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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE HYDROXYCUT  
MARKETING AND SALES  
PRACTICES LITIGATION

CASE NO. 09md2087 BTM(KSC)

CASE NO. 09cv1088 BTM(KSC)

ANDREW DREMAK, on Behalf of  
Himself, All Others Similarly  
Situating and the General Public,

**ORDER GRANTING MOTION  
FOR FINAL APPROVAL OF  
CLASS ACTION SETTLEMENT**

Plaintiff,

v.

IOVATE HEALTH SCIENCES  
GROUP, INC., et al.,

Defendants.

Co-Lead Class Counsel (and Proposed Class Counsel for the Settlement Class) have filed a Motion for Final Approval of Class Action Settlement. The Court held a hearing on the motion on October 15, 2014. No objectors were present. For the reasons set forth below, the Court **GRANTS** the motion for final approval of the Settlement.

1 **I. BACKGROUND**

2 In this consolidated class action lawsuit, Plaintiffs assert consumer injury  
3 claims in connection with their purchase of the Hydroxycut Products.<sup>1</sup> This  
4 lawsuit does not involve personal injury claims.

5  
6 **A. Procedural Background**

7 On December 22, 2009, the First Consolidated Amended Class action  
8 Complaint (“FAC”) was filed in this multi-district litigation. Twenty named plaintiffs  
9 asserted claims on behalf of themselves and a putative nationwide class of  
10 persons who purchased Hydroxycut Products (14 specific Hydroxycut-branded  
11 products).

12 On March 8, 2010, the Court issued an order appointing Timothy G. Blood  
13 of Blood Hurst & O’Reardon, LLP (“BHO”) and Andrew S. Friedman of Bonnett,  
14 Fairbourn, Friedman, & Balint, P.C. (“BFFB”) as Co-Lead Class Counsel.

15 In an order filed on May 31, 2011, the Court granted in part and denied in  
16 part motions to dismiss the FAC. The Court dismissed Plaintiffs’ consumer  
17 protection, express warranty, and unjust enrichment claims against the Iovate  
18 Defendants and Retailer Defendants. The Court held that Plaintiffs had failed to  
19 satisfy Rule 9(b)’s heightened pleading standard because the FAC was vague as  
20 to what representations each plaintiff relied on and whether each plaintiff actually  
21 saw advertising claims before purchasing the Hydroxycut Product.

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25 <sup>1</sup> The “Hydroxycut Products” refer to the fourteen Hydroxycut-branded products at issue  
26 in this litigation sold in the United States prior to May 1, 2009, specifically: Hydroxycut Regular  
27 Rapid Release Caplets, Hydroxycut Caffeine-Free Rapid Release Caplets, Hydroxycut  
28 Hardcore Liquid Caplets, Hydroxycut Max Liquid Caplets, Hydroxycut Regular Drink Packets,  
Hydroxycut Caffeine-Free Drink Packets, Hydroxycut Hardcore Drink Packets (Ignition Stix),  
Hydroxycut Max Drink Packets, Hydroxycut Liquid Shots, Hydroxycut Hardcore RTDs,  
Hydroxycut Max Aqua Shed, Hydroxycut 24, Hydroxycut Carb Control, and Hydroxycut Natural.  
The definition excludes Hydroxycut-branded products containing ephedra, and Hydroxycut-  
branded products available for purchase prior to December 1, 2004 or after May 1, 2009.

1 In an order filed on July 12, 2011, the Court denied a motion to dismiss for  
2 lack of personal jurisdiction filed by defendant Kerr Investment Holding Corp. f/k/a  
3 lovate Health Sciences Group Inc.

4 On August 8, 2011, Plaintiffs filed the Second Consolidated Amended Class  
5 Action Complaint. ("SAC").

6 On March 8, 2013, Plaintiffs filed a motion for final approval of class action  
7 settlement. After holding a hearing on the motion on October 22, 2013, the Court  
8 issued an order denying final approval. The Court denied final approval on the  
9 ground that the proposed *cy pres* distribution was being used as a vehicle to  
10 settle the personal injury cases, not to provide an indirect prospective benefit to  
11 the entire class.

