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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

VICTOR GUTTMANN,  
Plaintiff,  
v.  
OLE MEXICAN FOODS, INC.,  
Defendant.

Case No. 14-cv-04845-HSG

**ORDER GRANTING MOTION FOR  
FINAL APPROVAL OF CLASS  
ACTION SETTLEMENT AND  
GRANTING MOTION FOR  
ATTORNEYS' FEES AND COSTS**

Re: Dkt. Nos. 54, 55

United States District Court  
Northern District of California

Before the Court are Plaintiff Victor Guttman’s (“Plaintiff”) motions for final approval of class action settlement, Dkt. No. 54 (“Mot.”), and for attorneys’ fees and costs, Dkt. No. 55 (“Fees Mot.”). Defendant Ole Mexican Foods, Inc. (“Defendant”) does not oppose either motion.

For the reasons set forth below, the Court **GRANTS** Plaintiff’s motions for final approval of class action settlement and for attorneys’ fees and costs.

**I. BACKGROUND**

Plaintiff filed this food-labeling class action on October 31, 2014. Dkt. No. 1 (“Compl.”). Plaintiff alleges that Defendant failed to properly disclose that its “Xtreme Wellness” line of tortillas contain partially-hydrogenated oil, an artificial trans-fat food additive. *Id.* ¶¶ 5, 9, 11. On that basis, Plaintiff asserts six causes of action against Defendant for violating California’s unfair competition law (Cal. Bus. & Prof. Code § 17200, *et seq.*) (“UCL”), False Advertising Law, (Cal. Bus. & Prof. Code § 17500, *et seq.*) (“FAL”), and Consumer Legal Remedies Act (Cal. Civ. Code § 1750, *et seq.*) (“CLRA”), and for breaching express warranties. *Id.* ¶¶ 123-76.

Defendant filed a motion to dismiss on federal preemption grounds, Dkt. No. 12, and a motion to stay discovery pending resolution of that motion, Dkt. No. 24. But Defendant withdrew both after new case law emerged from the Ninth Circuit addressing the preemption issue. Dkt.

1 No. 37. The parties agreed to settle the case on a classwide basis shortly thereafter. Dkt. No. 41.  
2 Before the parties ceased active litigation, Plaintiff served some written discovery on Defendant,  
3 to which Defendant served objections and responses. Mot. at 10.

4 Plaintiff filed a motion for preliminary approval of the class action settlement on July 2,  
5 2015. Dkt. No. 48. The proposed settlement would enjoin Defendant from using any partially-  
6 hydrogenated oils in their Xtreme Wellness line of tortillas for a period of ten years. *Id.* at 2. In  
7 exchange, the putative class would release their claims against Defendant regarding, among other  
8 things, the manufacturing, advertising, sale, labeling, and the ingredients of these tortilla products,  
9 excepting personal injury claims. *Id.* Defendant agreed to pay for class notice, which included:  
10 (1) publishing a long-form class notice in *USA Today*; (2) displaying banner advertisements on  
11 Facebook (at least 25,000 times); and (3) creating a bilingual website that provided the settlement  
12 agreement and other case-related documents. *Id.* And, upon final approval, the parties agreed that  
13 Plaintiff could seek up to \$1,800 as an incentive and Plaintiff's counsel could seek up to \$85,000  
14 in fees and costs without opposition from Defendant. *Id.* The Court granted preliminary approval,  
15 provisionally certifying the proposed nationwide injunctive-relief class under Federal Rule of  
16 Civil Procedure 23(b)(2) and directing class notice as agreed by the parties. Dkt. No. 52.

17 On December 31, 2016, Plaintiff filed the instant motions for final approval of class action  
18 settlement and for attorneys' fees and costs. In his final approval motion, Plaintiff represents that  
19 the class notice program was implemented as the Court directed. Mot. at 5-6. The settlement  
20 administrator received no objections to the proposed settlement from class members. Dkt. No. 56.

