BEFORE THE AMERICAN ARBITRATION ASSOCIATION

KAREN DAVIS-HUDSON and SARAH DIAZ, individually and on behalf of all others similarly situated,	)	
Claimants,	)	
vs.	)	CASE NO. 74-20-1400-0032
23ANDME, INC.,	)	
Respondent.	)	

CLAIMANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF AN AWARD OF ATTORNEYS' FEES, COSTS AND EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION..... 1

II. ARGUMENT..... 2

A. The Overwhelmingly Positive Reaction of the Class Weighs Heavily in Favor of Granting Final Approval..... 2

B. The "Objections" Should Be Overruled 3

1. Class Members' Statements of Satisfaction With the PGS Do Not Constitute Objections to the Fairness, Reasonableness or Adequacy of the Settlement 3

2. The Class Member Compensations Provided for by the Settlement is Well Within the Range of Reasonableness 4

3. The Requested Award of Attorneys' Fees is Fair and Reasonable..... 5

4. Objector Towsner's Unique Objections Are Meritless 7

III. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Boyd v. Bechtel Corp.,
485 F. Supp. 610, 624 (N.D. Cal. 1979) 6

Brazil v. Dole Packaged Foods, LLC,
660 Fed. Appx. 531 (9th Cir. 2016)..... 8

Browne v. American Honda Motor Co., Inc.,
No. CV 09-06750 MMM (DTBx), 2010 WL 9499072 (C.D. Cal. July 29, 2010) 12

Day v AT&T Corp.,
63 Cal. App. 4th 325 (1998) 8

Destefano v. Zynga, Inc., Case No.
12-cv-04007-JSC, 2016 WL 537946 (N.D. Cal. Feb. 11, 2016)..... 9

Glass v. UBS Financial Services, Inc.,
No. C-06-4068 MMC, 2007 WL 221862 (N.D. Cal. Jan. 26, 2007) 9, 12

Glendora Cmty. Redev. Agency v. Demeter,
155 Cal. App. 3d 465 (1984).....10

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998).....6, 8

In re Austrian & German Bank Holocaust Litig.,
80 F. Supp. 2d 164 (S.D.N.Y. 2000) 6

In re Celera Corp. Sec. Litig.,
Case No. 5:10-CV-02604-EJD, 2015 WL 1482303 (N.D. Cal. Mar. 31, 2015)..... 9

In re Omnivision Techs., Inc.,
559 F. Supp. 2d 1036 (N.D. Cal. 2008) 9

Lafitte v. Robert Half Int'l, Inc.,
1 Cal. 5th 480 (2016).....10

Morris v. Lifescan, Inc.,
54 F. App'x 663 (9th Cir. 2003).....11

Officers for Justice v. Civil Serv. Comm.,
688 F.2d 615 (9th Cir. 1982)..... 8

Ozga v. U.S. Remodelers, Inc.,
Case No. C-09-05112-JSW, 2010 WL 3186971 (N.D. Cal. Aug. 9, 2010) 6

Vizcaino v. MicroSoft Corp.,
290 F.3d 1043 (C.D. Cal. 2012) 10

Wershba v. Apple Computer, Inc.,
91 Cal. App. 4th 224 (2001).....10

Wixon v. Wyndham Resort Dev. Corp.,
Case No. 07-02361 JSW, 2011 WL 3443650 (N.D. Cal. Aug. 8, 2011) 7

Zepeda v. PayPal, Inc.,
Case No. 10-1668 SBA, 2017 WL1113293 (N.D. Cal. Mar. 24, 2014) 7

Claimants submit this Reply Memorandum in support of their Motion for Entry of Order Finally Approving Class Action Settlement (the " Motion for Final Approval") and their Motion for Approval of an Award of Attorneys and Expenses and Incentive Awards for Class Representatives (the "Motion for Attorneys' Fees").

