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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ROHINI KUMAR, individual, on behalf of herself, the general public and those similarly situated

Plaintiff,

v.

SALOV NORTH AMERICA CORPORATION,

Defendant.

CASE NO. 4:14-cv-02411-YGR

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS

Date: May 30, 2017
Time: 2:00 p.m.
Courtroom 1, Fourth Floor
Judge: Hon. Yvonne Gonzalez Rogers

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I. INTRODUCTION

Although class notice was viewed millions of times, the settlement website visited by over 227,000 people and nearly 65,000 claims have been filed, there have been only 20 opt-outs and three objections. (Dkt.# 155, 157.) This overwhelmingly positive response weighs strongly in favor of final approval of the settlement and the requested fees, costs and incentives. *See In re: Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000) (low number of objectors and opt-outs supports trial court's finding that settlement was "fair, adequate and reasonable"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (same).

The two timely-filed objections were by serial objectors, Pamela Sweeney (in *pro per*) and Ted Frank, Director of the Center for Class Action Fairness ("CCAF"), which has merged with the Competitive Enterprise Institute ("CEI"). Their objections here are identical to those in other cases, which courts have nearly always rejected. As Plaintiff has demonstrated that this settlement is fair, reasonable and adequate, and that the fee request is justified, final approval should be granted.[1]

II. ARGUMENT

A. Frank's Objections Should Be Overruled.

The leitmotif of Frank's objection is that final approval should be withheld because this settlement exhibits signs of "collusion" and "self-dealing," and is thereby marred by irreconcible conflicts and inadequate representatives and attorneys. Frank has made the same arguments on behalf of himself as objector (eleven times) and CEI (dozens of times); most courts have rejected them. His arguments are based on suspicions and academic arguments, supported only by cherry-picked law that overlooks both well-settled precedent and the facts of this case.[2]

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[1] A third objection, by Bradley Griffin, was post-marked May 3, 2017, one day after the filing deadline (*See* Dkt.# 160; Dkt.# 151, p. 7, ¶ 13). Griffin says without explanation that the settlement is a "joke" and says he does not understand what "harm" is alleged in this case, because he likes the product. None of his issues merit a response; not only are they unexplained and unsupported; but they do not undermine or diminish the fairness of the settlement. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 20 (N.D. Cal. 1980) ("This Court thus finds it impossible to respond to his objection in any way other than dismissing it for lack of support.").

[2] Courts have also rejected Frank and CEI's claims that they are motivated to protect the class action device. *See City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07 CIV. 10329 RJS, 2013 WL 4399015, at *5 (S.D.N.Y. Aug. 7, 2013) ("Petri's objection on this count does not seem grounded in the facts of this case, but in her and her attorney's [Ted Frank] objection to class actions generally."); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 785 (N.D. Ohio 2010)

1. *Bluetooth* Does Not Apply.

Relying primarily on *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935 (9th Cir. 2011) ("*Bluetooth"*), Frank first incorrectly claims that this case requires "heightened scrutiny" to meet a "higher standard" of fairness. But *Bluetooth* only applies to agreements that are "negotiated *prior* to formal class certification." *Id*. at 946 (emphasis in original). *See also Allen v. Bedolla,* 787 F.3d 1218, 1224 (9th Cir. 2015) (noting that *Bluetooth*'s "more strict" standards apply only "when a settlement is negotiated absent class certification"); *In re Ferrero Litigation,* 583 F. App'x 665, 668 (9th Cir. 2014) (fact that "settlement was reached after class certification, through settlement conferences with judicial officers, and produced both monetary and injunctive relief for the class . . . ameliorate[s] the concerns regarding collusion expressed by the *Bluetooth* court"). This Court certified a class of California purchasers months before settlement negotiations began.

Frank's insistence that *Bluetooth* controls depends on an assumption that it would be more difficult to certify a national class under New Jersey law than it was to certify the California class. He fails to identify any basis for the assumption, and does not even cite, let alone address, any factors that a court might address. *See Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 480 (S.D. Cal. 2013) (objections to nationwide settlement must identify the material differences between state laws) (citing *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 590 (9th Cir. 2012)). If anything, he concedes that New Jersey law treats absent class members the same as does California by admitting "reliance is *not required* to maintain a false advertising claim under the New Jersey Consumer Fraud Act." (Frank Obj. at 21-22 (emphasis original).) *Cf. Hartless v. Clorox Co.*, 273 F.R.D. 630, 639 (S.D. Cal. 2011), *aff'd in part,* 473 F. App'x 716 (9th Cir. 2012) approving settlement of consumer claims brought on behalf of nationwide class; noting "the settlement does not require the court to make fine distinctions between state-law theories of relief as it does not require class members to show reliance or causation").

