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17 UNITED STATES DISTRICT COURT FOR THE
18 NORTHERN DISTRICT OF CALIFORNIA

19 JACKIE FITZHENRY-RUSSELL and
20 GEGHAM MARGARYAN, as individuals,
on behalf of themselves, the general public
21 and those similarly situated,

22 Plaintiffs,

23 v.

24 KEURIG DR PEPPER, INC and DR
25 PEPPER/SEVEN UP, INC.,

26 Defendants.

Case Nos. 5:17-cv-00564-NC (lead); 5:17-cv-04435-NC (consolidated)

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION TO APPROVE CLASS ACTION
SETTLEMENT**

Date: April 10, 2019

Time: 2:00 p.m.

Courtroom: 5

Judge: Honorable Nathanael Cousins

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1
2 **I. INTRODUCTION**

3 Class Members' reactions to the Settlement have been overwhelmingly positive. The
4 settlement website was visited by over 494,994 users and 91,254 claims have been filed for a
5 maximum recovery of \$470,735. Out of this, only 318 people have opted out and no objections
6 were filed. This positive response weighs strongly in favor of final approval of the settlement and
7 the requested fees, costs and incentives. *See In re: Mego Financial Corp. Securities Litigation*, 213
8 F.3d 454, 459 (9th Cir. 2000) (low number of objectors and opt-outs supports trial court's finding
9 that settlement was "fair, adequate and reasonable"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
10 1027 (9th Cir. 1998) (same).

11 There were two purported objections to the Settlement. One was mailed to the claim
12 administrator by serial objector Patrick Sweeney. (Finegan Decl., Ex. G.) Sweeney did not follow
13 the proper procedures for objecting, did not file a claim, did not mail his objection to this Court or
14 counsel in this case, and most likely, did not even intend to object to the California settlement
15 because he is not a class member, so the Court need not even consider his objection. The second
16 purported objection, sent by David Greenstein, was not received by the Clerk of the Court until
17 after the deadline to submit objections. (Dkt. 344.) Regardless, Sweeney and Greenstein's
18 arguments here are identical to those courts have invariably rejected in dozens of other cases. As
19 Plaintiffs have demonstrated that this settlement is fair, reasonable and adequate, and that the fee
20 request is justified, the Court should grant its final approval to the settlement and award fees and
21 costs to Class Counsel.

22 **II. SUMMARY OF SETTLEMENT**

23 The settlement terms are described more fully in Plaintiffs' Motion to Approve the
24 Settlement (Dkt. 327), but Plaintiff provides a brief summary here for ease of reference. After
25 years of discovery and hard-fought motion practice, and on the eve of trial in this case, Defendants
26 agreed to settle by permanently removing the "Made From Real Ginger" claim from their Canada
27 Dry ginger ales (collectively, the "Products"). They also agreed to allow purchasers to make

1 claims for cash refunds of \$0.40 for each Product purchased during the class period, up to a
2 maximum of 13 Products (\$5.20) without Proof of Purchase or 100 products (\$40.00) with proof
3 of purchase, with a guaranteed minimum payment of \$2.00 even if fewer than five purchases are
4 claimed, subject to Defendants' right to terminate the agreement if more than one million valid
5 claims are submitted by California purchasers. By contrast, Plaintiffs' best case-scenario for
6 recovery at trial was approximately \$.09 per product purchased.

7 **III. ARGUMENT**

8 **A. Both Sweeney and Greenstein Have Been Suspended from the Practice 9 of Law and Convicted of Felonies; Sweeney is a Serial Objector and Greenstein is a Vexatious Litigant.**