12 In an order filed on January 27, 2014, the Court denied motions to dismiss  
13 the SAC filed by Defendants, but ordered Plaintiff to provide a more definite  
14 statement as to the Retailer Defendants (GNC Corporation, Wal-Mart Stores,  
15 Inc., Walgreens Company, CVS Caremark Corp., Vitamin Shoppe Industries,  
16 Inc., NBTY, Inc., BJ's Wholesale Club, Inc., Kmart Corporation, and Rite Aid  
17 Corporation). The Court held that Plaintiffs had failed to plead fraud with  
18 particularity as to the Retailer Defendants. The Court also held that apart from  
19 Rule 9(b)'s particularity requirements, most of Plaintiffs had failed to state a claim  
20 against the Retailer Defendants under the various state consumer protection laws  
21 because Plaintiffs (1) did not allege that prior to purchasing a Hydroxycut Product  
22 they saw/heard a specific representation made, adopted, or controlled by a  
23 Retailer Defendant; and (2) did not allege sufficient facts establishing aider and  
24 abettor liability for representations made by lovate.

25 In May 2014, the Court granted preliminary approval of the current class  
26 action settlement. On August 29, 2014, Plaintiffs filed their motion for final  
27 approval of the class action settlement.

28

1 B. Terms of the Settlement

2 The main features of the Settlement are as follows:

- 3 • \$14 million non-reversionary Settlement Fund consisting  
4 of a \$7 million Cash Component and a \$7 million Product  
5 Component.
- 6 • Class members without proof of purchase may elect to  
7 receive cash payments of \$15 per purchase for up to  
8 three purchases.
- 9 • If money remains in Cash Component (after paying  
10 eligible cash claims, notice and claim administration  
11 expenses, attorney's fees and expenses, taxes and tax  
12 expenses, and service awards) each cash claim will be  
13 increased pro rata up to \$50 for each product purchased.
- 14 • If any amounts still remain in the Cash Component, the  
15 money will go to ChangeLab Solutions, a non-profit  
16 organization that works to combat false and misleading  
17 advertising regarding food and nutrition, or a similar  
18 organization.
- 19 • Class members without proof of purchase may elect to  
20 receive a free Product Unit for up to three purchases.  
21 The Product Unit shall have a retail price of at least \$25.  
22 For each Product Unit Award, class members may  
23 choose any one of the following: (1) Hydroxycut Pro  
24 Clinical (72 count); (2) Hydroxycut Hardcore (60 count);  
25 (3) Hydroxycut Caffeine Free (72 Count); and (4)  
26 Hydroxycut Max (60 count).
- 27 • Amounts remaining in the Product Component will be  
28 distributed nationwide in the form of additional product  
(Pro Clinical Hydroxycut or such other products that are  
top-selling throughout the United States) at the time of  
purchase by the consumer. The value of the additional  
product shall be calculated at the manufacturers'  
suggested retail price of the regular size  
Hydroxycut-branded product, less 15%. The additional  
product will be distributed over an eighteen-month period.  
Within 60 days of the Effective Date of the Settlement,  
lovate will provide Class counsel with a distribution plan  
regarding the Additional Product and will also provide  
Class Counsel with a bimonthly distribution report  
detailing the distribution of Additional Product.
- lovate agrees to not oppose Plaintiffs' counsel's  
application for attorney's fees not to exceed \$3,500,000  
and for expenses not to exceed \$300,000. Plaintiffs'  
counsel seeks \$3.5 million in attorneys fees and  
\$204,378.21 in costs.

- lovate does not oppose payment of service awards to class representatives in the amount of \$2,000 each.

C. Notice to the Class and Claims Administration

Notice was provided to the class pursuant to the process previously approved by the Court. See Decl. of Cameron R. Azari. The Settlement Administrator mailed individual notices and also disseminated notice through four consumer publications, over a thousand Sunday local newspapers, and popular websites. Additional notice was provided through an Informational Release and the Settlement website. The Notice Plan reached an estimated 81.1% of adults who take an over-the-counter remedy for weight loss.

