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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CURT SCHLESINGER and PETER LO RE, on behalf of themselves and the Class,

Plaintiffs,

vs.

TICKETMASTER, a Delaware Corporation,

Defendant.

CASE NO. BC 304565

Assigned for all purposes to Hon. Kenneth R. Freeman – Dept. 310

TICKETMASTER'S REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL

DATE: January 13, 2015
TIME: 10:00 a.m.
DEPT: 310

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Trial Date: Vacated

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I. INTRODUCTION

Two objectors—Eric Fuller and John Navarrete—have filed briefs opposing final settlement approval. These objectors largely rehash the same baseless arguments they presented in their formal objections to the Settlement, to which Plaintiffs and Ticketmaster have thoroughly responded in prior briefing. And as discussed below, the handful of new additional arguments that Messrs. Fuller and Navarrete raise here are similarly deficient. Thus, because the Settlement is fair, reasonable, and adequate, and provides significant value to the 57-million member Class, the Court should grant final approval and bring this hard-fought litigation to a close.

II. ARGUMENT

A. The Objectors' Arguments Concerning the Free-Ticket Component Are Misplaced

The majority of Mr. Fuller's criticisms focus on the free-ticket component of the settlement, which he estimates to be "worth nothing." (Fuller Opp. p. 5.) Mr. Fuller's colorful analogies and cinematic references aside, he is badly mistaken about the value of these free tickets, as explained below. But the more fundamental flaw in his argument is that these tickets are merely a *backstop* to address the Court's concern about the possibility of low redemption of the Discount Codes—which are the primary consideration offered to Class Members. Plaintiffs have submitted expert testimony that puts the expected redemption value for the Discount Codes at $71 million over four years, even under the "Minimum Expected Redemption Rate" scenario. (See Fair Decl. ¶ 12, Ex. B.) Thus, all of Mr. Fuller's purported concerns about the free tickets should be viewed through that lens.

1. In any event, Mr. Fuller's position on the free-ticket component is unsupported and internally inconsistent. On the one hand, he posits that the free tickets will be subject to such "extremely limited availability" that they are essentially worthless. (Fuller Opp. pp. 3–5 ["A free ticket to a show no one wants to see is not worth the face value plus service charges for which Ticketmaster seeks credit in this settlement. *It's worth nothing.*"], italics added.) On the other hand, Mr. Fuller complains that these tickets will be so highly sought after that there will be the equivalent of a run on the bank—such that all but a few Class Members will be unable to claim tickets. (See *id.* at 5–7 ["[O]f the 57 million class members who will receive discount codes for free tickets, few if any will ever get a ticket"].) Mr. Fuller cannot have it both ways. The reality is that these free tickets

are highly likely to be claimed, and in the event of a shortfall in Discount Code redemption, they provide assurance that this Settlement will still provide meaningful value to the Class.

2. Mr. Fuller is flatly wrong in arguing that under the Settlement, Ticketmaster "will, at its sole discretion and subject to no oversight, give away whatever [tickets] it feels appropriate." (Fuller Opp. p. 4.) Far from giving Ticketmaster unfettered discretion, the Settlement Agreement provides detailed guidelines regarding how many free tickets Ticketmaster must make available each year to ensure a minimum settlement value of $42 million. Specifically, the Agreement requires that Ticketmaster make available at least $5 million in free tickets during the first year after Final Approval, and following Year 1, Ticketmaster must make available up to $10.5 million in free tickets each year to make up for any shortfall below $10.5 million per year in cumulative value. (Settlement Agreement, § 2.2(c).)[1]

