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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, and CAMILLE BERLESE, individually and on behalf of all others similarly situated

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC, a Delaware Limited Liability Company,

Defendant.

Case No: 3:16-cv-6450 MMC

PLAINTIFFS' RENEWED MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENT AND ENTRY OF FINAL JUDGMENT

Date: May 20, 2022
Time: 9:00 a.m.
Courtroom: 7 – 19th Floor
Judge: Hon. Maxine M. Chesney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 20, 2022, at 9:00 a.m., in Courtroom 7 of the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, CA 94102, the Honorable Maxine M. Chesney presiding, Plaintiffs Baerbel McKinney-Drobnis, Joseph B. Piccola, and Camille Berlese in the matter titled *McKinney-Drobnis, et al., v. Massage Envy Franchising, LLC,* Case No. 3:16-cv-06450-MMC, will and hereby do move the Court, pursuant to Federal Rules of Civil Procedure 23, for an Order:

1. Granting final approval to the Class Action Settlement Agreement filed March 15, 2019, [ECF No. 103] and preliminarily approved by the Court on June 7, 2019 [ECF No. 114];

2. Certifying the Settlement Class, as defined in the Court's Order on Preliminary Approval, for settlement purposes pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3);

3. Appointing Plaintiffs Baerbel McKinney-Drobnis, Joseph B. Piccola, and Camille Berlese as Class Representatives;

4. Affirming Jeffrey R. Krinsk of Finkelstein & Krinsk LLP as Class Counsel;

5. Approving Class Counsel's costs and attorneys' fees;

5. Approving Plaintiffs' incentive awards; and

6. Finding that the Class Notice Program has been adequate and reasonable, has met the requirements of Federal Rules of Civil Procedure 23 and due process, and has constituted the best notice practicable under the circumstances

This Motion is supported by the accompanying Memorandum of Points and Authorities; the Declarations of Jeffrey R. Krinsk and David A. Rotman. submitted herewith and exhibits thereto; all papers and records on file in this action; the argument of counsel; and such other matters as the Court may consider.

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Date: March 30, 2022

Respectfully submitted,

FINKELSTEIN & KRINSK LLP

By: /s/ Jeffrey R. Krinsk

Jeffrey R. Krinsk, Esq.

Attorneys for Plaintiffs and the proposed Class

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs filed this Action, on November 4, 2016, against Massage Envy Franchising, LLC ("MEF") challenging increases in monthly membership fees that they and members of the Class paid to independently owned and operated Massage Envy® franchise locations ("ME Locations"). First Amended Complaint ("FAC") [Doc. 60]. Plaintiffs allege that their membership agreements preclude increases in their monthly membership fees and that those fees were improperly increased in varying increments during the Class Period in violation of the membership agreements and other applicable law. *Id.* MEF has challenged this litigation at every turn, raising a number of issues before both this Court and the Ninth Circuit Court of Appeals. Despite three years of contentious litigation, the parties were able to achieve a fair and reasonable compromise of the Class's claims despite the risk associated with continued litigation and prevailing with this case.

The Settlement was the product of more than a year of arm's-length negotiations between the Parties, including multiple mediation sessions before David Rotman, Esq. The negotiations were informed by the Court's ruling on MEF's pleadings challenges, extensive discovery efforts, the review of thousands of pages of documents, and Plaintiffs' depositions. Accordingly, the Settlement appropriately reflects the realities and risks of litigation and is well calibrated to the facts of the case. This is particularly true, given that the parties were preparing for cross motions for summary judgment and class certification briefing shortly before executing the Stipulated Class Action Settlement and Release (the "Settlement Agreement").[1]

The Court finally approved this Settlement on February 28, 2020. Minute Order, ECF No. 145; Order on Final Approval, ECF No. 146, at ¶ 14. In doing so, the Court carefully considered the arguments of the parties, as well as the objections of Kurt Oreshack. *Id.* Ultimately, Mr. Oreshack appealed the Court's decision. *See McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 612 (9th Cir. 2021). While the Ninth Circuit agreed with Mr. Oreschack that the coupon provisions of CAFA applied, and that the Court should conduct a rigorous analysis of the Settlement terms, the Ninth Circuit took no

[1] The original Settlement Agreement is attached to the Declaration of Jeffrey Krinsk, ECF No. 107] as Exhibit D. All capitalized terms within this brief shall have the same meaning as in the Settlement Agreement, unless otherwise noted.

position regarding the fairness of the underlying Settlement. *See generally id.* Instead, the Ninth Circuit remanded the case for the Court's further consideration.

Since the appeal, the parties returned to mediation and agreed to amend the Settlement Agreement to address any of the concerns that may remain following the Ninth Circuit's decision. In doing so, the parties agreed to increase the Vouchers provided to the Settlement Class from $10 million to $11 million, to remove any clear sailing provision from the Settlement Agreement, and to provide that the portion of attorneys' fees attributable to the Vouchers would only be provided after the redemption period ends. Additionally, the parties have provided detailed estimates regarding the value of the Injunctive Relief provided by the Settlement as well as the estimated redemption rate of the Vouchers provided.

This information confirms the Court's initial finding, the proposed Settlement provides compensation to Settlement Class Members that is fair, just, reasonable, and adequate under the circumstances. Each Settlement Class Members, who timely submitted a Voucher Request, with a **$39.78, $79.56, $119.34, $159.12, or $198.90 Voucher**, in amounts corresponding to the monthly membership fee increases each Class Member paid. The Vouchers may be used to purchase goods and/or services at any ME Locations (often with no additional money from a Settlement Class Member) and are fully transferrable and aggregable. MEF also has agreed to Injunctive Relief by adopting an updated template membership agreement that requires each ME Location to provide at least forty-five days' advance written notice before any future increases in monthly membership fees, while reducing the cancelation period to ten days. Based on an expert review of the benefits already provided, this Injunctive Relief has saved consumers **$2,349,887** between June 2019 and December 2021 and will save consumers another **$3,736,016** from 2022 through 2024 (the estimated end of the two-year Injunctive Relief period).

The reaction to this Settlement has been overwhelmingly positive. The participation rate exceeds the original estimates made by Class Counsel in its Motion for Preliminary Approval and exceeds the rates in similar consumer class settlements. Additionally, only seven of the approximately 1.7 million Class Members filed objections (0.0004% of the Class), and there were only 351 Class Members who opted-out of the Settlement (just 0.02% of the Class). Accordingly, the Court should

approve this Settlement.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

The procedural background, facts of the dispute, and settlement negotiations are thoroughly described in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ECF No. 103, Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Award, ECF No. 119-1, and the concurrently filed Declarations of Jeffery R. Krinsk in support thereof. Thus, Plaintiffs will not fully recite this extensive history here. But, some recitation of general information regarding the history of this action, however, remains prudent.

MEF operates as a franchisor of spa services with over 1,200 franchised locations throughout the United States. As part of its business model, MEF's franchisees sell memberships entitling members to monthly membership services, among other things, in exchange for a monthly fee. Plaintiffs filed a complaint alleging that MEF unilaterally increased the price of its franchisees' monthly memberships in violation of the members' membership agreements.

The initial phases of this litigation were fraught with motion practice. On January 27, 2017, Plaintiffs filed a Motion to Strike Defendant's Affirmative Defenses. *See* ECF No. 24. The same day, MEF filed its Motion for Judgment on the Pleadings or, in the Alternative, to Strike Class Action Allegations. *See* ECF No. 26. MEF's Motion advanced two arguments that: (1) Plaintiffs' claims were released by a prior settlement (the *Hahn* settlement), and (2) Plaintiffs' counsel was legally prohibited from representing a class of both current and former Massage Envy members. *Id*.

The Court granted Plaintiffs' Motion to Strike as to twenty-five of MEF's twenty-nine Affirmative Defenses and denied MEF's Motion finding, in part, that the *Hahn* settlement could not have released the claims at bar under the "Identical Factual Predicate" doctrine. *See* Order Denying Defendant's Motion for Judgment on the Pleadings, ECF No. 49. MEF later moved this Court to certify that order for interlocutory appeal, which was denied. *See* Order Denying Defendant's Motion for Certification of Order for Interlocutory Appeal, ECF No. 68.

MEF, thereafter, petitioned the Ninth Circuit for a Writ of Mandamus to vacate the Court's Orders on the Motions for Judgment on the Pleadings [ECF No. 49] and Interlocutory Appeal [ECF No. 68]. *Massage Envy Franchising, LLC v. United States District Court*, No. 17-71722, ECF No. 1

(9th Cir.). The Ninth Circuit ordered that the issue be fully briefed. *Id.,* ECF No. 2. MEF's petition, however, was denied. *Id.,* ECF No. 5.

The parties also engaged in extensive discovery. Plaintiffs propounded fifty-five document requests, twenty-five interrogatories, and two document subpoenas. Declaration of Jeffrey R. Krinsk in Support of Motion for Preliminary Approval ("Krinsk Decl. I"), ECF No. 103-1, at ¶ 41. Plaintiffs reviewed over 7,000 pages of documents, and thousands of documents from the *Hahn* litigation. *Id*., ¶ 46. Additionally, Plaintiffs were preparing for the scheduled depositions of MEF's key corporate officers at the time of settlement. *Id*., ¶ 43.

MEF had similarly issued multiple document requests, interrogatories, and requests for admissions. *Id*., ¶¶ 44. Defendant deposed each of the named Plaintiffs and subpoenaed several of Plaintiffs' family members and friends. *Id*., ¶¶ 45. Plaintiffs successfully moved to quash several of these subpoenas. Order Regarding Joint Discovery Letter, ECF No. 87.

Settlement discussions did not proceed in earnest until October 2017 and the Parties eventually agreed to mediation before David A. Rotman in February 2018. Krinsk Decl. I, ¶¶ 47, 50. The Parties were unable to come to an agreement at this mediation. *Id*.

Over the following months, the Parties' counsel were able to narrow the points of disagreement concerning key material terms. *Id*., ¶ 51. The Parties scheduled a follow-up mediation for August, but disagreement between the parties caused the mediation to be cancelled. *Id*, ¶ 52. Counsel then resumed litigation efforts. *Id.*, ¶ 53; Order Lifting Stay of Case, ECF No. 96. It was at this time that MEF filed its Motion for Relief from the Magistrate's order regarding the parties' Joint Discovery Letter. ECF No. 97.

Plaintiffs were simultaneously preparing to move for class certification and a potential motion for summary judgment. Krinsk Decl. I, ¶ 54. The Parties previously had represented to the Court that "MEF anticipates filing a motion for summary judgment prior to Plaintiffs' anticipated motion for class certification" and "Plaintiffs… may move for summary adjudication regarding Plaintiffs' contract." *See* Stipulation Re: Schedule for Briefing, ECF No. 70, at pp. 1-2; *see also* Order Lifting Stay of Case, ECF No. 96 (setting a May 17, 2019 deadline for Plaintiffs to file their motion for class certification). However, the parties returned to mediation before Mr. Rotman and were thereafter able

to agree as to a settlement. Krinsk Decl. I, ¶ 55.

In exchange for the negotiated release of claims that were actually litigated in this case, MEF originally committed to issue $10,000,000 in Vouchers that can be redeemed at any ME Location for retail products, massage sessions, enhancements, and/or facial sessions. Settlement Agreement, at ¶ 11. The Vouchers are 100% transferrable and may be aggregated. *Id.* Participating Settlement Class Members are provided sixteen months from the date the Vouchers are issued to redeem them. The only other limitations on the Vouchers are that they are not redeemable for cash and cannot be used for monthly membership fees or to pay tips to employees of the ME Locations. *Id.*

The Settlement also provides important Injunctive Relief intended to provide real monetary benefits to Settlement Class Members (and other consumers). MEF's new template Membership Agreement requires at least forty-five days' written notice before any future monthly fee increase and reduces the cancelation period to ten days. *Id.*, at §§ 14-15; *see also* Settlement Agreement, at Ex. 5 (for the proposed Membership Agreements). This concession is a substantial change from the ten days' price increase notice period and thirty-day cancelation period previously provided by prior Membership Agreements. These terms allow Massage Envy members a reasonable amount of time to cancel, should they opt to do so, before incurring any price increase. Settlement Agreement, at § 15. Additionally, it delays any potential price increase by, at least, thirty-five days, when compared to the previous contractual terms.