(criticizing CEI's objections as "long on ideology and short on law."). *Cf. Dennis v. Kellogg Co.*, 2013 WL 6055326, at *4 n.2 (S.D. Cal. Nov. 14, 2013) ("when assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first") (citations and quotes omitted).

2. Even Under *Bluetooth*, The Settlement Is Fair, Reasonable, and Should Be Approved.

In *Bluetooth*, the Ninth Circuit identified possible signs of collusion the district court should examine to ensure a fair pre-certification settlement, including (1) class counsel receiving a "disproportionate share ***of the settlement***," (2) "a clear sailing agreement that carries the potential of enabling a defendant to pay class counsel ***excessive fees and costs*** in exchange for . . . accepting an unfair settlement" and (3) a "kicker," i.e., ***a common fund settlement*** in which fees not awarded revert to defendant ***instead of remaining in the fund*** for benefit of class members. *Id.* at 947 (citations and quotation marks omitted) (emphasis added). But the record is clear that the settlement was the product of arms-length negotiation, not collusion, which ends the inquiry, even under *Bluetooth*. (Gutride Decl. (Preliminary Approval, Dkt. # 140-1) ¶ 6; Wulff Decl. ¶ 5; Commons Decl. ¶ 16.) *In re Ferrero,* 583 F. App'x at 668; *Poertner v. Gillette Co*., 618 F. App'x 624, 630 (11th Cir. 2015), *cert. denied sub nom. Frank v. Poertner*, 136 S. Ct. 1453 (2016) ("Frank's self-dealing contention is belied by the record: the parties settled only after engaging in extensive arms-length negotiations moderated by an experienced, court-appointed mediator."). In any event, the *Bluetooth* factors do not suggest collusion here, because (1) class counsel is receiving a small portion of the total settlement value, (2) Frank does not challenge the lodestar, despite having access to class counsel's billing records, and (3) this is not a common fund settlement but one in which fees are paid separately without reducing class benefits.

a. Frank Misrepresents Facts and Law In Claiming Counsel Will Receive a Disproportionate Benefit.

To determine whether a settlement results in counsel receiving a disproportionate benefit, a district court must make "express findings about the value of injunctive relief." *Allen*, 787 F.3d at 1224-25 (citing *Bluetooth* at 938). The district court also must conduct a lodestar analysis. *Id.* at 1225. Frank ignores both holdings of *Allen* and miscites it to suggest that this Court must *only* take into account the value of claims made, on which basis he then asserts that that the requested attorneys' fees are a disproportionate "80% of the class benefit." But *Allen* holds no such thing, and numerous Ninth Circuit cases *prohibit* the Court from focusing only on value of claims made.

i. The Total Amount of Made Available to the Class Is the Touchstone of Fairness.

Bluetooth did not change the longstanding rule that fairness is determined by comparing the value *made available* to the class.[3] *See, e.g. Williams v MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Lee v. Enter. Leasing Co.-West.,* 2015 WL 2345540, at *5 (D. Nev. May 15, 2015) (considering *Bluetooth*; noting "the weight of precedent in this district and the Ninth Circuit favors considering the total amount available to the class . . .") (internal citations omitted).[4]

Here, unlike in *Bluetooth*, where the class received nothing, Plaintiff has made available to the class at least $5 million in cash at more than 100% of the premium price they paid for the mislabeled olive oil, in addition to injunctive relief. *See Shames v. Hertz Corp.*, 2012 WL 5392159, at *14 (S.D. Cal. Nov. 5, 2012) (under claims-made settlement, analyzing fairness in terms of amount made available, explaining that "[i]n stark contrast [to *Bluetooth*], the parties in this case have negotiated a settlement that provides direct payment to class members and the value of which dwarfs the negotiated fee amount"); *see also Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *6 (C.D. Cal. July 27, 2015) ("BSH's agreement up front to be on the hook for all valid claims is worth something greater than simply the value of the actual payment that will be made to class members."). Frank's cases do not hold otherwise. *See, e.g., Banks v. Nissan N. Am., Inc.*, 2015 WL 7710297, *7 (N.D. Cal. Nov. 30, 2015) (explaining that "even a reasonable settlement will likely result in class counsel recovering more than the class" and noting that even in a hypothetical situation where the fee award is three times what is made available to the class, "the court obviously could have no issue with a settlement where the claimants are receiving a

[3] *Cf. Poertner*, 618 F. App'x at 630 (11th Cir. 2015) ("Frank claims that the settlement is unfair because class counsel's slice of the settlement pie is too large (i.e., the fees-and-costs award is unreasonable). But this objection is based on Frank's flawed valuation of the settlement pie: limiting the monetary value to the amount of Gillette's actual payments to the class along with excluding the substantial nonmonetary benefit and the cy pres award.").

