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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOANN MARTINELLI, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

JOHNSON & JOHNSON and McNEIL
NUTRITIONALS, LLC,

Defendants.

No. 2:15-cv-01733-MCE-DB

MEMORANDUM AND ORDER

Through this class action, Plaintiff JoAnn Martinelli (“Plaintiff”), individually and on behalf of others similarly situated, seeks relief from Defendants Johnson & Johnson and McNeil Nutritionals, LLC (collectively “Defendants”) arising from the labeling and sale of Benecol Regular and Light Spreads (“Benecol Spreads”). On September 28, 2021, the Court preliminarily approved the settlement agreement reached by the parties. ECF No. 270. Presently before the Court is Plaintiff’s unopposed Motion for Final Approval of Class Action Settlement. ECF Nos. 273 (“Mot. Final Approval”), 277. Also before the Court is Plaintiff’s unopposed Motion for an Award of Attorneys’ Fees, Reimbursements of Costs and Expenses, and an Incentive Award. ECF Nos. 271 (“Mot. Att’y Fees”), 275.

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1 For the reasons set forth below, Plaintiff's Motion for Final Approval is GRANTED
2 whereas the Motion for Attorneys' Fees is GRANTED in part and DENIED in part.¹

3
4 **BACKGROUND²**

5
6 **A. Procedural History**

7 On August 14, 2015, Plaintiff commenced this putative class action in this Court,
8 asserting claims for breach of express warranty, breach of the implied warranty of
9 merchantability, unjust enrichment, violation of California's Consumers Legal Remedies
10 Act, violation of California's Unfair Competition Law, violation of California's False
11 Advertising Law, negligent misrepresentation, and fraud. ECF No. 1. Plaintiff
12 subsequently filed the operative FAC on October 16, 2015. ECF No. 9. In 2017, the
13 parties participated in their first mediation session before Judge Garrett E. Brown, Jr.
14 (Ret.), at Judicial Arbitration and Mediation Services ("JAMS"). Ex. 1, Stipulation of
15 Class Action Settlement, Deckant Decl., ECF No. 265-1 ("Settlement Agreement"), at 3.
16 However, no resolution was reached. Id.

17 Between April and July 2018, Plaintiff filed a motion for class certification and both
18 parties filed motions to exclude expert testimony and other evidence, all of which were
19 fully briefed. ECF Nos. 171, 175–76, 182–84, 193, 195, 204. On July 6, 2018, the
20 parties participated in their second mediation with Judge Wayne R. Andersen (Ret.) at
21 JAMS, but they again failed to reach a settlement. Settlement Agreement, at 3.

22 On March 29, 2019, the Court denied the motions to exclude and granted in part
23 and denied in part Plaintiff's motion for class certification. ECF No. 216. The following
24 classes were certified:

25 _____
26 ¹ Because oral argument would not be of material assistance, the Court ordered these matters
submitted on the briefs. E.D. Local Rule 230(g).

27 ² For an account of the class allegations, the Court refers to those set forth in its prior
28 Memorandum and Order, which were taken, sometimes verbatim, from the First Amended Complaint
("FAC"). See ECF No. 216, at 2–3.

1 1. The “Multi-State Express Warranty Class,” consisting of all
2 Benecol purchasers between January 1, 2008 and
3 December 31, 2011 in California, and all Benecol purchasers
4 between August 24, 2011 and December 31, 2011 in
5 Delaware, D.C., Kansas, Missouri, New Jersey, Ohio, Utah,
6 Virginia, and West Virginia; and

7 2. The “California Class,” consisting of all Benecol purchasers
8 between January 1, 2008 and December 31, 2011 in
9 California.

10 Id. at 19. Almost one year later, on March 18, 2020, Plaintiff filed a motion for entry of
11 the proposed notice plan, which Defendants opposed. ECF Nos. 221, 226, 229.

12 Defendants subsequently filed a motion to modify the class definition on April 2, 2020,
13 which Plaintiff opposed. ECF Nos. 227, 230, 232. Lastly, on October 15, 2020,

14 Defendants filed a motion to decertify the classes, but to date, Plaintiff has not opposed
15 that motion. ECF No. 247. All three motions remain pending.

16 On November 6, 2020, the Court granted the parties’ stipulation to stay the
17 present action so the parties could engage in settlement negotiations. ECF Nos. 254–
18 55. The parties participated in their third mediation session with Judge Andersen, which
19 began on November 16, 2020. Settlement Agreement, at 3. Those settlement
20 negotiations continued for several months with the assistance of Judge Andersen and
21 culminated in the parties reaching the proposed Settlement Agreement. Id. On
22 August 10, 2021, Plaintiff filed an unopposed motion for preliminary approval of the class
23 action settlement, which this Court granted. ECF Nos. 265, 270.

24 **B. Settlement Agreement**

25 Pursuant to the Settlement Agreement, Plaintiff seeks to certify the following
26 settlement class (“Settlement Class”): “All individuals who purchased Benecol Spreads
27 in the United States from January 1, 2008 through December 31, 2011 for personal use.”
28 Settlement Agreement, at 6. Under the proposed settlement, Defendants “shall make
29 available a total Claim Fund of up to two million dollars (\$2,000,000) for payment of Valid
30 Claims, attorneys’ fees and expenses, administration costs, and the Incentive Award.”