Given the benefits provided, the Court approved the Settlement at the previous fairness hearing. *See* Minute Order, ECF No. 145. This was no rubber-stamped approval. After hearing extensive arguments from the parties and Mr. Oreshack's counsel, the Court reduced Plaintiffs requested attorneys' fees and costs from the requested $3,300,000 to $2,612,500 in attorneys' fees and to $65,593.05 in costs. Order on Final Approval, ECF No. 146, at ¶ 14. Additionally, the Court reduced the incentive fees for each of the Named-Plaintiffs from $10,000 to $5,000. *Id.*, at ¶ 15.

A single objector did not feel the same. When approving the Settlement, the Court overruled the objections of Kurt Oreshack, who argued that argued that the Settlement represents a coupon settlement under the Class Action Fairness Act ("CAFA"), the requested attorneys' fees are disproportionate to the "coupon" benefit provided to the Class, and when combined with existence of

the purported reversionary aspects of the attorneys' fees and a "clear sailing clause," indicates a collusive settlement. *See generally,* Oreshack Objection, ECF No. 124. Oreshack would later appeal the Court's decision. Notice of Appeal, ECF No. 152.

Ultimately, the Ninth Circuit agreed with Mr. Oreshack that the CAFA coupon provisions applied, but "express[ed] no opinion" on the fairness of the negotiated settlement *McKinney-Drobnis*, 16 F.4th at 612. The Ninth Circuit vacated the Court's approval of the Settlement and remanded the case to the Court to "use the value of the redeemed vouchers as required by CAFA and to analyze the pre-certification settlement agreement with heightened scrutiny." *Id.* Under CAFA, at section 1712, the Court must separately calculate the portion of attorneys' fees paid to class counsel based on the recovery of the coupons and the portion of fees that is not based upon on the coupon recovery (i.e. injunctive relief). 28 U.S.C. § 1712(c).

Despite the appeal, the parties still believe the Settlement to be fair, reasonable, and adequate. Nonetheless, parties agreed return to Mr. Rotman for additional mediation regarding the concerns raised by the Ninth Circuit Opinion regarding CAFA and the heighted scrutiny required under *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935 (9th Cir. 2011). Declaration of Jeffrey R. Krinsk in Support of Renewed Motion for Final Approval ("Krinsk Decl. II"), concurrently filed herewith, at ¶ 77. The result of this mediation was positive. Class Counsel was able to have Massage Envy Franchising, LLC agree to increase the minimum Voucher amount in the Settlement to account for any increase in costs cause by inflation and to offset any reverter caused by the reduction of Plaintiff's attorneys' fees. *Id.*, at ¶¶ 78, 90. The parties also agreed to remove any clear sailing clause and to provide that the portion of attorneys' fees attributable to the Vouchers would only be paid following the redemption period. *Id.* The parties memorialized their Amendment to the Settlement Agreement on March 29, 2022. *Id.*, at ¶ 79, Ex A, the Amendment and Modification to Stipulated Class Action Settlement and Release (the "Amendment").

Additionally, as the Injunctive Relief has already taken effect, the parties were able to do a robust analysis of the monetary benefit resulting from the changes to the Membership Agreement. The parties engaged Christian M. Dippon, Ph.D. to examine the value associated with the Injunctive Relief provided by the Settlement and estimate potential redemption rates based on MEF's business

records. Dr. Dippon found that the Injunctive Relief provided $2,349,887 in value between June 2019 and December 2021 and forecasts that the Class Members will receive additional value for 2022 through 2024 equal to $3,736,016. Declaration of Luanne Sacks in Support of Plaintiffs' Renewed Motion for Final Approval of Class Action Settlement ("Sacks Decl."), concurrently filed herewith, at Ex. A ¶ 10. Therefore, the total value of the Injunctive Relief Measures (June 2019 through 2024) to Class Members is **$6,085,903**. *Id.* In total, the Settlement provides over $17,000,000 in real relief to the Class.

III. THE SETTLEMENT CLASS SATISFIES ALL REQUIREMENTS OF RULE 23 AND SHOULD BE CERTIFIED

In its Preliminary Approval Order, the Court concluded that certification of a Settlement Class is appropriate under Rule 23(a) and (b)(3). ECF No. 114 at 1-2. The Court certified the Settlement Class at final approval and no party appealed this decision. However, in an abundance of caution, Plaintiffs restate their argument that the Settlement Class is suitable for certification.

A. Rule 23(a)(1): The Settlement Class is Sufficiently Numerous

The proposed Settlement Class is both numerous and ascertainable. Based on the Class Data, there are approximately 1.7 million Class Members. Krinsk Decl. I, ¶ 58; Declaration of Cameron R. Azari ("Azari Decl. II"), ECF No. 135-2, ¶ 15. Joinder of all Settlement Class Members would be impracticable, and the numerosity requirement is satisfied. *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000) (numerosity is typically satisfied when the class exceeds 40 members); *Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006) ("Joinder of 1,000 or more co-plaintiffs is clearly impractical.").

B. Rule 23(a)(2): There are Common Questions of Law and Fact

The Court must next determine whether questions of law and fact common to the class are substantially similar and predominate over questions affecting a class member individually. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 349 (2011). "All questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150 F.3d 1019, 1026 (9th Cir. 1998). Rather, commonality is satisfied "if the named plaintiffs share at least one question of fact or

law with the grievances of the prospective class." *See Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir.2010) (*citing Baby Neal for & by Kanter v.* Casey, 43 F.3d 48, 56 (3d Cir.1994)).

At the heart of Plaintiffs' lawsuit is the allegation of breach of contract claim. Each Settlement Class Member was subject to identical or substantially similar Membership Agreements, with common payment and modification clauses, and were allegedly injured by similar price increases. *See generally* FAC; *Hahn v. Massage Envy Franchising, LLC* ("*Hahn I*"), No. 12CV153, 2014 WL 5099373, at *4-12 (S.D. Cal. Apr. 15, 2014). Plaintiff asserts that these common business practices, *i.e.* MEF's template Membership Agreements and pricing policy, allow the claims to be decided within a 'single stroke.' *See id*. Egro, the Settlement Class Members shares common questions of law and fact, including, *inter alia*, whether membership dues were improperly increased in violation of their Membership Agreements. *See id*.[2]

C. Rule 23(a)(3) and (b)(3): Plaintiffs' Claims are Typical of the Settlement Class Members' Claims and Predominate Over Individual Issues

Plaintiffs must also establish that the claims promulgated are "typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). "The purpose of the typicality requirement is to ensure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508 (citation omitted). A plaintiff's claim is typical "if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory." *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257-58 (C.D. Cal. 2008). Claims need not be "substantially identical," but only "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020.

Similarly, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Courts often examine "commonality under Rule 23(a) together with predominance under Rule 23(b)(3)." *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-6314-YGR, 2017 WL 1806583, at *6 (N.D. Cal. May 5, 2017), *amended sub nom.*, 2018 WL 558844 (N.D. Cal. Jan. 25, 2018).

[2] Of course, MEF challenges Plaintiffs' assertion that any class should be certified for litigation purposes.

The typicality requirement is satisfied because the named Plaintiffs and the absent Settlement Class Members suffered the same injury, resulting from the same alleged breach of the Membership Agreements: MEF and/or the ME Locations improperly increased the Settlement Class Members' monthly member fees in breach of their Membership Agreements. Plaintiffs are aware of no individual claim or defense which they do not share with at least a portion of the Settlement Class. Thus, Plaintiffs' claims sufficiently coincide with those of the other Settlement Class Members.

D. Rule 23(a)(4): Plaintiffs and Class Counsel Have Fairly and Adequately Protected the Interests of the Settlement Class

Rule 23(a)(4)'s adequacy requirement is met where, as here, "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). Adequacy entails a two-prong inquiry: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Hanlon*, 150 F.3d at 1020.

The named Plaintiffs have each litigated their respective case for over three years, have assumed the responsibilities as class representatives, and has vigilantly protected and advanced the interests and rights of the similarly situated Members of the Settlement Class. *See* Declaration of Camille Berlese ("Berlese Decl."), ECF No. 119-11; Declaration of Baerbel McKinney-Drobnis ("McKinney Decl."), ECF No. 119-10; Declaration of Joseph B. Piccola ("Piccola Decl."), ECF No. 119-12. Additionally, Plaintiffs have no disabling conflicts. Each of the Plaintiffs experienced the same injury, *i.e.* increased monthly membership fees, caused by the same alleged breach of contract. While Plaintiffs and Settlement Class Members may have differing quantum of damages (*e.g.*, amount of increased membership fees paid), this is of no consequence. *See Wolin v. Jaguar Land Rover N. Am., LLC,* 617 F.3d 1168, 1175 (9th Cir. 2010) (*citing Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D. 534, 540 (N.D.Cal.2010) (finding named plaintiff typical of class despite availability of plaintiff-specific remedy and finding "no authority for the argument that typicality is defeated because the remedies may be different for class members or that the availability of rescission as a remedy will monopolize this case")). Named Plaintiffs have the same interest as Settlement Class Members in seeking relief for any increased membership fees paid. This is sufficient. *Parkinson v. Hyundai Motor*

Am., 258 F.R.D. 580, 594–95 (C.D. Cal. 2008) ("[P]laintiffs have shown that their interests are sufficiently aligned with those of the proposed class to satisfy the adequacy requirement of Rule 23(a).")

Plaintiffs have chosen competent and experienced counsel to pursue their claims. Krinsk Decl. I, at ¶¶ 72-77, Ex. F. Class Counsel has shown its alacrity to litigate the Settlement Class's claims, including dispositive motion practice, appellate briefing, discovery, and months of extensive, and often antagonistic, settlement negotiations. *Id*. The Settlement Class is adequately represented.

E. Rule 23(b)(3): Class Treatment is Superior to Other Available Methods for the Resolution of this Case

Finally, Rule 23(b)(3) requires that class litigation is a superior method for adjudicating this dispute. Factors considered include: class members' interest in individually controlling litigation; the extent and nature of litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in this particular forum; and the likely difficulties in managing the class action. FED. R. CIV. P. 23(b)(3)(A)–(D) The superiority requirement tests whether "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter–Wallace, Inc*., 97 F.3d 1227, 1234 (9th Cir. 1996).[3]

This case involves approximately 1.7 million Settlement Class Members. The individual amounts of recovery at issue would otherwise be too small to warrant individual litigation. *Bee, Denning, Inc. v. Capital All. Grp*., 310 F.R.D. 614, 630 (S.D. Cal. 2015) (Consumer actions "which provides for a relatively small recovery for individual violations but is designed to deter conduct directed against a large number of individuals, can be effectively enforced only if consumers have available a mechanism that makes it economically feasible to bring their claims."); *Local Joint Exec. Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc*., 244 F.3d 1152, 1163 (9th Cir. 2001) ("Counsel for the would-be class estimated that, under the most optimistic scenario, each class member would recover about $1,330. If plaintiffs cannot proceed as a class, some –perhaps most –

[3] There are no serious manageability difficulties presented by conditionally certifying the Settlement Class for settlement purposes because there will be no trial. *See Amchem Prods. v.Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems.")

will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover."). Yet, even if the individual Class Members were inclined to seek relief, such repetitive litigation would not benefit the parties or the Court. *McCrary v. Elations Co., LLC*, No. EDCV 13-00242, 2014 WL 1779243, at *16 (C.D. Cal. Jan. 13, 2014) ("It is more efficient to resolve the common questions . . . in a [single] proceeding rather than to have individual courts separately hear these cases"). Therefore, Settlement of the instant case as a class action is superior to any alternative.

IV. THE CLASS SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement that would bind a class. Although the Ninth Circuit has emphasized that a strong judicial policy favors settlement of class actions, *Class Plaintiffs v. City of Seattle,* 955 F.2d 1268, 1276 (9th Cir. 1992), Rule 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court" and provides several factors to be considered. FED. R. CIV. PRO. § 23(e). The Ninth Circuit has also instructed district courts to consider and balance multiple factors when assessing the fairness of the class settlement including:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the 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 of the proposed settlement.

In re Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) *citing Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).[4] Where the settlement precedes formal class certification, however, the Court is instructed to carefully scrutinize the Settlement "for evidence of collusion or other conflicts of interest." *Id.*, at 946-47. Additionally, a coupon settlement under CAFA is also subject to "heightened scrutiny." *In re EasySaver Rewards Litig.*, 906 F.3d 747, 754–55 (9th

[4] "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982); *Nat'l Rural Telecomms. Coop*, 221 F.R.D. at 526-27 ("Not all of these factors will apply to every class action settlement. Under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval.")