3. The record also squarely refutes Mr. Fuller's assertion that Ticketmaster will make available only those tickets it "do[es] not expect to sell." (Fuller Opp. p. 4.) On the contrary, under the Settlement, the free tickets will be made available *at the same time they go on sale to the general public* (Settlement Agreement § 2.1(d)), before Ticketmaster knows whether an event will sell out. Moreover, Live Nation does not book artists at venues where it does not expect to sell tickets. As the President of the North America Concerts Division at Live Nation Entertainment, Inc. explained, Live Nation carefully attempts to book artists in venues that will match the anticipated demand for that artist. (Campana Decl. in Support of Ticketmaster's Prelim. Approval Br. ¶ 3.) Put differently: "We are not interested in booking artists into venues that are too big to support the anticipated gate, or too small to accommodate anticipated demand. [And] artists do not want to perform to half-empty venues. . ." (*Ibid.*; see also Marc Geiger Decl. ¶ 2 [according to the head of the Music Division at William Morris Endeavor: "In representing successful artists and bands who seek to perform at live

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[1] For example, if the total value in redeemed Discount Codes and free tickets used after Year 1 were only $7 million, then Ticketmaster would be required to make available at least $3.5 million in free tickets during Year 2. And, assuming for the sake of argument that not a single Discount Code were redeemed in Year 2, such that the total value redeemed by Class Members remained at $10.5 million after the end of Year 2, then Ticketmaster would be required to make available $10.5 million in free tickets during Year 3. And so on.

concert venues, it is important to find venues that are the right size for the artist. Generally, we try to book our clients into venues that they can fill or nearly fill. [It] does not benefit anyone to book artists into half empty venues . . . ."].)

Mr. Campana even gave specific examples of the types of free tickets that will likely be made available at venues across the country, including for popular artists (whose shows routinely sell out) such as Jay Z, Beyoncé, Lady Gaga, Sting, and Miranda Lambert. (See Campana Decl., Ex. A.) There is no support whatsoever for Mr. Fuller's bald assertions that the shows for which free tickets will be made available will be undesirable.

4. Mr. Fuller's criticisms about the "lottery" nature of the free tickets (Fuller Opp. pp. 5–7) fare no better. The geographic diversity of Live Nation's venues will ensure that not all 57 million class members will be vying for the same tickets for each event. Live Nation owns 44 amphitheaters and five marquee theaters and clubs in a variety of bigger and smaller markets throughout the country, and it will make free tickets available in the majority of these venues. (Campana Decl. ¶¶ 3, 5.) And Mr. Fuller overlooks that over the course of the Settlement, Class Members will exhaust their free ticket codes by redeeming them, making it that much easier for the remaining Class Members to utilize their codes.

5. Nor is there any evidence that automated "bots" will be able to infiltrate Ticketmaster's free ticket microsite, as Mr. Fuller claims. (Fuller Opp. pp. 5–7.) Tickets are not even sold through the microsite. (See David Han Decl. ¶ 3.) Instead, the site will be used to inform class members when new tickets become available for a show, and then class members can link to Ticketmaster's purchase site to acquire their tickets for that show. (*Ibid.*) Only class members with codes in their "my account" web page will be able to claim the free tickets on the main site. (*Ibid.*) And purchases can be fulfilled only using class members' proprietary login information. (*Id.* ¶ 4.) Thus, there is no way for third parties to "grab" those codes or use them to jump ahead of the line, employing bots or otherwise.

Mr. Fuller's hypothetical scenario also depends on a few Class Members violating Ticketmaster's "terms of use," which specifically prohibit the use of automated bots. (See <http://www.ticketmaster.com/h/terms.html> [prohibiting, among other things, the use of "any

automated software or computer system to search for, reserve, buy or otherwise obtain tickets"].) Further, even assuming for the sake of argument that a relatively small number of brokers were able to acquire the majority of the free tickets by collecting them from shills whom they may have used to purchase tickets on their behalf, these brokers and their shills are still Class Members. Thus, even in this scenario, when combined with the Discount Codes automatically available to every Class Member, the Class as a whole would be getting significant value.[2]

