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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 TONY DICKEY, et al.,
8 Plaintiffs,

9 v.

10 ADVANCED MICRO DEVICES, INC.,
11 Defendant.

Case No. 15-cv-04922-HSG

**ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Re: Dkt. No. 153

12
13 Pending before the Court is the unopposed motion for preliminary approval of class action
14 settlement filed by Plaintiffs Tony Dickey and Paul Parmer. Dkt. No. 153. The parties have
15 reached a settlement regarding Plaintiffs' claims and now seek the required court approval. For
16 the reasons set forth below, the Court **GRANTS** Plaintiffs' motion for preliminary approval of
17 class action settlement.

18 **I. BACKGROUND**

19 **A. Factual Background**

20 Plaintiffs bring this consumer class action against Defendant Advanced Micro Devices,
21 Inc. ("AMD"), alleging that Defendant engaged in deceptive practices when it purportedly
22 misrepresented the number of central processing units ("CPUs") in its "Bulldozer Processors."
23 *See generally* Dkt. No. 94 ("Second Amended Complaint" or "SAC"). According to Plaintiffs,
24 AMD consistently advertised the Bulldozer Processors as having eight cores to outmatch its
25 competitors. SAC ¶¶ 30–32. However, the Bulldozer Processors allegedly did not have eight
26 cores, because the "cores" were actually sub-processors that could not operate and simultaneously
27 multitask as "actual cores." *Id.* ¶¶ 24–29, 38. Plaintiffs contend that had they known the CPUs
28 did not have eight-core capabilities, they would not have purchased the processors. *Id.* ¶¶ 55, 63.

1 Based on those facts, the SAC asserts the following six causes of action: (1) California's
2 Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*; (2) California's Unfair
3 Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (3) California's False Advertising
4 Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.*; (4) fraud in the inducement; (5) breach of express
5 warranties; and (6) negligent misrepresentation. SAC ¶¶ 76–147.

6 **B. Procedural History**

7 Plaintiff Tony Dickey initially filed this action on October 26, 2015. Dkt. No. 1. The
8 original complaint asserted the same causes of action as the SAC, plus an additional unjust
9 enrichment claim. *See generally id.* Defendant moved to dismiss the complaint, and the
10 Honorable Ronald M. Whyte granted Defendant's motion on April 7, 2016. Dkt. No. 46.

11 On May 5, 2016, Plaintiff Dickey and newly-added Plaintiff Paul Parmer filed their first
12 amended complaint, removing the claim for unjust enrichment while realleging all the other causes
13 of action. *See generally* Dkt. No. 50. Defendant again moved to dismiss the first amended
14 complaint, and Judge Whyte granted Defendant's motion to dismiss with leave to amend. Dkt.
15 No. 71. The case was reassigned to this Court on November 3, 2016. Dkt. No. 72. Plaintiffs filed
16 the operative SAC on November 21, 2016, and Defendant moved to dismiss. Dkt. No. 78. The
17 Court granted Defendant's motion to dismiss Plaintiffs' claims for injunctive relief, but otherwise
18 denied the motion. Dkt. No. 96.

19 On March 27, 2018, Plaintiffs filed a motion for class certification. Dkt. No. 118. The
20 Court granted the motion, certifying the following class:

21 All individuals who purchased one or more of the following AMD
22 computer chips either (1) while residing in California or (2) after
23 visiting the AMD.com website: FX-8120, FX-8150, FX-8320, FX-
8350, FX-8370, FX-9370, and FX-9590.

24 Dkt. No. 135 at 13. The Court appointed the Named Plaintiffs Dickey and Parmer to represent the
25 class and appointed their attorneys at Edelson PC as Class Counsel. *Id.* On January 31, 2019,
26 Defendant filed a petition in the Court of Appeals for permission to appeal the Court's class
27 certification order, and the petition was denied. Dkt. Nos. 138, 148.

1 The parties participated in a mediation session before the Honorable James F. Holderman
 2 (Ret.) of JAMS in May 2019. Dkt. No. 146. They were able to reach an agreement in principle to
 3 settle the case on a class-wide basis, and agreed to stay any pretrial and trial deadlines. *Id.*
 4 Plaintiff moved for preliminary approval on August 23, 2019. Dkt. No. 153.