21 The Court held a final fairness hearing on February 11, 2016. Dkt. No. 58. At the hearing,  
22 no class members objected, commented, or otherwise appeared. The Court took the matter under  
23 submission, but also ordered that: (1) Defendant file a declaration confirming that the Facebook  
24 component of the notice plan was performed, which was not apparent from the moving papers;  
25 and (2) Plaintiff file a declaration setting forth what Plaintiff did to assist this case and the hours  
26 he spent doing so. *Id.* Both declarations were timely filed as requested. Dkt. Nos. 59 & 60.

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1 **II. DISCUSSION**

2 **A. Motion for Final Approval of Class Action Settlement**

3 The Court now considers whether final approval of the proposed class action settlement is  
4 appropriate. Finding that the parties performed the class notice program as directed and that there  
5 were no objections to the proposed settlement, the Court grants final approval.

6 1. Adequacy of Class Notice

7 Federal Rule of Civil Procedure 23(e) governs class action settlements, including notice.  
8 When any certified class settles its claims, courts “must direct notice in a reasonable manner to all  
9 class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1); *see also* William  
10 B. Rubenstein, *Newberg on Class Actions* § 4:36 (5th ed. rev. June 2016) (“Rule 23(c) makes  
11 notice of a *class certification decision* discretionary [for Rule 23(b)(2) class actions], but Rule  
12 23(e) requires that (b)(2) class members receive notice of any *proposed settlement*[.]”) (emphasis  
13 original). Additionally, Rule 23(h) requires that class members receive notice of any claim for an  
14 award of attorneys’ fees and costs. Fed. R. Civ. P. 23(h)(1); *see also* Rubenstein, *supra*, § 4:36.

15 In its order granting preliminary approval, the Court directed a three-part notice plan. That  
16 plan included: (1) publishing a long-form, one-time class notice in *USA Today*; (2) displaying  
17 banner advertisements on Facebook at least 25,000 times; and (3) creating a bilingual website that  
18 provided the settlement agreement and other case-related documents to interested persons. *Id.*  
19 Plaintiff’s counsel has submitted a declaration attesting that the newspaper notice was published  
20 and that the settlement website was properly created. Dkt. No. 54-1 ¶¶ 3, 5-8. Rust Consulting,  
21 the settlement administrator, has also submitted a declaration, attesting that the Facebook notice  
22 was published in the manner and frequency directed. Dkt. No. 60. The Court finds that the class  
23 notice delivered complied with the preliminary approval order, Rule 23(e), and Rule 23(h).

24 2. Fairness, Reasonableness, and Adequacy of Settlement

25 Federal Rule of Civil Procedure 23(e) requires that “[t]he claims, issues, or defenses of a  
26 certified class may be settled . . . only with the court’s approval.” Courts may approve of a class  
27 action settlement “only after a hearing and on finding that it is fair, reasonable, and adequate.”  
28 Fed. R. Civ. P. 23(e)(2); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). In

1 making this decision, courts consider the following factors:

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

9 *Id.* (hereinafter, the “*Hanlon* factors”). At the end of the day, however, “the decision to approve  
10 or reject a settlement is committed to the sound discretion of the trial judge.” *Id.*

11 In its order granting preliminary approval, the Court set forth its reasoning as to why the  
12 proposed settlement was negotiated in good faith, lacked any obvious deficiencies, did not treat  
13 any class member in an improperly preferential manner, and fell within the range of approval. *See*  
14 Dkt. No. 52 at 6-10. Nothing has happened since then that would change this analysis, but the  
15 Court proceeds to briefly discuss each of the approval factors set forth above.