6. Both Mr. Fuller and Mr. Navarrete appear to misunderstand Ticketmaster's obligation in the event of a redemption shortfall. Namely, the Agreement provides for a minimum—not a maximum—of 100 tickets at 60% of amphitheater events in the event of a shortfall. Ticketmaster will make available *as many free tickets as necessary* to make up for any shortfall below $10.5 million per year in cumulative value. (Settlement Agreement, ¶¶ 2.1(b), 2.2(c).)[3]

B. Mr. Fuller and Mr. Navarrete Misapprehend the Value of the Settlement

1. Mr. Fuller and Mr. Navarrete continue to refer to this Settlement pejoratively as a "coupon only settlement," ignoring that it incorporates several valuable non-coupon features. (See, e.g., Ticketmaster's Final Approval Br. at pp. 4–9; Ticketmaster's Resp. to Objectors at pp. 3, 6.) These features include: (1) potentially tens of millions of dollars in free, fully transferrable tickets that do not require Class Members to make any additional purchases from Ticketmaster; (2) a provision requiring Ticketmaster to maintain augmented disclosures on its website and FAQs for a period of seven years (subject to ongoing Court supervision and enforcement); and (3) a *cy pres*

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[2] Mr. Fuller's arguments also highlight the fundamental inconsistencies in his positions. Namely, if Mr. Fuller were correct that ticket brokers will utilize hundreds of different email addresses to claim free tickets (Fuller Opp. at pp. 4–7), then this would alleviate his concern that the Settlement undercompensates ticket brokers (*id.* at p. 12), since these brokers could claim hundreds or even thousands of free tickets, which are fully transferrable (and these brokers would also be entitled to redeem potentially thousands of Discount Codes).

[3] Mr. Navarrete mischaracterizes the settlement in arguing that every individual Class Member must actually receive a free ticket under this shortfall provision (Navarrete Opp. at p. 12 [suggesting that it would "take over 180 years for the Shortfall Ticket Codes to meet [the] demand [of 57 million class members]"). Only the number of tickets required to address the Shortfall need be contributed after Year 1, where $5 million worth of tickets will be contributed. And there is no requirement in law or logic to ensure that each individual class member takes full advantage of all the settlement benefits.

provision that provides for a minimum of $3 million to be distributed in a manner that furthers the underlying goals of Plaintiffs' causes of action. (*Ibid.*)

2. Moreover, as Ticketmaster has explained repeatedly, there is nothing improper or inherently suspect about a coupon settlement—especially in a case such as this with relatively small dollar amounts at issue, where the value of the coupons likely exceed the amount of restitution that would have been available had the Class prevailed at trial. (See, e.g., *Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 590; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 247; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1804–1805.)

3. Mr. Fuller also contends that both Plaintiffs and Ticketmaster "overstate" the settlement value. (Fuller Opp. at pp. 7–10.) But contrary to Mr. Fuller's argument, there is no "wide discrepancy" between Plaintiffs' and Ticketmaster's respective valuations of the Settlement. (*Id.* at p. 7.) Plaintiffs' expert projects that Class Members will redeem at least $76 million in Discount Codes and free tickets (see Fair Decl. ¶ 12, Ex. B), but both parties agree that the Settlement provides a *minimum value* of $42 million to Class Members (plus at least $3 million to the *cy pres* recipient).[4]

With respect to Live Nation's SEC filing, which stated that the company has reserved $35.4 million for the anticipated loss, Ticketmaster already explained that this reserve amount does not include the value of the free tickets that Ticketmaster will be giving away to make up for any shortfall in Discount Code redemptions. (See Ticketmaster's Resp. to Objectors at p 12.) The value of such tickets is not required to be accrued in advance; for accounting purposes, the tickets are treated as lost revenue *when the show occurs*. (*Ibid.*) More important, the estimate recited in Live Nation's SEC filings reflects the Settlement's cost to Live Nation, not the value of the Settlement *to the Class*—which is the only valuation perspective that matters here. (See, e.g., 4 Newberg on Class Actions (5th ed. 2014) § 13:49 ["[T]he value of a settlement *to the settling plaintiffs* is the most