31 Id. at 7. The amount owed to each class member will be determined as follows:

1 For any Settlement Class Member who provides a Proof of
2 Purchase, the Settlement Class Member shall be entitled to a
3 full monetary refund of the amount(s) shown on the Proof of
Purchase, for as many units of the Benecol Spreads as he or
she has a Proof of Purchase.

4 For any Settlement Class Member who does not provide a
5 Proof of Purchase, but who submits a Claim Form, either
6 online or via mail, attesting, swearing or affirming under
7 penalty of perjury that he or she purchased Benecol Spreads
8 during the Settlement Class period, the amount paid to each
Settlement Class Member will be \$5 per unit of Benecol
Spreads, with a cap of 4 units per Settlement Class Member
(i.e., up to \$20 per Settlement Class Member).

9 Payments to Claimants may be subject to pro rata reduction if
10 the total value of all Valid Claims exceeds the \$2 million Claim
11 Fund after reduction of the Claim Fund by the payment of
attorneys' fees and expenses, administration costs, and the
Incentive Award.

12 Id. at 8. Furthermore, Class Counsel will seek "payment for an award of attorneys' fees,
13 costs and expenses of up to one-third of the total value of the Settlement[,]" as well as
14 "an Incentive Award payable to the Class Representative in an amount not to exceed
15 \$7,500.00."³ Id. at 10.

17 ANALYSIS

19 A. Class Certification

20 A court may certify a class if a plaintiff demonstrates that all of the prerequisites of
21 Federal Rule of Civil Procedure 23(a)⁴ have been met, and that at least one of the
22 requirements of Rule 23(b) have been met. Fed. R. Civ. P. 23; see also Valentino v.
23 Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996). The Court has already
24 determined that certification of the Settlement Class solely for purposes of settlement is
25 appropriate in that: (1) the class members are so numerous that joinder of all class

26 ³ The Settlement Agreement lists "Class Counsel" as Scott A. Bursor and the law firm Bursor &
27 Fisher, P.A., and the "Class Representative" as the named Plaintiff JoAnn Martinelli. Settlement
Agreement, at 4.

28 ⁴ All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure.

1 members is impracticable; (2) there are questions of law and fact common to the
2 Settlement Class which predominate over any individual questions; (3) Plaintiff's claims
3 are typical of the claims of the Settlement Class; (4) Plaintiff and her counsel have fairly
4 and adequately represented and protected the interests of the Settlement Class;⁵ and
5 (5) a class action and class-wide resolution of the action via class action settlement
6 procedures is superior to other available methods for the fair and efficient adjudication of
7 the controversy. See ECF No. 270, at 3. No party or class member has objected to
8 certification of the Settlement Class, and there is nothing before the Court to suggest
9 that these prior findings should not be affirmed. Therefore, the Court affirms its prior
10 certification of the Settlement Class for settlement purposes inasmuch as the
11 requirements of Rule 23(a)–(b) are satisfied.

12 **B. Fairness Determination**

13 Rule 23(e) provides that “[t]he claims, issues, or defenses of a certified class—or
14 a class proposed to be certified for purposes of settlement—may be settled, voluntarily
15 dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23(e).
16 “Approval under [Rule] 23(e) is a two-step process in which the Court first determines
17 whether a proposed class action settlement deserves preliminary approval and then,
18 after notice is given to class members, whether final approval is warranted.” Nat’l Rural
19 Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). “The
20 universally applied standard in determining whether a court should grant final approval to
21 a class action settlement is whether the settlement is fundamentally fair, adequate, and
22 reasonable.” Id. (citation and internal quotation marks omitted).

23 “In December 2018, Congress and the Supreme Court amended Rule 23(e) to set
24 forth specific factors to consider in determining whether a settlement is ‘fair, reasonable,
25 and adequate.’” Briseño v. Henderson, 998 F.3d 1014, 1023 (9th Cir. 2021).
26 Specifically, Rule 23(e)(2) provides the following:

27 ⁵ See also Fed. R. Civ. P. 23(e)(2)(A) (in determining whether the proposed settlement is fair,
28 reasonable and adequate, a court must consider, in part, whether “the class representatives and class
counsel have adequately represented the class”).

1 If the proposal would bind class members, the court may
2 approve it only after a hearing and only on finding that it is fair,
reasonable, and adequate after considering whether:

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

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

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

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

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

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

12 (iv) any agreement required to be identified under
Rule 23(e)(3);⁶ and

13 (D) the proposal treats class members equitably relative to
14 each other.

15 See also Briseño, 998 F.3d at 1023–24. In the Ninth Circuit, “a district court examining
16 whether a proposed settlement comports with Rule 23(e)(2) is guided by” the following
17 factors:

18 (1) the strength of the plaintiff's case; (2) the risk, expense,
19 complexity, and likely duration of further litigation; (3) the risk
20 of maintaining class action status throughout the trial; (4) the
21 amount offered in settlement; (5) the extent of discovery
completed and the stage of the proceedings; (6) the
experience and views of counsel; (7) the presence of a
governmental participant; and (8) the reaction of the class
members to the proposed settlement.