[4] *See also Ellsworth v. U.S. Bank, N.A.,* 2015 WL 12952698, at *4 (N.D. Cal. Sept. 24, 2015) ("precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the actual amount that is ultimately claimed") (emphasis added); *Miller v. Ghirardelli Chocolate Co.,* 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) (same); *Miller v. Sw. Airlines Co.,* 2014 WL 11369764, at *2 (N.D. Cal. Mar. 21, 2014) (same).

recovery equal to, or even closely approaching, what could be obtained at trial").

ii. The Value of Injunctive Relief Here is High.

Frank asks the Court to ignore the value of the injunctive relief, asserting that the label changes had already been made, do not benefit class members, and have no value. He is wrong in all respects.

First, the fact that Defendant changed its labels as a result of this litigation before settlement does not lessen its value; absent the injunction, Defendant could revive the misrepresentations. Indeed, the Ninth Circuit and Eleventh Circuits have rejected the identical arguments by Frank's organization. *See Lane v. Facebook, Inc*., 696 F.3d 811, 825 (9th Cir. 2012) ("Even assuming Objectors' premise that Beacon was already effectively terminated, absent a judicially-enforceable agreement, Facebook would be free to revive the program whenever it wanted. It is thus false to say that Facebook's promise never to do so was illusory."); [5] *accord Zepeda v. PayPal, Inc*., 2017 WL 1113293, at *13 (N.D. Cal. Mar. 24, 2017) (rejecting same argument from CEI).[6]

Second, the changed practices *do* benefit past purchasers. A substantial number of the class will be repeat purchasers and will save money. *See Allen v. Similasan Corp.,* 318 F.R.D. 423, 427 (S.D. Cal. 2016) (rejecting Frank's argument; noting strong contingency of repeat users, many of whom would benefit). Frank himself admits that he is a repeat customer. (Dkt. # 157-1, ¶

[5] *See also Poertner*, 618 F. App'x at 629 (11th Cir. 2015) ("Frank contends that the nonmonetary relief was illusory… because Gillette was no longer selling Ultra batteries when it agreed to stop putting the allegedly misleading statements on the batteries' packaging.… [But] Gillette's decision to stop selling and marketing Ultra batteries with the challenged statements on the packaging was motivated by the present litigation. . . . Thus, we conclude that the district court's valuation of the nonmonetary relief was supported by the record.").

[6] Frank's argument further ignores authority from the Ninth Circuit and California Supreme Court, which permit Plaintiff's counsel to seek fees where they were the catalyst for Defendant's discontinued use of "Imported from Italy." *See Graham v. DaimlerChrysler Corp*., 34 Cal. 4th 553, 560–61 (2004) (affirming plaintiff's right to recover attorneys fees under California Civil Code section 1021.5, where the plaintiff was a "catalyst to defendant's changed behavior"); *Klein v. City of Laguna Beach*, No. 13-56973, 810 F.3d 693, 701 (9th Cir. Jan. 14, 2016) ("When California plaintiffs prevail in federal court on California claims, they may obtain attorneys' fees under section 1021.5."); *Tipton–Whittingham v. City of L.A.,* 316 F.3d 1058, 1062 (9th Cir. 2003) ("California law continues to recognize the catalyst theory and does not require 'a judicially recognized change in the legal relationship between the parties' as a prerequisite for obtaining attorney fees under Code of Civil Procedure section 1021.5.").

4.) Others who want 100% Italian oil will benefit by having truthful information so they can choose a different brand. And all will benefit from an improved marketplace that is not skewed by false advertising. *See Lilly v. Jamba Juice Co.*, 2015 WL 1248027, at *5 (N.D. Cal. Mar. 18, 2015) ("The harms Plaintiffs seek to avoid by bringing this litigation are not just the harms related to purchasing or consuming a mislabeled product, but also the harm of being a consumer in the marketplace who cannot rely on the representations made by Defendants on their product labels. Without injunctive relief, Lilly could never rely with confidence on product labeling when considering whether to purchase Defendants' product."); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012) (same; noting "[t]his is the harm California's consumer protection statutes are designed to redress"). Nor is there anything wrong with considering the value provided to in the general public. *See, e.g.*, *In re TracFone Unlimited Service Plan Litigation,* 112 F. Supp. 3d 993, 1005 (N.D. Cal. 2015) ("The Court finds that the injunctive relief will have significant value for both class members and the general public.").[7]