5 **C. Settlement Agreement**

6 Following extensive formal discovery and with the assistance of a mediator, the parties
 7 entered into a settlement agreement on August 9, 2019. Dkt. No. 152-1 (“SA”). The key terms
 8 are as follows:

9 Class Definition: The Settlement Class is defined as:

10 [A]ll Persons who purchased one or more of the following AMD
 11 computer chips either (1) while residing in California or (2) after
 12 visiting the AMD.com website: FX-8120, FX-8150, FX-8320, FX-
 8350, FX-8370, FX-9370, and FX-9590.

13 SA ¶ 1.28. Excluded from the Class are any Judges or Magistrate Judges presiding over this
 14 action and their family members; Defendant, Defendant’s subsidiaries, parent companies,
 15 successors, predecessors, and any entity in which the Defendant or its parent has a controlling
 16 interest and their current or former officers, directors, and employees; persons who properly
 17 execute and timely file a request for exclusion; and the legal representatives, successors, or assigns
 18 of any such excluded persons. *Id.*

19 Settlement Benefits: Defendant will make a \$12,100,000 non-reversionary payment. *Id.*
 20 ¶ 1.30. The settlement payment includes settlement payments to Class Members, settlement
 21 administrative expenses estimated between \$350,000–\$700,000, incentive awards, and any
 22 attorneys’ fees and costs awards. *Id.* ¶¶ 1.26, 1.30, 8.1, 8.3. Individual settlement amounts are
 23 estimated to average approximately \$37.50 per purchased processor. Dkt. No. 153-1 ¶ 10.

24 Release: All settlement class members will release:

25 any and all actual, potential, filed, known or unknown, fixed or
 26 contingent, claimed or unclaimed, suspected or unsuspected, claims,
 27 demands, liabilities, rights, causes of action, contracts or agreements,
 28 extracontractual claims, damages, punitive, exemplary or multiplied
 damages, expenses, costs, attorneys’ fees and or obligations
 (including “Unknown Claims,” as defined below), whether in law or
 in equity, accrued or unaccrued, direct, individual or representative,

1 of every nature and description whatsoever, whether based on
 2 California's Unfair Competition Law, California's False Advertising
 3 Law, California's Consumer Legal Remedies Act, or on claims of
 4 fraudulent inducement, breach of express warranty, or negligent
 5 misrepresentation, or other federal, state, local, statutory or common
 6 law or any other law, rule or regulation, against the Released Parties,
 7 or any of them, arising out of any marketing materials, advertising,
 8 descriptions, facts, transactions, events, matters, occurrences, acts,
 9 disclosures, statements, representations, omissions or failures to act
 10 regarding the number of cores in AMD's FX-8120, FX-8150, FX-
 11 8320, FX-8350, FX-8370, FX-9370, and FX-9590 processors,
 12 including all claims that were brought or could have been brought in
 13 the Action relating to representations about those CPUs.

14 SA ¶ 1.23. "Unknown Claims" mean claims:

15 that could have been raised in the Action and that any or all of the
 16 Releasing Parties do not know or suspect to exist, which, if known by
 17 him or her, might affect his or her agreement to release the Released
 18 Parties or the Released Claims or might affect his or her decision to
 19 agree, object or not to object to the Settlement.

20 *Id.* ¶ 1.32.

21 Class Notice: A third-party settlement administrator will send class notices via U.S. mail
 22 and/or email based on information provided by certain third-party resellers of the AMD processors
 23 at issue. *Id.* ¶ 4.1. The settlement administrator will also implement a digital media campaign
 24 targeting approximately 6,713,000 potential purchasers. Dkt. No. 153-3 ¶¶ 25–29. The notice
 25 will include: the nature of the action, a summary of the settlement terms, and instructions on how
 26 to object to and opt out of the settlement, including relevant deadlines. SA ¶¶ 1.16, 4.2; Dkt. No.
 27 152-1, Exs. C, D.

28 Opt-Out Procedure: The deadline for a class member to submit a request for exclusion is
 forty-five (45) days after the Notice Date and no sooner than fourteen (14) days after papers
 supporting a fee award are filed with the Court and posted to the settlement website. SA ¶ 1.18.

Incentive Award: The Named Plaintiffs will apply for incentive awards of no more than
 \$7,500. *Id.* ¶ 8.3.

Attorneys' Fees and Costs: Class Counsel will file an application for attorneys' fees not to
 exceed one third of the settlement fund (\$3,630,000), as well as costs. *Id.* ¶ 8.1.

