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8 **UNITED STATES DISTRICT COURT**

9 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

10 GORDON NOBORU YAMAGATA and
STAMATIS F. PELARDIS, individually and
11 on behalf of all others similarly situated,

12 Plaintiffs,

13 v.

14 RECKITT BENCKISER LLC,

15 Defendant.

Case No. 3:17-cv-03529-VC

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT AND
MOTION FOR AWARD OF ATTORNEYS'
FEES, REIMBURSEMENT OF EXPENSES,
AND SERVICE AWARDS FOR CLASS
REPRESENTATIVES**

CLASS ACTION

Hrg Date: October 28, 2021
Time: 10:00 a.m.

District Judge Vince Chhabria
Courtroom 4, 17th Floor

Complaint Filed: June 19, 2017

JURY TRIAL DEMANDED

BLOOD HURST & O' REARDON, LLP

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1 Plaintiffs submit this reply memorandum in further support of their Motion for Final
 2 Approval of Class Action Settlement and Motion for Award of Attorneys' Fees, Reimbursement of
 3 Expenses, and Service Awards for Class Representatives.¹ Filed concurrently is the Declaration of
 4 Timothy G. Blood ("Blood Reply Decl.") in support of this reply.

5 I. INTRODUCTION

6 The proposed Settlement continues to receive strong support from the Class, further
 7 compelling final approval. The Class Notice Program is complete, claims continue to be submitted,
 8 and the opt-out and objection period has expired. The Settlement Administrator estimates that about
 9 \$27 million to \$30 million in valid claims will be filed by the close of the claims period. This means
 10 claimants will receive refunds of slightly more than the \$22 per bottle average retail price.

11 Meanwhile, out of the approximately 4.6 million Class Members who received direct notice,
 12 only six Class Members filed five objections or something that reasonably could be interpreted as
 13 an objection and only 96 people submitted opt-out requests.² *See* concurrently filed Third
 14 Supplemental Declaration of Cameron R. Azari re Settlement Administration ("Azari Third
 15 Supplemental Declaration"), ¶ 16. As addressed below, none of the objections raise any issue that
 16 should prevent final approval. Rather, the most prevalent objection is that the dietary supplement
 17 worked for them. While not a basis to deny final approval, the belief highlights the risks Plaintiffs
 18 face in trying this case to a jury.

19 As a strong indicator of the settlement's fairness, one Class Member, Shiyang Huang, a
 20 frequent objector to attorneys' fees requests in class actions, sent in a letter complementing the
 21 Settlement and supporting Class Counsel's requested fee. *See* Huang letter received October 10,
 22 2021, attached to Blood Reply Declaration as Exhibit A.

23 Plaintiffs request the Court reaffirm its finding on preliminary approval that the Settlement
 24 is "fair, reasonable, and adequate," particularly when considering "the current posture of this
 25 litigation and the risks and benefits to the Parties involved in both settlement of these claims and

26
 27 ¹ All capitalized terms have the same meaning as defined in the Stipulation of Settlement (ECF
 No. 221-2) ("Settlement Agreement" or "SA"), unless otherwise stated.

28 ² Randolf and Vivian Reddick each submitted the same objection. *See* ECF No. 231.

1 continuation of the litigation,” grant final approval of the proposed Settlement, and grant Plaintiffs’
 2 Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for Class
 3 Representatives. ECF No. 227 at 1.

4 **II. CLASS MEMBER RESPONSE AND THE ESTIMATED CASH PAYMENTS**

5 As of October 18, 2021, 332,608 claims have been submitted. *See* Azari Third Supplemental
 6 Declaration, ¶ 17. The Claim Deadline is November 8, 2021. After all claims are received, they will
 7 be processed and validated. If Plaintiffs’ motion for attorneys’ fees, reimbursement of expenses and
 8 for incentive awards is granted as requested, then based on the cost of notice and settlement
 9 administration, the Net Fund available for distribution to the Settlement Class is expected to be
 10 about \$34.5 million. Blood Reply Decl., ¶ 6. Based on the claims submitted and estimated to be
 11 submitted, the Settlement Administrator projects that each valid claim will yield full reimbursement
 12 of the \$22 averaged retail price for each purchase claimed and likely more. Azari Third
 13 Supplemental Declaration, ¶ 19. Under the terms of the proposed Settlement for distribution of the
 14 Net Fund, the amount of the expected valid claims and increases in those amounts will exhaust the
 15 Common Fund. *See* ECF. No. 221-2 at § IV.4.b.