Frank relies heavily on *Koby v. ARS National Services, Inc*. 846 F.3d 1071 (9th Cir. 2017), in which the Ninth Circuit rejected a settlement that provided no monetary award to class members, required them to waive their rights to statutory damages of $1,000 per violation, and required defendant merely to use a voicemail message that it had voluntarily adopted after the litigation was initiated. The class—persons previously subjected to the defendant's debt collection practices—would only benefit from the injunctive relief if they had a future uncollected debt assigned to defendant. *Id.* at 1080. The court reversed final approval, finding that there was "no evidence that the relief afforded by the settlement has any value to the class members, yet to obtain it they had to relinquish their right to seek damages in any other class action." *Id.* The facts there stand in stark contrast to the situation here, where the class is receiving cash payments, and is likely to purchase this brand again or at a minimum, to shop for olive oil.

Frank also contends that injunctive relief here is worthless, attacking the declaration

[7] *See also Choi v. Mario Badescu Skin Care, Inc*., 2016 WL 1754236, at *15 (Cal. App. Apr. 29, 2016) ("We also disagree with the McLaren Objectors that the injunctive relief portion of the settlement had no value. Defendants stopped selling the creams after the lawsuit was filed and the permanent injunction ensures that in the future, the public will no longer be exposed to this sort of misleading labeling and advertising.").

provided by Plaintiff's expert, Colin Weir, who opined that the changed practices required by the settlement for the next three years can be expected to save class members at least at $19.6 million. His complaints do not hold up. Frank first asserts that Mr. Weir should have controlled for other characteristics such as taste, but Mr. Weir's declaration does controls for taste.[8] (Supp. Weir Decl. ¶¶ 15-17.) He also complains that Weir did not do a "before and after analysis" or use more recent sales data to analyze the impact of the label change, but Mr. Weir has explained why he performed the correct analysis on the correct dataset. (Id. at ¶¶ 22-30.) When Salov made the identical objections at class certification, this Court concluded that Plaintiff "has sufficiently established that it has a model for calculating the damages resulting from its theory of liability." *Kumar v. Salov N. Am. Corp.*, 2016 WL 3844334, at *10 (N.D. Cal. July 15, 2016). If Frank is correct in his attacks on Weir, then Plaintiff could not prove damages at trial, and Plaintiff achieved an extraordinary result in making available a $0.50 cash refund per bottle.

In arriving at the estimate of $19.6 million as the value of the changed practices, Mr. Weir used the *most conservative* figures about a potential price premium. (Dkt. # 154-8, ¶ 12.) *See Ghirardelli,* 2015 WL 758094, at *5 ("even if the value of the changed practices is only half of what Mr. Weir opines, for instance, the requested fee represents 13% of the total settlement value; if the changed practices are worth only 10% of what he opines, the requested fee is less than 24%—still below the Ninth Circuit benchmark"). Likewise, here, if value of the changed practices is only *half* of what he opines, *i.e.,* $9.8 million, the total settlement value (including the $5 million made available to claimants and for notice and administration, plus $982,500 in fees and costs) is $15.8 million, and the requested fee (of approximately $875,000) represents only 5.5%. Even if the value of the changed practices is only *twenty percent* of what he opines, *i.e.*, $3.8 million, the total settlement value is $9.9 million, and the requested fee is 8.8%.

iii. The Actual Value Claimed By Class Supports Approving the Settlement and the Full Fee Award.

Here, despite the fact that actual notice was not possible, there were more than 65,000

[8] Frank contends that this Court should not be permitted to rely on Mr. Weir's previous declarations, which were filed partly under seal, but Plaintiff does not cite those declarations in her Motion for Final Approval. There, Mr. Weir compared the difference between "Imported from Italy" and nothing; for this brief, Mr. Weir compared "Imported from Italy" to "Imported."

claims made out of an estimated 5.4 million purchasers (1.2%), a substantially higher-than-average result. (Supp. Finegan Decl. n. 1; Supp. Gutride Decl. ¶ 3.) *See, e.g., In re Carrier IQ, Inc., Consumer Privacy Litig*., 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (stating that, "[i]n an analysis of settlements administered by KCC where notice relied on media notice exclusively, the claims rate ranged between 0.002% and 9.378%, ***with a median rate of 0.023%***") (emphasis added). Class counsel also undertook substantial efforts to encourage more claims (see section II.A.3, *infra*).

