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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

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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I. INTRODUCTION

Class Members' reactions to the Settlement have been overwhelmingly positive. The settlement website was visited by over 494,994 users and 91,254 claims have been filed for a maximum recovery of $470,735. Out of this, only 318 people have opted out and no objections were filed. This 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).

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

II. SUMMARY OF SETTLEMENT

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

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

III. ARGUMENT

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

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

Numerous other cases are in accord.[1]

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

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

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[1] *E.g.*, *Chambers v. Whirlpool*, 214 F.Supp.3d 877, 890 n. 7 (C.D. Cal. 2016) (noting that Mr. Sweeney is "prolific in objecting to class action settlements" and "well-known for routinely filing meritless objections to class action settlements for the purpose of extracting a fee rather than to benefit the Class"); *Roberts v. Electrolux Home Prods., Inc*., 2014 WL 4568632, at *12-15 (C.D. Cal. Sep. 11, 2014) (holding that "[t]he Court has considered the objections of Mr. Sweeney, overrules them in their entirety, finds that they are not made for the purpose of benefitting the Class, and finds that they are meritless in all respects."); *In re TRS Recovery Servs*., 2016 WL 543137, at *6 n.16 (D. Me. Feb. 10, 2016) (overruling Sweeney's objection and stating his "listed objections are without merit and appear to be a form document"); *In re Carrier IQ, Inc.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (overruling objection by Mr. Sweeney and labeling him a "serial objector" who lacked standing to object because the phone number he "provided on his claim form was actually the same number his wife, Pamela Sweeney, previously swore was hers in another case."); *Brown v. Hain Celestial Group*, 2016 WL 631880, at *10 (N.D. Cal. Feb. 17, 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).

"Courts in the Ninth Circuit have routinely discounted objections from 'professional' objectors." *Retta*, 2017 U.S. Dist. LEXIS 220288, at *20 (citations omitted). This is because "professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose benefit the appeal is purportedly raised, gains nothing." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 n.3 (N.D. Cal. 2012) (quoting *In re Checking Account Overdraft Litigation*, 830 F.Supp.2d 1330, 1361, n. 30 (S.D. Fla. 2011)) (discussing objector who challenges settlements and files appeals to settlement approval "and does not do so to effectuate changes to settlements, but does so for his own personal financial gain")*; see also 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). Indeed, Rule 23 was recently amended in part to address these problems. As the Advisory Committee Notes to the amendment to Rule 23(e)(5) recognize:

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

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

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

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

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

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

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

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

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

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

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

C. Sweeney and Greenstein's Boilerplate Objections are Meritless.

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

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

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

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

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

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

Sweeney and Greenstein take issue with the fees awarded to Class Counsel. Sweeney objects because they "do not depend upon how much relief is actually paid to the Class Members." (Finegan Decl., Ex. G.) Greenstein claims that the fees are "out of proportion to benefit to consumers." (Dkt. 344.) These objections are unsupported by any analysis and do not respond to any of the arguments in the motion to approve the settlement that the fee award is legally justified on a lodestar-multiplier basis, because the primary recovery is injunctive. An objector's "[c]onclusory and unsubstantiated objections are not sufficient to warrant a reduction in fees." *Lucas v. White*, 63 F.Supp.2d 1046, 1057 (N.D.Cal.1999) (holding that "[t]he 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*, No. 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, 310–311, (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* (2008) 162 Cal.App.4th 770, 775 (objection to attorney fee award forfeited where unsupported by discussion and analysis of the record). Sweeney and Greenstein ignore that, under Ninth Circuit standards, where the "primary form of relief" is an injunction, *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 337 (2011), and there is a fee-shifting statute (California Civil Code § 1750 and

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

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

[6] Further, even if the Court were to exercise its discretion to "cross-check" the fee request against the amount of monetary relief the settlement provides, Sweeney's objection still lacks merit. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) (holding that "a cross-check is entirely discretionary"). The cross-check would be against the amount *made available* to class members, not the amount actually claimed. *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); *cf. Williams v MGM-Pathe 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.

preparation, meeting and conferring with opposing counsel, and most discovery-related work. Thus, Contrary to Sweeney's flawed "docket entry" fee analysis, Plaintiffs' fee request is imminently reasonable under the applicable lodestar standard, as detailed in the declarations supporting the amount of Class Counsel's lodestar. *Id.* ¶¶ 2-27; 63-75; Dkt. 327-2 ¶¶ 12-17; Dkt. 327-3 ¶¶ 6-18; Dkt. 327-4 ¶¶ 7-17. Further, Sweeney simply ignores that under the appropriate lodestar calculation, Class Counsel is accepting ***considerably less*** than their lodestar, approximately 60%. Dkt. 327-1 ¶ 72.[8]

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

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

Class Members' reactions to the Settlement have been overwhelmingly positive. Notice was effectuated according to the proposed plan and more than145 million impressions of the settlement notice were delivered in a variety of methods (i.e., print, online, mobile). Finegan Decl., ¶¶ 3. The Settlement Website received over 494,994 unique visits, and the claims administrator responded to hundreds of inquiries regarding the settlement made via mail, e-mail, and the toll-free number. *Id.* ¶ 25. There were 91,254 claims, representing approximately 4% of the estimated 2.3 million class members, and only 318 people opted out of the settlement. Although the claims-rate was slightly lower than the predicted 100,000 claims (Dkt. 327-5 ¶ 36), this is still reasonable. Class Counsel and the claim administrator undertook several actions above and beyond the notice

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

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

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

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

IV. CONCLUSION

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

[9] *See also Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1257 (C.D. Cal. 2016) (holding 2.75% claim rate to be reasonable where "direct notice could not be provided to more than half of the class"); *Touhey v. U.S.*, No. EDCV 08-01418-VAP (RCx), 2011 WL 3179036, at *7-8 (C.D. Cal. July 25, 2011) (finding response rate of 2% "weighs slightly in favor of settlement"); *see 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).

Dated: March 27, 2019

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CERTIFICATE OF SERVICE

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