Boston Financial was appointed and approved as Claims Administrator in this matter. Boston Financial has performed its duties pursuant to the Preliminary Approval Order and the Stipulation of Settlement, including: mailing the Current Eligible Claimant Notice to Current Eligible Claimants; establishing and maintaining a website to provide information regarding the proposed settlement and to allow online claims submissions; developing and staffing live operator services and a toll free number with interactive voice response system; forwarding copies of the Notice, Claim Form, and other related documents to potential Class Members upon request; and receiving, logging, and processing requests for exclusion, claims forms, proofs of claim, and other communications. See Decl. of Madeline J. Fitzgerald. The deadline for submitting claims is January 13, 2015.<sup>2</sup>

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<sup>2</sup> The Court finds that Plaintiffs have satisfied the notice requirements of Rule 23, which requires that the court direct to class members “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”

## II. DISCUSSION

### A. Class Certification

Plaintiffs seek final certification of the Settlement Class, defined as all persons in the United States who purchased any of the Hydroxycut Products from May 9, 2006 through May 1, 2009. Excluded from the Settlement Class are: (i) those who purchased Hydroxycut Products for the purpose of resale; (ii) Iovate and its officers, directors and employees; (iii) any person who files a valid and timely Request for Exclusion; and (iv) the Judge(s) to whom this Action is assigned and any members of their immediate families.

To certify a settlement class, the requirements of Rule 23 must generally be satisfied. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). However, the Court need not inquire whether the case, if tried, would present management problems. Amchem Prods., Inc. v. Windsor, 521 U.S. 1, 613 (1997).

Rule 23(a) sets forth four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The Court finds that all four of these requirements have been satisfied.

The numerosity requirement is satisfied if “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Here, the class would include purchasers of the Hydroxycut Products, which were sold nationwide at major retailers, over a time period of three years. The Court has no doubt that the numerosity requirement has been met.

Rule 23(a)(2) requires “questions of law or fact common to the class.” Commonality requires that the class members’ claims depend upon a “common contention,” which is of such a nature that “it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” Wal-Mart

1 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). Central common  
2 contentions in this case include allegations that the Hydroxycut Products were  
3 unsafe and did not provide the weight-loss benefits that were touted in  
4 advertisements and labeling.

5 Rule 23(a)(3) requires that the “claims or defenses of the representative  
6 parties are typical of the claims or defenses of the class.” The claims of the class  
7 plaintiffs need not be identical to those of the absent class members, but, rather  
8 must be “reasonably co-extensive.” Hanlon, 150 F.3d at 1020. “The test of  
9 typicality is whether other members have the same or similar injury, whether the  
10 action is based on conduct which is not unique to the named plaintiffs, and  
11 whether other class members have been injured by the same course of conduct.”  
12 Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (internal  
13 quotation marks and citation omitted). Plaintiffs’ claims are typical of the claims  
14 of the other members of the class because the SAC alleges that Defendants  
15 engaged in a unified course of conduct – i.e., false and deceptive marketing  
16 regarding the safety and benefits of the Hydroxycut Products – that resulted in  
17 consumers not getting what they thought they were paying for.

18 The Court must also determine whether the “representative parties will fairly  
19 and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This  
20 determination depends on the resolution of two questions: (1) whether the named  
21 plaintiffs and their counsel have any conflicts of interest with other class  
22 members; and (2) whether the named plaintiffs and their counsel will prosecute  
23 the action vigorously on behalf of the class. Hanlon, 150 F.3d at 1020. No  
24 conflict of interest is apparent to the Court. Furthermore, Class Counsel have  
25 significant experience in class action litigation and have vigorously prosecuted  
26 this action to reach this settlement.

27 In addition to satisfying the requirements of Rule 23(a), a proposed class  
28 must qualify for certification under one of the categories in Rule 23(b). Plaintiffs

1 seek certification under Rule 23(b)(3). Certification is proper under Rule 23(b)(3)  
2 if “the court finds that the questions of law or fact common to class members  
3 predominate over any questions affecting only individual members, and that a  
4 class action is superior to other available methods for fairly and efficiently  
5 adjudicating the controversy.”

6       The predominance inquiry “tests whether proposed classes are sufficiently  
7 cohesive to warrant adjudication by representation” and “focuses on the  
8 relationship between the common and individual issues.” Hanlon, 150 F.3d at  
9 1022 (internal quotation marks and citation omitted). “When common questions  
10 represent a significant aspect of the case and they can be resolved for all  
11 members of the class in a single adjudication, there is a clear justification for  
12 handling the dispute on a representative rather than on an individual basis.”  
13 Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1778. When  
14 one or more of the central issues in the action are common to the class and can  
15 be deemed to predominate, certification may be proper under Rule 23(b)(3) even  
16 though other important matters, such as damages or affirmative defenses, will  
17 have to be tried separately. Id.

18       Common issues predominate in this litigation even though claims have  
19 been brought under various state consumer protection laws. Central to this  
20 action are issues regarding whether Defendants engaged in false advertising  
21 regarding the safety and efficacy of the Hydroxycut Products. Plaintiffs allege a  
22 common injury caused by Defendants’ common course of conduct.