10 Before turning to the substance of Sweeney's objections, which are meritless, numerous
11 courts have criticized Sweeney for being a "serial" or "professional" objector to class settlements
12 and for repeatedly making the same meritless objections. *See, e.g., In re Yahoo Mail Litig.*, No. 13-
13 CV-4980-LHK, 2016 U.S. Dist. LEXIS 115056, at *26 (N.D. Cal. Aug. 25, 2016) ("Sweeney is a
14 serial objector. During Sweeney's deposition, Sweeney revealed that he had objected in 25 federal
15 cases across the country."); *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877, 890 (C.D. Cal.
16 2016) (noting that Sweeney is a "serial" objector "well-known for routinely filing meritless
17 objections to class action settlements for the improper purpose of extracting a fee rather than to
18 benefit the Class"); *Retta v. Millennium Prods.*, No. CV15-1801 PSG AJWx, 2017 U.S. Dist.
19 LEXIS 220288, at *20 (C.D. Cal. Aug. 22, 2017) (noting that "Sweeney [is a] serial objector[.]
20 Sweeney has objected in at least nine other class actions and filed identical objections as those
21 raised here.") In *In re Polyurethane Foam Antitrust Litigation*, 178 F.Supp.3d 635 (N.D. Ohio
22 2016), Judge Jack Zouhary described Mr. Sweeney as having "shown bad faith and vexatious
23 conduct, both in prior cases and in this action, in the pursuit of a payoff." *Id.* at 640. Judge
24 Zouhary further declared that the conduct of Mr. Sweeney and the other objectors "resembles
25 scavenger ants on a jelly roll, scrambling to extort money from the approved settlements." *Id.*
26
27
28

1 Numerous other cases are in accord.¹

2 Courts also have noted that Mr. Sweeney has been disbarred in both Wisconsin and
3 Florida,² and convicted of felony bankruptcy fraud. *See* McCrary Decl. Ex. 2 (11/22/17 Judgment
4 in a Criminal Case). Mr. Sweeney committed bankruptcy fraud when he falsely listed embezzled
5 funds from three companies, Fairview Ridge, LLC; Fairview Ridge II, LLC; and Fairview Ridge
6 III, LLC, as “loans to debtor” after he filed for bankruptcy in 2013. *See Id.*, Ex. 3 at 1-3 (7/12/17
7 Indictment of Patrick S. Sweeney). As part of Mr. Sweeney’s plea deal, he was sentenced to five
8 years’ probation and ordered to pay restitution in the amount of \$481,970. *Id.*, Ex. 2. At the
9 sentencing hearing, Judge James Peterson stated that Mr. Sweeney “deserved a prison sentence”
10 but instead received probation due to the needs of Mr. Sweeney’s disabled son. *Id.*, Ex. 4.

11 Mr. Greenstein has also been disbarred in California. *See* McCrary Decl. Ex. 5. Mr.
12 Greenstein is infamous for filing hundreds of lawsuits and was apparently charged with conspiracy
13 to commit grand theft auto for purposes of insurance fraud, and two counts of grand theft. *Id.*, Ex.
14 6.

15 ¹ *E.g.*, *Chambers v. Whirlpool*, 214 F.Supp.3d 877, 890 n. 7 (C.D. Cal. 2016) (noting that Mr.
16 Sweeney is “prolific in objecting to class action settlements” and “well-known for routinely filing
17 meritless objections to class action settlements for the purpose of extracting a fee rather than to
18 benefit the Class”); *Roberts v. Electrolux Home Prods., Inc.*, 2014 WL 4568632, at *12-15 (C.D.
19 Cal. Sep. 11, 2014) (holding that “[t]he Court has considered the objections of Mr. Sweeney,
20 overrules them in their entirety, finds that they are not made for the purpose of benefitting the
21 Class, and finds that they are meritless in all respects.”); *In re TRS Recovery Servs.*, 2016 WL
22 543137, at *6 n.16 (D. Me. Feb. 10, 2016) (overruling Sweeney’s objection and stating his “listed
23 objections are without merit and appear to be a form document”); *In re Carrier IQ, Inc.*, 2016 WL
24 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (overruling objection by Mr. Sweeney and labeling him
25 a “serial objector” who lacked standing to object because the phone number he “provided on his
26 claim form was actually the same number his wife, Pamela Sweeney, previously swore was hers in
27 another case.”); *Brown v. Hain Celestial Group*, 2016 WL 631880, at *10 (N.D. Cal. Feb. 17,
28 2016) (noting that Mr. Sweeney is a “professional objector”); *Larsen v. Trader Joe’s Co.*, 2014
WL 3404531, at *7 (N.D. Cal. 2014) (overruling objections and recognizing that “attorney Patrick
Sweeney also has a long history of representing objectors in class action proceedings”); *Martin v.
Global Marketing Research Services, Inc.*, Case No. 6:14-cv-01290-GAP-KRS, Dkt. No. 139, at 2
(M.D. Fl. Nov. 4, 2016) (“Finally, the Court finds that the objection filed by Patrick Sweeney is
frivolous and without merit.”).