I. INTRODUCTION

On August 16, 2017, the Arbitrator's Order Granting Motion for Preliminary Approval of Class Settlement and Directing Dissemination of Class Notice Program ("Preliminary Approval Order") granted preliminary approval of the parties' Settlement of claims first asserted over three and a half years ago, on January 13, 2014. Both the Settlement – which provides Class members with up to 80% of their estimated possible recovery – and the requested fee award – which is only approximately 10% of the benefit provided to the Class – are fair, reasonable and adequate, and should be finally approved. After completion of the notice program, where notice was sent out to over 335,000 individual consumers only 68 Class members submitted requests for exclusion, and approximately 40 submitted "objections" to the Arbitrator, about 30 of which were not really objections to the Settlement at all in terms of the value of the relief being provided to Class members.

With one exception, the objections all fall into one of three categories: (1) objections that there was nothing wrong with Respondent's Personal Genome Service (the "PGS"), despite Respondent's alleged unlawful conduct; (2) objections to the effect that a higher recovery or full refund was warranted; or (3) objections that the amount of attorneys' fees and expenses sought by Class Counsel is too high. Although these objections were already addressed in Claimants' Memoranda in support of the Motion for Final Approval and Motion for Attorneys' Fees, Claimants further respond to these objections in this Memorandum. One objector, Henry

Towsner, makes some unique objections that Claimants also address in this Memorandum. As discussed in further detail below, these objections should all be overruled.

II. ARGUMENT

A. The Overwhelmingly Positive Reaction of the Class Weighs Heavily in Favor of Granting Final Approval

Considering that out of the 335,109 Class Members who received notice, 26,070 Class Members have submitted cash compensation election forms but only 68 opted out of the Settlement and only 40 submitted anything that could possibly be construed as an objection, it is beyond question that Class Members' response to the Settlement has been overwhelmingly positive. *See* Declaration of Alex Thomas on Behalf of the Settlement Administrator Regarding Notice (the "Thomas Declaration" or "Thomas Decl."), at ¶¶ 2, 5-6; Supplemental Declaration of Alex Thomas on Behalf of Settlement Administrator Regarding Notice (the "Supplemental Thomas Declaration"), at ¶¶ 7, 9. These facts weigh heavily in favor of granting final approval. In this regard, if, after having a full opportunity to object to the settlement, there is an absence of objections by Class Members, that is an important factor in evaluating the fairness of the settlement. *See, e.g.*, *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1024 (9th Cir. 1998); *Ozga v. U.S. Remodelers, Inc.*, Case No. C-09-05112-JSW, 2010 WL 3186971, at *2 (N.D. Cal. Aug. 9, 2010) (in granting final approval of a settlement class, court considered that the "overall reaction to the settlement has been positive," there were "no objections to the Settlement" and "[n]o Class Member appeared at the final approval hearing to object"); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding "persuasive" the fact that 84% of the class has filed no opposition). *See also In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." (internal citations omitted). Here, Class Members

have spoken. Out of the 335,109 Class Members who were provided notice of the Settlement, less than one thirtieth of one percent opted out of the settlement or submitted anything that could possibly be interpreted as an objection. This strongly supports granting both Claimants' Motion for Final Approval and Claimants' Motion for Attorneys' Fees.

B. The "Objections" Should Be Overruled

1. Class Members' Statements of Satisfaction With the PGS Do Not Constitute Objections to the Fairness, Reasonableness or Adequacy of the Settlement.

Most of the "objections" submitted are not really objections at all. Instead, most of the criticisms of the Settlement were based on a Class Member's belief that Respondent provided a valuable service, did nothing wrong, or should not have been subjected to the claims asserted in this Arbitration. In these objections, the Class Members assert that they are generally satisfied with the PGS they purchased from Respondent, but do not challenge any of the Settlement terms as unfair, unreasonable or inadequate.[1]

General, ideological, or vague objections to a class settlement are invalid because they do not specifically assert why the settlement is unfair. *See, e.g.*, *Zepeda v. PayPal, Inc.*, Case No. 10-1668 SBA, 2017 WL1113293, at *18 (N.D. Cal. Mar. 24, 2014) (rejecting objections consisting "solely of conclusory boilerplate statements that are devoid of authority or explanation"); *Wixon v. Wyndham Resort Dev. Corp.*, Case No. 07-02361 JSW, 2011 WL 3443650, at *3 (N.D. Cal. Aug. 8, 2011) (rejecting general objections that "Settlement Agreement is not in the best interests of the class . . .").