23       The Court also finds that a class action is the appropriate vehicle to resolve  
24 this controversy. Pursuant to Rule 23(b)(3), the Court should consider four  
25 non-exclusive factors when considering whether class action is a superior method  
26 of adjudication, including: (1) the class members’ interest in individual litigation,  
27 (2) other pending litigation, (3) the desirability of concentrating the litigation in one  
28 forum, and (4) difficulties with the management of the class action. Here, the

1 damages for each class member would be small. Therefore, class members  
2 would have little motivation to pursue individual cases. Furthermore, due to the  
3 common issues in this case, it is desirable to litigate the claims in one forum to  
4 ensure consistency of rulings and findings. The Court need not be concerned  
5 regarding any difficulties with management of the class action due to this  
6 settlement.

7 In sum, the Court finds that the requirements of Rule 23(a) have been  
8 satisfied and certifies the Settlement Class under Rule 23(b)(3).

9  
10 B. Fairness, Reasonableness, and Adequacy of the Settlement

11  
12 1. Legal Standard

13 Before approving a class action settlement, the court must determine  
14 whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ.  
15 P. 23(e)(2). In reaching this determination, courts consider a number of factors,  
16 including: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity,  
17 and likely duration of further litigation; (3) the risk of maintaining class action  
18 status throughout the trial; (4) the amount offered in settlement; (5) the extent of  
19 discovery completed and the stage of the proceedings; (6) the experience and  
20 views of counsel; (7) the presence of a governmental participant; and (8) the  
21 reaction of the class members to the proposed settlement. Churchill Vill., L.L.C.  
22 v. Gen. Elec., 361 F.3d 566, 575 (9th Cir.2004).

23 When a settlement agreement is negotiated prior to formal class  
24 certification, the court must also scrutinize the settlement for evidence of collusion  
25 or other conflicts of interest. In re Bluetooth Headset Products Liability Lit., 654  
26 F.3d 935, 946-47 (9th Cir. 2011). Signs of collusion include: (1) when counsel  
27 receive a disproportionate distribution of the settlement; (2) when the parties  
28 negotiate a "clear sailing" arrangement that provides for the payment of attorneys'

1 fees separate and apart from class funds; and (3) when the parties arrange for  
2 fees not awarded to revert to defendants rather than to be added to the class  
3 fund. Id. at 947.

4

5 2. Strength of Plaintiffs' Case

6 As pointed out by Plaintiffs, if this case continues, Plaintiffs face significant  
7 hurdles to recovery on their claims. The Court's January 27, 2014 Order made  
8 it clear that Plaintiffs would have to allege more specific facts regarding (1) how  
9 each Retailer Defendant participated in or controlled representations that were  
10 seen and/or heard by a plaintiff prior to purchasing a Hydroxycut Product; and (2)  
11 aider and abettor liability for representations made by Iovate. According to  
12 Plaintiffs, the Court's ruling effectively eliminated their claims against the Retailer  
13 Defendants. Plaintiffs also explain that without the Retailer Defendants in the  
14 litigation, there is a real risk that Plaintiffs would be left without a defendant from  
15 whom a judgment could be collected. Furthermore, Defendants have made it  
16 clear that they would challenge class certification based on, among other things,  
17 the various state laws involved and individualized inquiries that would have to be  
18 made. Defendants also contend that their claims regarding the effectiveness of  
19 the Hydroxycut Products were not misleading and that their warnings were  
20 sufficient. Given the uncertainties of continued litigation, this factor weighs in  
21 favor of approval of the Settlement.

22

23 3. Risk, Complexity, Expense, and Duration of the Litigation

24 As discussed above, there are substantial risks in continued litigation, which  
25 would certainly be time-consuming and costly. In addition to continued challenges  
26 to the pleadings by the Retailer Defendants, it is expected that Defendants would  
27 oppose class certification. Continued litigation would involve the expense of  
28 additional discovery and the hiring of numerous experts for both sides. This

1 Settlement alleviates the need to engage in expensive, protracted litigation and,  
2 as discussed below, provides a significant benefit to the Class.