Cir. 2018) (citing 28 U.S.C. § 1712).

This Court previously reviewed the Settlement terms and held that the Settlement was fair, reasonable, and adequate. Now, with additional information regarding the estimated redemption rate and the value of the Injunctive Relief, it is clear that the weight of evidence overwhelmingly supports approval of this Settlement. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.") Accordingly, the Settlement warrants final approval.

A. The Settlement Provides Real and Immediate Relief for the Settlement Class's Claims

All settlements are necessarily an "offspring of compromise." *Hanlon*, 150 F.3d at 1027. Therefore, "the court must not hold [class] counsel to an impossible standard" requiring that their settlement negotiations obtain the best conceivable outcome, regardless of the reality of the present circumstances. *See In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000). The correct and proper measurement of the Settlement is whether it, in fact, confers real and substantial benefits on the Settlement Class Members. *See, e.g., In re Prudential Ins. Co. of America Sales Practices Litig.*, 962 F.Supp. 450, 557 (D.N.J. 1997) ("The Court rejects also the argument that if the cost of [the non-monetary] Relief to Prudential is low, then [the non-monetary] Relief is worthless to policyholders. The cost of the relief to Prudential is not the measure of class member benefit. The value of the relief to the Class, which may be substantial, is what matters."); *In re Clark Oil & Refining Corp. Antitrust Litig.*, 422 F.Supp. 503, 511 (E.D. Wis. 1976) ("It is, however, the nonmonetary features of the settlement agreement which plaintiffs' counsel urge to be the most valuable benefits included in the agreement... the Court is convinced that they confer real and substantial benefits upon members of the class.")

The Settlement in this case provides excellent relief for Settlement Class Members in the form of substantial Vouchers for goods and services that offset the amount of increased membership fees previously paid. Settlement Agreement, § IV. The Vouchers to be issued can be redeemed at any of the over 1,200 nationwide ME Location for retail products, massage sessions, enhancements, and/or facial sessions but is not redeemable for cash, payment of monthly membership fees, or to pay tips.

Id. The Vouchers to be issued also are fully transferrable, can be used in multiple transactions, and may be aggregated. *Id*. Courts have recognized that such settlement benefits are valuable and do not render a settlement unfair or unreasonable. *See, e.g., Knapp v. Art.com, Inc*., 283 F. Supp. 3d 823, 833 (N.D. Cal. 2017) (granting final approval of settlement providing $10 vouchers where "class members who choose to use their voucher have the opportunity to realize a $10 value"); *In re Mexico Money Transfer Litig*., 267 F.3d 743, 748 (7th Cir. 2001) (approving settlement where class members could redeem voucher for services).

The Settlement benefits are of significant value. Based on the Claims Administrator's revised calculations, Settlement Class Members, who timely submitted a Voucher Request, will receive between *$39.78 and $198.90 dollars in Vouchers*:

Total Fee Increases Paid by Class Member	*Voucher Face Value Requested*	*# of Claim Forms/Voucher Requests*	*Pro Rata Voucher Value*	*Claim Form/Voucher Request Total Value*
$75.00 or Less	$10 Voucher	49,488	$39.78	$1,968,791.76
$75.01 to $125.00	$20 Voucher	8,231	$79.56	$654,778.80
$125.01 to $175.00	$30 Voucher	10,428	$119.34	$1,244,596.86
$175.01 to $225.00	$40 Voucher	8,503	$159.12	$1,352,997.36
$225.01 or More	$50 Voucher	29,043	$198.90	$5,777,647.20
	TOTAL	***105,693***		***$10,998,811.98***

Krinsk Decl.. II, at ¶ 88. The amount of the Vouchers to be issued is more than *triple* the minimum Voucher amount contemplated under the Settlement Agreement. Ultimately, the mean recovery for Settlement Class Members will be a *$79.56* Voucher and the average weighted recover would be *$104.05*. *Id.*, at ¶¶ 88, 106.

Accordingly, most Settlement Class Members, who timely submitted a Voucher Request, will receive between 53 and 70 percent of their individual loss.[5] Considering that this Settlement, like

[5] Those Settlement Class Members who paid up to $75.00 in increased membership fees will receive a $39.78 Voucher (or, at least, 53 percent of their alleged maximum damages), those who paid between $75.01 to $125.00 in increased membership fees will receive a $79.56 Voucher (or approximately 63 percent of their maximum alleged damages), those who paid between $125.01 to $175.00 in increased membership fees will receive a $119.34 Voucher (or approximately 68 percent of their maximum alleged damages), and those who paid between $175.01 to $225.00 in increased membership fees will receive a $159.12 Voucher (or, at least, 70 percent of their maximum alleged damages). Krinsk Decl. II, at ¶ 88.

every settlements, is a creature of compromise, this is an excellent result. *In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 454 (C.D. Cal. 2014) (finding a $5 or $30 [voucher] that represents 5% to 30% of the recovery that might have been obtained was fair and adequate in a consumer class action).[6]

Viewed in the aggregate, the Settlement similarly warrants approval. Plaintiffs estimate that the aggregate potential recovery, at trial, could theoretically be in excess of $130 million dollars. Krinsk Decl. I, ¶ 49 (For each month the case continues, additional damages accrue.). This value of the Settlement Vouchers is approximately 9 percent of this total potential liability and is a reasonable amount for a consumer class action. *See City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 6:12–1609, 2015 WL 965696, at *7-8 (W.D. La. Mar. 3, 2015).

The Vouchers can be used to purchase a wide number of items and services. As noted in Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Award, and based on discovery, the ME Locations offer 351 spa-related retail products (251 when different variations of the similar product are omitted). Plaintiffs' Motion for Attorneys' Fees, Cost, and Incentive Award, ECF No. 122, at p. 9. Based on information provided at final approval, approximately 58% of the products sold at the ME Locations for less the $36.10. Krinsk Decl. II, at ¶ 90. Additionally, approximately 79% of the products sold at the ME Locations are under $72.38; approximately 91% of the products sold are under $108.48; approximately 95% of the products are under $144.58; and approximately 97% of the products are under $180.68. *Id.*

This is also true of services offered at the ME Locations. Based on the most 2019 pricing, the most popular services range between $20 and $46 for a thirty-minute session,[7] $40 and $80 for a sixty-

[6] The methodology used to distribute the Vouchers is also fair, objective, and impartial. The only variation between the Settlement Class Members' recovery is based on the amount of overpayment during the Class Period. Given that damages accrued by Settlement Class Member would be logically proportional to the amount paid, the Vouchers formula forwarded in the Settlement is reasonable and equitable. *Petruzzi's, Inc. v. Darling–Delaware Co., Inc.*, 880 F.Supp. 292, 300–01 (M.D. Pa. 1995) ("disparate treatment of class members may be justified by a demonstration that the favored class members have different claims or greater damages"); FED. R. CIV. PRO. § 23(e)(2)(C)(ii), (e)(2)(D). Additionally, as noted below, any attorneys' fees resulting from the Voucher relief will only be paid after the Class redeems the Vouchers. FED. R. CIV. PRO. § 23(e)(2)(C)(iii).

[7] A thirty-minute Total Body Stretch or Rapid Tension Relief Session.

minute session,[8] and $60 and $120 dollars for a ninety-minute session.[9] Declaration of Jeffrey Krinsk in support of Plaintiffs' Motion for Attorneys' Fees, Cost, and Incentive Award ("Krinsk Decl. III") [ECF No. 119-2], ¶ 70 (pricing varies based on geographic region). Individuals may, additionally, purchase enhancements or additional services that supplement a massage or facial session for between $10 and $30, such as Enhanced Therapies, including Aroma Therapy, CyMe Boosts, Exfoliating Lip Treatment, Exfoliating Foot Treatment, Exfoliating Hand Treatment, Anti-Aging Eye Treatment, 10-min Percussion Therapy, or Enhanced Muscle Therapy. *Id*. The majority of the Settlement Class thus will be able to purchase services from the ME Locations without any additional outlay of money. And while the prices have increased since 2019, such price increases will be offset, by the ten percent increase to the Settlement Benefits provided in the Amendment (increased from $10 million to $11 million). *See* Sacks Decl., at ¶ 71 (finding that the median price increase for products between June 2019 through December 2021 was 7.7 percent).

Importantly, this is not a case where a plaintiff argues that the defendant's products are defective, or that its service is subpar. *See generally,* FAC. Plaintiffs, rather, complain that they overpaid for services actually wanted. *Cf. Hendricks v. Ference*, 754 F. App'x 510, 512 (9th Cir. 2018) (unpublished) (noting vouchers for canned tuna to replace the allegedly under-filled product provided consumer with the exact product they wished to purchase). Additionally, the Voucher were requested by the Class Members, and not provided without regard for actual demand. Thus, Plaintiffs believe that the Vouchers will be used by the Class. As noted in Dr. Dippon's Declaration, the estimated the redemption rate of the Vouchers will likely be similar to or greater than the historical redemption rate for regular MEF gift cards, or 48 percent. Sacks Decl., at Ex. A ¶¶ 54, 67-68 (noting that the redemption rate for the Voucher may be even higher than the general gift card redemption rate because the recipients completed a voucher request to receive this benefit and voucher recipients are current or former Massage Envy Members, demonstrating preference for services and products offered at the Massage Envy franchise locations).[10] This is not an unreasonable assumption, as the Vouchers have

[8] A sixty-minute Massage, Healthy Skin Facial, or Total Body Stretch.
[9] A ninety-minute Massage or Healthy Skin Facial.
[10] Dr. Dippon took into account the sixteen-month expiration period for the Vouchers. Sacks Decl., Ex. A at ¶¶ 55-58.

same characteristics of a gift card: they can be used for any services or products MEF offers (excluding tip), can be used until depleted, and are freely transferable. When applied to the $11 million in provided Vouchers, this historic gift card redemption rate would suggest that the value of redeemed settlement Vouchers will be $5.3 million. *Id.*, at ¶ 67. Again, this estimate is based on the last three years of data for redemption rates on actual MEF gift cards. *Id.*, at ¶¶ 67-68. Accordingly, this value ascribed to the Voucher based on real world data from a realistic analog. *See McKinney-Drobnis v. Oreshack,* 16 F.4th 594, 608, 611 (9th Cir. 2021) (noting that the Court should examine the actual redemption rate for the non-cash relief); Sacks Decl., Ex. A at ¶ 54.

The Settlement further ensures that Class Members, and other consumers, will have an opportunity to cancel their membership before any future fee increases become effective. This Injunctive Relief will prevent future "surprise" increases and give the Settlement Class (and other consumers) the opportunity to make an informed decision regarding membership. But it also has a real economic benefit. The parties also engaged Christian M. Dippon, Ph.D. to examine the monetary value arising from this injunctive relief. Dr. Dippon found that the value of the Injunctive Relief Measures to Class Members equals $2,349,887 between June 2019 and December 2021 and forecasts that the Class Members will receive additional value for 2022 through 2024 equal to $3,736,016. Sacks Decl., Ex. A at ¶ 10. Therefore, the total value of the Injunctive Relief Measures (June 2019 through 2024) to Class Members is **$6,085,903**. *Id.*; 28 U.S.C. § 1712(c) (noting that in mixed coupon and injunctive relief settlements, the Court must value both the coupon and injunctive relief portions of the settlement separately).