16 **III. THE OBJECTIONS SHOULD BE OVERRULED**

17 Out of the approximately 4.6 million Class Members that received direct notice, only five
 18 objections were filed by six Class Members. This represents a very favorable reaction by the
 19 Settlement Class and supports final approval. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454,
 20 459 (9th Cir. 2000) (where just a “handful” objected, “[t]he reaction of the class members to the
 21 proposed settlement further supports the conclusion that ... the Settlement was fair, adequate and
 22 reasonable”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (376,301 class
 23 members supported final approval).

24 The few objections received do not provide a basis to deny final approval. *See In re*
 25 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 617 (9th
 26 Cir. 2018) (objections that do “not directly challenge the substantive fairness of the settlement”
 27 should be overruled); *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012) (objections that
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1 merely “disagree” with the settlement are without merit when the settlement as a whole is “fair,
2 adequate, and free from collusion.”); *see also In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573,
3 592 (N.D. Cal. 2015) (“[O]bjectors to a class action settlement bear the burden of proving any
4 assertions they raise challenging the reasonableness of a class action settlement.”).

5 The most common objection—asserted in four objections—is that Move Free Advanced
6 works for them, and therefore the lawsuit has no merit or the Settlement is unfair to the Defendant.
7 *See* ECF Nos. 228 (Jeffrey Murkin), 229 (Cynthia Peterson), 231 (Randolf and Vivian Reddick),
8 233 (Troy Barry). This type of objection does not address the substantive fairness of the Settlement
9 and is therefore not relevant to whether a settlement is fair, reasonable, and adequate. *Glass v. UBS*
10 *Fin. Servs.*, No. C-06-4068, 2007 U.S. Dist. LEXIS 8476, at *23-24 (N.D. Cal. Jan. 26, 2007); *see*
11 *also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 249 (E.D.N.Y. 2010). Similarly,
12 objections based on personal belief that the lawsuit is unfair to a defendant “are not germane to the
13 issue of whether the settlement is fair.” *Ko v. Natura Pet Prods.*, No. C 09-02619 SBA, 2012 U.S.
14 Dist. LEXIS 128615, at *18-19 (N.D. Cal. Sept. 10, 2012) (citing *Officers for Justice v. Civil Serv.*
15 *Com.*, 688 F.2d 615, 624 (9th Cir. 1982)). “[T]he purpose of Rule 23(e)’s final approval process is
16 the protection of absent class members, and not the defendant.” *In re TD Ameritrade Account Holder*
17 *Litig.*, No. C 07-2852, 2011 U.S. Dist. LEXIS 103222, at *32 (N.D. Cal. Sept. 12, 2011).

18 These objections do, however, underscore one of the risks Plaintiffs could face at trial. Many
19 people believe dietary supplements work, regardless of the scientific evidence. In part, this is the
20 result of the well documented placebo effect associated with the use of glucosamine supplements
21 and other products purchased to treat transitory pain. In fact, Defendant intended to argue at trial
22 that many customers were satisfied long-time users of Move Free Advanced. *See Yamagata v.*
23 *Reckitt Benckiser LLC*, No. 17-cv-03529, 2019 U.S. Dist. LEXIS 117599, at *2-3 (N.D. Cal. June
24 5, 2019).

25 Mr. Murkin also generally objects to the attorneys’ fee and service award requests. ECF No.
26 228. These requests are well in line with established authority. *See generally*, ECF No. 230 at 3-5,
27 20-21. Mr. Murkin notes the disparity between an individual Class Member’s recovery and the
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1 attorneys' fees and service awards sought. By design, class actions operate to aggregate many small
 2 claims so they may be economically litigated and worth the effort and investment of class counsel.
 3 *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). Another Class Member takes the opposite
 4 view of Mr. Murkin. Experienced class action objector Shiyang Huang wrote to Class Counsel in
 5 this case that "it is refreshing that Plaintiffs' Counsel is willing to start with a 'reasonable' fee award
 6 without the need to waste judicial resources to battle attorney's fee request. Such outcomes should
 7 be encouraged ..." See Blood Reply Decl., Ex. A.