² *See* <https://bit.ly/2HYPJ4Z> (last visited March 25, 2019) (revoked); <https://bit.ly/2JGy1FN> (last
visited March, 25, 2019) (not eligible to practice).

1 “Courts in the Ninth Circuit have routinely discounted objections from ‘professional’
2 objectors.” *Retta*, 2017 U.S. Dist. LEXIS 220288, at *20 (citations omitted). This is because
3 “professional objectors can levy what is effectively a tax on class action settlements, a tax that has
4 no benefit to anyone other than to the objectors. Literally nothing is gained from the cost:
5 Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised,
6 gains nothing.” *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 n.3 (N.D. Cal.
7 2012) (quoting *In re Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330, 1361, n. 30
8 (S.D. Fla. 2011)) (discussing objector who challenges settlements and files appeals to settlement
9 approval “and does not do so to effectuate changes to settlements, but does so for his own personal
10 financial gain”); *see also Dennis v. Kellogg Co.*, 2013 WL 6055326, at *4 n.2 (S.D. Cal. Nov. 14,
11 2013) (“when assessing the merits of an objection to a class action settlement, courts consider the
12 background and intent of objectors and their counsel, particularly when indicative of a motive
13 other than putting the interest of the class members first”) (citations and quotes omitted). Indeed,
14 Rule 23 was recently amended in part to address these problems. As the Advisory Committee

15 Notes to the amendment to Rule 23(e)(5) recognize:

16 [S]ome objectors may be seeking only personal gain and using objections to
17 obtain benefits for themselves rather than assisting in the settlement-review
18 process. At least in some instances, it seems that objectors—or their counsel—
19 have sought to obtain consideration for withdrawing their objections or dismissing
20 appeals from judgments approving class settlements. And class counsel
21 sometimes may feel that avoiding the delay produced by an appeal justifies
22 providing payment or other consideration to these objectors. Although the
23 payment may advance class interests in a particular case, allowing payment
24 perpetuates a system that can encourage objections advanced for improper
25 purposes.

26 Accordingly, this Court should discount Sweeney’s and Greenstein’s objections.

27 **B. The Court Should Strike Sweeney and Greenstein’s Objections For
28 Lack of Standing and For Failure to Comply With the Process for
Objecting.**

29 The Court should strike Sweeney and Greenstein’s objections because they have not
30 established they have standing to object to the Settlement. “[I]n the Ninth Circuit, only an
31 ‘aggrieved class member’ has standing to object to a proposed class settlement” and the “burden is
32 on the objector to ‘prove that he has standing to object.’” *In re Yahoo Mail Litig.*, 2016 U.S. Dist.

1 LEXIS 115056, at *26 (quoting *In re First Cap. Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d
2 29, 30 (9th Cir. 1994)). The purported objectors have not met that burden here. Sweeney’s
3 objection states only that, “upon information and belief” Sweeney “**believes** that he is a member of
4 the class, as it is defined in [the Class Notice].” Finegan Decl., Ex G (emphasis added). A “belief”
5 is not evidence, and Courts have rejected as proof of standing similarly equivocal statements from
6 Sweeney in the past. *E.g.*, *In re Yahoo Mail Litig.*, 2016 U.S. Dist. LEXIS 115056, at *26
7 (“Sweeney has not met this burden [to prove he had standing to object]. During Sweeney’s
8 deposition, Sweeney admitted that he did not ‘have actual evidence’ of his Class Membership, and
9 that he ‘guess[ed]’ that he was a Class Member.”). Sweeney also did not file an actual claim,
10 which would have required him to declare under penalty of perjury that he was a class member.
11 Instead, Sweeney printed out the claim form, hand wrote on the form “The website for a claim will
12 not allow me to indicate the months 8-1-2014 → 8-15-2015” and mailed that to the claim
13 administrator. McCrary Decl., Ex. 1. Other class members were able to submit forms and indicate
14 their dates of purchase, rendering Sweeney’s claim highly suspect, and, given his recent fraud
15 conviction, most likely an attempt to avoid having to declare his class membership under penalty
16 of perjury.³ *Id.*, at Ex. 2. At no time has he stated under penalty of perjury that he actually
17 purchased even one can or bottle of Canada Dry in California during the class period. Further,
18 Sweeney’s claim form, which states that he purchased 24 units of Canada Dry in California at
19 some unspecified date, is particularly insufficient to show a purchase during the class period and is
20 highly suspect since he has resided in Wisconsin during that time.⁴ *Id.* at Ex. 1. He also failed to
21 provide proof of purchase for his claim of more than 13 units. Numerous courts have rejected
22 Sweeney’s claims of California class membership given his out-of-state residence. *See, e.g.*, *Spann*
23 *v. J.C. Penney Corp.*, No. SA CV 12-0215 FMO (KESx) (C.D. Cal.) Dkt. No. 266 at p.10