Again, this evaluation is not aspirational, it is based on MEF's actual business records. The Injunctive Relief became effective on the date of preliminary approval (June 7, 2019).[11] Settlement Agreement, at ¶ 14; Order Granting Preliminary Approval [ECF No. 114]. Accordingly, the parties have over two years of real-world data to examine the effect of the Injunctive Relief on actual consumers. Using these records, Dr. Dippon was able to examine the actual monetary value provided

[11] The reason that the Injunctive Relief become effective on the date of preliminary approval is that the Settlement Class is temporally defined as ending on the date of preliminary approval. Settlement Agreement, at I(A)(G). Accordingly, to avoid additional damages and lawsuits, the Injunctive Relief was scheduled start as soon as the Class Period ended.

from June 2019 to December 2021. Sacks Decl., Ex. A at ¶ 5, 12-24, 32-53. This information was then used to forecast the value that will be provided from Injunctive Relief from January 2022 to the end of 2024. *Id.*

In total, this Settlement provides a maximum estimated benefit of **$17,085,903** ($11 million in Vouchers and $6,085,903 in injunctive relief) in monetary value to the Settlement Class. But even if the parties were to take into account the estimated redemption rate, the Settlement would still provide the Settlement Class **$11,385,903** ($5.3 million in Vouchers and $6,085,903 in Injunctive Relief) in direct monetary benefits. This does not account for any attorneys' fees and costs, including **$1,008,654.97** in settlement administration costs, paid separately by MEF. Krinsk Decl. II, at ¶ 86. Even under the rigorous analysis called for by the Ninth Circuit, such relief is reasonable. *McKinney-Drobnis*, 16 F.4th at 606; *City of Omaha Police & Fire Ret. Sys.*, 2015 WL 965696, at *7-8 (finding that a "7.4%–10.3% [recovery] of estimated provable damages" amounts to "a high degree of success" because "[t]he typical recovery in most class actions generally is three-to-six cents on the dollar.").

B. The Settlement is Fair when Measured Against the Risk of Further Litigation

When evaluating the Settlement benefits, the Settlement should be weighed against the uncertainty of protracted litigation. "It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to the extent courts assess this factor, it is to 'determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.'" *Misra v. Decision One Mortg. Co.*, No. SACV070994, 2009 WL 4581276, at *7 (C.D. Cal. Apr. 13, 2009).

This litigation had reached a critical juncture before the Settlement Agreement was executed. At the time of Settlement, Plaintiffs were simultaneously preparing to oppose MEF's anticipated Motion for Summary Judgment and intended to file a cross motion for summary adjudication. Krinsk Decl. I, at ¶ 54; Joint Stipulation RE: Schedule for Briefing on Plaintiffs' Motion for Class Certification, ECF No. 70. While Plaintiffs were, and remain, confident of their case's merits, they recognize that there is always significant uncertainty and risk attendant to further litigation. The Membership Agreements contain sections that strongly suggest that membership fees would not

change:

> Your Membership dues of $39 (not including any additional applicable taxes) will be due on July 14th and then due on or after the same day of each month hereafter until your membership expires or is terminated in accordance with the agreement.
>
> [Berlese's Initials] (Initial) Your membership is auto-renewable. Following the initial term, your membership will automatically continue on a month-to-month basis at $39 per month until your membership is cancelled.

Krinsk Decl. I, at ¶ 6, Ex. A [emphasis added]. But, MEF relied on the agreement provision that indicates membership pricing could be changed with sufficient notice:

> You have the right to receive a notice of change in the event that any changes to the terms and conditions of your membership are implemented that will vary the amount to be periodically billed to your account as specified in the Membership Description and Payment Schedule section of this agreement. We will send you a notice of change at the mailing address you have provided at the top of this Agreement at least ten days prior to the effective date of such change. Except as expressly provided herein, we may modify our services or the terms and conditions of this Agreement at any time without notice and such modifications shall be deemed effective immediately upon making such changes.

Id., at ¶ 9, Ex. A [emphasis added]. Accordingly, each party cannot dispute that there is contractual language supporting their respective position.[12]

These anticipated dispositive motions would be particularly important because the Court could thereby decide the merits of the Parties' contract dispute through summary adjudication. *See City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008) ("Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence."). Yet, the Membership Agreement can only support a single interpretation. Stated differently, in the absence of the Settlement, the Court will likely have to find that either Plaintiffs' interpretation is correct and the Settlement Class is entitled to over a hundred million dollars in damages (whether from MEF or otherwise) or MEF was correct and the Settlement Class is entitled to nothing.[13] There exists little middle ground, presenting significant risk for Plaintiffs and the

[12] MEF also asserts that it is not a contracting party to the Membership Agreements. Indeed, some of the Membership Agreements state that it is the "home clinic" (or the Clinic at which a member signed the Membership Agreement), not MEF, that is the contracting party. Krinsk Decl. I, at ¶ 12. This issue also would need to be adjudicated, adding additional risk to securing favorable rulings on the merits of the case and maintaining a class.

[13] Class Counsel was also concerned that MEF would not be able to absorb a judgment. *See* Krinsk

Settlement Class. *In re Nvidia Derivs. Litig.*, No. C-06-06110, 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008) ("The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.").[14]

Plaintiffs had also prepared to litigate class certification. Krinsk Decl. I., at ¶ 39. "The prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action." *In re Ikon Office Sols., Inc.*, 194 F.R.D. at 181 ("The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits.") MEF strongly opposed class-wide certification, arguing that it did not dictate fee increases to the ME Locations, such that the increases in membership fees were not uniform and were not made at the same time. MEF also asserted that material terms of the Membership Agreements changed over the Class Period, preventing uniform interpretation on a class-wide basis. Class certification thus was thus not a foregone conclusion. And even if a class was certified, "[a] district court may decertify a class at any time." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); *see also* FED. R. CIV. P. 23(c)(1)(C). Plaintiffs would have to maintain the class through trial, an obligation which has proven difficult in similar consumer cases. *See, e.g., Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014) ("Each of the five contracts used by Home Depot requires an independent legal analysis to determine whether the language and design of that contract did or did not suffice to alert customers that the damage waiver was an optional purchase…").

Consumer class litigation is inherently complex, expensive, and protracted. Krinsk Decl. II, at

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Decl. I, ¶ 81; *In re Toys R Us*, 295 F.R.D. at 452 (C.D. Cal. 2014) ("For its part, Toys risked the possibility of 'catastrophic damages' … The fact that both sides faced this type of all-or-nothing prospect weighs in favor of approval."); *County of Suffolk v. Long Island Lighting* Co., 907 F.2d 1295, 1323–1324 (2d Cir. 1990) (The Court should consider the ability of the defendant to withstand a greater judgment when approving a class settlement).

[14] It is also important to note that evidence suggests that the Settlement Class Members did not pay MEF the monthly membership fees directly. Krinsk Decl. I, at ¶ 81. MEF is a franchisor. The Settlement Class Members paid membership fees to their "Home Clinic" (one of the more than 1,200 ME Locations). *Id.* Accordingly, it has always been MEF's position that its more than 1,200 ME Locations are responsible for any damages suffered by the Settlement Class. *See Hahn v. Massage Envy Franchising, LLC,* No. 12CV153 DMS BGS, 2014 WL 5099373, at *12 (S.D. Cal. Apr. 15, 2014). If Plaintiffs were required to join each of these ME Locations to seek full recovery, it would considerably complicate this case. *See* Answer, ECF No. 69 (Affirmative Defense No. 10).

¶ 48. In *Hahn*, plaintiffs submitted over 2,500 pages of briefing and evidence in support of their motions for class certification and summary judgment. *Id*. Plaintiffs believe a similar effort would be required here. Additionally, before traditional pretrial motions, Plaintiffs anticipated that the Parties would engage in extensive expert testimony, particularly with regards to damages and MEF's database. *Id*., at ¶ 48. Such experts would likely cost the Parties hundreds of thousands of dollars even before trial. When combined with traditionally asserted pretrial motions and discovery, it would likely be another year or two before the Parties reached a position where they could try this case. And nothing is guaranteed to Plaintiffs at trial.

But even were Plaintiffs were to succeed at trial on the merits, a favorable judgment would not conclude the case. Krinsk Decl. II, at ¶ 104. MEF has already indicated that it would seek appellate review of any favorable judgment, a threat that Class Counsel takes seriously (MEF has already filed a writ of mandamus in this case). *Id*. Any appeal could take two years or more to resolve. *Id*. "Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation." *Nat'l Rural Telecomms. Coop v. DirecTV*, 221 F.R.D. at 527. This factor strongly favors final approval of the Settlement. *See Nobles v. MBNA Corp*., No. C 06-3723 CRB, 2009 WL 1854965, at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair.") (*citing In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 458 (9th Cir. 2000)); *Kim v. Space Pencil, Inc*., No. C 11-03796 LB, 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.").

Given the risk and delay associate with litigating this case to trial, the benefits provided under the Settlement are fair and reasonable.

C. Plaintiffs Had Vigorously Litigated and Negotiated their Claims

"A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." *In re Heritage Bond Litig*., No. 02-ML-1475 DT, 2005 WL 1594403, at *9 (C.D. Cal. June 10, 2005). Moreover, if the

settlement terms are fair, courts generally assume the negotiations were proper. *See In re GM Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785-86 (3d Cir. 1995).

The Settlement was negotiated only after the Parties conducted significant amounts of discovery. Plaintiffs propounded fifty-five document requests, twenty-five interrogatories, and two document subpoenas. Krinsk Decl. II., ¶¶ 43-48. Class Counsel had reviewed over 7,000 pages of documents and were preparing for the depositions of key MEF corporate officers. *Id.*, ¶ 48. Plaintiffs had been deposed and responded to MEF's written discovery requests. *Id.*, ¶ 47. The information gleaned in this discovery was buttressed by Class Counsel's experience with MEF in *Hahn*. *Id.*, ¶ 43.

Much ink was consumed litigating the Parties' positions by the time of settlement. In both Plaintiffs' Motion to Strike and Defendant's Motion for Judgment on the Pleadings, the Parties contested each other's respective claims and defenses. ECF Nos. 24, 26. MEF petitioned the Ninth Circuit for a Writ of Mandamus to vacate the Court's Orders on the Motions for Judgment on the Pleadings, ECF No. 49. *Massage Envy Franchising, LLC v. United States District Court*, No. 17-71722, ECF No. 1 (9th Cir.). Additionally, the Parties were preparing to file motions for summary judgment at the time of the final settlement discussions. Krinsk Decl. I, ¶ 39. Stipulation Re: Schedule for Briefing on Motion for Class Certification, ECF No. 70, at pp. 1-2. The Parties negotiations were well informed of the strength and weakness of the respective positions.

The Parties' settlement discussions were lengthy and contentious. The Parties' settlement discussions lasted well over one year and settlement was only reached during a second mediation session with Mr. David Rotman, a well-respected mediator. Krinsk Decl. I, ¶¶ 47-55; *G. F. v. Contra Costa Cty.*, No. 13-CV-03667, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) (The "assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." (alteration and citation omitted)). Additionally, the parties returned to Mr. Rotman after the mediation to seek additional guidance. Krinsk Decl. II, ¶ 78. The inclusion of this respected and natural mediator, who is willing to testify to the vigorous and continuous nature of the negotiation, dispels any accusation of collusion. *See generally* Declaration of David A. Rotman, concurrently filed herewith.

D. The Reaction of the Class Members to the Settlement has been Overwhelmingly Positive

"The reaction of class members to the proposed settlement, or perhaps more accurately the absence of a negative reaction," is an essential litmus test in approving any class action settlement. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010). When a settlement enjoys overwhelming support from the class, it is reasonable to assume the class members find the terms fair, adequate, and reasonable. *Nat'l Rural Telecommunications Coop*., 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members").

In this case, the response of the Class proved overwhelmingly positive. A total of *105,691 Class Members (or approximately 6.2% of the Class) submitted timely and valid Voucher Requests*. Declaration of Cameron R. Azari ("Azari Decl. I"), ECF No. 133, ¶ 14. This number exceeded the participation rates projected by Plaintiffs in the Preliminary Approval Motion, which was based on the *Hahn* settlement. *See* Motion for Preliminary Approval of Class Action Settlement, ECF No. 103, at p. 10 (estimating a 4.65% participation rate based on the *Hahn* Settlement). Further, the Class' participation proved well within the norms seen in other consumer class actions. *See Ferrington v. McAfee, Inc*., No. 10–CV–01455, 2012 WL 1156399, at *4 (N.D. Cal. Apr. 6, 2012) ("the prevailing rule of thumb with respect to consumer class actions is 3–5 percent"); *see also Touhey v. United States*, No. EDCV 08–01418, 2011 WL 3179036, at *7–8 (C.D. Cal. July 25, 2011) (finding a 2% response rate acceptable); *In re Cardizem Antitrust Litig*., 218 F.R.D. 508, 526 (E.D. Mich. 2003) (finding favorable class reactions in a 6.9% response rate).[15]

Further, the small number of objections and opt-outs supports approval of the Settlement. Only seven class members objected to the Settlement. Azari Decl. I, ¶ 21. This represents a faction of a percent of (0.0004%) of the Class Settlement. There also were only 351 Class Members who opted-out of the Settlement – or 0.02% of the Class Settlement. *Id*. This extremely small number of objectors and opt outs is viewed as highly indicative of an equitable class settlement. *Bell Atl. Corp. v. Bolger*,

[15] The relatively high class participation also supports that the Voucher Request process was simple and straight forward. Class Members could simply input their information online on the Settlement Website, or alternatively, request and submit a paper Voucher Request.

