit
7 artificial DL-Malic Acid from its drink products as well as getting Defendant to change the
8 packaging labels, which the Court finds to be a superior result. Thus, the Court applies a
9 multiplier of 1.675, and finds that the lodestar calculation supports the 25% award in this
10 case. Thus, the Court approves the requested attorneys’ fees amount of \$246,250.

11 **B. Costs**

12 Plaintiffs also request reimbursement of costs in the amount of \$7,376.66, which
13 includes the costs of filing and serving the complaint, transmitting copies of ECF filings to
14 the Court, mailing expenses and investigative costs, and, primarily, the costs of mediation.
15 (Friedman Decl. ¶ 22.) The Court finds these are all reimbursable costs.

16 Additionally, the class administrator Postlethwaite and Netterville, APAC (“P&N”)
17 requests costs in the amount of \$250,000 for administering the class. Brandon Schwartz,
18 Director of Notice for P&N, submits a declaration indicating that the administrative costs
19 incurred by the class administrator so far is \$215,003, and that he anticipates this will rise
20 to \$251,934 by the time the case is fully resolved. (Decl. of Brandon Schwartz (“Schwartz
21 Decl.”) ¶ 21, ECF No. 24-5.) Thus, the Court finds the requested amount of \$250,000 is
22 appropriate.

23 **C. Incentive Fees**

24 Plaintiffs request incentive fees for the two named plaintiffs in the amount of \$7,500
25 for Richard Winters and \$5,000 for Jake Gruber. According to Mr. Friedman and the
26 declarations filed by these two plaintiffs, Richard Winters, who was the first plaintiff in the
27 case, assisted with drafting pleadings, helped with informal discovery, sent the cans of
28 product he had retained to the lab for testing, and attended the mediation that resulted in

1 this settlement. (Friedman Decl. ¶ 41; Decl. of Richard Winters ¶ 2, ECF No. 24-4.)
2 Similarly, Mr. Gruber regularly discussed the case with his lawyers, assisted in informal
3 discovery, helped in drafting the Second Amended Complaint and stayed in touch with his
4 attorneys during settlement discussions. (Decl. of Jake Gruber ¶ 2, ECF No. 24-3.)

5 The Court finds the amount requested is reasonable. In *On-line DVD Rental*, the
6 Ninth Circuit pointed out that the focus is less on the amount the class representative is
7 awarded compared to the amount the individual class members is awarded and “more on
8 the number of class representatives, the average incentive award amount, and the
9 proportion of the total settlement that is spent on the incentive awards.” 779 F.3d at 947.
10 Ultimately, the court in that case found that \$5,000 was a reasonable amount for an
11 incentive award. *Id.*

12 In this case, there are only two named class representatives. The total incentive
13 award (\$12,500) is only 1.27% of the total settlement fund. Plaintiffs request that Jake
14 Gruber be awarded \$5,000, which has been approved in many other cases. Although the
15 request for Richard Winters is slightly higher, he participated in the lengthy mediation that
16 resulted in the settlement in this case and was involved with the case from the outset. Thus,
17 the Court finds the modest additional amount of \$7,500 is appropriate for him.

18 **III. CONCLUSION**

19 For the reasons stated above, the Court **GRANTS** Plaintiffs’ Motion for Attorneys’
20 Fees, Costs and Incentive Awards (ECF No. 23). The Court grants Plaintiffs’ request that
21 the Court award Plaintiffs’ counsel \$246,250 in attorneys’ fees, \$7,376.66 in costs,
22 \$250,000 for the settlement administrator P&N for administering the class and providing
23 notice, and incentive awards of \$7,500 for named plaintiff Richard Winters and \$5,000 for
24 named plaintiff Jake Gruber.

25 **IT IS SO ORDERED.**

26
27 **DATED: May 11, 2021**

28 
Hon. Cynthia Bashant
United States District Judge