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[4] Ticketmaster has thoroughly responded, in multiple rounds of briefing, to Mr. Fuller's and Mr. Navarrete's suggestion that the *cy pres* provision here is somehow inadequate. (See Ticketmaster Prelim. Approval Br. at pp. 14–19; Pls.' Prelim. Approval Br. at pp. 21–23; Ticketmaster Br. in Support of Final Approval at pp. 5–6; Ticketmaster Resp. to Objectors at pp. 6–8.)

important factor in the court's decision to approve or disapprove a settlement"], italics added).

4. Mr. Navarrete attacks the analysis of Rebecca Kirk Fair—Plaintiffs' expert who analyzed the likely redemption rates for this Settlement—as "self-contradictory at several points." (Navarrete Opp. at p. 9.) He first complains that Ms. Fair "uses [a] non-class action [coupon] redemption rate [of 4.8%] to calculate her valuation of the primary benefit [of the Discount Codes] without explanation or discounting for the fact that this is a class action and . . . coupons in class actions are less than half as likely to be redeemed as other coupons." (*Ibid.*) But Ms. Fair cogently laid out her reasoning for adopting 4.8% as a conservative redemption estimate here. Namely:

- Before the year 2000, average redemption rates on food and beverage coupons consistently fell within 2-6%, and before the year 2002, redemption rates in other class action matters typically fell somewhere below 2%. (Fair Decl. ¶ 8.)
- This redemption rate range of < 2%-6% establishes a *lower bound* on the probable redemption rates that can be expected for this Settlement. This is because one can expect that the identification of class members, the distribution of coupons, and the facilitation of the redemption process were significantly less effective a decade ago than they will be today—particularly in light of the highly automated electronic processes that are specified in this Settlement. (*Id.* ¶¶ 8–9.)
- Recent research conducted between 2012 and 2014 indicates that redemption rates rise considerably (4.8–11.5%) for *digitally distributed* non-food-item coupons, such as the Discount Codes that will be issued here. (*Id.* ¶ 10.)
- Thus, in Ms. Fair's opinion, a 4.8% estimated redemption rate—which falls squarely within the lower bound established by the outdated class action studies and matches the lowest redemption rate indicated in modern studies featuring technologically comparable coupons—represents a conservative estimate. (*Id.* ¶ 12, fn. 17.)

Mr. Navarrete also faults Ms. Fair for assuming in a valuation scenario "that the . . . free Ticket Codes will have a 100 percent redemption rate." (Navarrete Opp. at p. 9.) But Mr. Navarrete overlooks that Ms. Fair's 100% redemption scenario for the free tickets was an "extreme" scenario, which also assumes "*zero redemption* of discount codes" during Year 1 of the Settlement. (Fair Decl.

¶ 14, italics added; see also *id.* fn. 16 ["It is reasonable to assume [a] 100 percent redemption rate of free tickets in an analysis of the extreme case in which no discount codes are redeemed in a given year."]; Ex. C.) Ms. Fair's analysis includes a variant on that "extreme" scenario in which, in Years 2 through 7, only 65% of the free tickets are redeemed, which still leads to at least $42 million in direct value to the Class. (*Id.*, Ex. C – Sensitivity A.) And regardless, even if Ms. Fair were wrong about the anticipated redemption rates for the free tickets, that would affect the bottom line in her most realistic scenario by—at most—$5 million (the total amount of codes and tickets redeemed would be $71 million instead of $76 million). (See Fair Decl. ¶ 12.)