2 F.3d 1304, 1313-14 (3d Cir. 1993) ("Less than 30 of approximately 1.1 million shareholders objected. This is an infinitesimal number."); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir. 1990) ("only" 29 objections in 281 member class "strongly favors settlement").

E. The Lack of Objections by Governmental Agencies Also Supports Final Approval

In addition to the lack of significant opposition from the Class, state and federal agencies charged with enforcing various consumer protection laws have not challenged the Settlement despite that notice was sent to all "appropriate" federal and state offices pursuant to the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1715. Azari Decl. II, ¶ 11. That no federal or state agency objected to the Settlement or brought a parallel regulatory action further supports approval of the Settlement. *See In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 2012 WL 2512750, at *10 (D. Minn. June 29, 2012) aff'd, 716 F.3d 1057 (8th Cir. 2013) (noting the lack of objections to a national settlement by any state Attorneys General, combined with minimal objections from class, supported approval).[16]

V. THE REQUESTED ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS ARE REASONABLE

A. Class Counsel's Fees are not a Product of Collusion

In contemplating the approval of a proposed settlement, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Knight v. Red Door Salons Inc.*, No. 08-01520, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009) (*citing Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979)); *see also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 528. "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Nothing suggests that the Court should depart from this assumption.

Class Counsel is well-seasoned both in litigating complex class action case, as well as opposing MEF and opposing counsel, having extensive knowledge of MEF's business model. Class Counsel had tested Plaintiffs' claims *via* several important motions and conducted discovery. Based on this

[16] Class Counsel was contacted by the Attorneys General offices of Arizona, California and Texas to seek information regarding how the Vouchers may be used by class members. Krinsk Decl. II, ¶¶ 92-93. But, no objections have been raised after these discussions. *Id.*

experience, and information gleaned from discovery, Class Counsel negotiated a substantial recovery for the Settlement Class.

There is no evidence of collusion of any kind by Class Counsel to undersell the Settlement Class's Claims for their own benefit. Nonetheless, Plaintiffs recognizes that the Ninth Circuit found that this Court "must apply the *Bluetooth* factors in examining pre-certification settlements 'to smoke out potential collusion.'" *McKinney-Drobnis,* 16 F.4th at 608. "Collusion may not be evident on its face, thus the Ninth Circuit has provided examples of subtle signs of collusion including: (1) when counsel receive a disproportionate distribution of the settlement; (2) when the parties negotiate a clear sailing arrangement providing for the payment of attorneys' fees separate and apart from class funds; and (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *In re Linkedin User Privacy Litig*., 309 F.R.D. 573, 589 (N.D. Cal. 2015) (internal quotations omitted) (*citing In re Bluetooth Headset*, 654 F.3d 935, 946–47).

As to the first factor, Class Counsel's fees are not disproportionate distribution of the Settlement. Here, Class Counsel is only requesting $2,612,500 in attorneys' fees and $65,593.05 in costs, the reduced amount previously approved by the Court. As noted above, taking into account the estimated redemption rate, the Settlement provides an estimated **$11,385,903** ($5.3 million in Vouchers and $6,085,903 in injunctive relief) in direct monetary benefits to the Class. Additionally, the Settlement also provides for settlement administration costs, paid separately by MEF, estimated at **$1,008,654.97**. Krinsk Decl. II, at ¶ 86. *Accordingly, the attorneys' fees requested will only be 21% of the benefits provided to the Settlement Class* ($2,612,500 divided by $12,394,558). This is well within the range of the Ninth Circuit's benchmark for class actions. *See, e.g., Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir. 1993) (reaffirming 25% benchmark). Additionally, as noted below, approximately 42% (or $1,117,123.34) of the Attorneys' fees requested will only be paid if supported by the Voucher redemption rate. Thus, Class Counsel's fee is commensurate with the value provided to the Class.

Regarding the second and third *Bluetooth* factors, the parties have removed the clear-sailing provision from the Settlement Agreement and agreed to increase the amount of Vouchers provided

thereunder. *See* Amendment, at ¶¶ 4, 10. Thus, the clear-sailing provision is no longer an issue.[17] Additionally, any reversion of fees should be tempered by the increase in the Vouchers provided. The Court reduced Class Counsel's attorney's fees from $3,214,582.86 to $2,612,500, or $602,082.86. Order on Final Approval, ECF No. 146, at ¶ 14. The one million dollar increase in the value of Vouchers provided offsets, in part, this "reversion." Similarly, the Amendment links the Attorneys' requested by Class Counsel to the Vouchers Redeemed, as required by 28 U.S.C. § 1712. *See* Amendment, at ¶¶ 8-9, 10. This will also alleviate the risks associated with clear-sailing and reversion provisions, because Counsel's payment will be dictated by the statutory requirements of CAFA and not solely on the agreement of the parties. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018) (" For all these factors, considerations, "subtle signs," and red flags, however, the underlying question remains this: Is the settlement fair? The factors and warning signs identified in *Hanlon, Staton, In re Bluetooth*, and other cases are useful, but in the end are just guideposts.")

A. Class Counsel's Fees are Reasonable and will be Based on the Voucher Redemption Rate

Pursuant to 28 U.S.C. § 1712, paragraph (c), if a proposed settlement in a class action provides coupons to class members and also provides for equitable relief, including injunctive relief, the Court must separately apportion the attorneys' fees to be paid to class counsel that is based upon the recovery of the coupons and the portion of the attorneys' fees to be paid to class counsel that is not based coupons. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1183 (9th Cir. 2013). The attorneys' fees attributable to the coupon portion of the Settlement must be "based on the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a). And attorneys' fees attributable to the injunctive relief "shall be based upon the amount of time class counsel reasonably expended working on the action." 28 U.S.C. § 1712(b)(1).

The Ninth Circuit has provided guidance on the application of 28 U.S.C. § 1712 to "mixed"

[17]Even if there is some lingering concern regarding the clear-sailing provision from the Settlement Agreement, it should not displace the approval of the Settlement. *Larsen v. Trader Joe's Co.*, No. 11-CV-05188-WHO, 2014 WL 3404531, at *8 (N.D. Cal. July 11, 2014) ("All of the Churchill factors support the finding that the settlement should be approved. The only Bluetooth factor present, the existence of a 'clear sailing' provision, will not affect the class because, as discussed below, I shall award the requested 28% attorneys' fees, an amount within the acceptable range in this Circuit.")

settlements:

> The practical effect of § 1712(c) is that the district court must perform two separate calculations to fully compensate class counsel. First, under subsection (a), the court must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded. Second, under subsection (b), the court must determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained. This lodestar amount can be further adjusted upwards or downwards using an appropriate multiplier. § 1712(b)(2). In the end, the total amount of fees awarded under subsection (c) will be the sum of the amounts calculated under subsections (a) and (b).

In re HP Inkjet Printer Litig., 716 F.3d at 1184–85 (fn. omitted).

In this case, the Injunctive Relief provides a significant benefit to consumers based on the material to the Membership Agreement used by MEF's franchisees. This change in business practices is a concession which warrants the awarding of reasonable attorneys' fees. Section 1021.5 of the California Code of Civil Procedure authorizes a court (including a federal court) to award attorneys' fees to a party who has achieved "the enforcement of an important right affecting the public interest." *See id.*; *see also Klein v. City of Laguna Beach*, 810 F.3d 693, 701 (9th Cir. Jan. 14, 2016) ("When California plaintiffs prevail in federal court on California claims, they may obtain attorneys' fees under section 1021.5.") To be eligible for a fee award pursuant to C.C.P. § 1021.5, a party need not win at summary judgment or trial. Rather, as the California Supreme Court has explained:

> The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.

Maria P. v. Riles, 43 Cal. 3d 1281, 1291 (1987) (internal citations omitted), accord *MacDonald v. Ford Motor Co.*, No. 13-CV-02988-JST, 2015 WL 6745408, at *3 (N.D. Cal. Nov. 2, 2015).

A plaintiff who obtains changed practices, even during the litigation, meets the "prevailing party" standard. *See, e.g., Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989) (explaining that under certain statutes, a "prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation"); *see also Tipton-Whittingham v. City of Los Angeles,* 316 F.3d 1058, 1062 (9th Cir. 2003), *certified question answered,* 34 Cal. 4th 604 (2004) ("California law continues to recognize the catalyst theory and does not require 'a judicially recognized change in the legal relationship between the parties' as a prerequisite for obtaining attorney fees under Code of Civil Procedure section

1021.5."). And as a prevailing party, plaintiff can apply for attorneys' fees under C.C.P. § 1021.5.

Here, the monetary benefit provided through the Injunctive Relief can be reduced to a monetary value because it will delay prices increases enacted by Massage Envy franchisees for a new forty-five-day notice period and the time to cancel a membership will be reduced from thirty to ten days. Under the original terms of the named Plaintiffs' member agreements, price increases may arguably occur after ten -days' notice and it took thirty days for cancelations to become effective. *See* Krinsk Decl. I, Ex. C. As a result, Massage Envy members now have thirty-five additional days to decide whether they want to pay the new price or cancel their membership. Accordingly, consumers who do not cancel their membership get an additional thirty-five days at the lower price (the "Delay Benefit"). Moreover, consumers who cancel their membership can do so without occurring a price increase (the "Mitigation Benefit"). Finally, this forty-five-day notice period gives consumers additional time to use massages accrued membership services before having to cancel to avoid a price increase (the "Accrual Benefit"). *See generally* Sacks Decl., Ex. A.

Dr. Dippon was able to value each of these different 'benefits' separately to determine the total value of the Injunctive Relief:

Valuation Class	June 2019 - Dec 2021	2022 - 2024 (forecasted)	TOTAL
Delay Benefits	$2,016,846	$3,117,965	$5,134,811
Mitigation Benefits	$51,836	$77,949	$129,785
Accrual Benefits	$281,206	$540,101	$821,307
TOTAL	**$2,349,887**	**$3,736,016**	**$6,085,903**

Id., at ¶ 63. Dr. Dippon also was able to demonstrate that consumers had already reaped $2.3 million of the value provided by the Injunctive Relief. Such detailed, real world, analysis shows that the Injunctive Relief provided, and will continue provide, significant relief.

When Plaintiffs compare the estimated value of coupon portion of the Settlement ($5.3 million in estimated redeemed Vouchers) with the non-coupon portion of the Settlement ($6,085,903.00 in Injunctive Relief and $1,008,654.97 in administration costs), the non-coupon portion of the Settlement makes up approximately 57.24 percent of the benefits provided. If we were to split the requested attorneys' fees $2,612,500 by the same ratio, $1,495,376.66 would be

attributable to the non-coupon portion and $1,117,123.34 to the coupon portion of the Settlement.

The $1,117,123.34 in attorneys' fees which is subject to the coupon portion, should only be awarded when and if the redemption rate for the Vouchers justifies it. 28 U.S.C. § 1712(a).[18] However, the Court can and should award the Class Counsel fees based on the non-coupon valued relief more immediately. 28 U.S.C. § 1712(b), (c); *In re HP Inkjet Printer Litig.*, 716 F.3d at 1186-67 n.19 (noting that courts can bifurcate a fee award, by providing an immediate payment for benefits that are subject to immediate evaluation and delaying the fees attributed to the coupon for a later date); *Chambers v. Whirlpool Corp*., 980 F.3d 645, 661 (9th Cir. 2020) (same). Accordingly, the Court should examine whether the $1,495,376.66 in attorneys' fees attributable to the non-coupon portion is reasonable.

1. Lodestar Method

A lodestar analysis compares counsel's request for fees to the actual hours spent on a case. Under the lodestar method, the court multiplies a reasonable number of hours by a reasonable hourly rate. *Class Plaintiffs v. City of Seattle*, 19 F.3d 1291, 1294 n. 2 (9th Cir. 1994). "The court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.* "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002). Additionally, courts often recognize that "the complexity of this case, the risks involved and the length of the litigation" should be considered when determining the equitable amount of payable fees. *See Vizcaino*, 290 F.3d at 1051. In this case, Class Counsel seeks an attorneys' fee award of $1,495,376.66, which reflects a modest 1.59 multiplier on their lodestar.

a. *Class Counsel's Rates Are Reasonable*

Class Counsel's 2019 rates[19] are reasonable because they are consistent with, if not lower than, hourly rates charged by attorneys of comparable experience, reputation, and ability for similar

[18] Class Counsel will submit a motion for the coupon portion of the attorneys' fees after the Redemption Period expires 16 months follow the effective date.