24 _____
25 ³ *See* Fed. R. Evid. 603 (requiring oath or affirmation); 28 U.S.C. § 1746 (allowing substitute
testimony by declaration under penalty of perjury).

26 ⁴ Sweeney also apparently did not purchase any of the products in Wisconsin as he has not
27 submitted a claim form in the 49 state settlement or otherwise attested to such a purchase.
(Finegan Decl. ¶ 36.)

1 (“Patrick S. Sweeney is an attorney from Madison Wisconsin. It is questionable whether he ever
2 traveled to California, much less shopped at a JC Penney in California during the class period.”);
3 *Brown v. Hain Celestial Group, Inc.*, No. 3:11-cv-03082-LB (N.D. Cal.) Dkt. No. 367 at 18 (“Mr.
4 Sweeney is not a resident of California and was not a resident of California at any time during the
5 class action. Nevertheless, he submitted a claim stating he purchased a single Jason Product and
6 mailed an objection from his residence in Wisconsin. In light of his history as a serial objector, Mr.
7 Sweeney’s self-serving statement from the Midwest is worthy of little weight.”). Greenstein
8 similarly failed to establish he has standing to object, as he did not assert that he is a Class member
9 or provide any information as to when and where he purchased Canada Dry. (Dkt. 344.)

10 Sweeney and Greenstein also failed to follow the Court-ordered process for submitting
11 objections. First, Sweeney did not file the objection “with the Clerk of the Court” or even send it
12 by any method to class counsel in this case (Dkt. 335 at 8), but rather mailed it to the claim
13 administrator. Sweeney states that he “emailed it to counsel” but no plaintiffs’ counsel in this case
14 received it, McCrary Decl. ¶ 3, so presumably he emailed it only to counsel in the 49-state
15 litigation, if at all. Courts routinely strike objections for failure to properly file them. *See, e.g.*,
16 *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-00350-JST, 2014 U.S. Dist. LEXIS 87180, at *19-20
17 (N.D. Cal. June 24, 2014) (“Hicks also lacks standing because he failed to follow the procedures
18 set forth in the class notice. . . . Here, Hicks never filed the objection and notice to appear with the
19 court. . . .”); *Moore v. Verizon Communs., Inc.*, No. C 09-1823 SBA, 2013 U.S. Dist. LEXIS
20 122901, at *42-43 (N.D. Cal. Aug. 28, 2013) (“The Class Notice (long form) instructs class
21 members that any objection to the Settlement must be mailed to Class Counsel and defense
22 counsel and filed with the Court. . . . Mr. Turkish’s objection is OVERRULED because it does not
23 contain an address or phone number and was not filed with the Court.”); *In re TD Ameritrade*
24 *Account Holder Litig.*, No. C 07-2852 SBA, 2011 U.S. Dist. LEXIS 103222, at *30 (N.D. Cal.
25 Sep. 12, 2011) (“M. Blum apparently submitted an objection to Class Counsel, but did not file his
26 objection with the Court as required. Because Mr. Blum did not file his objection, it is not properly
27 before the Court. . . . Therefore, the putative objection of Mr. Blum will not be considered.”).

1 Sweeney also failed to provide “a detailed list of any other objections submitted by the
2 Class Member, or his/her counsel, to any class actions submitted in any court, whether state or
3 otherwise, in the United States in the previous five (5) years” as required by the Court’s order,
4 likely because the list would be so extensive. *See, e.g., Moore*, 2013 U.S. Dist. LEXIS 122901, at
5 *42-43 (“Specifically, Mr. and Mrs. Fix’s objection is OVERRULED because it does not contain
6 the caption and case number appearing on the Settlement Class Notice.”).