The Arbitrator should reject this group of "objections" because they are conclusory, void of authority, and do not challenge the fairness, reasonableness or adequacy of the Settlement.

[1] Four Class Members (Reddy, Levine, Bracco, and Manning) object to Class Counsel receiving *any* attorneys' fees. This position, however, is based not on the reasonableness of the fee, but solely on those Class members' belief that the claims against Respondent should not have been asserted at all.

Instead, they object solely on ideological grounds relating to Class Members' general satisfaction with Respondent's product without taking into account the facts of the case, the tens of thousands of people who have indicated they want the relief provided by the Settlement, or the other factors that are to be weighed in assessing the reasonableness of any settlement.

2. The Class Member Compensation Provided for by the Settlement is Well Within the Range of Reasonableness.

A handful of Class Members submitted objections to the amount of their recovery, claiming that they should receive a higher percentage of the amount they paid for the PGS or a full refund. These objections also fail. In their previously-submitted moving papers, Claimants established that the amount of Class Members' recovery was well within the range of reasonableness based on the factors set forth in *Officers for Justice v. Civil Serv. Comm.*, 688 F.2d 615 (9th Cir. 1982).

In addition, by its very nature, "[s]ettlement is the offspring of compromise; [and] the question [the Court] address[es] is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). The range of possible recovery must take into account the difference between the amount a class member paid for the product or service and the value he or she received in return. *See Day v AT&T Corp.*, 63 Cal. App. 4th 325, 340 (1998). Under this principle, a class member is only entitled to a full refund if the product he or she purchased was totally worthless. *Brazil v. Dole Packaged Foods, LLC*, 660 Fed. Appx. 531, 534 (9th Cir. 2016) (holding class members were not entitled to full refund because purchased fruit products were not worthless) (citation omitted).

Under the terms of the Settlement, Class members are entitled to either 80% (if they do nothing and receive a discount Certificate) or 25% (if they elect the cash option) of their

estimated possible recovery based on the predominant purchase price of the PGS. Thus, by any measure, the Settlement provides for very significant payouts. *See, e.g., Destefano v. Zynga, Inc.*, Case No. 12-cv-04007-JSC, 2016 WL 537946, at *12 (N.D. Cal. Feb. 11, 2016) (approving settlement with payout of 9.5% of maximum recovery); *In re Celera Corp. Sec. Litig.*, Case No. 5:10-CV-02604-EJD, 2015 WL 1482303, at *6 (N.D. Cal. Mar. 31, 2015) (granting final approval of settlement with 17% payout of estimated recovery); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (granting final approval of settlement with 6% payout); *Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007 WL 221862 at *6 (N.D. Cal. Jan. 26, 2007)(finding settlement of wage and hour class action for 25% to 35% of actual damages to be reasonable). Accordingly, the Arbitrator should reject any objection to the sufficiency of the amount of Class Members' payouts, or to the lack of a full refund.

3. The Requested Award of Attorneys' Fees is Fair and Reasonable.

A few Class Members have asserted objections to the amount of attorneys' fees requested by Class Counsel. These objections are also without merit, and should be rejected.

In their papers previously submitted in support of their Motion for Attorneys' Fees, Class Counsel set forth in detail why their requested fee of $2.25 million (including expenses), the amount of which was not even discussed with Respondent until after all other material terms of the Settlement were already agreed upon, is eminently fair and reasonable. Class Counsel will not repeat those detailed arguments other than to briefly highlight the key reasons why the Arbitrator should approve the requested award.