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1 **II. CLASS CERTIFICATION**

2 Because no facts that would affect the Court’s reasoning have changed since the Court
3 approved the class on January 17, 2019, this order incorporates by reference its prior analysis
4 under Rules 23(a) and (b) as set forth in the order certifying the class.¹ *See* Dkt. No 135. In
5 addition, the Court incorporates its previous analysis appointing Plaintiffs as class representatives,
6 and Edelson PC as Class Counsel. *Id.* at 13.

7 **III. PRELIMINARY SETTLEMENT APPROVAL**

8 **A. Legal Standard**

9 Federal Rule of Civil Procedure 23(e) provides that “[t]he claims, issues, or defenses of a
10 certified class—or a class proposed to be certified for purposes of settlement— may be settled . . .
11 only with the court’s approval.” Fed. R. Civ. P. 23(e). “The purpose of Rule 23(e) is to protect
12 the unnamed members of the class from unjust or unfair settlements affecting their rights.” *In re*
13 *Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, before a district court
14 approves a class action settlement, it must conclude that the settlement is “fundamentally fair,
15 adequate and reasonable.” *In re Heritage Bond Litig.*, 546 F.3d 667, 674–75 (9th Cir. 2008).

16 Where the parties reach a class action settlement prior to class certification, district courts
17 apply “‘a higher standard of fairness’ and ‘a more probing inquiry than may normally be required
18 under Rule 23(e).’” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (citation omitted).
19 However, because the Court certified the class here prior to settlement, the Court need not apply
20 this heightened standard.

21 Courts may preliminarily approve a settlement and direct notice to the class if the proposed
22 settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) does
23 not grant improper preferential treatment to class representatives or other segments of the class;
24 (3) falls within the range of possible approval; and (4) has no obvious deficiencies. *In re Lenovo*

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¹ The Court notes that the only difference between the certified class and settlement class is that
the certified class included “all individuals,” whereas the settlement class includes “all persons.”
Compare Dkt. No. 135 at 14 *with* SA ¶ 1.28. This change is to permit businesses to participate in
the settlement. Dkt. No. 153 at 8. The Court finds that this difference is not material such that it
would change its initial class certification analysis.

1 *Adware Litig.*, No. 15-MD-02624-HSG, 2018 WL 6099948, at *7 (N.D. Cal. Nov. 21, 2018)
2 (citation omitted). Courts lack the authority, however, to “delete, modify or substitute certain
3 provisions. The settlement must stand or fall in its entirety.” *Hanlon v. Chrysler Corp.*, 150 F.3d
4 1011, 1026 (9th Cir. 1998).

5 **B. Analysis**

6 **i. Settlement Process**

7 The first factor the Court considers is the means by which the parties settled the action.
8 “An initial presumption of fairness is usually involved if the settlement is recommended by class
9 counsel after arm’s-length bargaining.” *Lenovo*, 2018 WL 6099948, at *7 (citation and quotations
10 omitted).

11 Here, Class Counsel believes, after significant discovery, class certification, and mediation,
12 that the settlement is fair, adequate, and reasonable. *See* Dkt. No. 153 at 10; Dkt. No. 153-1 ¶¶ 3–
13 10. Based on the record, the Court agrees that the nature of the settlement process conducted by
14 the parties weighs in favor of preliminary approval.

15 **ii. Preferential Treatment**

16 The Court next considers whether the settlement agreement provides preferential treatment
17 to any class member. The Ninth Circuit has instructed that district courts must be “particularly
18 vigilant” for signs that counsel have allowed the “self-interests” of “certain class members to
19 infect negotiations.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir.
20 2011). For that reason, courts in this district have consistently stated that preliminary approval of
21 a class action settlement is inappropriate where the proposed agreement “improperly grant[s]
22 preferential treatment to class representatives.” *Lenovo*, 2018 WL 6099948, at *8 (citation and
23 quotations omitted).