22 Kim v. Allison, 8 F.4th 1170, 1178 (9th Cir. 2021) (quoting In re Bluetooth Headset
23 Prods. Liability Litig., 654 F.3d 935, 946 (9th Cir. 2011)); but see Briseño, 998 F.3d at
24 1025–26 (recognizing that while most factors “fall within the ambit of the revised
25 Rule 23(e),” “Congress provided district courts with new instructions—such as analyzing
26 the ‘terms of the settlement’ and ‘terms of any proposed award of attorney’s fees’—that

27 _____
28 ⁶ “The parties seeking approval must file a statement identifying any agreement made in
connection with the proposal.” Fed. R. Civ. P. 23(e)(3).

1 require them to go beyond our precedent.”). The Ninth Circuit has made clear that these
2 factors are not an “exhaustive list of relevant considerations,” and that “the relative
3 degree of importance to be attached to any particular factor will depend on the unique
4 circumstances of each case.” Officers for Just. v. Civil Serv. Comm’n of City & Cnty. of
5 S.F., 688 F.2d 615, 625 (9th Cir. 1982). Furthermore, the Court must ensure that the
6 parties reached their settlement through arms-length negotiation and that “the
7 agreement is not the product of fraud or overreaching by, or collusion between, the
8 negotiating parties.” Id.

9 **1. Procedural Fairness**

10 Before examining the aforementioned factors, the Court must “consider the
11 procedure by which the parties arrived at their settlement to determine whether the
12 settlement is truly the product of arm’s length bargaining, rather than the product of
13 collusion or fraud.” Millan v. Cascade Water Servs., Inc., 310 F.R.D. 593, 613 (E.D. Cal.
14 2015); see also Fed. R. Civ. P. 23(e)(2)(B) (considering whether “the proposal was
15 negotiated at arm’s length”). “Participation in mediation tends to support the conclusion
16 that the settlement process was not collusive.” Palacios v. Penny Newman Grain, Inc.,
17 No. 1:14-cv-01804-KJM, 2015 WL 4078135, at *8 (E.D. Cal. July 6, 2015) (citation and
18 internal quotation marks omitted); but see In re Bluetooth, 654 F.3d at 948 (“[T]he mere
19 presence of a neutral mediator, though a factor weighing in favor of a finding of non-
20 collusiveness, is not on its own dispositive of whether the end product is a fair,
21 adequate, and reasonable settlement agreement.”).

22 As noted above, the parties engaged in three separate mediations by Judges
23 Brown and Andersen at JAMS before reaching the proposed Settlement Agreement.
24 See Settlement Agreement, at 3; Deckant Decl. ISO Mot. Final Approval, ECF No. 273-
25 1, at 2 ¶ 3 (stating, in part, that the parties “reached a fair and reasonable compromise
26 after negotiating the terms of the Settlement at arms’-length and with the assistance of
27 neutral mediators.”). In addition to the mediations, the parties, represented by
28 experienced counsel, engaged in written discovery and contested motion practice over

1 six years, meaning, as this Court previously found, that “the Parties and their counsel
2 had sufficient information to evaluate the strengths and weaknesses of the case and to
3 conduct informed settlement discussions.” ECF No. 270, at 2. As a result, the Court
4 finds that the parties’ negotiations constituted genuine and informed arms-length
5 bargaining.

6 **2. Substantive Fairness**

7 In determining whether the proposed Settlement Agreement is fair, reasonable,
8 and adequate, the Court will address each of the factors set forth by Rule 23(e)(2) and
9 Ninth Circuit precedent.

10 **a. Strength of the Case; Risk, Expense, Complexity, and**
11 **Likely Duration of Further Litigation; and Risk of**
Maintaining Class Action Status Throughout Trial

12 Regarding these three factors, “the Court shall consider the vagaries of litigation
13 and compare the significance of immediate recovery by way of the compromise to the
14 mere possibility of relief in the future, after protracted and expensive litigation.”
15 Shames v. Hertz Corp., No. 07-CV-2174-MMA (WMC), 2012 WL 5392159, at *5 (S.D.
16 Cal. Nov. 5, 2012) (quoting Nat’l Rural Telecomms., 221 F.R.D. at 526); see also
17 Fed. R. Civ. P. 23(e)(2)(C)(i) (considering “the costs, risks, and delay of trial and
18 appeal”). Here, while the parties have engaged in extensive discovery and contested
19 motion practice, there is no guarantee that Plaintiff and the Settlement Class would
20 obtain a favorable, unanimous jury verdict. Since its inception, Defendants have
21 vigorously defended against this action by challenging liability and asserting defenses on
22 the merits under Rules 8 and 12(b). Deckant Decl. ISO Mot. Final Approval, ECF
23 No. 273-1, at 2–3 ¶ 5. Although this Court previously granted, in part, Plaintiff’s motion
24 for class certification, Defendants have subsequently moved to decertify the class or
25 modify the class definition, “both of which pose a risk that most or all Class Members
26 would recover nothing.” Deckant Decl. ISO Mot. Att’y Fees, ECF No. 271-1, at 5 ¶ 17.
27 Furthermore, both sides have retained expert witnesses, which, should this case go to
28 trial, makes it “virtually impossible to predict with any certainty which testimony would be

1 credited, and ultimately, which expert version would be accepted by the jury.” Mot. Final
2 Approval, at 20. Even if Plaintiff “prevail[s] at every stage of this litigation, there remains
3 a substantial likelihood that Class Members would not be awarded significantly more
4 than (or even as much as) is offered under this settlement.” Id.