8 To the extent Mr. Murkin's objection concerns the three bottle limitation without proof of
 9 purchase, such limitations are common because it provides an effective guard against
 10 unsubstantiated or fraudulent claims. See *Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-01027,
 11 2020 U.S. Dist. LEXIS 74801, at *25-26 (N.D. Cal. Feb. 5, 2020) (finding it equitable to the class
 12 to distribute individual awards based on whether the class member submits sufficient proof of
 13 purchase); *Carlotti v. ASUS Comput. Int'l*, No. 18-cv-03369, 2019 U.S. Dist. LEXIS 201564, at
 14 *38-39 (N.D. Cal. Nov. 19, 2019) (same); *Yaeger v. Subaru of Am. Inc.*, No. 1:14-cv-4490, 2016
 15 U.S. Dist. LEXIS 117193, at *41 (D.N.J. Aug. 31, 2016) (proof of purchase requirement was
 16 "reasonable to prevent fraudulent claims"); *In re Groupon, Inc.*, No. 11md2238, 2012 U.S. Dist.
 17 LEXIS 185750, at *23 (S.D. Cal. Sept. 28, 2012) (proof of purchase requirement "serves to ensure
 18 that money is fairly distributed for valid claims"). Further, the three-bottle limit makes sense here
 19 because 2.6 is the average number of purchases per person. ECF No. 221-1 ("Blood Preliminary
 20 Approval Decl."), ¶ 72.

21 Mr. Murkin also notes that the Settlement does not "mention anything about changing the
 22 label." A settlement without injunctive relief does not render it unfair. See, e.g., *Donovan v. Estate*
 23 *of Fitzsimmons*, 778 F.2d 298, 311 (7th Cir. 1985); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d
 24 998, 1016 (E.D. Cal. 2019); *In re Domestic Airline Travel Antitrust Litig.*, 378 F. Supp. 3d 10, 26
 25 (D.D.C. 2019); *Alvarez v. Sirius XM Radio Inc.*, No. CV 18-8605, 2021 U.S. Dist. LEXIS 67754,
 26 at *20-21 (C.D. Cal. Feb. 8, 2021); *Vasco v. Power Home Remodeling Group LLC*, No. 15-4623,
 27 2016 U.S. Dist. LEXIS 141044, at *29-30 (E.D. Pa. Oct. 12, 2016). Where injunctive relief benefits
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1 future purchasers but not class members, the injunctive relief does not provide consideration for a
 2 settlement's release and should not be counted as part of the value of the settlement. *See, e.g., Kim*
 3 *v. Allison*, 8 F.4th 1170, 1179, 1181 (9th Cir. 2021). Here, refunds compensate Class Members, who
 4 are past purchasers. Injunctive relief would benefit only future purchasers. Most Class Members
 5 stop purchasing Move Free Advance because it does not work.

6 Mr. Murkin also objects to the requested \$7,500 service awards to three of the nine Class
 7 Representatives. ECF No. 228 at 1. This amount falls squarely in line with amounts awarded in
 8 comparable cases. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 n.7 (2018) (class
 9 representative may obtain incentive award of \$25,000); *see also* ECF No. 230 at 21 (collecting
 10 cases).

11 Lastly, Harriett Kostelecky, a 90-year-old member of the Class, objected that requiring proof
 12 of purchase is unfair and an award for up to three bottles without proof "is a small payment for
 13 misconception of many years." *See* Blood Reply Decl., Ex. B. In effect, this is an argument the
 14 amount of settlement consideration should be more. However, an objection "that the settlement
 15 could have been better" does not address the question of "whether it is fair, adequate and free from
 16 collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Class Counsel contacted
 17 Ms. Kostelecky to ensure she submitted a claim for all of her purchases. Blood Reply Decl., ¶ 5. As
 18 a result, she has successfully submitted a claim for all seven purchases and has reported to Class
 19 Counsel that she is "happy." *Id.*

20 **IV. CONCLUSION**

21 For all the foregoing reasons, Plaintiffs respectfully request that the Court confirm
 22 certification of the Settlement Class, grant final approval of the Settlement, and approve Class
 23 Counsel's request for attorneys' fees and expenses and service awards for the Class Representatives.

24 Respectfully submitted,

25 Dated: October 21, 2021

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27 By: s/ Timothy G. Blood

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CERTIFICATE OF SERVICE

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I hereby certify that on October 21, 2021, I electronically filed the foregoing **Plaintiffs’ Reply in Support of Motion for Final Approval of Class Action Settlement and Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for Class Representatives** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

I further certify that I caused to be served the foregoing **Plaintiffs’ Reply in Support of Motion for Final Approval of Class Action Settlement and Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Service Awards for Class Representatives** via the United States Postal Service to the non-CM/ECF participants indicated on the attached Service List, and that there is regular communication by mail between the place of mailing and the places so addressed.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 21, 2021.

s/ Timothy G. Blood

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