First, the CLRA provides for a *mandatory* award of attorneys' fees to the prevailing party. *See* Cal. Civil Code § 1780(d) ("The court shall award attorney's fees to a prevailing

plaintiff in litigation filed pursuant to this section."). Accordingly, entitlement to fees is not the question. Rather, the only issue is whether the requested fee is fair and reasonable.

Second, the requested fee is fair and reasonable under the lodestar method. As of October 6, 2017, when the Motion for Attorneys' Fees was filed, Class Counsel had collectively worked 2,139.75 hours on this case for a total lodestar, at current billing rates, of $1,172,456.25. A fee award of $2,250,000, including litigation expenses, would represent a multiplier of approximately 1.8 over the base lodestar fee.[2] Such a multiplier falls below multipliers routinely approved by courts in California and the Ninth Circuit. *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255 (2001) ("Multipliers can range from 2 to 4 or even higher."); *Glendora Cmty. Redev. Agency v. Demeter*, 155 Cal. App. 3d 465, 479 (1984) (approving a multiplier of 12); *Vizcaino v. MicroSoft Corp.*, 290 F.3d 1043, 1051 n. 6 (C.D. Cal. 2012)(lodestar multipliers normally range from 0.6 to 19.6, with most (83%) falling between 1 and 4). Notably, the requested multiplier will go down as Class Counsel continue to work on settlement administration issues in the coming weeks and months.

Finally, Class Counsel's requested attorneys' fees are reasonable when cross-checked as a percentage of the "constructive common fund." As discussed more fully in Claimants' opening submission in support of their Motion for Attorneys' Fees, the total value of the constructive common fund of this Settlement is over $22,670,000. Accordingly, Class Counsel's requested payment of attorneys' fees (after reimbursement for the litigation costs and expenses) constitutes approximately 10% of that constructive common fund. This percentage is well within the normal range recognized in California. *See, e.g., Lafitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480 (2016)(a percentage-based fee is appropriate under California law particularly if lodestar is also

[2] Since October 6, 2017, Class Counsel have expended dozens of hours on work benefitting the Settlement Class. Accordingly, the actual multiplier is somewhat less than 1.8.

considered); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming attorney's fee award of 33% of the recovery). Indeed, even if one only took into account the cash component of the Settlement, Class Counsel's fee request still falls comfortably within the range routinely awarded by the California courts. In this regard, the total cash value of the Settlement, including the Cash Compensation made available to Class Members (519,670 units of the PGS multiplied by $12.50, or $6,495,875), the attorneys' fees and expenses ($2,250,000) and incentive awards ($20,000), is $8,765,875 – exclusive of notice and administration costs, which would typically also be part of the common fund. Class Counsel's fee request is 25.6% of the Settlement's cash value. In sum, it is clear under any analysis that Class Counsel's requested fee is fair and reasonable.

And as no one objected to the provision and amount of incentive awards to the Claimants, that amount should be approved with no further inquiry necessary.

4. Objector Towsner's Unique Objections Are Meritless

In addition to echoing some of the objections addressed above, Objector Towsner makes some unique, meritless objections of his own. *First*, Objector Towsner claims that it is inaccurate to say that the PGS retailed for $99 during the majority of the class period, claiming that he purchased the PGS for $299 and that the PGS only sold for $99 during the last year of the class period. Significantly, he does not say he should have received more as a result, or that the settlement payments should have been for a greater amount. Objector Towsner is also wrong in multiple respects. Based on information provided by 23andMe, he paid $99 for his PGS on April 18, 2011 -- nearly two and a half years before the end of the class period. Reply Declaration of Patrick J. Sheehan in Support of Claimants' Motion for Entry of Order Finally Approving Class Action Settlement and Motion for Award of Attorneys' Fees and Expenses and Incentive Awards

for Class Representatives (the "Sheehan Reply Declaration" or "Sheehan Reply Decl."), at ¶ 2. Objector Towsner's claims are contradicted by his own purchase history. Moreover, based on information provided by 23andMe, 519,670 units of the PGS were sold during the class period. *Id.*, at ¶ 3. Of those, 447,706, or over 86% of the units sold, were sold for $99 or less. *Id*. As such, contrary to Objector's Towsner's suggestion, the vast majority of units of the PGS sold during the class period were in fact sold for $99 or less.