3

4 4. Amount Offered in Settlement

5 This Settlement offers substantial benefits to the class members. Without  
6 proof of purchase, class members may elect to receive cash payments of \$15 per  
7 product purchased for up to three purchases, or up to three free Product Units  
8 (each with a retail price of at least \$25). Cash payments will probably be even  
9 higher than \$15 per purchase because amounts remaining in the Cash  
10 Component (after paying eligible cash claims, notice and claims administration  
11 expenses, attorney's fees and expenses, taxes and tax expenses, and service  
12 awards) are to be used to increase cash claims pro rata up to \$50 for each  
13 product purchased. At the Final Approval Hearing, Class Counsel estimated that  
14 the cash award would end up being close to \$40 per purchase. Many claimants  
15 will receive compensation that exceeds their damages. According to Defendants'  
16 market research, the average Settlement Class Member purchased 2.2 units of  
17 Hydroxycut Product. The benefits provided by the Settlement are real and  
18 significant. The Court notes that Class members who suffered personal injuries  
19 will be compensated for those injuries through the personal injury settlement.

20

21 5. Stage of the Proceedings & Experience and Views of Counsel

22 The parties in this case have engaged in substantial discovery and this  
23 litigation is at an advanced stage. Therefore, the parties are in a position to  
24 accurately assess the strengths and weaknesses of their respective positions.  
25 Class Counsel are experienced class action litigators and believe that the  
26 Settlement represents an excellent recovery for the Class. Accordingly, these  
27 factors favor final approval of the settlement as well.

28

1           6. Reaction of the Class Members to the Proposed Settlement

2           It appears that the reaction of Class Members to the Settlement is positive.  
3 There have been only six requests for exclusion (FitzGerald Decl. ¶ 11) and two  
4 filed objections. No objectors appeared at the final approval hearing.

5

6                   a. Objection by Bobi Little

7           Ms. Little objects to paying amounts left in the Cash Component to  
8 ChangeLab Solutions. Ms. Little argues that any remaining money should be  
9 distributed to purchasers. However, according to Class Counsel, based on the  
10 current claims rate, all cash will be distributed to Class Members, and no  
11 significant amount will be left for *cy pres* distribution. Therefore, the Court  
12 overrules Ms. Little's objection.

13

14                   b. Objection by Sigge Malkvist

15           Class Counsel move to strike Malkvist's objection because it does not list  
16 his real address as required by the Order Preliminarily Approving Class Action  
17 Settlement and the Class Notice. The address listed by Malkvist is the address  
18 for a UPS Store. The Court denies Class Counsel's motion to strike but overrules  
19 the objection on the merits.

20           Malkvist argues that the structure of the settlement is unfair because after  
21 subtracting attorney's fees and expenses from the cash component, there isn't  
22 much left for the Class Members. Malkvist further argues that the actual value of  
23 Hydroxycut products distributed is likely to be only a small percentage of the \$7  
24 million. According to Malkvist, the settlement disadvantages Class Members, the  
25 majority of whom would prefer cash.

26           However, the Settlement is structured so that Class Members can choose  
27 either cash or product. Some Class Members may actually prefer the product with  
28 a retail value of at least \$25. At the final approval hearing, lovate's counsel

1 explained that there is high brand loyalty among its customers, who are likely to  
2 be repeat purchasers. The cash remaining after subtracting attorney's fees and  
3 administrative expenses is 2.6 or 2.7 million. This is not a paltry sum, and the  
4 cash awards (estimated by Class Counsel to be up to \$40 per purchase) will be  
5 substantial.

6 Malkvist complains that product distribution is not as good as cash and  
7 compares product distribution to coupon settlements that mask the benefit  
8 actually received by the class members. Malkvist also contends that it is unknown  
9 whether the current products are safe, and that it is inappropriate to encourage  
10 class members to continue using Hydroxycut products.

11 The product option is not comparable to a coupon. Class Members do not  
12 have to buy or pay anything to get the product, which has an identifiable retail  
13 value. Furthermore, the Settlement requires that the free product "consist of  
14 different ingredient formulations as compared to the Hydroxycut Products," and  
15 the offered products do not contain any of the ingredients alleged to be dangerous  
16 in this litigation. (Stipulation of Settlement, §IV.C.6.b.) The Class Members can  
17 exercise their own free will and judgment regarding whether they should continue  
18 to use Hydroxycut products.

19 Malkvist contends that the payments to the Class Representatives show  
20 they have a conflict of interest vis-a-vis the class because they are getting  
21 significantly more payment than the class members. However, the proposed  
22 incentive awards are only \$2,000 each. This is a modest amount and in keeping  
23 with incentive awards in this Circuit. Class Representatives should receive more  
24 than the average class member because of their efforts in furthering the litigation.