16 a) *Plaintiff’s Case and the Risk of Continued Class Action Litigation*

17 Under the first three *Hanlon* factors, the Court “must balance against the risks of continued  
18 litigation, including the strengths and weaknesses of Plaintiff’s case, the benefits afforded to class  
19 members, and the immediacy and certainty of a recovery.” *Ching v. Siemens Indus., Inc.*, No. 11-  
20 CV-04838, 2014 WL 2926210, at \*3 (N.D. Cal. Jun. 27, 2014). Where a plaintiff must overcome  
21 “significant barriers” to prove his claims, this factor weighs in favor of settlement approval. *See*  
22 *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010).

23 Plaintiff argues that both sides would face serious risks in continued litigation. Mot. at 8-  
24 11. In support of this proposition, Plaintiff cites to cases that highlight the difficulties of litigating  
25 class actions alleging misleading food labels. *See, e.g., Ries v. Ariz. Beverages USA LLC*, No. 10-  
26 01139, 2013 WL 1287416, at \*16 (N.D. Cal. Mar. 28, 2013) (decertifying Rule 23(b)(2) food-  
27 labeling class action asserting claims about misleading labels and granting summary judgment for  
28 the defendant). The Court agrees that these types of food labeling claims are difficult to maintain.  
For example, Plaintiff would need to prove that Defendant’s labels, including “Xtreme Wellness,”  
were misleading entirely by virtue of the product containing a small amount of trans-fat. *See*  
Compl. ¶ 69-71.

1 Accordingly, the first three *Hanlon* factors weigh in favor of final settlement approval.

2 b) *Settlement Amount*

3 The fourth *Hanlon* factor, which considers the amount offered in settlement, “is generally  
4 considered the most important, because the critical component of any settlement is the amount of  
5 relief obtained by the class.” *Bayat v. Bank of the West*, No. 13-cv-02376, 2015 WL 1744342, at  
6 \*4 (N.D. Cal. Apr. 15, 2015). Because “the interests of class members and class counsel nearly  
7 always diverge, courts must remain alert to the possibility that some class counsel may urge a  
8 class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet  
9 treatment on fees.” *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013).

10 As a Rule 23(b)(2) class action, the proposed settlement agreement provides no monetary  
11 relief for the class members, but instead provides injunctive relief in the form of a ten-year ban on  
12 Defendant’s use of partially-hydrogenated oils in its Xtreme Wellness line of tortillas. As the  
13 Court explained in its order granting preliminary approval, the proposed settlement provides  
14 substantial health benefits to all purchasers of Defendant’s Xtreme Wellness tortillas in light of the  
15 evidence offered by Plaintiff about the health effects of partially-hydrogenated oils. Dkt. No. 52 at  
16 9-10. Despite the fact that the Food and Drug Administration has already proposed a ban on some  
17 of these same food additives, the proposed settlement would go into effect years earlier, it bars the  
18 use of all types of these food additives, unlike the FDA regulation, and the FDA regulation would  
19 still permit carve-outs. *Id.* Accordingly, the Court finds that the proposed relief is adequate.

20 c) *Stage of Proceedings*

21 The fifth *Hanlon* factor considers the extent of discovery completed and the stage of the  
22 proceedings. “This factor evaluates whether the parties have sufficient information to make an  
23 informed decision about settlement.” *Larsen v. Trader Joe’s Co.*, No 11-cv-05188, 2014 WL  
24 3404531, at \*5 (N.D. Cal. Jul. 11, 2014) (quotation marks omitted). “[A]s long as the parties have  
25 sufficient information to make an informed decision about settlement, formal discovery is not a  
26 necessary ticket to the bargaining table.” *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245,  
27 257 (N.D. Cal. 2015). “Rather, the court’s focus is on whether the parties carefully investigated  
28 the claims before reaching a resolution.” *Id.* (quotation marks and citation omitted).