24 Although the Settlement Agreement authorizes Plaintiffs Dickey and Palmer to seek
25 incentive awards of no more than \$7,500 for their roles as Named Plaintiffs in this lawsuit, *see* SA
26 ¶ 8.3, the Court will ultimately determine whether they are entitled to such an award and the
27 reasonableness of the amount requested. Incentive awards “are intended to compensate class
28 representatives for work done on behalf of the class, to make up for financial or reputational risk

1 undertaken in bringing the action.” *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th
 2 Cir. 2009). Plaintiffs must provide sufficient evidence to allow the Court to evaluate Plaintiffs’
 3 award “individually, using ‘relevant factors includ[ing] the actions the plaintiff has taken to
 4 protect the interests of the class, the degree to which the class has benefitted from those actions,
 5 . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation”
 6 *Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (citation omitted). The Court will
 7 consider the evidence presented at the final fairness hearing and evaluate the reasonableness of
 8 any incentive award request. Nevertheless, because incentive awards are not per se unreasonable,
 9 the Court finds that this factor weighs in favor of preliminary approval. *See Rodriguez*, 563 F.3d
 10 at 958 (finding that “[i]ncentive awards are fairly typical in class action cases” and “are
 11 discretionary” (emphasis omitted)).

12 **iii. Settlement within Range of Possible Approval**

13 The third factor that the Court considers is whether the settlement is within the range of
 14 possible approval. To evaluate whether the settlement amount is adequate, “courts primarily
 15 consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *Lenovo*,
 16 2018 WL 6099948, at *8. This requires the Court to evaluate the strength of Plaintiff’s case.

17 Here, assuming a 20% claims rate, Plaintiffs estimate that Class Members will recover
 18 approximately \$37.50 per purchased processor, and the total settlement amount constitutes
 19 approximately 20% of Plaintiffs’ estimated maximum possible recovery at trial. Dkt. No. 153-1
 20 ¶¶ 8–10; Dkt. No. 153 at 12. Plaintiffs acknowledge that there is substantial risk they would face
 21 in continuing to litigate this case, such as proceeding past a motion for summary judgment,
 22 maintaining class treatment, and prevailing at trial. Dkt. No. 153 at 11. The Court finds that the
 23 settlement amount, given these risks, weighs in favor of granting preliminary approval.

24 **iv. Obvious Deficiencies**

25 The fourth and final factor that the Court considers is whether there are obvious
 26 deficiencies in the settlement agreement. The Court finds no obvious deficiencies, and therefore
 27 finds that this factor weighs in favor of preliminary approval.

28 * * *

1 Having weighed the relevant factors, the Court preliminarily finds that the settlement
2 agreement is fair, reasonable, and adequate, and **GRANTS** preliminary approval.

3 **IV. MOTION FOR FINAL SETTLEMENT APPROVAL AND ATTORNEYS' FEES**

4 The Court **DIRECTS** the parties to include both a joint proposed order and a joint
5 proposed judgment when submitting their motion for final approval.

6 **V. PROPOSED CLASS NOTICE PLAN**

7 For Rule 23(b)(3) class actions, “the court must direct notice to the class members the best
8 notice that is practicable under the circumstances, including individual notice to all members who
9 can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

10 With respect to the content of the notice itself, the notice must clearly and concisely state
11 in plain, easily understood language:

- 12
- 13 (i) the nature of the action;
 - 14 (ii) the definition of the class certified;
 - 15 (iii) the class claims, issues, or defenses;
 - 16 (iv) that a class member may enter an appearance through an attorney if
17 the member so desires;
 - 18 (v) that the court will exclude from the class any member who requests
19 exclusion;
 - 20 (vi) the time and manner for requesting exclusion; and
 - 21 (vii) the binding effect of a class judgment on members[.]

22 Fed. R. Civ. P. 23(c)(2)(B).

23 The Court finds that the proposed notices, Dkt. No. 152-1, Exs. C and D, are the best
24 practicable forms of notice under the circumstances.

25 **VI. CONCLUSION**

26 For the foregoing reasons, the Court **GRANTS** Plaintiffs’ motion for preliminary approval
27 of class action settlement. The parties are **DIRECTED** to meet and confer and stipulate to a
28 schedule of dates for each event listed below, which shall be submitted to the Court within seven
days of the date of this Order:

United States District Court
Northern District of California


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Event	Date
Deadline for Settlement Administrator to mail notice to all putative class members	
Filing Deadline for attorneys' fees and costs motion	
Filing deadline for incentive payment motion	
Deadline for class members to opt-out or object to settlement and/or application for attorneys' fees and costs and incentive payment	
Filing deadline for final approval motion	
Final fairness hearing and hearing on motions	

The parties are further **DIRECTED** to implement the proposed class notice plan.

IT IS SO ORDERED.

Dated: 10/4/2019


 HAYWOOD S. GILLIAM, JR.
 United States District Judge