5 Moreover, it is clear that the litigation would continue on far longer, possibly for
6 years, if the case did not settle. This case has already been ongoing for over seven
7 years and no trial date is currently set. Additionally, the Court has not yet ruled on
8 Defendants’ pending motions to decertify the class or modify the class definition, and the
9 parties have indicated their intentions to file motions for summary judgment in the
10 absence of settlement. See Deckant Decl. ISO Mot. Final Approval, ECF No. 273-1,
11 at 2–3 ¶ 5. Needless to say, such protracted litigation would likely come at considerable
12 expense to both parties. Thus, these factors weigh in favor of approving the Settlement
13 Agreement.⁷

14 **b. Settlement Amount; Distribution of Relief; and Equitable**
15 **Treatment**

16 To determine whether the Settlement Amount is fair, “the Court may compare the
17 settlement amount to the parties’ estimates of the maximum amount of damages
18 recoverable in a successful litigation.” Shames, 2012 WL 5392159, at *6 (citing In re
19 Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000)); see also Fed. R. Civ. P.
20 23(e)(2)(C)(ii), (D) (considering “the effectiveness of any proposed method of distributing
21 relief to the class, including the method of processing class-member claims” and whether
22 “the proposal treats class members equitably relative to each other”). “It is well-settled
23 law that a cash settlement amounting to only a fraction of the potential recovery does not
24

25 ⁷ Under Rule 23(e)(2)(C)(iv) and (e)(3), “[t]he parties seeking approval must file a statement
26 identifying any agreement made in connection with the proposal.” According to Plaintiff, “there is related
27 litigation pending in the Southern District of New York, captioned Chamlin v. Johnson & Johnson,
28 No. 1:19-cv-03852-AJN (S.D.N.Y.), bringing similar claims regarding the alleged mislabeling of Benecol
Spreads under New York law.” Mot. Final Approval, at 26–27. “On or about July 19, 2021, Defendants’
counsel, Plaintiff’s counsel, and the parties to the Chamlin matter entered into a separate individual
settlement of the claims asserted in that action, as part of their efforts to resolve all Benecol litigation
against Defendants.” Id.

1 per se render the settlement inadequate or unfair.” In re Megco, 213 F.3d at 459 (quoting
2 Officers for Just., 688 F.2d at 628).

3 Here, the total proposed gross settlement amount is \$2,000,000 “for payment of
4 Valid Claims, attorneys’ fees and expenses, administration costs, and the Incentive
5 Award.” Settlement Agreement, at 7. To date, the Settlement Administrator JND Legal
6 Administration (“JND”) “has received a total of 63,654 preliminarily valid Claim Forms
7 (63,233 Online Claim Forms submitted electronically and 421 Claim Forms submitted by
8 mail).” Keough Decl., ECF No. 273-2, at 7 ¶ 29. “Of these, 309 claims with Proof of
9 Purchase were submitted and 63,344 claims without Proof of Purchase were submitted.”
10 Id. Based on these numbers, the following estimates are provided:

11 At the current claims rate, assuming that attorneys’ fees, costs
12 and expenses, and the client incentive award are approved in
13 full, JND estimates that a pro rata reduction will be necessary,
14 such that “each Settlement Class Member providing Proof of
Purchase will receive a pro rata average of \$44.54 and each
claimant whose submitted claim did not include Proof of
Purchase will receive a pro rata average of \$12.87.”

15 Mot. Final Approval, at 22 (citing Keough Decl., ECF No. 273-2, at 7 ¶ 29); see also
16 Settlement Agreement, at 8. According to Plaintiff, “[t]his is an excellent recovery, given
17 Plaintiff’s theory of damages, which ‘rests on the fact that a certain percentage of the
18 price consumers paid for Benecol constituted a [20.8%] price premium [about \$1.00]
19 solely attributable to the No Trans Fat claim.” Mot. Final Approval, at 22 (citing Mot.
20 Class Certification, ECF No. 174, at 18) (brackets in original); see also Deckant Decl.
21 ISO Mot. Att’y Fees, ECF No. 271-1, at 5 ¶ 15 (“Plaintiff sought damages based on a
22 ‘price premium’ theory, amount to approximately \$1.00 per tub of Benecol Spreads.”).