1 While this case settled before class certification and before significant discovery was  
2 taken, the parties briefed the merits of Plaintiff's case in connection with Defendant's motion to  
3 dismiss in some detail. *See* Dkt. Nos. 12, 19 & 23. The parties debated whether Plaintiff's claims  
4 were preempted, had extraterritorial scope outside of California, were based on labels constituting  
5 actionable non-puffery, and whether Plaintiff could state a California unfair competition claim  
6 under its unlawfulness prong. *See id.* Most importantly, Defendant argued that the FDA requires  
7 any product with less than .5 grams of trans fat to disclose the content as "zero" and, therefore, the  
8 "Trans Fat free" statement on the front of the Xtreme Wellness packages was legal. Dkt. No. 12 at  
9 3-7. While the Ninth Circuit ultimately rejected this argument, the parties were left with sufficient  
10 information to make an informed decision about settlement. Accordingly, this factor also weighs  
11 in favor of approving the settlement agreement.

12 d) *Experience and Views of Counsel*

13 "Parties represented by competent counsel are better positioned than courts to produce a  
14 settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enters. Sec.*  
15 *Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). The Court already found class counsel's qualifications  
16 and experience sufficient to represent the class' interests in this action. Dkt. No. 52 at 6. Nothing  
17 has changed since that time. Accordingly, this factor weighs in favor of settlement approval.

18 e) *Class Member Reaction*

19 "It is established that the absence of a large number of objections to a proposed class  
20 action settlement raises a strong presumption that the terms of a proposed class settlement action  
21 are favorable to the class members." *In re Omnivision*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal.  
22 2008). A small number of objections to and opt-outs from a settlement "presents at least some  
23 objective positive commentary as to its fairness." *Hanlon*, 150 F.3d at 1027. Here, none of the  
24 class members objected to the settlement agreement or opted out. Dkt. No. 56 at 1. The Court  
25 therefore finds that this final factor also weighs in favor of approval.

26 f) *Summary*

27 After considering and weighing all of the above *Hanlon* factors, the Court finds that the  
28 settlement class members received adequate notice and that the settlement is fair, adequate, and

1 reasonable. Accordingly, Plaintiffs' motion for final approval of class action settlement is granted.

2 **B. Motion for Attorneys' Fees and Costs**

3 Having approved the settlement agreement, the Court now turns to Plaintiff's motion for  
4 attorneys' fees and costs. The Court finds that Plaintiff's request for attorneys' fees and costs is  
5 proper and reasonable, as is Plaintiff's request for a class representative incentive award.

6 1. Attorneys' Fees

7 Under the terms of the settlement agreement, Plaintiff was permitted to request 85,000 in  
8 attorneys' fees and costs without opposition from Defendant. Fees Mot. at 7. Plaintiff requests  
9 \$82,837.15 in attorneys' fees, in line with the parties' agreement.

10 "In a certified class action, the court may award reasonable attorney's fees and nontaxable  
11 costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Even where  
12 an award is authorized by the parties' agreement, "courts have an independent obligation to ensure  
13 that the award, like the settlement itself, is reasonable[.]" *In re Bluetooth Headset Prods. Liab.*  
14 *Litig.*, 654 F.3d 935, 943 (9th Cir. 2011). The reasonableness of a fees agreement is determined  
15 by state law when state law provides the basis for the claims asserted. *See Vizcaino v. Microsoft*  
16 *Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). In this case, California law controls the analysis of  
17 the parties' fees' agreement because Plaintiff seeks to recover under California's UCL, FAL,  
18 CLRA, and express warranty law. *See Compl.* ¶¶ 123-76.<sup>1</sup>

19 "The two primary methods for determining reasonable fees in the class action settlement  
20 context are the 'lodestar/multiplier' method and the 'percentage of recovery' method. *Wershba v.*  
21 *Apple Computers, Inc.*, 91 Cal. App. 4th 224, 254 (2001). "Because the settlement [here] resulted  
22 in injunctive relief, the lodestar method is the appropriate measure for calculating attorneys' fees."  
23 *Lilly v. Jamba Juice Co.*, No. 13-cv-02998, 2015 WL 2062858, at \*5 (N.D. Cal. May 4, 2015).