[19] The hourly rates listed above are the usual and customary rates set by Class Counsel for each individual back in 2019. Krinsk Decl. II, ¶ 121. Plaintiffs do not seek to increase their rates from the previously Final Approval hearing. This increases the reasonableness of Counsel's proposed rates.

litigation. Class Counsel's requested hourly rates ranging from $375 to $750 (averaging $725 for partners, $445 for associates):

Staff Member	Position	Years of Experience	Time	Rate	Total
Jeffrey R. Krinsk	Partner	43	457.8	$750.00	$343,350.00
Mark L. Knutson	Of Counsel	32	538.1	$700.00	$376,670.00
Joshua C. Anaya*	Associate	10	2.4	$500.00	$1,200.00
David J. Harris	Associate	7	120.0	$475.00	$57,000.00
Trenton R. Kashima	Associate	6	1328.1	$450.00	$597,645.00
Lauren R. Presser*	Associate	4	424.3	$425.00	$180,327.50
A. Trent Ruark*	Associate	4	145.1	$375.00	$54,412.50
Siobhán E. Murillo	Law Clerk	n/a	77.3	$150.00	$11,595.00
Rebecka A. Garcia	Paralegal	n/a	89.7	$150.00	$13,455.00
Carol L. Grace	Office Manager	n/a	11.9	$150.00	$1,785.00
Shelby M. Ramsey	Paralegal	n/a	8.8	$150.00	$1,320.00
			3203.5	**$511.55**	**$1,638,760.00**

Krinsk Decl. II, ¶ 119.[20]

Rates Other Courts Have Awarded. "[R]ate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of American v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). When similar cases are examined, Class Counsel's rates are consistent with the rates charged by firms practicing in this District. *See, e.g., Congdon*, 2019 WL 2327922, at *6 (finding that hourly rates of between $200 and $750, in a national breach of contract/conversion class action, were reasonable) *citing In re MagSafe Apple Power Adapter Litig.*, No. 5:09-cv-01911 EJD, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) ("In the Bay Area, reasonable hourly rates for partners range from $560 to $800, for associates from $285 to $510[.]"); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509 LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (awarding partners rates "from about $490 to $975" and non-partners "from about $310 to $800"); *Banas v. Volcano Corp.*, No. 12–cv–01535 WHO, 2014 WL 7051682, at *5 (N.D. Cal. 2014) (finding rates ranging from $355 to $1,095 per hour for partners and associates were within the range of prevailing rates).

Survey Data. Courts have frequently used survey data in evaluating the reasonableness of

[20] Class Counsel have submitted the firm resume detailing its respective experience and qualifications. Krinsk Decl. III, ¶ 78, Ex. C.

attorneys' fees. *Cleo D. Mathis & Vico Prods. Mfg. Co. v. Spears,* 857 F.2d 749, 755-56 (9th Cir. 1988). The *2016 Real RateReport in Brief* by Wolters Kluwer reflects the annual billing rates actually paid by clients. The Report indicates that partners billed, on average, $595; associates billed $400; and paralegals billed $172 in San Francisco. *See* Krinsk Decl. III, ¶ 80, Ex. D, at p. 5. The Report also notes the average rate for "Commercial, Litigation" in San Francisco was $544. *Id*. Similarly, *United States Consumer Law Attorney Fee Survey Report 2015-2016* found that that the median billing rate for "Attorneys Handling Class Action Cases" in California is $513. *Id*., at ¶ 81, Ex. E at p. 43. For San Francisco, the survey found that attorneys' rates generally ranged from $350 (for the 25% median rate for attorneys) and $725 (for the 95% median rate for attorneys). *Id.*

Blended Rate. The reasonableness of Class Counsel's rates is further supported by the blended lodestar, calculated by taking the total lodestar and dividing it by the total hours of all attorney timekeepers and one staff person who will be in charge of assisting on this case post-Motion. The blended rate in this case for Class Counsel is **$511.55** ($1,638,760.00 divided by 3203.5 hours). Krinsk Decl. III, ¶ 83. This is in line with the average rate listed in recent surveys. *See id.,* at ¶ 83, Ex. D, at p. 5 (average commercial litigation rate was $544 in San Francisco); Ex. E, p. 43 (the median billing rate for class action litigation in California is $513). This blend hourly rate also supports the contention that Counsel reasonably staffed the case and did not overly rely on more expensive partners to complete tasks performed by junior attorneys. *See Hayes v. MagnaChip Semiconductor Corp.,* No. 14-CV-01160-JST, 2016 WL 6902856, at *8 (N.D. Cal. Nov. 21, 2016) (After finding over reliance on the work of partners, the Court order that a blend rate of $600 more accurately reflects a reasonable rate.).

Class Counsel's hourly rates, clearly on par with the prevailing market rates of attorneys in this District, are reasonable, particularly given counsel's demonstrated skill, experience and reputation in the area of complex class action litigation.[21]

[21] Class Counsel also seeks compensation for its support staff, such as paralegals and law clerks, which is permitted:

> The key … is the billing custom in the "relevant market." Thus, fees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is "the prevailing practice in a given community," … Indeed, even purely clerical or secretarial

b. *The Hours Expended by Class Counsel are Reasonable*

"Beyond establishing a reasonable hourly rate, a party seeking attorneys" fees bears the burden to "document[ ] the appropriate hours expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) *accord Roberts v. Marshalls of CA, LLC*, No. 13-CV-4731-MEJ, 2018 WL 510286, at *15 (N.D. Cal. Jan. 23, 2018). Class Counsel, however, "is not required to record in great detail how each minute of his time was expended," but should "identify the general subject matter of his [or her] time expenditures." *Id*. at 437 n. 12.

Over the last approximate three years of litigation, Class Counsel expended a total of **3,176.30** attorney, law clerk, and paralegal/legal assistant hours (excluding the time to prepare the to-be-drafted Motion for Final Approval, its supporting declarations, and other post-application work, which will conservatively add at least 100 post-application hours). Krinsk Decl. III, ¶ 77. This case was particularly hard fought with Defendant filing numerous motions to stay the action [ECF Nos. 27, 53], a Motion for Judgment on the Pleadings [ECF No. 26], a Motion for Certification of Order for Interlocutory Appeal [ECF No. 52]. Plaintiff filed an Amended Complaint [ECF. No. 60], a Motion to Strike Defendant's Affirmative Defenses [ECF No. 24], and a Motion to Quash [ECF. No. 79]. Furthermore, the parties fully briefed a petition for mandamus. *See Massage Envy Franchising, LLC v. United States District Court for the Northern District of California*, No. 17-71722, ECF. Nos. 1-4 (9th Cir.). This does not include the numerous requests for judicial notices [ECF No. 25, 26-1, 27-1, 43], motions to shorten time [ECF No. 29, 54], and other administrative matters. Krinsk Decl. III, ¶¶ 15-41. Class Counsel had largely drafted a motion for summary adjudication and was preparing the class certification motion at the time of settlement. *Id*., ¶ 40.

Class Counsel likewise engaged in a significant amount of discovery, settlement negotiations, and communications with the Class, which is not reflected in the docket. The Settlement was only reached after the parties conducted focused discovery and after more than a year of extensive arm's-length negotiations, including two mediations before Mr. Rotman. *Id*., ¶¶ 48-56. The parties'

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work is compensable if it is customary to bill such work separately…

Trustees of the Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1257 (9th Cir. 2006). Class Counsel's support staff's hourly rate is $150, well within the range of reasonableness. *In re Volkswagen "Clean Diesel" Mktg. Litig*., No. 2672 CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (rates of $80 to $490 for paralegals are reasonable.).

negotiations were informed by Class Counsel's review of several sets of written discovery responses (which involved significant meet and confer to secure), thousands of pages of documents, and Plaintiffs' depositions. *Id.*, ¶ 42-47. Even after the parties reached a settlement in principle, Class Counsel worked with Defendant to draft the Class Notices and has fielded numerous telephone calls and emails from the Settlement Class.

Collectively, these tasks have taken a substantial amount of Counsel's time and resources:

Task	Hours	Fee
Administrative task: Including filing, scheduling, and other necessary tasks to ensure the proper management of the case.	45.3	$10,440.00
Appeal: Preparing Plaintiff's opposition to Defendant's Petition for Writ of Mandamus.	117.9	$59,665.00
Client and Class Communications: Telephone calls and correspondence with Plaintiffs and other class members.	85.3	$40,200.00
Discovery - Depositions: Preparing to take and defending depositions. Including travel to the deposition location.	108.8	$50,000.00
Discovery - Document Review: Review documents produced by Defendants and other third parties in response to Plaintiffs' document requests.	188.0	$89,152.50
Discovery - Experts: Investigating potential experts for the litigation.	19.7	$10,872.50
Discovery - Meet and Confer: Telephone calls and correspondence with opposing counsel and third parties regarding discovery requests.	72.5	$34,385.00
Discovery: Requests and Responses: Preparing Plaintiffs' discovery requests, responding to discovery request by Defendant, and reviewing discovery responses.	165.8	$81,280.00
Litigation Strategy and Analysis: Meeting between counsel to develop strategies and assign the staffing of the case, the development of trial plans, creating damages models, and preparation for various hearings	292.6	$162,440.00
Mediation: Preparation of mediation briefs, attending mediation, and communications with the mediator. Including travel to the mediation location.	256.9	$147,607.50
Legal Research: Legal research regarding various issues arising from the case.	149.0	$81,220.00
Motion to Strike Affirmative Defenses: Preparing and replying to Plaintiff's Motion to Strike	163.4	$82,740.00
Motion for Judgment on the Pleading: Preparing the opposition to Defendant's dispositive Motion for Judgment on the Pleadings.	185.7	$80,272.50
Motion for Certification of Order for Interlocutory Appeal: Preparing the opposition to Defendant's requested appellate review of the Court's order on Motion to Strike and Motion for Judgment on the Pleadings.	98.2	$51,380.00
Motion for Class Certification: Counsel's preparations for the anticipated filing of Class Certification.	39.7	$25,357.50
Miscellaneous Motions and Orders: Attending case management conferences, preparing various stipulations, preparing and responding to administrative motions (including motions to stay, shorten time, and requests for judicial notice), and review of various orders of the Court.	404.2	$206,745.00
Motion for Summary Judgment: Counsel's preparations for the anticipated filing of Plaintiff's Motion for Summary Adjudication, as well and	187.2	$107,582.50

Defendant's anticipated Motion for Summary Judgment.

Motion for Preliminary Approval: Preparing Plaintiffs' Motion for Preliminary Approval and related documents.	102.5	$48,555.00
Pleadings: Preparing the Complaint and First Amended Complaint, investigations regarding the same, interviews with clients regarding their experiences at Massage Envy, and legal research regarding Plaintiffs' causes of action.	192.4	$86,777.50
Settlement: Direct settlement negotiations with Defense Counsel, drafting and editing the Settlement Agreement and related documents, selecting the Claims Administrator, development of class notice and the settlement website.	328.4	$182,087.50
	3203.5	**$1,638,760.00**

Krinsk Decl. III, Ex. F.[22]

The 3203.5 total hours expended by Class Counsel on this case is not excessive when compared to the necessary effort.

c. *The Request Multiplier is Warranted*

The lodestar calculation is not limited to hours expended and the hourly rate. The Court normally further applies a "multiplier" to Class Counsel's lodestar to determine the appropriate fee award. *Class Plaintiffs,* 19 F.3d at 1294 n. 2. To determine whether the lodestar multiplier is reasonable, such factors may be considered: (1) the amount involved and the results obtained; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; and (10) awards in similar cases. *See Fischel*, 307 F.3d at 1006–07. Applying these factors warrant the 1.59 multiplier requested by Class Counsel.