Frank relies on *In re Sony PS3 "Other OS" Litigation,* 2017 WL 424716 (N.D. Cal. Jan. 31, 2017). But *Sony* involved a precertification settlement, and there was no evidence about "the basis for its estimate of the class size, and thus the claims rate," and thus no way to determine whether "the class settlement fairly and adequately compensates the number of people who were using the Other OS functionality." *Id.* at *4. Further, while in *Sony* there was direct notice to 10 million purchasers (of a durable good) but only 11,000 claims, here, actual notice was not possible to the estimated 5.5 million purchasers (of a grocery item), and yet there are nearly 65,000 claims.

b. **The Clear-Sailing Provision Is Meaningless.**

Frank is correct that the parties agreed to a "clear sailing" provision, i.e., that Defendant would not oppose Plaintiff's fee application. But that provision had no effect on the class, because the fee negotiation was overseen by an experienced mediator—Randall Wulff—and did not begin until after all other terms of the settlement had been agreed. (Wulff Decl. ¶ 4.) *See, e.g., In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 1047834, at *4 (N.D. Cal., Mar. 17, 2017) ("Volkswagen's agreement not to oppose the application does not evidence collusion and was not obtained by Class Counsel to Class Members' detriment."); *G. F. v. Contra Costa Cty*., 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) (noting that "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"). Plaintiff is unaware of any court rejecting final approval of a settlement as collusive under this *Bluetooth* factor alone. *Cf. Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 291 (6th Cir. 2016) ("Though some courts have 'disfavored' clear sailing agreements and kicker clauses, their inclusion absent more—as is the case here—does not show

that the court abused its discretion in approving the settlement.").

Another sign that there was no self-dealing is that the fee represents a fraction of class counsel's lodestar. *See, e.g., Mendoza v. Hyundai Motor Co., Ltd* 2017 WL 342059, at *12 (N.D. Cal. Jan. 23, 2017) ("the parties' fee agreement thus represents a legitimate compromise and not a collusive agreement to pay Class Counsel more in exchange for paying the class less"); *see also Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 687 (N.D. Cal. 2016) (clear-sailing provision does not signal collusion when the agreed-upon fees are reasonable and the relief negotiated for the class is favorable). Frank contends that the Court should ignore the fact that class counsel agreed to a fractional recovery, but his cases do not support him. In *Bluetooth*, the Ninth Circuit took issue with the district court's acceptance of the lodestar because the court neither made an "explicit calculation of a reasonable lodestar" nor did a cross-check against the benefit to the class. 654 F.3d at 943. In *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), the Third Circuit observed in dicta that the fractional lodestar was not "outcome determinative," only after explaining that the enormous lodestar of $31 million gave counsel "a significant financial incentive to cut its losses and settle the lawsuits." *Id.* at n. 14.[9]

Finally, even though Plaintiff submitted contemporaneous time records, Frank does not challenge *any* of counsel's hours worked nor *any* hourly rate.[10]

c. The Third *Bluetooth* "Sign"—the "Kicker" —Is Absent From This Settlement

Frank also objects that this settlement has a "kicker," because fees not awarded to Plaintiff's counsel will be retained by Defendant. According to Frank, the "kicker" prevents the class from getting the full benefit of the amount Defendant is willing to pay, by unfairly

[9] The other cases cited by Frank on page 12 of his brief involve coupon settlements, triggering Section 1712 of the Class Action Fairness Act, and thus are not applicable.

[10] This failure has been held to be fatal to an objection. *See, e.g., Lucas v. White*, 63 F. Supp. 2d 1046, 1057 (N.D. Cal. 1999) (holding that "The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits."); *see also In re Toyota Unintended Acceleration*, 2013 WL 8541175 (C.D. Cal. July 24, 2013) (rejecting unsupported objections to a proposed fee award where the objectors presented no expert declaration or other evidence undermining the Court's conclusions); *EnPalm, LLC v. Teitler,* 162 Cal. App. 4th 770, 775 (2008) (objection to attorney fee award forfeited where unsupported by discussion and analysis of the record).

segregating attorney's fees from the amount payable to the class. Frank's argument—which would apply to *any* settlement in which attorney's fees are paid separately from the amount paid to the class—finds no support in the Ninth Circuit. Such structures are routinely approved, as the defendant's retention of unawarded fees does not reduce the benefit to class members. *See, e.g., Shames*, 2012 WL 5392159, at *14 ("[B]ecause the attorneys' fees in this case are wholly separate from the class settlement—and will have no impact one way or the other on the amount the class recovers—a 'savings' for Defendants does not implicate the concerns the Ninth Circuit expressed about the 'kicker' provision in the *Bluetooth* settlement."); *In re Magsafe Apple Power Adapter Litig.*, 2015 WL 428105, at *8 (N.D. Cal. Jan. 30, 2015) ("[I]n evaluating the kicker provision, it does not appear there was collusion because the unawarded fees that will revert back to Apple does not in any way impact the benefit to the class—class members had the ability to obtain a cash refund or replacement adapter regardless of the amount reverted back to Apple.").