7 Greenstein failed to make a timely objection to the Settlement. The Clerk of the Court did
8 not receive Greenstein’s purported objection until March 25, 2019. (Dkt. 344.) Class Notice
9 specified that the Objection Deadline was March 19, 2019. (*See, e.g., Dkt. 325, Ex. B1 (Long*
10 *Form Notice).*) Class Notice further provided that “All information listed herein must be filed as a
11 written objection with the Clerk of the Court, postmarked by mail, express mail, or personal
12 delivery, such that the Objection is postmarked, and ***received by, the Clerk on or before the***
13 ***Objection Deadline.***” (Dkt. 325, Ex. B1 (Long Form Notice (emphasis added).) Greenstein’s
14 purported objection should be stricken since it was untimely. *See, e.g., Moore v. PetSmart, Inc.*,
15 728 F. App’x 671, 673 (9th Cir. 2018) (“the district court did not err in striking Loomis’s
16 objection” since the objection was “not timely filed”). Further, Greenstein’s purported objection
17 failed to include all the information required for an objection, including “a statement of his/her
18 membership in the Class, including all information required by the Claim Form” and should be
19 stricken on that basis. *In re Yahoo Mail Litig.*, 2016 U.S. Dist. LEXIS 115056, at *26.

20 **C. Sweeney and Greenstein’s Boilerplate Objections are Meritless.**

21 Even if the Court were to treat Sweeney and Greenstein’s submissions as objections, they
22 are meritless. Sweeney’s objections in this case consists of nearly identical arguments from a
23 multitude of other objections he has filed in the past and which have been invariably rejected by
24 the dozens of courts presiding over those cases.⁵ Sweeney complains that a portion of the fees
25 should be held back to ensure “future oversight” of the distribution of funds to class members so

26 _____
27 ⁵As Sweeney failed to provide the list of cases as required by the class notice, Class Counsel
28 provides a partial list in the declaration of Matthew McCrary filed herewith at paragraph 4.

1 that Class Counsel brings the settlement process to its “ultimate completion.” Sweeney
2 acknowledges this is not the “usual process,” but nevertheless suggests his proposal “would be an
3 improvement to the present process procedure.” Finegan Decl., Ex. G, p. 3. Setting aside the lack
4 of authority in support of this proposal, it is also unnecessary. This Court has already determined
5 that Class Counsel is adequate, and Sweeney presents no evidence to suggest Class Counsel will
6 somehow become inadequate to oversee distribution of funds to the class. Class Counsel will also
7 file the Post-Distribution Accounting as required by the recent revisions to this district’s class
8 action settlement guidelines. Moreover, the Court retains continuing jurisdiction over and will
9 have the power to enforce the terms of the agreement during the distribution process. In other
10 words, if Class Counsel and the parties do not implement the settlement as they have promised, or
11 provide the required accounting, the Court can order them to do so. *See Retta v. Millennium*
12 *Prods.*, No. CV15-1801 PSG AJWx, 2017 U.S. Dist. LEXIS 220288, at *22 (C.D. Cal. Aug. 22,
13 2017) (“[Sweeney’s] objection is without merit because the Court, by virtue of this Order, retains
14 jurisdiction over the settlement and all matters relating to the litigation. This process ensures that
15 the Court will have adequate oversight of the distribution process.”). Finally, Sweeney cites no
16 case that has ever required Class Counsel’s fees be withheld to ensure “oversight” of the
17 distribution process, and he ignores that it would be unfair to Class Counsel to withhold fees as
18 counsel has worked without payment for more than two years. Dkt. 327-1 ¶ 63.

19 Sweeney next objects that “no timeframe for completing administration of the monetary
20 relief is set, so Class Members cannot know when payment would arrive” and the administrator is
21 not held to any specific timeframe to complete distributions. Both objections only highlight
22 Sweeney’s ignorance of the terms of this settlement because neither is true. Contrary to Sweeney’s
23 understanding, the timing for payment of claims is set forth in the settlement agreement. (Dkt. 325,
24 § 4.7 (stating “Valid Claims shall be paid by check to the Class Members and mailed to the
25 address provided on the Claim Form as updated in the National Change of Address Database,
26 within forty-five (45) days after the Effective Date except that, in the event of an appeal from final
27 approval that challenges only the award of Attorneys’ Fees and Expenses and/or the Class

1 Representative Service Awards and does not challenge any other aspect of the Settlement and does
2 not raise an argument, theory, or issue that could result in the reversal of final approval or
3 modification of other terms of the Settlement, then all Valid Claims shall be paid within sixty (60)
4 days after entry of the Final Approval Order, unless otherwise ordered by the Court.”)