Here, the coupon and non-coupon relief stems from the same litigation of the same causes of

[22] Class Counsel provides billing summaries for the Court. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("If counsel submit bills with the level of detail that paying clients find satisfactory, a federal court should not require more."); *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 920 (N.D. Cal. 2005) ("The Sidener declaration breaks out the hours expended by lead counsel into five categories... This is an especially helpful compromise between reporting hours in the aggregate (which is easy to review, but lacks informative detail) and generating a complete line-by-line billing report (which offers great detail, but tends to obscure the forest for the trees)."). To the extent that the Court requires Counsel's individual time entries, Counsel is prepared to provide such documentation. (*See* N.D. Cal. Procedural Guidance for Class Action Settlements.)

action, so it is not so easy separate out the hours attributable to the Injunctive Relief. However, the lodestar in this case ($1,638,760) is still less than the $1,495,376.66 currently requested. But if one was to assume that 57.24 percent of the value provided to the Settlement Class is non-coupon relief (as noted above) and was to reduce the lodestar accordingly (57.24 percent of $1,638,760), one would get $938,026.22 in attorneys' fees. Accordingly, the amount requested would result in a 1.59 multiplier ($1,495,376.66 divided by $938,026.22) even under this less favorable calculation.

Plaintiffs achieved substantial relief on behalf of the Class. As discussed in above, the non-coupon portion of the Settlement results in a **$7,094,557.97** benefit to the Class ($6,085,903.00 in Injunctive Relief and $1,008,654.97 in administration costs). Furthermore, this litigation has been demanding. The parties have collectively filed numerous motions, amended their pleadings, propounded over a hundred sets of discovery requests, briefed a writ petition for mandamus, taken three depositions, issued multiple subpoenas, and attended numerous in person and telephonic settlement discussion (including two and half days of mediations). *See generally* Krinsk Decl. II, ¶ 16-48. Plaintiffs had drafted their Motion for Summary Adjudication and were preparing the Motion for Class Certification at the time the parties finally agreed to terms. *Id*. Therefore, it is not surprising that Class Counsel have devoted an enormous amount of time vigorously prosecuting this litigation on behalf of the Class.

Although, at first blush, the First Amended Complaint represents a relatively simple contract claim, this litigation is complex both in its scope and the legal issues involved. The Settlement Class includes approximately 1.7 million members, with numerous contractual variations, who executed their Membership Agreements over a span of more than ten years. The case also involved the business practices of Defendant and its approximately 1,200 franchised clinics and numerous price increases (which occurred at different times, in different amounts, in different regions). Given the number of variables, even the most straight-forward claims and defenses become difficult to investigate and present to the trier of fact.

This lawsuit also transcends normal breach of contract cases. First, the parties contested the identity of the contracting parties to the Membership Agreement. *See* Defendant's Amended Answer [ECF No. 69]. This dispute arises from Defendant's franchise business model. Each of the individual

Massage Envy franchised locations are independent entities having separate ownership. Defendant asserts that it is their franchised locations that contract with the consumers. Of course, Plaintiffs disagreed. Nonetheless, it was an issue that would need to be addressed at trial and would undoubtedly complicate the case. *See, e.g.*, Defendant's Amended Answer [ECF No. 69], at p. 22 (asserting a defense for "Failure to Join Indispensable Parties" regarding the franchised locations).

Moreover, Class Members paid their monthly membership amount to their "Home Clinic." In turn, each Massage Envy franchise paid a modest share of their revenue to Defendant under the applicable Franchise Agreements. Defendant has, therefore, consistently argued that any liability in this case is limited to its share of these revenues. *See, e.g.*, Defendant's Amended Answer [ECF No. 69]. Again, the multiple parties involved in Defendant's franchise business model muddled legal issues attendant to the case.[23]

These complexities also engender increased risk for both the Class and Class Counsel. Such a risk is particularly acute as Counsel has taken this case on a contingent basis. Krinsk Decl. II, ¶ 109. "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *Fischel*, 307 F.3d at 1008. "This provides the 'necessary incentive' for attorneys to bring actions to protect individual rights and to enforce public policies." *Id.* Indeed, "[o]ne of the most common fee enhancers ... is for contingency risk. 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *See Browne v. Am. Honda Motor Co.*, No. CV 09-06750, 2010 WL 9499073, at *11 (C.D. Cal. Oct. 5, 2010) *citing Graham v. DaimlerChrysler Corp*., 34 Cal. 4th 553, 579-80 (2004), *as modified* (Jan. 12, 2005).

Class Counsel's risk was multiplied by the fact that Counsel has a relatively limited number of attorneys (between five and six attorneys during the litigation of this case) and the aggressive litigation required that Class Counsel periodically dedicate the vast majority of their staff to this case. Krinsk

[23] These 'trial' issues do not include Defendant's novel argument regarding the abridgment of the "Identical Factual Predicate" Rule that was the subject of Defendant's Petition of Mandamus and likely any appeal in this case.

Decl. II, ¶ 111. This constricted Class Counsel's ability to take on other matters. *Id.*

Class Counsel faced dogged opposition in both the litigation and settlement negotiations. Defendant was represented by experienced lawyers from two well-respected law firms (Sacks Ricketts and Case LLP and Gibson, Dunn & Crutcher, LLP), each of which have a deserved reputation for vigorous advocacy. *Id.*, ¶ 16. Class Counsel's ability to obtain this Settlement with such formidable opposition confirms the quality of Class Counsel's representation of the Class. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F.Supp. 1303, 1337 (C.D. Cal. 1977). The Class also benefited from Class Counsel's extensive experience with class action litigation, particularly against this Defendant and its counsel. *See Hahn v. Massage Envy Franchising, LLC*, No. 12CV153 DMS, 2014 WL 5100220 (S.D. Cal. Sept. 25, 2014) & *Hahn v. Massage Envy Franchising, LLC*, No. 12CV153 DMS, 2014 WL 5099373 (S.D. Cal. Apr. 15, 2014). Such expertise was invaluable in resourcefully litigating the Class's claims, as well as negotiating the Settlement.

Indeed, the resulting multiplier sought by Plaintiffs is 1.59, a relatively unexceptional amount in comparison to multipliers frequently approved by the Ninth Circuit. *See*, *e.g.*, *Vizcaino*, 290 F.3d at 1051(upholding multiplier of "3.65"); *In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. & Sales Practices Litig.*, No. 5:09-MD-02015-JF, 2011 WL 1877630, at *7 (N.D. Cal. May 17, 2011) (multiplier of 2.2 "is well within the acceptable range"); *In re Mercury Interactive Corp. Sec. Litig.*, No. 5:05-CV-03395-JF, 2011 WL 826797, at *2 (N.D. Cal. Mar. 3, 2011) (multiplier of 3.08 "is within the acceptable range"); *Thieriot v. Celtic Ins. Co.*, No. C-10-04462-LB, 2011 WL 1522385, at *7 (N.D. Cal. Apr. 21, 2011) (multiplier of 1.94 is "within the customary range"); *City of Roseville Employees' Ret. Sys. v. Micron Tech., Inc.*, No. 06-CV-85-WFD, 2011 WL 1882515, at *7 (D. Idaho Apr. 28, 2011), *aff'd sub nom.*, 484 F. App'x 138 (9th Cir. 2012) (multiplier of 2.72 "is relatively standard"). The length and complexity of the work performed by Counsel warrants the award of the amount fees of requested.

2. Percentage of the Fund

Class Counsel's fees are also appropriate when cross-checked under a "Percentage of the Fund" analysis. "Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund[.]" *In re Online DVD*, 779 F.3d at 949. In the Ninth Circuit, "courts

typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award." *In re Bluetooth*, 654 F.3d at 942. However, federal courts in California have previously found 20% to 40% of the common fund to be a reasonable award of attorneys' fees and cost in a class action. *See Class Plaintiffs*, 19 F.3d at 1297; *See Vizvaino*, 290 F.3d 1043, 1050 n.4, Appendix A (conducting a survey of attorneys' fees in class cases and finding that courts awarded between 3-40 percent of the settlement). This variation reflects that the "benchmark percentage should be adjusted…, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

To calculate an appropriate percentage, the Ninth Circuit examines the "gross" settlement benefit (and not the "net" common fund—deducting litigation, notice, and claims administration expenses). *See In re Online DVD*, 779 F.3d at 953 (affirming attorney fee award "as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses") (*citing Powers v. Eichen*, 229 F3d 1249, 1258 (9th Cir 2000) (rejecting the requirement to base an award on a percentage of the net recovery) & *Staton v. Boeing Co.*, 327 F.3d 938, 974-75 (9th Cir. 2003) ("The district court also did not abuse its discretion by including the cost of providing notice to the class ... as part of its putative fund valuation.... We have said that 'the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable.'")).

In re Online DVD-Rental Antitrust Litig. is instructive. Under the *In re Online DVD* settlement agreement, defendant "agreed to pay a total amount of $27,250,000, comprising both a 'Cash Component' and a 'Gift Card Component,' in exchange for dismissal with prejudice of all claims asserted in the complaint." *In re Online DVD*, 779 F.3d at 940. From this fund, defendant would also agree to pay class counsel's fees and expenses, costs of notice and administration, and incentive payments to class representatives. *Id.* The Ninth Circuit upheld the District Court's decision to award class counsel 25% of the "overall" settlement fund of $27,250,000, not just the "net" fund. *Id.*, at 949, 953. In doing so, the Ninth Circuit counselled "that the reasonableness of attorneys' fees is not measured by the choice of the denominator." *Id.*, at 953.

The $1,495,376.66 in fees requested by Class Counsel equals *20.08 percent* of the "non coupon" settlement benefit ($1,495,376.66 divided by $7,094,557.97 [$6,085,903.00 in Injunctive Relief and $1,008,654.97 in administration costs]). This percentage is easily within the range of reasonableness accepted by this Circuit. *See, e.g., Vizvaino*, 290 F.3d 1043 at 1052-54 (finding that courts have awarded between 3 and 40 percent of the settlements in class actions); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (reaffirming 25% benchmark); *Wren v. RGIS Inventory Specialists, No.* C-06-05778 JCS, 2011 WL 1230826, at *29 (N.D. Cal. Apr. 1, 2011) (awarding 42%). An upward departure from the 25% benchmark (assuming the Court considers the "net" settlement benefit) is warranted for the same reasons provided in the previous section. *See, supra,* section III(B)(3) (auguring for the use of a lodestar multiplier); *Vizcaino,* 290 F.3d at 1048-50 (Factors relevant to a determination of the percentage ultimately awarded include: (1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases.)

The Court can verify under both a lodestar analysis and/or a percentage-recovery methodology that the amount requested as fees is reasonable. Class Counsel, therefore, requests that the Court award $1,495,376.66 as recoverable attorneys' fees at final approval, with the remaining $1,117,123.34 to be potentially award only after the redemption period ends.

B. Class Counsel's Costs Are Reasonable

Class Counsel also seeks reimbursement of their reasonable routinely reimbursed expenses in the amount of $65,593.05. *See* FED. R. CIV. P. 23(h). This sum represents the normal costs that "would typically be billed to paying clients in non-contingency matters," and include: Transportation and Meals: $16,443.69 (Class Counsel's travel and meal expenses to defend depositions, to meet with witnesses and/or opposing counsel, and attend mediations and hearings); Photocopying: $1,219.48; Filing and Service of Process Fees: $2,247.50; Document Hosting and Discovery: $6,552.34 (these expenses were paid to attorney service firms to host and process electronic discovery); Court Hearings, Deposition Reporting, and Transcripts: $6,024.60; Mediation: $25,500; Online Research Expenses: $97.85; and Mail and Courier Expenses: $596.94, plus post-appeal costs of Copying and Messenger Services for the Appeal: 285.65 and •Meditation: $6,625.00. *In re Omnivision Techs., Inc.*, 559 F.

Supp. 2d 1036, 1048 (N.D. Cal. 2008); Krinsk Decl. II., ¶¶ 126-27.[24] These costs are not disproportionate to the needs of the litigation relative to the Settlement benefit to the Settlement Class.

C. The Settlement Class Representatives Have Earned, and Public Policy Supports, the Requested Service Awards

The original Settlement provided for an incentive award of $10,000 to each of the three Plaintiffs. However, the Court reduced the incentive fees for each of the Named-Plaintiffs from $10,000 to $5,000 at the previous final approval hearing. Order on Final Approval, ECF No. 146, at ¶ 15. Plaintiffs agree to only seek this reduced amount.