24 The first step in the lodestar analysis is to multiply the number of hours counsel reasonably

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26 <sup>1</sup> The CLRA itself contains a mandatory fee-shifting provision that awards attorneys' fees to a  
27 prevailing plaintiff. Cal. Civ. Code § 1780(e). When the basis for an attorneys' fees motion is  
28 both a class action settlement agreement and a fee-shifting statute, the analysis remains the same.  
*See, e.g., Tadepalli v. Uber Techs., Inc.*, No. 15-cv-04348, 2016 WL 1622881, at \*10 (N.D. Cal.  
Apr. 25, 2016) (applying California's lodestar test where a class action settlement agreement and  
CLRA both provided the basis for the plaintiff's attorneys fees' motion).

1 expended on the litigation by a reasonable hourly billing rate. *See Graham v. DaimlerChrysler*  
2 *Corp.*, 34 Cal. 4th 553, 579 (2004); *Hanlon v. Chrysler Group, Inc.*, 150 F.3d 1011, 1029 (9th Cir.  
3 1998). Once this raw lodestar figure is determined, courts may apply a multiplier depending on  
4 several factors, including: (1) the results obtained; (2) the novelty and difficulty of the questions  
5 involved; (3) the requisite legal skill necessary to litigate the case; (4) the preclusion of other  
6 employment due to acceptance of the case; and (5) whether the fee is fixed or contingent. *See*  
7 *Serrano*, 20 Cal. 3d at 48.

8 Class counsel declares that they have expended 448.5 hours of work on this case as of  
9 December 30, 2015. Fees Mot. at 8. This time includes 171 attorney hours and 277.5 paralegal  
10 hours. *Id.* Counsel has not provided detailed timesheets documenting the amount of time spent on  
11 each task, but instead has submitted a summary of time and rates of each firm member, Mot. for  
12 Fees, Appx. 1, and a description of the tasks performed, Dkt. No. 55-1 (“Weston Decl.”) at 10.  
13 That summary shows that Plaintiff’s attorneys and paralegals expended 39.7 hours investigating  
14 and drafting the complaint, 77.8 hours opposing Defendant’s motion to dismiss, 69.3 hours  
15 working on discovery-related matters, 25.6 hours negotiating the settlement, 18.1 hours drafting  
16 an unfiled motion for class certification, 174.6 hours drafting the motions for preliminary and final  
17 approval of class action settlement, and 43.4 hours on administrative tasks. Weston Decl. at 10.  
18 The Court finds that the time class counsel expended was reasonable.

19 With the total amount of time established, class counsel seeks to apply the following  
20 billing rates: \$605 for Mr. Weston, \$525 for Mr. Elliot, \$340 for Ms. Persinger, and \$305 for Mr.  
21 Joseph, as well as rates of \$215 and \$135 for senior and junior paralegals. *Id.* at 16-17. To  
22 support these rates, class counsel cites several similar cases from this circuit in which counsel was  
23 awarded equal or slightly lower fee rates. *See, e.g., In re Quaker Oats Labeling Litig.*, 2014 U.S.  
24 Dist. LEXIS 104941, at \*4 (N.D. Cal. Jul. 29, 2014) (awarding Mr. Weston a rate of \$580, Ms.  
25 Persinger \$340, and Mr. Joseph \$305); *Bruno v. Quten Research Inst., LLC*, 2013 U.S. Dist.  
26 LEXIS 35066, at \*9-10 (C.D. Cal. Mar. 13, 2013) (awarding Mr. Weston a rate of \$550 and Ms.  
27 Persinger \$315). Moreover, class counsel’s rates are in line with the prevailing rates in this  
28 district for consumer class actions. *See, e.g., In re Magsafe Apple Power Adapter Litig.*, No. 09-



1 CV-01911, 2015 WL 428105, at \*12 (N.D. Cal. Jan. 30, 2015) (“In the Bay Area, reasonable  
2 hourly rates for partners range from \$560 to \$800, for associates from \$285 to \$510, and for  
3 paralegals and litigation support staff from \$150 to \$240.). Accordingly, the Court finds that the  
4 billing rates requested by class counsel are reasonable.