5 Greenstein also apparently failed to review the Settlement since in his purported objection
6 he asked whether there was a “limit on the settlement” and “if there is money left over, who gets
7 it.” (Dkt. 344.) The Settlement provides that Defendants could terminate the agreement if more
8 than 1 million Valid Claims were filed (Id., § 13.1). Further, under the claims made structure of
9 the Settlement, there is no possibility of leftover money.

10 Sweeney and Greenstein take issue with the fees awarded to Class Counsel. Sweeney
11 objects because they “do not depend upon how much relief is actually paid to the Class Members.”
12 (Finegan Decl., Ex. G.) Greenstein claims that the fees are “out of proportion to benefit to
13 consumers.” (Dkt. 344.) These objections are unsupported by any analysis and do not respond to
14 any of the arguments in the motion to approve the settlement that the fee award is legally justified
15 on a lodestar-multiplier basis, because the primary recovery is injunctive. An objector’s
16 “[c]onclusory and unsubstantiated objections are not sufficient to warrant a reduction in fees.”
17 *Lucas v. White*, 63 F.Supp.2d 1046, 1057 (N.D.Cal.1999) (holding that “[t]he party opposing the
18 fee application has a burden of rebuttal that requires submission of evidence to the district court
19 challenging the accuracy and reasonableness of the hours charged or the facts asserted by the
20 prevailing party in its submitted affidavits.”); *see also In re Toyota Unintended Acceleration*, No.
21 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, 310–311, (C.D. Cal. July 24, 2013)
22 (rejecting unsupported objections to a proposed fee award where the objectors presented no expert
23 declaration or other evidence undermining the Court’s conclusions); *EnPalm, LLC v. Teitler*
24 (2008) 162 Cal.App.4th 770, 775 (objection to attorney fee award forfeited where unsupported by
25 discussion and analysis of the record). Sweeney and Greenstein ignore that, under Ninth Circuit
26 standards, where the “primary form of relief” is an injunction, *Kwikset Corp. v. Superior Court*, 51
27 Cal. 4th 310, 337 (2011), and there is a fee-shifting statute (California Civil Code § 1750 and

1 California Code of Civil Procedure § 1021.5), a District Court should analyze an attorneys' fee
2 request and issue an award based solely on the "lodestar" method, i.e., multiplying the number of
3 hours reasonably worked by a reasonable hourly rate. *Bluetooth Headset Prods. Liability Litig.*,
4 654 F.3d 935, 941 (9th Cir. 2011).⁶ Defendants here are agreeing to a permanent injunction to
5 change the Canada Dry label and marketing. That is a significant portion of the relief in the
6 settlement, which is not accounted for in a strict monetary assessment.

7 Finally, Sweeney contends, again with no intelligent analysis or admissible evidence, that
8 the fees requested are unreasonable when measured against the number of docket entries in this
9 case, many of which he contends are not "substantive in nature." Sweeney obviously spent no time
10 reviewing the docket or developing an understanding of what has happened in this hotly contested
11 case over the past two years. For example, Sweeney ignores that Plaintiff defeated two motions to
12 dismiss, reviewed over 200,000 pages of documents, won class certification, defeated two separate
13 *Daubert* motions, defeated summary judgment, and settled this case on the eve of trial only after
14 extensive trial preparations. Dkt. 327-1 ¶¶ 2-27. Further, no court has ever adopted a "docket
15 entry" standard for measuring attorneys' fees, as it does not reflect the realities of civil litigation.
16 For example, Plaintiffs' Class Certification motion alone was a 30-page brief with around 75
17 supporting exhibits. That one docket entry necessarily reflected hundreds of hours of attorney time
18 and would far exceed the "\$3,133" per docket entry Mr. Sweeney calculated.⁷ Additionally, docket
19 entries fail to capture significant amounts of work, such as Class Counsel's time spent on trial