23 Similarly, Rule 23(e) requires the Court to consider “the effectiveness of any
24 proposed method of distributing relief to the class, including the method of processing
25 class-member claims.” Fed. R. Civ. P. 23(e)(2)(C)(ii). As previously addressed, the
26 Settlement Agreement offers a full monetary refund for class members who submit a
27 Proof of Purchase whereas those who only submit a Claim Form may still receive

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1 between \$5 to \$20. Settlement Agreement, at 8. Regarding distribution of funds, under
2 the Settlement Agreement,

3 [e]very Claimant will have the option of receiving payment by
4 check or by electronic payment. Claimants may select an
5 electronic payment option on the Claim Form for payment of a
6 claim. If the Claimant does not select any payment option, the
7 Claimant will be sent payment by check. All settlement checks
8 issued to Claimants will be valid and negotiable for a period of
9 one hundred twenty (120) days.

10 Settlement Agreement, at 8. The method of distribution outlined here is a proper and
11 effective method for processing class member claims and “ensure[s] that it facilitates
12 filing legitimate claims.” Alvarez v. Sirius XM Radio Inc., No. CV 18-8605 JVS (SSx),
13 2020 WL 7314793, at *6 (C.D. Cal. July 15, 2020) (citing Fed. R. Civ. P. 23(e), 2018
14 Advisory Committee Notes).

15 Finally, the Court also finds the pro rata distribution set forth in the Settlement
16 Agreement to be equitable. See Fed. R. Civ. P. 23(e)(2)(D) (considering whether “the
17 proposal treats class members equitably relative to each other”); Settlement Agreement,
18 at 8. Class Members who submit a Proof of Purchase are entitled to receive “a full
19 monetary refund of the amount(s) shown on the Proof of Purchase” with no limit on the
20 number of units purchased. Id. Those who submit a Claim Form and not a Proof of
21 Purchase are still entitled to receive a pro rata share albeit for a limited amount, but the
22 Court does not find this to be unfair. Id. (stating that such class members may receive
23 “\$5 per unit of Benecol Spreads, with a cap of 4 units per Settlement Class Member (i.e.,
24 up to \$20 per Settlement Class Member).”). Overall, the Court finds that the settlement
25 amount and its distribution to the class members are fair, reasonable, and adequate, and
26 thus these factors weigh in favor of approving the Settlement.

27 **c. Extent of Discovery and Stage of Proceedings**

28 “A settlement following sufficient discovery and genuine arms-length negotiation is
presumed fair.” Adoma v. Univ. of Phoenix, Inc., 913 F. Supp. 2d 964, 977 (E.D. Cal.
2012) (citation omitted). Here, Plaintiff provides the following:

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1 Plaintiff, by and through her counsel, has conducted extensive
2 research, discovery, and investigation during the prosecution
3 of the Action, including, without limitation, through: (1)
4 performing extensive pre-litigation investigation into the
5 Benecol Spreads and associated marketing to assist with the
6 drafting of Plaintiff's complaint; (2) serving multiple rounds of
7 discovery requests on Defendants and seeking discovery from
8 third parties; (3) reviewing thousands of documents produced
9 by Defendants, including complex scientific and statistical
10 documents; (4) taking depositions of Defendants' three expert
11 witnesses and several fact witnesses; and (5) defending the
12 depositions of Plaintiff Martinelli and her physician, as well as
13 Plaintiff's expert witnesses. The parties also held numerous
14 telephonic and written discussions regarding Plaintiff's
15 allegations, discovery, and the prospects of settlement, as well
16 as three mediation sessions.

17 Mot. Final Approval, at 23 (citing Deckant Decl. ISO Mot. Att'y Fees, ECF No. 271-1, at 2
18 ¶ 3). As previously discussed, the parties have also engaged in contested motion
19 practice, including motions for class certification and to exclude expert testimony and
20 evidence. The Court finds that after seven years of litigation and extensive discovery,
21 the parties have gained a clear view of the strengths and weaknesses of their cases,
22 thus enabling them to engage in meaningful settlement negotiations. These factors
23 weigh in favor of finding the Settlement fair, reasonable, and adequate.

24 **d. Experience and Views of Counsel**

25 In this case, Class Counsel "has significant experience in litigating class actions of
26 similar size, scope, and complexity to the instant action." Deckant Decl. ISO Mot. Final
27 Approval, ECF No. 273-1 at 3-4 ¶ 10; see also Ex. 2, id., at 74-101 (firm resume). They
28 have been appointed class counsel in dozens of state and federal court cases and have
"served as trial counsel for class action plaintiffs in six jury trials," winning all six with
multimillion dollar recoveries. Id. at 3-4 ¶¶ 10-11; see also Deckant Decl. ISO Mot. Att'y
Fees, ECF No. 271-1, at 6-11 ¶¶ 21-22. As indicated in its prior Order, the Court is
satisfied that Class Counsel has adequately represented the class. ECF No. 270 ¶¶ 4,
6; see also Fed. R. Civ. P. 23(e)(2)(A) (considering, in part, whether "class counsel have
adequately represented the class"). As such, Class Counsel's support of the Settlement
is accorded significant consideration and weighs heavily in favor of finding the

1 Settlement fair, reasonable, and adequate. See Nat'l Rural Telecomms., 221 F.R.D.
2 at 528 (accord[ing] great weight to the “recommendation of counsel, who are most closely
3 acquainted with the facts of the underlying litigation[,]” because “parties represented by
4 competent counsel are better positioned than courts to produce a settlement that fairly
5 reflects each party’s expected outcome in the litigation.”) (citation omitted).