Incentive awards are a normal feature of a class action settlement, *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009), and provide compensation for the time and effort each Plaintiff expended in pursuing the litigation on behalf of the Class. *See Staton*, 327 F.3d at 977 (*citing Cook*, 142 F.3d at 1016). The requested $5,000 incentive award to each Plaintiff is the normal amount awarded in similar cases and is reasonable given Plaintiffs' significant involvement in this case, combined with the risks they bore. *See Hawthorne v. Umpqua Bank,* No. 11-CV-06700-JST, 2015 WL 1927342, at *8 (N.D. Cal. Apr. 28, 2015) ("Many courts in the Ninth Circuit have also held that a $ 5,000 incentive award is 'presumptively reasonable.'"); *In re Online DVD-Rental,* 779 F.3d at 947-48 (district court did not abuse discretion in approving $5,000 incentive awards for each of the class representatives). Each Plaintiff provided meaningful contributions to the litigation. Plaintiffs initiated this litigation and engaged experienced counsel. *See generally* Declaration of Baerbel McKinney-Drobnis ("McKinney Decl."), ECF No. 119-10; Declaration of Joseph B. Piccola, ECF No. 119-12 ("Piccola Decl."); and Declaration of Camille Berlese ("Berlese Decl."), ECF No. 119-11. Plaintiffs were deposed and responded to MEF's written discovery requests. *Id.* Plaintiffs also were active participants in the case: regularly supervising and directing Class Counsel's litigation decisions, reviewing numerous case filings, and making themselves available during mediations and settlement sessions. *Id.* Plaintiffs' collectively spent hundreds of hours to advocate for the Class's claims. Piccola Decl., at ¶ 21; Krinsk Decl. I, at ¶ 99.

[24] Plaintiffs had previously claimed Claims Administration costs of $26,724.74 for additional notices in its previous Motion for Attorneys' Fees, Costs, and Incentive Award, ECF No. 119-1. However, MEF confirmed that they had paid the outstanding amount. Accordingly, the parties agreed that this amount should not be awarded, as noted on the final approve hearing transcript.

Plaintiffs also were subjected to extensive, contentious litigation. Not only did Plaintiffs have to defend themselves, Plaintiffs were necessarily required to respond to broad and intrusive discovery requests propounded on their friends and family members. MEF subpoenaed the wife of Mr. Piccola (Kathleen "Kay" Piccola), the husband of Ms. McKinney-Drobnis (Burton Drobnis), and the husband (Robert Berlese), daughters (Lia Berlese and Angela Berlese), son (Christopher Berlese) and an acquaintance (Michael Damiani) of Ms. Berlese. McKinney Decl.; Piccola Decl.; Berlese Decl.; *see also* Motion to Quash Subpoenas [ECF No. 79]; Joint Letter Regarding Discovery Dispute [ECF No. 83]. Accordingly, a $5,000 incentive award is reasonable and warranted.

VI. THE SETTLEMENT ADEQUATELY APPRISED THE CLASS OF THEIR RIGHTS UNDER THE SETTLEMENT

A. The Notice Previously Provided Was Adequate

Pursuant to the Court's Preliminary Approval Order, ECF No. 114, and Order Approving Stipulation to Change Hearing for Final Approval and Directing Class Counsel to Provide Notice, ECF No. 130, and according to the terms of the Settlement, the Settlement Administrator initially provided 1,361,394 Email Notices and 178,573 Postcard Notices to Class Members. Azari Decl. I, ¶ 7. Additionally, a reminder email was sent to 1,135,216 Class Members whose original Email Notice had not bounced and who had not submitted a Voucher Request. *Id.*, ¶ 7. This notice regime was approved the Court at Final Approval, ECF No. 146, and the Court's finding was not challenged on appeal. Accordingly, there is no reason to displace the Court's prior finding. Nonetheless, when the Class Notice is examined, it was reasonably calculated to inform the Settlement Class of the Settlement and their rights thereunder.

This Notice effort resulted in individualized notice being provided to 96.5% of the identified Settlement Class. *Id.*, ¶ 13.[25] Additionally, the notice efforts gave raise to a settlement participation rate that exceeded Class Counsel's original estimates. *Compare* Motion for Preliminary Approval of Class Action Settlement, ECF No. 103, at p. 10 (predicting a 4.65% (the same as the *Hahn, et al. v. Massage Envy Franchising LLP* settlement) *with* Azari Decl. I, ¶ 16 (the Settlement resulted in a 6.2%

[25] A Long Form Notice and a paper Voucher Request was mailed via USPS first class mail to all Class Members who requested one from the Settlement Administrator by calling the toll-free phone number. Azari Decl. II, ¶ 11. As of January 10, 2020, 1,159 Long Form Notices and Voucher Requests were mailed. *Id.*

claims rate). This notice program satisfies the requirements that the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[26] [27]

Finally, the Court-edited, Class Notice clearly and concisely state[s] in plain, easily understood language: (1) the nature of the action; (2) the definition of the Class; (3) the relevant claims, issues and defenses; (4) the relief provided under the Settlement; (5) that a Class member may enter an appearance through an attorney; (6) the time and manner for requesting exclusion; (7) the terms of the proposed Settlement; and (8) the binding effect of a class judgment on Settlement Class members under Rule 23(c)(3). *See* FED. R. CIV. P. 23(c)(2)(B). The Class Notice also referred Class members to the Settlement website, www.massagefeesettlement.com, and a toll-free number for further information, thus "suggest[ing] that the claims process was designed to encourage—not discourage—the filing of claims." Azari Decl. I, ¶¶ 23-23; *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 591 (N.D. Ill. 2011); *see also In re Nasdaq Market–Makers Antitrust Litigation*, 2000 WL 37992, *4–5

[26] *See also Minter v. Wells Fargo Bank, N.A.*, 283 F.R.D. 268, 276 (D. Md. May 22, 2012) (where "all class members have been identified by name from Defendant records" and notice administrator used address updating methods, supplement notice by publication not necessary to satisfy due process); *Robinson v. Fountainhead Title Grp. Corp.*, 2009 WL 2842733 *1 (D. Md., Sep. 4, 2009) (direct mailed notice with additional notice on website satisfied Rule 23 without supplemental publication notice); *In re Wal-Mart Stores, Inc. Wage and Hour Litig.*, 2008 WL 1990806, * 2 (N.D. Cal. May 5, 2008) (denying Wal-Mart's request to include notice by publication because "the identity and location of class members can be determined through reasonable efforts using Wal-Mart's electronic records." "[N]otice by publication is only used when the identity and location of class members cannot be determined through reasonable efforts.").

[27] The only issue with the notice that was identity was quickly resolved. Following communications with two of the Objectors, Mr. and Ms. DeWitt, the parties discovered that Paid-in-Full members who had paid membership fee increases had not been included in the Class Data and thus had not been provided notice of the Settlement.[27] Declaration Of Mike Scott in Support of Stipulation to Change Hearing Date and Briefing Schedule for Final Settlement Approval ("Scott Decl."), ECF No. 129-1, at ¶¶ 7-11. After investigating this issue, the Parties determined that "paid-in-full" members of a ME Location who are Class Members ("Omitted Members") were inadvertently not included in the Class Data and thus were not provided Notice of the Settlement. *Id.*, ¶ 11-12. Once these Omitted Member were identified, the Settlement Administrator provided Notice of the Settlement to them and they were given the same amount of time, as other Class Members, or until December 17, 2019, in which to submit a Voucher Request, object to the Settlement or opt out of the Settlement. *See* Stipulation to Change Hearing Date for Final Settlement Approval [ECF No. 129]. Notice of the Settlement to the Omitted Members resulted in an additional 18,106 Email Notices and 4,998 Postcard Notices. Azari Decl. II, ¶ 14. On December 12, 2019, the Settlement Administrator sent 17,465 reminder emails to the Omitted Members for whom the original Email Notice did not bounce and who had not submitted a Voucher Request. *Id.*, ¶ 11.

(S.D.N.Y. Jan. 18, 2000) (recognizing that the "innovative use" of "electronic claim forms is likely to contribute to a far larger number of claims"); 3 Newberg on Class Actions § 8:40 (4th ed.) ("the inclusion of toll-free numbers in notices serves to facilitate, and thereby encourage, the filing of claims") (collecting cases). Thus, the Court-approved Class Notice program adequately informed Class Members of the proposed Settlement and satisfies Rule 23(c)(2)(B).

Furthermore, the Settlement provides additional notices to the participating Members of the Settlement Class regarding the availability of their Vouchers. Notice will be provided when the Vouchers are available for redemption, and a reminder notice will be provided more than sixty (60), but not less than forty-five (45), days before the Voucher redemption period ends at MEF's Expense. Amendment at ¶ 6 (Class Counsel can also provide an additional reminder notice at their expense). These notices ensure that the participating members of the Settlement Member have an opportunity to use their Vouchers.

B. Class Notice is Not Required for the Amendment

Furthermore, the Court can finally approve the amended Settlement because it does not substantively alter the rights of absent Class Members. Filing an amended settlement that corrects deficiencies identified in a denial of final settlement approval is quite common. *See e.g., Trauth v. Spearmint Rhino Companies Worldwide, Inc.*, No. EDCV 09–01316–VAP, 2012 WL 4755682, at *1, *5 (C.D. Cal. Oct. 5, 2012) (approving "renewed motions for final approval… and for attorneys fees and incentive awards" submitted after amended settlement corrected deficiencies that caused the court to previously deny final approval); *Harris v. Vector Mktg. Corp.*, No. C–08–5198, 2012 WL 381202, at *1 (N.D. Cal. Feb. 6, 2012) (same). As a general proposition, under Rule 23(e), modifications to a settlement agreement after the Court had the opportunity to consider objections does not require a new notice and opt-out period, if the modification only supplements the original relief provided. *Trauth*, *supra,* at *1, *5; *Harris*, *supra,* at *1; *also Klee v. Nissan N. Am., Inc.*, No. CV 12–08238, 2015 WL 4538426, *5 (C.D. Cal. July 7, 2015), *aff'd* (Dec. 9, 2015) ("Courts have recognized that when a settlement is amended to make it more valuable, it is unnecessary to give additional notice to those class members that received adequate notice of the original proposed settlement and decided not to opt out.") (citing cases).

Rule 23(e) has also been found not to apply to a settlement amendment that made only "minor modifications which did not impair class members' rights even indirectly." *Keepseagle v. Vilsack*, 102 F. Supp. 3d 306, 313-1 (D.D.C. 2015) citing *Jones v. Gusman,* 296 F.R.D. 416, 467 (E.D. La. 2013). The same is true when a proposed amended settlement provides slightly fewer benefits to class members than a previous settlement, for example a slightly less advantageous distribution plan. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 800 F.Supp.2d 328, 334 (D. Me. 2011) (no new notice is required where an amendment results in "benefits not substantially less than those proposed in the original settlement.") *quoting* Principles of the Law in Aggregate Litigation § 3.05 (2010); *Keepseagle*, 102 F. Supp. 3d at 313-14 ("an amendment requires supplemental notice only when it 'would have a material adverse effect on the rights of class members.'") (citing cases); *In re Diet Drugs Products Liab. Litig.*, 2010 WL 2735414, at *6 (E.D. Pa. July 2, 2010) (same).

This is particularly true in this case, as each Settlement Class Member was informed that the amount of their Voucher was always variable and was subject to change without additional notice. Agreement at Ex. 2 (*see* the VOUCHER SETTLEMENT BENEFIT section). Additionally, this briefing and the Amendment will be provided to the Settlement Class *via* the Settlement Website. Accordingly, there is no prejudice to the Class in not providing additional notice because Class Members were specifically and fully informed that the Voucher amounts may be subject to an upward adjustment when they decided whether to opt out, object, or file a Voucher request. Rule 23(e) has thus been satisfied, as have the due process rights of Settlement Class Members.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully move this Court to issue an Order in the form submitted by the parties concurrently herewith: (1) certifying the Settlement Class for settlement purposes and appointing Plaintiffs as Class Representatives, Jeffrey R. Krinsk of Finkelstein & Krinsk LLP as Class Counsel; (2) granting final approval of the proposed Settlement in all regards; (3) finding the Notice Program was adequate and reasonable, satisfying the requirements of Rule 23; and (4) directing the entry of Final Judgment, dismissing this Action (including all individual and Class claims presented thereby) on the merits with prejudice.

Date: March 30, 2020

Respectfully submitted,

FINKELSTEIN & KRINSK LLP

By: /s/ Jeffrey R. Krinsk

Jeffrey R. Krinsk, Esq.