5 Multiplying the time expended by the rates approved, Plaintiff’s lodestar is \$144,779.  
6 Fees Mot. at 16 & Appx. 1. Plaintiff requests, however, only \$85,000 in attorneys’ fees. This  
7 translates to a multiplier of .59, essentially a negative multiplier. When determining a reasonable  
8 fee in a class action, the lodestar figure is “presumptively reasonable.” *In re Bluetooth*, 654 F.3d  
9 at 941. Although Plaintiff did not secure any monetary relief for the class and the questions  
10 litigated in this case were not particularly novel or difficult, the Court finds that Plaintiff’s fees’  
11 request is reasonable, especially when given a ‘negative’ multiple. *See Serrano*, 20 Cal. 3d at 48.  
12 For that reason, the Court grants Plaintiff’s request for attorneys’ fees.

### 13 2. Costs

14 Plaintiff’s counsel is entitled to “recover as part of the award of attorneys’ fees those out-  
15 of-pocket expenses that would normally be charged to a fee paying client.” *Harris v. Marhoefer*,  
16 24 F.3d 16, 19 (9th Cir. 1994). Class counsel has provided an itemized list of the costs incurred  
17 during this litigation. Fees Mot., Appx. 2. Class counsel incurred a total of \$2,162.85 in costs,  
18 broken down into \$400.00 in filing fees, \$70.00 in costs for service of process, \$220.56 in costs  
19 for FedEx and certified mail, \$781.77 in transportation costs, and \$700.00 in expert witness costs.  
20 *Id.* The Court finds these costs reasonable and, accordingly, grants the request.

### 21 3. Incentive Award

22 Plaintiff requests an incentive award of \$1,800.00 for his service as class representative in  
23 this action. Dkt. No. 55 at 16. Defendant does not oppose this request, as agreed.

24 “[N]amed plaintiffs . . . are eligible for reasonable incentive payments.” *Staton v. Boeing*  
25 *Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Courts evaluate whether a proposed incentive award is  
26 reasonable by considering “the actions the plaintiff has taken to protect the interests of the class,  
27 the degree to which the class has benefitted from those actions,” and “the amount of time and  
28 effort the plaintiff expended in pursuing the litigation[.]” *Id.* at 977. Many courts in this circuit

United States District Court  
Northern District of California

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have held that a \$5,000 incentive award is “presumptively reasonable.” *See, e.g., Harris v. Vector Marketing Corp.*, No. 08-cv-5198, 2012 WL 381202, at \*7 (N.D. Cal. Feb. 6, 2012) (“Several courts in this District have indicated that incentive payments of \$10,000 or \$25,000 are quite high and/or that, as a general matter, \$5,000 is a reasonable amount.”) (collecting cases).


In his declaration, Plaintiff avers that he spent approximately five hours working on this case, reviewing the complaint, preserving relevant documents, and participating in the settlement negotiation process. Dkt. No. 59 ¶¶ 1-2. Courts in this district have granted incentive awards in food-labeling cases where the named plaintiffs stayed “actively involved” in the litigation. *See e.g., Miller*, 2015 WL 758094, at \*7. Plaintiff appears to have done so. In light of Plaintiff’s service to the class, the Court finds that the requested incentive award is fair and reasonable.

**III. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** Plaintiff’s motion for final approval of the proposed class action settlement agreement. Additionally, the Court **GRANTS** Plaintiff’s motion for attorneys’ fees and costs and Plaintiff’s class representative incentive award. The parties are instructed to file a proposed judgment within three days of this Order.

**IT IS SO ORDERED.**

Dated: 8/1/2016

  
HAYWOOD S. GILLIAM, JR.  
United States District Judge