6 **e. Reaction of Class Members**

7 In the Ninth Circuit, the number of class members who object to a proposed
8 settlement is a factor the Court may consider in its settlement approval analysis.
9 Rodriguez v. W. Pub. Corp., 563 F.3d 948, 963 (9th Cir. 2009). “The absence of a large
10 number of objectors supports the fairness, reasonableness, and adequacy of the
11 settlement.” Shames, 2012 WL 5392159, at *8 (citations omitted). Here, no class
12 members have objected to or opted out of the Settlement. Keough Decl., ECF No. 273-
13 2, at 6–7 ¶¶ 25, 27. Notice to the class members was administered in the method
14 previously approved by this Court. See ECF No. 270, at 4–5; see generally Keough
15 Decl., ECF No. 273-2. This factor thus weighs in favor of the Settlement Agreement.
16 After considering all of the Rule 23(e)(2) and Ninth Circuit factors, the Court finds that
17 the Settlement Agreement is fair, reasonable, and adequate, and Plaintiff’s unopposed
18 Motion for Final Approval is thus GRANTED.

19 **C. Attorneys’ Fees and Expenses**

20 Where the payment of attorneys’ fees is part of the negotiated settlement, the fee
21 settlement must be evaluated for fairness in the context of the overall settlement.
22 Knisley v. Network Assocs., 312 F.3d 1123, 1126 (9th Cir. 2002); see also
23 Fed. R. Civ. P. 23(e)(2)(C)(iii) (considering “the terms of any proposed award of
24 attorney’s fees, including timing of payment”). Courts must ensure that the attorneys’
25 fees awarded in a class action are reasonable, even if the parties have already agreed
26 on an amount. In re Bluetooth, 654 F.3d at 941; see Briseño, 998 F.3d at 1024–25
27 (holding that “courts must apply Bluetooth’s heightened scrutiny” to both pre- and post-
28 class certification settlements “in assessing whether the division of funds between the

1 class members and their counsel is fair and ‘adequate.’”). In the Ninth Circuit, “the
2 district court has discretion in common fund cases to choose either the percentage-of-
3 the-fund or the lodestar method.” Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th
4 Cir. 2002) (citing In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1295–96
5 (9th Cir. 1994)).

6 Under the percentage-of-recovery method, the prevailing attorneys are awarded a
7 percentage of the common fund recovered for the class. Id. In applying this method,
8 courts typically set a benchmark of 25 percent of the fund as a reasonable fee award
9 and justify any increase or decrease from this amount based on circumstances in the
10 record. Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir.
11 1990). Under the lodestar method, the prevailing attorneys are awarded an amount
12 calculated by multiplying the hours they reasonably expended on the litigation times their
13 reasonably hourly rates. Staton v. Boeing Co., 327 F.3d 938, 965 (9th Cir. 2003).

14 Under either method, the amount may be increased or decreased by a multiplier
15 that reflects any factors not subsumed within the calculation, such as “the quality of
16 representation, the benefit obtained for the class, the complexity and novelty of the
17 issues presented, and the risk of nonpayment.” In re Bluetooth, 654 F.3d at 942. Even
18 if the court chooses to apply the percentage-of-recovery method, calculation of the
19 lodestar amount may be used as a cross-check to assess the reasonableness of the
20 percentage award. Vizcaino, 290 F.3d at 1050–51.

21 Regardless of whether the court uses the percentage approach or the lodestar
22 method, the main inquiry is whether the end result is reasonable. Powers v. Eichen,
23 229 F.3d 1249, 1258 (9th Cir. 2000). The Ninth Circuit has held that “district courts must
24 apply the Bluetooth factors to scrutinize fee arrangements . . . to determine if collusion
25 may have led to class members being shortchanged.” Briseño, 998 F.3d at 1026.
26 Those three factors are: (1) whether “counsel receive[d] a disproportionate distribution
27 of the settlement,” (2) whether the parties agreed to a “‘clear sailing’ arrangement
28 providing for the payment of attorneys’ fees separate and apart from class funds,” and

1 (3) whether “the parties arrange for fees not awarded to revert to defendants rather than
2 be added to the class fund[.]” In re Bluetooth, 654 F.3d at 947 (citations omitted); see
3 also Briseño, 998 F.3d at 1026–27 (stating that, while “[d]isproportionate fee awards,
4 clear sailing agreements, and kicker clauses all may be elements of a good deal[.] . . .
5 they may also signal a collusive settlement, and district courts must scrutinize them
6 where they appear.”).