Mr. Navarrete concludes his criticism of Ms. Fair by arguing that she "does not discount the coupon value for any other economic factor pertinent to an in-kind settlement." (Navarrete Opp. at p. 10.) Mr. Navarrete suggests that "a fair estimate" is that the Discount Codes would have "a cash value 20 percent lower than their face value." (*Ibid.*) But Mr. Navarrete cites no cases in which California courts undertook such discounting in the context of valuing class action settlements. This is not surprising. The settlement value here is based on the number of Discount Codes *actually redeemed*—not the number of Discount Codes issued. If the *actual* Discount Code redemption rates drop too low across a Class as a whole, additional free tickets will be made available to the Class. (Settlement Agreement ¶¶ 2.1, 2.2.)[5] Thus, it would make no sense to apply a discount to the codes at the outset, based on concerns for low redemption, when the Settlement contains backstops to ensure value in the event of low redemption.

C. Mr. Navarrete's "Procedural Objections" Are Misguided and Do Not Warrant a Continuance or Additional Briefing

Mr. Navarrete's laundry list of purported "procedural objections" (Navarrete Opp. at pp. 2–5), some of which are recycled from his formal Objection, are factually inaccurate and legally baseless and/or irrelevant. There is no reason to authorize additional briefing or to continue the final fairness

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[5] Mr. Navarrete's analysis of "breakage" and "upspending," which are unique to the gift card context, are irrelevant to the evaluation of this Settlement and are unsupported by any studies and/or case law dealing with class actions.

hearing.

1. Mr. Navarrete claims that key portions of the exhibits to Ms. Fair's expert report were not uploaded onto settlement website. (Navarrete Opp. at p. 2 ["the file is cut off midway through Exhibit B to the declaration"].) He is wrong. The entire Fair Declaration and all supporting exhibits were and are available at the website, *www.ticketfeelitigation.com*. All of the relevant, complete documents are available under the Court Documents Tab at the top of the home webpage. Mr. Navarrete appears not to have looked closely at the website version of this document—which, as Mr. Navarrete acknowledges, is "25 pages long." (*Ibid.*) A review of Ms. Fair's Declaration on the website reveals that those 25 pages include the declaration itself, along with Exhibits A through D-2 (the twenty-fifth page is Exhibit D-2).

2. Mr. Navarrete also complains that objectors have somehow been prejudiced because documents relating to preliminary and final approval are not available on the Los Angeles Superior Court's website (www.lacourt.org), and because he was unable to retrieve them at the courthouse when he sent a document service. (Navarrete Opp. at p. 3.) But any purported difficulties accessing settlement-related documents through the Court's website or its hard-copy files are irrelevant—all such documents were readily available on the official settlement website identified in the class notice, as Mr. Navarrete admits. (See *id.* at p. 4 [admitting that he was "able to obtain . . . written filings" pertaining to this Settlement when they were "posted on the [official litigation] website"].)[6]

3. Although Mr. Navarrete acknowledges that he obtained a transcript of the March 18, 2014, preliminary approval hearing months before his objection was due (Navarrete Opp. p. 4), he complains that a portion of that hearing was conducted "off the record." (*Ibid.*) This is not a legally cognizable basis for an objection, particularly where, as Mr. Navarrete admits, "the parties ultimately agreed to address the issues raised in the Court's tentative ruling . . . in further written filings with the Court." (*Ibid.*)

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[6] In light of Mr. Navarrete's demonstrated knowledge that these key settlement-related materials were available through the litigation website, it is unclear why he would have attempted to obtain the same materials through an attorney document service.

4. Mr. Navarrete continues to claim that he received no notice of this settlement. (Navarrete Opp. p. 4.) This is false. (See Jennifer M. Keough Decl. in Support of Plaintiffs' Opposition to Objection of John Navarrete ¶ 3.) Moreover, there is no dispute that Mr. Navarrete received *actual* notice of the Settlement well in advance of the opposition and objection deadline.