3. The Provision Allowing Defendant To Terminate if Claims Exceed $5 Million Does Not Raise Adequacy Concerns.

Frank takes issue with Defendant's right to terminate the settlement if projected claims and administrative costs exceed $5 million, arguing that this provision gives Plaintiff and Class Counsel an incentive to suppress claims, because their attorneys' fees and incentive award might otherwise be jeopardized. (Dkt. 157 at 18.) Frank is wrong.

Far from being encouraged to depress claims, Plaintiff's counsel took extensive steps to provide robust notice and ensure a high claims rate. Class counsel ensured that the claims administrator conducted an in-depth analysis to identify olive oil purchasers and publications they read for purposes of targeting advertisements. (Supp. Gutride Decl. ¶ 4; Supp. Finegan Decl. ¶¶3-8.) Counsel worked with the claims administrator to re-target advertisements and to issue a second press release not required by the settlement agreement, *id.*, and it arranged for topclassactions.com to feature and promote the Settlement. (Zavareei Decl. ¶ 4.) Class counsel also refused to agree to Defendant's request for "authentication questions" in the claim form and a two-factor authentication process, which could discourage claims. (Commons Decl. ¶ 15.)

The termination option was more beneficial to class members than an automatic *pro rata* reduction to each claimant, because Defendant would face pressure to pay the excess claims to

avoid continued litigation in which hundreds of thousands of people had already come forward. In addition, the cap exceeded realistic claim predictions, as class members could only be reached by publication.[11]

Third, individualized notice was neither possible nor required. *See, e.g.*, *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017) (recognizing that Rule 23 "does not insist on actual notice to all class members;" and "courts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process"); *In re Toys R Us-Delaware, Inc. FACTA Litigation*, 295 F.R.D. 438, 449 (C.D. Cal. 2014) ("When the court certifies a nationwide class of persons whose addresses are unknown, notice by publication is reasonable."); *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007) ("Because defendants do not have a list of potential class members, the court agrees with plaintiffs that notice by publication is the only reasonable method of informing class members of the pending class action"). Unlike in *Larson v. AT&T Mobility LLC*, 687 F.3d 109 (3d Cir. 2012), cited by Frank, Salov did not have records from which class member contact information could be obtained. *See also Weiner v. Dannon Co., Inc.*, 255 F.R.D. 658, 672 (C.D. Cal. 2009) ("although there may be difficulties in locating class members because Dannon does not have records of purchasers . . . the Ninth Circuit has minimized the weight to be placed on the existence of unknown class members"). And contrary to Frank's assertion, Plaintiff *did* undertake an effort to identify class members through direct internet sales and shopper loyalty programs. (Dkt. 157 at 19 n.20.) But Plaintiff's subpoenas to third party retailers for purchaser information were met with objections based on California law governing consumer privacy. (Simplicio Decl. ¶¶ 3-4.)

Fourth, Frank claims that the termination option was not adequately disclosed to class members and to this Court. In fact, the provision was addressed in Plaintiff's Motion for Preliminary Approval (Dkt. # 154 at 5) and in the accompanying Settlement Agreement, both of

[11] In Frank's chief case, *Newman v. Americredit Fin. Servs. Inc.,* No. 3:11-cv-03041-DMS-BLM (S.D. Cal. Feb. 3, 2014), Dkt. # 48, the termination provision was triggered at a claim rate *below* the expected number of claims. *Id.* at 3, 9.

which were posted on the settlement website.[12] Further, there is no reason the termination option would impact any class member's decision whether to make a claim, and the law requires that the class notice disclose only material terms. *See Estakhrian v. Obenstine*, 2016 WL 6517052, at *13 (C.D. Cal. Feb. 16, 2016) ("As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members.") (quoting *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 252 (2001)).