7 In addition, the Ninth Circuit has identified a number of other factors that may be
8 relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks
9 of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the
10 fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases.
11 Vizcaino, 290 F.3d at 1048–50. Based on these factors, the percentage amount can be
12 adjusted upward or downward depending on the circumstances of the case. Paul,
13 Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 271 (9th Cir. 1989). Indeed, “in most
14 common fund cases, the award exceeds th[e] benchmark.” In re Omnivision Techs.,
15 Inc., 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008). Percentage awards of between
16 twenty and thirty percent are common. See In re Activision Sec. Litig., 723 F. Supp.
17 1373, 1377 (N.D. Cal. 1989) (“This court’s review of recent reported cases discloses that
18 nearly all common fund awards range around 30% even after thorough application of
19 either the lodestar or twelve-factor method.”); Vizcaino, 290 F.3d at 1047. Nonetheless,
20 an explanation is necessary when the district court departs from the 25% recovery
21 benchmark. Powers, 229 F.3d at 1256–57.

22 Here, Class Counsel seeks an award of \$666,666.66 for attorneys’ fees and
23 reimbursement of costs and expenses, which amounts to approximately 33 ⅓ percent of
24 the settlement amount. Mot. Att’y Fees, at 2, 9. Based on the Court’s review of the
25 case; the positive results received after seven years of litigation that included extensive
26 discovery, contested motion practice, and mediation; the risks taken on by counsel (and
27 specifically, by accepting the case on contingency, see Deckant Decl. ISO Mot. Att’y
28 Fees, ECF No. 271-1, at 17 ¶ 33); and the experience and skill of counsel, the Court

1 finds this award to be fair and reasonable. Though 33 ⅓ percent represents an upward
2 departure from the standard 25 percent benchmark, the Court finds it appropriate under
3 the circumstances. Moreover, a comparison to awards typically made in common fund
4 cases suggests that an award amounting to one-third of the settlement amount is
5 appropriate here. See In re Omnivision Techs., Inc., 559 F. Supp. 2d at 1047 (“[I]n most
6 common fund cases, the award exceeds th[e] benchmark.”). Lastly, Defendants have
7 agreed to the requested fees and no class member has objected, further supporting a
8 finding that the fees are reasonable.

9 As for the lodestar crosscheck, at the time of briefing, Class Counsel had
10 expended 2,901.1 hours over six years of litigation. Deckant Decl. ISO Mot. Att’y Fees,
11 ECF No. 271-1, at 11 ¶ 25; see also Ex. 3, id., at 119–70. Given that this lengthy case
12 has included extensive discovery, contested motion practice, and three rounds of
13 mediation, the Court has no reason to believe that a favorable result could have been
14 achieved in less time, nor is there any indication that counsel spent unnecessary time on
15 the case.

16 As for counsel’s hourly rates, a range of \$250 per hour for associates to \$1,000
17 per hour for the most senior partners, or a blended rate of \$670.18 per hour, is high in
18 this district.⁸ As many cases in the Eastern District observe, “prevailing hourly rates in
19 the Eastern District of California are in the \$400/hour range,” with some courts noting a
20 higher range for partners, commensurate with experience. Bond v. Ferguson
21 Enterprises, Inc., No. 1:09-cv-1662 OWW MJS, 2011 WL 2648879, at *12 (E.D. Cal.
22 June 30, 2011); see also Zakskorn v. Am. Honda Motor Co., Inc., No. 2:11-cv-02610-
23 KJM-KJN, 2015 WL 3622990, at *14 (E.D. Cal. June 9, 2015). Thus, the Court finds
24

25 ⁸ Class Counsel contends that its rates “have been deemed reasonable by Courts across the
26 country, including in California, New York, Michigan, Illinois, Missouri, and New Jersey[,]” and that “[n]o
27 court has ever cut [their] fee application by a single dollar on the ground that [their] hourly rates were not
28 reasonable.” Deckant Decl. ISO Mot. Att’y Fees, ECF No. 271-1, at 12–13 ¶¶ 29–30. But while the Court
must certainly take into account the “rate determinations in other cases, particularly those setting a rate for
the plaintiff[s] attorney” as “evidence of the prevailing market rate,” United Steelworkers of Am. v. Phelps
Dodge Corp., 896 F.2d 403, 407 (9th Cir. 1990), the rate determinations by other district judges are not
binding on this Court.

1 counsel's reference to a current lodestar of \$1,944,259.20 to be high (2,901.1 hours x
2 blended hourly rate of \$670.18). However, counsel appears to have taken this into
3 consideration in its request of \$666,666.66, which includes a negative multiplier of 0.34
4 based on their current lodestar. Deckant Decl. ISO Mot. Att'y Fees, ECF No. 271-1,
5 at 11 ¶ 25. Furthermore, Class Counsel does not seek a separate award for the
6 reimbursement of costs and expenses. See id. at 11–12 ¶ 27 (stating that Class
7 Counsel “has expended \$289,500.70 in out-of-pocket expenses in connection with the
8 prosecution of this action.”). Given the foregoing, the Court finds the lodestar amount
9 reasonable. Ultimately, the Court finds that 33 ⅓ percent of the common fund, or
10 \$666,666.66, is a fair and reasonable award for attorneys' fees and reimbursement of
11 costs and expenses in this case and does not constitute a disproportionate distribution of
12 the settlement.⁹ See In re Bluetooth, 654 F.3d at 947.