25 Malkvist objects that the attorney's fees are too high. Comparing the  
26 product option to coupons, Malkvist takes the position that the Court should look  
27 at how many product units are actually redeemed when determining attorney's  
28 fees based on percentage of the common fund. In addition, Malkvist argues that

1 the value of the products should not be calculated based on retail price. Malkvist  
2 also argues that the costs of notice and settlement administration as well as *cy*  
3 *pres* distribution should be excluded for purposes of calculating attorney's fees.

4 As already discussed, the product units are not comparable to coupons.  
5 Therefore, the cases governing coupons are not applicable. Seven million dollars'  
6 worth of product has been made available to Class Members; Malkvist does not  
7 cite any relevant authority that the value of the common fund should be based on  
8 how many product units end up actually being claimed. Similarly, there is no  
9 authority for excluding *cy pres* distribution amounts for purposes of determining  
10 attorney's fees. As for the "value" of the product units, retail value is an accurate  
11 measure of benefit to the class. See e.g., Hall v. AT&T Mobility LLC, 2010 WL  
12 4053547, at \* 10 (D.N.J. 2010) (non-cash benefits consisting of prepaid calling  
13 cards with retail value not exceeding \$2,000,000). The expenses incurred for  
14 notice and claims administration were for the benefit of the class and are typically  
15 borne by class plaintiffs. See, e.g., Miller v. Ghirardelli Chocolate Co., 2014 WL  
16 4978433 (N.D. Cal. Oct. 2, 2014).

17 Finally, Malkvist suggests that ChangeLab Solutions might not be an  
18 appropriate *cy pres* recipient. Malkvist does not provide specific reasons for  
19 objecting to ChangeLab Solutions. At any rate, as already discussed, it does not  
20 appear that there will be any funds left in the Cash Component to be distributed  
21 to ChangeLab Solutions.

## 22 23 7. Lack of Collusion

24 Because this settlement was reached prior to class certification, the Court  
25 examines the Settlement for evidence of collusion. Bluetooth, 654 F.3d at 946-  
26 47. The Court does not find any evidence of collusion. Class Counsel seek a fee  
27 award totaling 25% of the Settlement Fund. This percentage of recovery is typical  
28 and does not represent a disproportionate distribution of the settlement to

1 counsel. Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th  
2 Cir. 1990). Although there is a “clear sailing” provision, it does not raise concerns  
3 regarding collusion because the attorney’s fees are to be paid from the Settlement  
4 Fund as opposed to on top of the Settlement Fund. See, e.g., Rodriguez v. West  
5 Publishing Corp., 563 F.3d 948, 961 n.5 (9th Cir. 2009). Attorney’s fees not  
6 awarded do not revert back to Defendants.

7 Moreover, this case was vigorously litigated over the course of several  
8 years. The parties engaged in extensive settlement negotiations and participated  
9 in multiple mediation sessions with two different mediators. The history of the  
10 case as well as the substantial benefit provided to the Class by the Settlement  
11 convince the Court that there has been no collusion.

#### 12 13 8. Final Approval

14 Upon consideration of the relevant factors, the Court finds that the  
15 Settlement is fair, reasonable, and adequate. Therefore, the Court grants final  
16 approval of the Settlement.

#### 17 18 C. Attorney’s Fees

19 Class Counsel, on behalf of themselves and other Plaintiffs’ counsel, seek  
20 an award of attorney’s fees in the amount of \$3.5 million, equal to 25% of the \$14  
21 million Settlement Fund.

22 The Ninth Circuit has established 25% of a common fund as a benchmark  
23 award for attorney’s fees. Six Mexican Workers, 904 F.2d at 1311. The court  
24 may depart from this benchmark percentage if special circumstances indicate that  
25 the percentage recovery would be either too small or too large. Id. The court’s  
26 selection of the benchmark or any other rate must be supported by findings that  
27 take into account all of the circumstances of the case. Vizcaino v. Microsoft  
28 Corp., 290 F.3d 1043, 1047 (9th Cir. 2002). Such factors include, but are not

1 limited to: (1) the results achieved; (2) the risk involved in the litigation; (3)  
2 incidental or nonmonetary benefits conferred by the litigation; and (4) financial  
3 burden of the case on counsel. Id. at 1049-50. Application of the “lodestar  
4 method” may provide a useful “cross-check” as to the reasonableness of a given  
5 percentage award. Id. at 1050.