To be sure, the fact that the purchase price for the PGS varied to an extent for the hundreds of thousands of Class Members is neither surprising nor relevant to whether the settlement is fair, reasonable or adequate. *See, e.g., Browne v. American Honda Motor Co., Inc.*, No. CV 09-06750 MMM (DTBx), 2010 WL 9499072 at *18 (C.D. Cal. July 29, 2010)("While the proposed settlement does not perfectly compensate every member of the class, it is unlikely that any ... settlement of the claims of a class of more than 740,000 members would achieve such a result. Despite the reasonable concerns raised by the objectors, the settlement represents a compromise that fairly compensates class members who chose to remain in the class"); *Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007 WL 221862 at *6 (N.D. Cal. Jan. 26, 2007)("Settlements by their very nature are not intended to provide full compensation for the claimed losses and consequently cannot be calculated with the same precision as actual damages").

Second, Objector Towsner complains that he did not receive adequate notice on the basis that he purportedly did not any notice of the proposed settlement until October 13, 2017 and that, upon investigation, the original e-mail notice was filtered out by his Gmail email account as SPAM. However, as evidenced by the fact that he submitted an objection, Objector Towsner did in fact receive adequate notice. Objector Towsner then erroneously speculates that because

many people use Gmail with similar SPAM filters, other Class Members may not have received adequate notice. However, he cites no evidence for his speculation, In fact, as set forth in the Supplemental Declaration of Alex Thomas on Behalf of Settlement Administrator Regarding Notice (the "Supplemental Thomas Declaration" or "Supp. Thomas Decl.") submitted herewith, the Settlement Administrator took several steps to ensure that the emailed notices were not blocked by service providers as SPAM. Supp. Thomas Decl., at ¶ 6. Prior to being sent, the email notices were scanned for content and earned the best possible SPAM score of zero. *Id*. Therefore, despite Objector Towsner's assertions, the evidence shows that the likelihood that the email notices were caught up in SPAM filters is extremely remote at best.

Finally, Objector Towsner claims that the proposed settled creates unnecessary obstacles to objecting by requiring objectors to mail a physical letter at personal expense. However, Objector Towsner is simply wrong that objections could not be emailed. Although the form of notice attached to the Settlement Agreement properly provided that objections were to be submitted by mail, the notice preliminarily approved and that was actually distributed to Class Members provided that objections could be submitted by mail or email. *See* Declaration of Alex Thomas on Behalf of the Settlement Administrator Regarding Notice (the "Thomas Declaration" or "Thomas Decl."), at ¶¶ 5-6, Exs. A-B. In any case, there is no evidence whatsoever to suggest that any Class Members were deterred from submitting objections by any confusion related to whether or not they had to be mailed.[3]

[3] Objector Towsner also asserts that the attorneys' fees sought by Class Counsel are excessive. However, as discussed above and in Claimants' previous submissions, the fees sought are well within the normal range of fees awarded in connection with class action settlements.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Claimants' previous submissions, Claimants respectfully request that the Arbitrator overrule the objections and grant Claimants' Motion for Final Approval and Motion for Attorneys' Fees in their entirety. Claimants further request that the Arbitrator adopt and enter the proposed form of Settlement Approval Order and Final Award, which was previously submitted to the Arbitrator on July 20, 2017 in connection with Claimants' request for preliminary approval of the Settlement and is also submitted herewith, at the final approval hearing.

DATED: November 3, 2017

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