D. Mr. Fuller's Arguments Concerning Restitution and Reliance Are Contrary to California Law

Mr. Fuller takes issue with the fact that if the Class prevailed at trial, they would be limited in recovery only to that portion of the OPFs that exceeded Ticketmaster's actual order processing costs. According to Mr. Fuller, the Class would actually be entitled to a *full refund* of their OPFs. (Fuller Opp. at p. 10.) He further argues that Plaintiffs would not be required to prove the element of "reliance" at trial. (*Id.* at p.11.) Mr. Fuller is wrong on both counts.

As Ticketmaster has explained, Plaintiffs' theory is that while they knowingly and willingly paid OPFs, they did so under the assumption that the fee was a straight pass-through of Ticketmaster's order processing costs—when in fact, Plaintiffs claim, Ticketmaster failed to disclose that the OPF also included a profit component. (See Ticketmaster Br. in Support of Final Approval at pp. 12–14; see also Ticketmaster Resp. to Objectors pp. 1–2; Fourth Am. Compl. ¶ 49 ["unbeknownst to Mr. Lo Re, the Order Processing Fee was a profit generator for Ticketmaster, unrelated to the cost of processing tickets"].) If they prevailed at trial, Plaintiffs and the Class would be entitled to restitution. (See Bus. & Prof Code, § 17203.) But because restitution is "[t]he difference between what the plaintiff paid and the value of what the plaintiff received" (*In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 131), the amount of any recovery here would be limited to the amount a Class Member paid in OPFs *in excess* of Ticketmaster's actual order processing costs. Otherwise, that Class Member would effectively be getting "free" order processing—which is far more than he or she bargained for. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 174 [restitution is "the excess of what the plaintiff gave the defendant over the value of what the plaintiff received"]; *Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1101 [the UCL does not permit a "windfall award of restitution"]; see also *Clark v. Superior Court* (2010) 50 Cal.4th 605, 614 ["Restitution is not a punitive remedy"].) Mr. Fuller's arguments to the contrary (Fuller Opp. at

p. 10) find no support in California law—indeed, he literally relies on nothing more than a strained analogy to a bank robber who steals his own money from a bank.

Finally, Mr. Fuller argues that Plaintiffs would not need to prove the element of "reliance" at trial because Ticketmaster supposedly is a "monopolist," such that "Plaintiffs had no real choice" but to pay Ticketmaster's OPF. (Fuller Opp. at p. 11.) This is nonsense. The number of competitors in the ticket marketplace has no legal or logical significance in terms of whether Plaintiffs need to prove reliance on Ticketmaster's alleged misleading description of its OPFs. Thus, Mr. Fuller's "monopoly" argument is not a proper basis on which to distinguish *Mazza v. Am. Honda Motor Corp.* (9th Cir. 2012) 666 F.3d 581, let alone a reason to create an exception to the "reliance" requirement under California law. (See, e.g., *Sevidal v. Target Corp.* (2010) 189 Cal.App.4th 905, 928 ["[T]o recover, each unnamed class member would be required to prove individual reliance on Target's false country-of-origin designation"].)

III. CONCLUSION

For these reasons, as well as those articulated in Plaintiffs' and Ticketmaster's extensive briefing in support of final approval and in response to the objections, the Court should find that this Settlement is fair, reasonable, and adequate, and it should grant final approval.

DATED: December 22, 2014

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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On December 22, 2014, pursuant to Judge Kenneth R. Freeman's Order Authorizing Electronic Service dated February 28, 2013, I served a true copy of the document(s) described as: **TICKETMASTER'S REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR FINAL SETTLEMENT APPROVAL** in this action by transmitting the document(s) to Case Anywhere pursuant to the terms in the aforementioned Order.

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☒ **(BY CASE ANYWHERE)** I caused the above document(s) to be electronically served on the interested parties identified above by using www.caseanywhere.com and the e-mail addresses maintained by www.caseanywhere.com for this case. Said transmission(s) were verified as complete and without error.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 22, 2014, at Los Angeles, California.

Ana Rivera