4. The Averment Is a Routine Administrative Tool That Does Not Depress Claims Nor Create An Improper Subclass.

Frank also takes issue with the simple averment on the claim form that "If the Products had not included the phrase 'Imported from Italy' on the label, I would not have made the purchase(s) or paid the price(s) charged." Frank's arguments do not hold up. Frank first argues that the averment depresses claims. Other than his self-serving statement that it deterred him from making a claim, he cites no facts in support, and none exist.[13] He misrepresents the holding in *True v. American Honda Motor Co*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010), which limited relief to those for whom the defendant had a prior written record of complaints even though damages were identical for those who had not complained. *Id.* at 1068. The averment here is not analogous to a

[12] Frank cites a series of cases in which courts denied approval of settlements over concerns about counsel's integrity, but none are analogous. In *Creative Montessori Learning Ctrs. V. Ashford Gear LLC*, 662 F.3d 913 (7th Cir. 2011), counsel solicited the class representative by duping an advertiser into giving them a list of "junk faxes" she had sent on behalf of the defendant. *Id.* at 916. In *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015), class counsel attempted to "sabotage" his own clients' recovery by arguing that they had been *overcompensated*. In *In re Dry Max Pampers Litigation*, 724 F.3d 713, 715-16 (6th Cir, 2013), the court took issue with counsel claiming a $2.73 million fee notwithstanding that they had done no work and had obtained only perfunctory relief for unnamed class members as all monetary recovery required proof of purchase. In *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 959-60 (9th Cir. 2009), class counsel failed to disclose to the class, the court, and defendants that they had entered into incentive agreements with class representatives at the retention stage, which violated the California Rules of Professional Conduct. And in *Lobatz v. U.S. West Cellular of Cal. Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000), class counsel had negotiated higher fees with the defendant in exchange for lower class member recovery.

[13] Nothing in the claim form calls attention to this sentence, which appears at the end of a block of text in the middle of the claim form. There is no checkbox next to it. And despite more than 270 calls to the toll-free help line and 125 letters and emails requesting help, Heffler (the claims administrator) did not receive *a single inquiry* about the text. (Finegan Decl. ¶¶ 10-11.)

requirement that a defendant have a record of a previously lodged complaint. Averments like the one here are routine in settlements to confirm entitlement to damages.[14]

Further, the averment is consistent with how funds would be disseminated after trial. *See, e.g.*, *Briseno*, 844 F.3d at 1129 (recognizing that claims are typically validated at the claims administration stage, when defendants have an opportunity "to individually challenge the claims of absent class members if and when they file claims for damages"); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19–20 (1st Cir. 2015) ("At the class certification stage, the court must be satisfied that, prior to judgment, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members."); *see also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (stating that funds unclaimed after trial may revert to defendant).

Frank nevertheless argues that the averment gives rise to two subclasses with conflicting interests because it denies relief to class members like him who did not rely on the "Imported from Italy" statement in making their purchases. (Dkt. 157 at 20-21.) This argument is based on a hyper-technical reading, as the statement does not require an assertion of "reliance" but only a belief that the claimant suffered harm. Frank does not explain why those who do not believe they were damaged have claims that are released in the settlement or are entitled to compensation.[15]

[14] *See, e.g.*, *Wilson v. EverBank*, 2016 WL 457011, at * 9 (S.D. Fla. Feb. 3, 2016) (granting final approval where claims form required claimant to check box indicating belief claimant had been charged for lender-placed insurance); *Jackson v. Wells Fargo Bank, N.A*, 136 F. Supp. 687, 708 (W.D. Pa. 2015) (same where claim form required claimant to attest to payment of challenged fees); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 185, 208 (D.D.C. 2011) (same where claim form required claimant to attest to incurance of at least one overdraft fee from a debit card transaction during the class period); *Schulte v. Fifth Third*, 805 F. Supp. 2d 560, 592-93 (N.D. Ill. 2011) (rejecting objection that it was too onerous to require claimant to identify amount of overdrafts incurred during class period).

[15] The cases cited by Frank on pages 20-22 all involved situations where the class members treated unfairly by a settlement actually did have damages. For example, in *Ferrington v. McAfee Inc*. 2012 WL 1156399, at *7 (N.D. Cal. Apr. 6, 2012), the plaintiff alleged that customers of McAfee were tricked into enrolling in a third party service when purchasing software. *Id.* at *1. While all class members had been wrongfully enrolled in the service regardless of whether they eventually downloaded the software, and all claims were released, the settlement only provided for compensation to those who did not download the software. *Id.* at *7.

5. Frank's Challenge to the Objection Process Lacks Merit.

Frank also argues that a low number of objections should not be considered because the objection procedures were "onerous and confusing."[16] Frank's arguments are without merit.