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21 ⁶ Further, even if the Court were to exercise its discretion to "cross-check" the fee request against
22 the amount of monetary relief the settlement provides, Sweeney's objection still lacks merit. *See*
23 *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) (holding that "a cross-
24 check is entirely discretionary"). The cross-check would be against the amount *made available* to
25 class members, not the amount actually claimed. *See Shames v. Hertz Corp.*, 2012 WL 5392159, at
26 *14 (S.D. Cal. Nov. 5, 2012) (under claims-made settlement, analyzing fairness in terms of
27 amount made available); *cf. Williams v MGM-Pathé Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir.
1997) (holding that it was abuse of discretion for district court to base class action settlement fee
award "on the class members' claims against the fund rather than on a percentage of the entire
fund or on the lodestar"). Here, Class Counsel made \$40 million available to class members.

⁷ Sweeney even gets his simple math wrong because he is not addressing the fees requested in this
settlement.

1 preparation, meeting and conferring with opposing counsel, and most discovery-related work.
2 Thus, Contrary to Sweeney’s flawed “docket entry” fee analysis, Plaintiffs’ fee request is
3 imminently reasonable under the applicable lodestar standard, as detailed in the declarations
4 supporting the amount of Class Counsel’s lodestar. *Id.* ¶¶ 2-27; 63-75; Dkt. 327-2 ¶¶ 12-17; Dkt.
5 327-3 ¶¶ 6-18; Dkt. 327-4 ¶¶ 7-17. Further, Sweeney simply ignores that under the appropriate
6 lodestar calculation, Class Counsel is accepting *considerably less* than their lodestar,
7 approximately 60%. Dkt. 327-1 ¶ 72.⁸

8 Mr. Sweeney finally purports to adopt and join in all other objections. But there are no
9 other objections. In any event, this catch-all must be rejected because, at minimum, it violates this
10 Court’s order that each objection must include “a written statement of all grounds for the
11 Objection, accompanied by any legal support for such Objection.” *See also In re Toyota Motor*
12 *Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.* (C.D. Cal. July 24,
13 2013, No. 8:10ML 02151 JVS (FMOx)) 2013 U.S. Dist. LEXIS 123298, at *268, fn. 30) (striking
14 “any objection that purports to incorporate the objections raised by others in other documents.”).

15 **D. Class Notice Was Reasonable and Adequate as Are the Number of**
16 **Claims.**

17 Class Members’ reactions to the Settlement have been overwhelmingly positive. Notice
18 was effectuated according to the proposed plan and more than 145 million impressions of the
19 settlement notice were delivered in a variety of methods (i.e., print, online, mobile). Finegan Decl.,
20 ¶¶ 3. The Settlement Website received over 494,994 unique visits, and the claims administrator
21 responded to hundreds of inquiries regarding the settlement made via mail, e-mail, and the toll-free
22 number. *Id.* ¶ 25. There were 91,254 claims, representing approximately 4% of the estimated 2.3
23 million class members, and only 318 people opted out of the settlement. Although the claims-rate
24 was slightly lower than the predicted 100,000 claims (Dkt. 327-5 ¶ 36), this is still reasonable.
25 Class Counsel and the claim administrator undertook several actions above and beyond the notice

26 ⁸ Plaintiffs previously requested fees and submitted declarations supporting Class Counsel’s
27 lodestar in conjunction with their motion to approve the settlement. Dkt. 327. Class Counsel
28 provides updated lodestar figures in conjunction with this Reply. Gutride Decl. ¶¶ 3 and 5.

1 plan to provide notice and encourage claims. For example, the claim administrator did a claim
2 stimulation program, which included featuring the settlement in an email sent to
3 topclassactions.com’s 700,000 subscribers, two broadcast interviews, and social media
4 advertisements were targeted at health and cooking websites that maximized website traffic and
5 social media influencers. Finegan Decl. ¶¶ 26-29. Class Counsel also paid for a boosted Facebook
6 post and sent the administrator the email contact information of potential Class members that had
7 contacted GSLLP during the pendency of the case. Gutride Decl. in Support of Reply ¶ 2. Further,
8 the claims rate in the California-only settlement far exceeds that for the total claims of all other 49
9 states in the 49-state settlement. Finegan Decl. ¶ 4. This confirms that the extra work done in the
10 California settlement to provide notice was effective.