6 The Court finds that 25% of the Settlement Fund is an appropriate award in  
7 this case. In reaching this conclusion, the Court has taken into account, among  
8 other things, the quality of representation by counsel, the excellent results  
9 achieved for the class, the risks of continued litigation given the weaknesses in  
10 Plaintiffs’ case, and the length and complexity of this hard-fought litigation, which  
11 has spanned several years. The Court finds no basis for departing from the  
12 benchmark percentage.

13 The percentage award is supported by a lodestar cross check. The lodestar  
14 of Class Counsel alone is \$3,365,350 as of August 27, 2014. See Decl. of  
15 Timothy G. Blood (Doc.1872-2), ¶¶ 8, 10; Decl. of Elaine A. Ryan (Doc. 1872-3),  
16 ¶ 7. The Court finds that the hourly rates charged by Class Counsel are  
17 reasonable and are typical rates for attorneys of comparable experience. If the  
18 Court also considers the lodestar of Milberg LLP, which amounts to \$1,121,342.50  
19 (Decl. of John R. S. McFarlane (Doc. 1637-6), ¶ 5), the total lodestar is  
20 \$,4,486,692.50. Thus, the lodestar method confirms the reasonableness of the  
21 percentage calculation.

#### 22 23 D. Costs

24 Class Counsel seek reimbursement of expenses totaling \$202,545.19,<sup>3</sup>  
25 incurred by Plaintiffs’ Counsel to prosecute this litigation.

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26  
27  
28 <sup>3</sup> In their moving papers, Class Counsel requested reimbursement of \$204,378.21.  
However, in supplemental briefing ordered by the Court, Milberg reduced its reimbursable  
expenses by \$1,833.02.

1 Plaintiffs' Counsel "may recover their reasonable expenses that would  
2 typically be billed to paying clients in non-contingency matters." In re Omnivision  
3 Tech., Inc., 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008). Here, the costs were  
4 for filing fees, photocopies, postage, telephone charges, computer research,  
5 mediation fees, and travel. These are the types of expenses routinely charged to  
6 paying clients. See In re Media Vision Tech. Sec. Lit., 913 F. Supp. 1362 , 1367-  
7 72 (N.D. Cal. 1996).

8 Therefore, the Court grants Class Counsel's request for reimbursement of  
9 expenses in the amount of \$202,545.19.

#### 10 11 E. Incentive Awards

12 Class Counsel requests a service award of \$2,000 for each of the plaintiffs  
13 named in the SAC and the other plaintiffs named as plaintiffs in the MDL class  
14 actions.

15 The Court may, in its discretion, award incentive or service awards to named  
16 plaintiffs to "compensate class representatives for work done on behalf of the  
17 class, to make up for financial or reputational risk undertaken in bringing the  
18 action, and, sometimes, to recognize their willingness to act as a private attorney  
19 general." Rodriguez v. West Publishing Corp., 563 F.3d 948, 958-59 (9th Cir.  
20 2009). District courts must carefully scrutinize incentive awards to ensure that  
21 they do not undermine the adequacy of the class representatives. Radcliffe v.  
22 Experian Information Solutions, Inc., 715 F.3d 1157, 1165 (9th Cir. 2013.)

23 Plaintiffs' counsel have submitted declarations explaining that their clients  
24 assisted the litigation by, among other things, providing information and  
25 documents, meeting with counsel, supervising counsel on behalf of the Class,  
26 participating in efforts leading to settlement, and approving the amount and type  
27 of settlement proposed for the Class. See Decl. of Timothy G. Blood (Doc. 1872-  
28 2), ¶ 5, Decl. of Elaine A. Ryan (Doc. 1872-3), ¶ 17, Decl. of other Plaintiffs'

1 Attorneys (Docs. 1637-5-1637-30). The Court finds that the requested incentive  
2 payment of \$2,000 for each of the Plaintiffs is reasonable to compensate them for  
3 the work done on behalf of the Class.

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**III. CONCLUSION**

For the reasons set forth above, Plaintiffs' motion for final approval of the class action settlement is **GRANTED**, and judgment shall be entered according to the Final Order and Judgment filed concurrently herewith.

**IT IS SO ORDERED.**

DATED: November 18, 2014

  
BARRY TED MOSKOWITZ, Chief Judge  
United States District Court