Frank takes issue with the requirement that the objector (and not merely his attorney) sign the objection. The signature is simply a tool to ensure that a real class member has authorized the filing. Contrary to Frank's argument, the Rules of Civil Procedure do not preclude this procedure. He does not explain why requiring a signature would deter *bona fide* objections or is burdensome or confusing. Likewise, Frank complains that the requirement that objector provide a list of cases in which he previously objected. That requirement aids the Court by identifying professional objectors and cases in which identical objections may have been rejected.[17]

B. The Sweeney Objections Should Be Overruled.

[16] Citing treatises but not case law, Frank contends that the number of objections is not indicative of the strength of the settlement. But courts overwhelmingly hold otherwise. *See, e.g., Zepeda v. PayPal, Inc*., 2017 WL 1113293, at *16 (N.D. Cal. Mar. 24, 2017) (holding "the indisputably low number of objections and opt-outs, standing alone, presents a sufficient basis upon which a court may conclude that the reaction to settlement by the class has been favorable); *Cruz v. Sky Chefs, Inc.*, 2014 WL 7247065, at *5 (N.D. Cal. Dec. 19, 2014) ("A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it."); *Chun-Hoon*, 716 F. Supp. 2d at 852 (granting final approval of settlement where 16 out of 329 class members (4.86%) requested exclusion).

[17] Finally, the purported "other infirmities in the Long-form Notice" identified by Frank (Dkt.# 157, p. 24 n. 21), are not material. For example, Frank complains that the list of requirements for objectors is "incomprehensible" because it "only starts itemizing the list at item (vii)." *Id.* But Frank identifies nothing unclear about the listed items. He points out a minor inconsistency between the Court's preliminary approval order requiring objections by both mail *and* ECF, with the notice specifying mail *or* ECF, which he speculates is a "recipe for an improper filing." *Id.* However, (1) no improper filings have actually come to pass, and (2) had an objection only been filed by one of the specified means, neither party would have challenged it on those grounds. Courts have repeatedly granted final approval in spite of far more objectionable notice-related typographical errors than those identified by Frank. *See, e.g.*, *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1247 (D. Kan. 2015) (typographical error in notice "not a material defect"); *Arnett v. Bank of Am., N.A.*, 2014 WL 4672458, at *3 n.7 (D. Or. Sept. 18, 2014) (granting final approval motion where notice contained error in date of final approval hearing); *In re Processed Egg Antitrust Litig.*, 284 F.R.D. 278, 295 n.16 (E.D. Pa. 2012) (approving settlement in spite of "inadvertent typo" in notice). Frank also identifies a purported inconsistency between the averment in the claim form and the one in the Settlement Agreement. But there is no inconsistency. The Settlement Agreement provided that Class Members should state that they "would not have paid the price charged and/or made the purchase(s) in the absence of the phrase 'Imported from Italy'" (*see* Settlement Agreement, ¶ 4.3(e)), while the claim form states, "If the products had not included the phrase 'Imported from Italy' on the label, I would not have made the purchase(s) or paid the price(s) charged" (*see* Dkt. 157-4, at 3). A plain reading of the two documents shows that the two phrases carry the same message and meaning.

Sweeney raises boilerplate objections that have been invariably rejected by the dozens of courts presiding over the cases in which she (at least six times) or her family (at least two dozen times) has objected.[18] Sweeney complains that a portion of the fees should be held back to ensure counsel brings the settlement process to a "successful conclusion," but this Court determined counsel to be adequate and will have power to enforce the terms of the agreement. Sweeney also contends that requested fees are to be measured against docket entries, and under this metric, the fee award is not justified. But no court has ever adopted such a standard, which does not reflect the realities of civil litigation. Sweeney objects that the notice is defective due to unclear instructions about filing objections, but she does not explain what is confusing. *Cf. Larsen v. Trader Joe's Co*., 2014 WL 3404531, at *7 (N.D. Cal. July 11, 2014) ("Ms. Sweeney claims to be among those who did not receive [adequate] notice of the settlement, yet made a timely objection."). Finally, she takes issue with the size of the fee award as compared to the benefits to the class; the argument ignores prevailing Ninth Circuit law, discussed throughout this brief. All of these objections are identical to those raised by Patrick Sweeney and overruled by this Court just two months ago. *See In re Lithium Ion Batteries Antitrust Litig*., 2017 WL 1086331, at *3 (N.D. Cal. Mar. 20, 2017).

III. CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court enter final judgment certifying the settlement class, approving the settlement, granting her application for an incentive award of $5,000, and awarding her counsel $982,500 in attorneys' fees and costs.

Dated: May 16, 2017

Respectfully submitted,
GUTRIDE SAFIER LLP

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Kristen Simplicio
Counsel for Plaintiffs

[18] As Sweeney failed to provide the list of cases as required by the class notice, Plaintiff's counsel provides a partial list in the declaration of Kristen Simplicio filed herewith.