11 “A court may appropriately infer that a class action settlement is fair, adequate, and
12 reasonable when few class members object to it”, as is the case here, notwithstanding a low
13 percentage of claims. *Evans v. Linden Research, Inc.*, No. C-11-01078 DMR, 2014 WL 1724891,
14 at *4 (N.D. Cal. April 29, 2014). And where, as here, notice satisfies due process, “the number of
15 claims submitted at any particular time is not a relevant factor in evaluating the fairness,
16 reasonableness, or adequacy of the settlement.” *Hall v. Bank of Am.*, No. 1:12-cv-22700-FAM,
17 2014 WL 7184039, at *8 (S.D. Fla. Dec. 17, 2014). Importantly, in claims-made settlements like
18 this one, “Courts around the country have approved settlements where the claims rate was less
19 than one percent”—far lower than the 4% claims rate here—because “the claims rate does not
20 dictate whether the notice provided was the best notice practicable under the circumstances” and
21 “does not govern whether the settlement is fair, reasonable, or adequate.” *Pollard v. Remington*
22 *Arms Co., LLC*, 320 F.R.D. 198, 214-15 (W.D. Mo. 2017) (collecting cases). This is particularly
23 true in cases such as this, where the identity of putative class members is unknown and notice was
24 reasonably delivered via publication through national periodicals and popular internet outlets. *See*
25 *id.* at 210-15 (final approval of claims-made settlement with 0.29% claims rate (22,000 claims /
26 7.5 million potential members), where most members’ personal information was unknown and
27 notice utilized several types of mediums, including targeted social media and magazine

1 campaigns, resulting in several hundred thousand visits to settlement website); *Poertner v. Gillette*
2 *Co.*, 618 Fed. Appx 624, 625-26, 628 (11th Cir. July 16, 2015) (affirming final approval of claims-
3 made settlement with 0.76% claims rate (55,346 claims / 7.26 million members) where members’
4 personal information was unknown and notice was reasonably provided via publication through
5 national periodicals and popular internet outlets); *In re Apple iPhone 4 Prods. Liab. Litig.*, No.
6 5:10-md-2188 RMW, 2012 WL 3283432, at *1 (N.D. Cal. Aug. 10, 2012) (final approval of
7 claims-made settlement with claims rate between 0.16% and 0.28% (44,000 claims / 15.7-27.1
8 million members)).⁹ As in these cases, the notice program employed here is the same type of
9 program that would have been employed had this been litigated and, arguably broader, because
10 Plaintiff was able to negotiate to for Defendant to bear the notice costs under the settlement.

11 **IV. CONCLUSION**

12 For the reasons stated above, Plaintiffs respectfully request that this Court enter final
13 judgment approving the settlement, granting their applications for an Class Representative Service
14 Award of \$5,000 each, and awarding Class Counsel \$2,250,000 in attorneys’ fees and costs.

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24 ⁹ *See also Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1257 (C.D. Cal. 2016) (holding
25 2.75% claim rate to be reasonable where “direct notice could not be provided to more than half of
26 the class”); *Touhey v. U.S.*, No. EDCV 08-01418-VAP (RCx), 2011 WL 3179036, at *7-8 (C.D.
27 Cal. July 25, 2011) (finding response rate of 2% “weighs slightly in favor of settlement”); *see*
28 *also In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015) (upholding
settlement in which the parties sent direct notice to 35,000,000 class members and received
1,183,444 claims, which represents a 3.4% claim rate).

1 Dated: March 27, 2019

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CERTIFICATE OF SERVICE

1
2 I, Matthew T. McCrary hereby certify that on March 27, 2019, I caused a copy of the
3 foregoing document to be served on Patrick Sweeney by email at the following email address
4 provided in his purported objection: patrickshanesweeney@gmail.com and by U.S. mail on the
5 following address provided by Mr. Sweeney: 2672 Mutchler Road, Madison, WI 53711. I also
6 caused a copy of the foregoing document to be served on David Greenstein by email at the
7 following email provided in his purported objection: 1988jeopardychampion@gmail.com and by
8 U.S. mail on the following address provided by Mr. Greenstein: 17639 Sherman Way A-35,
9 Van Nuys, CA. 91406.

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