13 **D. Incentive Award**

14 “Named plaintiffs, as opposed to designated class members who are not named
15 plaintiffs, are eligible for reasonable incentive payments.” Staton, 327 F.3d at 977. The
16 district court, however, must “evaluate their awards individually” to detect “excessive
17 payments to named class members” that may indicate “the agreement was reached
18 through fraud or collusion.” Id. at 975. To assess whether an incentive payment is
19 excessive, district courts balance “the number of named plaintiffs receiving incentive
20 payments, the proportion of the payments relative to the settlement amount, and the size
21 of each payment.” Id.

22 Here, Plaintiff requests an incentive award of \$7,500, which constitutes
23 approximately 0.38 percent of the total settlement amount. Mot. Att'y Fees, at 22.
24 Courts have generally found that \$7,500 incentive payments are reasonable. See, e.g.,
25 Pelletz v. Weyerhaeuser Co., 592 F. Supp. 2d 1322, 1330 (W.D. Wash. 2009)
26 (approving incentive awards of \$7,500 each to the four class representatives of a class
27 between 110,000 and 140,000 members in a settlement for an unspecified amount and

28 ⁹ The Settlement Agreement does not contain a clear sailing agreement or a kicker clause.

1 in which attorneys' fees were capped at \$1.75 million); Jacobs v. Cal. State Auto. Ass'n
2 Inter-Ins. Bureau, No. C 07-00362 MHP, 2009 WL 3562871, at *5 (N.D. Cal. Oct. 27,
3 2009) (awarding incentive payment of \$7,500 to class representative of a class of 8,057
4 members in a settlement of \$1.5 million).

5 According to a declaration from Class Counsel,

6 Throughout the litigation, Plaintiff Martinelli held regular
7 meetings with Class Counsel by phone and through email to
8 receive updates on the progress of the case and to discuss
9 strategy. She assisted in Class Counsel's pre-suit
10 investigation by discussing her experiences, she assisted in
11 drafting the complaints that have been filed in this action, and
12 she reviewed the complaints for accuracy before they were
13 filed. She also searched for and produced documents,
14 responded to Defendants' interrogatories, and sat for a full-day
deposition, as did her husband.

15 Plaintiff Martinelli was intimately involved in the settlement
16 process, and has continued to keep abreast of settlement
17 progress to date. Thus, Plaintiff Martinelli was actively
18 involved in the litigation and devoted substantial time and effort
19 to the case.

20 Deckant Decl. ISO Mot. Att'y Fees, ECF No. 271-1, at 19 ¶¶ 40–41. However, the
21 average recovery under the settlement is approximately \$44.54 for class members
22 providing Proof of Purchase and \$12.87 for those who do not. See Keough Decl., ECF
23 No. 273-2, at 7 ¶ 29. The disparity between the approximate class member recovery
24 and the proposed \$7,500 incentive award to Plaintiff is considerable, particularly in light
25 of the fact that there is no evidence that Plaintiff spent more time assisting counsel than
26 occurs in the average case. Instead, the Court awards Plaintiff an incentive award of
27 \$5,000, which is approximately 0.25 percent of the total settlement amount and still
28 considerable in light of the average class member recovery.

29 CONCLUSION

30 For the foregoing reasons, Plaintiff's Motion for Final Approval of Class Action
31 Settlement, ECF No. 273, is GRANTED. Plaintiff's Motion for an Award of Attorneys'

1 Fees, Reimbursement of Costs and Expenses, and an Incentive Award, ECF No. 271, is
2 GRANTED in part and DENIED in part. The Court hereby orders as follows:

3 1. The Court certifies for settlement purposes only a class consisting of all
4 individuals who purchased Benecol Regular and Benecol Light Spreads in the United
5 States from January 1, 2008, through December 31, 2011, for personal use. This class
6 satisfies the applicable criteria for class certification under Rule 23(a) and (b)(3);

7 2. Scott A. Bursor and Bursor & Fisher, P.A., are appointed as Class
8 Counsel;

9 3. Class Counsel is awarded attorneys' fees, costs, and expenses in the
10 amount of \$666,666.66, to be paid in the time and manner described in the Settlement
11 Agreement;

12 4. Plaintiff JoAnn Martinelli is appointed the Class Representative;

13 5. The Class Representative is awarded \$5,000 as an incentive award, to be
14 paid in the time and manner described in the Settlement Agreement;

15 6. This action is hereby DISMISSED with prejudice and without costs as
16 against Defendants and Released Persons;


17 7. The Court reserves continuing jurisdiction over the parties for the purposes
18 of implementing, enforcing, and/or administering the Settlement Agreement or enforcing
19 the terms of the judgment;

20 8. All pending motions and hearing dates are hereby VACATED; and

21 9. The Clerk of Court is directed to close the case.

22 IT IS SO ORDERED.

23 Dated: September 8, 2022

24 
25 MORRISON C. ENGLAND, JR.
26 SENIOR UNITED STATES DISTRICT JUDGE
27
28