

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

JANET SIHLER, Individually and On
Behalf of All Others Similarly Situated;
CHARLENE BAVENCOFF,
Individually and On Behalf of All Others
Similarly Situated,

Plaintiffs,

v.

GLOBAL E-TRADING, LLC DBA
CHARGEBACKS911, GARY
CARDONE, MONICA EATON,

Defendants.

Case No.: 8:23-CV-01450-VMC-UAM

JOINT NOTICE REGARDING NOTICE OF CERTIFICATION TO CLASS

MEMBERS

Pursuant to the Court's August 13, 2024 Order granting Plaintiffs' Motion for Class Certification, ECF No. 156, the Parties jointly submit this statement regarding the proposed manner and method of providing notice of certification to Class members. Plaintiffs propose issuing a partial *joint notice* of Class certification in this case and settlement in the Central District of California case *Sihler et al. v. The Fulfillment Lab, Inc.*, case no. 3:20-cv-01528. Plaintiffs' position is that this proposed joint notice plan will minimize Class members' confusion and the costs incurred on behalf of the class while also satisfying the requirements of Rule 23.

Defendants have moved for a partial stay in this matter to stay the issuance of class notice pending the outcome of Defendants' motion for permission to appeal the Court's order granting class certification pursuant to Federal Rule of Civil Procedure

Rule 23(f) (the “Rule 23(f) Appeal”). In the event that notice is issued in this case, Defendants, for the reasons set forth below, believe that it should reference only this case as the two cases are completely distinct involving different Defendants, different jurisdictions, different statutes of limitations, different class members, and different alleged wrongdoing. Plaintiffs will oppose Defendants’ motion for a partial stay and do not believe that Class notice should be stalled pending the Rule 23(f) Appeal.

BACKGROUND

On August 13, 2024, this Court entered an order granting Plaintiffs’ motion for the certification of the following Class:

All consumers in the United States who, within the applicable statute of limitations period until the date notice is disseminated, were billed for shipments of either three bottles or five bottles of Ultrafast Keto Boost, Insta Keto, or InstantKeto.¹

See ECF No. 121 at 2, 2 fn, 1.

The Court’s August 13, 2024 Order directed that: “Within 14 days from the date of this Order, the parties shall file a joint notice that (1) describes the identification of class members and their contact information; (2) describes the method of disseminating class notice; and (3) proposes a notice to be disseminated to the class.” ECF No. 156 at 34. The Court’s Order further directed that prior to the filing of their joint notice, the Parties must “meet and confer and agree to the extent possible” on

¹ Excluded from the Class are any consumer who received a full refund for the “free” products for which they were improperly charged, governmental entities, Defendants, any entity in which Defendants have a controlling interest, and Defendants’ officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Class is any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

the issues identified by the Court. *See id.*

By August 27, 2024, Defendants will file a motion seeking a partial stay of class proceedings, including staying the notice being issued pending the outcome of Defendants' Rules 23(f) Appeal, which will be filed by August 27, 2024.

Having duly met and conferred, the Parties jointly submit this notice outlining their respective positions on a multi-tiered notice plan that is reasonably anticipated to reach a significant percentage of Class members.

THE IDENTIFICATION OF CLASS MEMBERS AND THEIR CONTACT INFORMATION

Plaintiffs' position is that Class Members will be identified based on the shipping records of The Fulfillment Lab, Inc., which provided shipping services for Brightree Holdings Corp. during the majority of the period in which Brightree Holdings Corp. was selling Keto Products. Defendants were not involved in the sales or shipments of Brightree's Keto Products and have no ability to confirm the accuracy of The Fulfillment Lab's shipping records. Those records have not been authenticated by any witnesses in this case. According to Plaintiffs, the spreadsheet includes thousands of shipments to individuals who are not class members either because they did not purchase Ultrafast Keto Boost, Insta Keto, or InstantKeto, do not live in the United States, or purchased quantities *other than* three or five bottle bundles. Plaintiffs propose identifying Class members by using the Excel software's "filter" function to "filter" for individuals living in the United States who purchased three or five bottles of Ultrafast Keto Boost, InstaKeto, or Instant Keto. Brightree Holdings Corp. used

the product descriptor “Keto Boost” internally and in certain financial contexts when selling products marketed to consumers as “Instant Keto” and “InstaKeto” and, as such, purchasers of “Keto Boost,” which is not a discrete product but instead an alias for “Instant Keto,” would also be counted as Class Members. Class Members’ email addresses and postal addresses will then be collected from this spreadsheet.

Plaintiffs believe their proposed notices clearly indicate the definition of the Class in this case, including applicable exclusions. For example, Plaintiffs’ proposed email notices advise recipients that “[i]n the Florida Class Action, you are not a Class Member if you received a full refund for pill bottles which Plaintiffs allege were advertised as being ‘free’ but which were allegedly not actually free.” *See* Ex. 1. The website notice likewise states that those “who received a full refund for the supposedly ‘free’ products for which they were allegedly improperly charged” are excluded from the Class.” *See* Ex. 2. Because of the Keto Racket’s return policies, which included deducting a \$5.00 restocking fee before issuing refunds, Plaintiffs believe the number of individuals who are excluded from the Class because they received full refunds for the supposedly “free” bottles is negligible. *See* Exs. A-C to the Declaration of A. Lorraine Weekes. As such, Plaintiffs’ position is that the expediency gained by sending notice of certification to all U.S. consumers who were shipped three or five bottles of Keto Products far outweighs whatever precision is to be had by taking on the extreme burden of investigating whether any of those individuals received a full refund *before* issuing notice. Further, the *very earliest* shipments reflected on the shipping spreadsheet Plaintiffs propose using to identify Class members for notice are on September 23,

2019. *See* Ex. D to the Declaration of A. Lorraine Weekes. As such, though the limitations period in *Sihler et al. v. The Fulfillment Lab Inc., et al.*, No. 3:20-cv-01528-LL-DDL (S. D. Cal.) begins on August 6, 2016, and the limitations period in this case does not begin until June 28, 2019, there is no one who would receive the Class certification notice using Plaintiffs' proposed methodology who would be excluded from one of the Classes on statute of limitations grounds. Defendants observe that Plaintiffs' proposed method for notice fails to confirm the actual identity of a consumer or the existence of a financial transaction in relation to such email address, and also fails to exclude consumers who received a refund for the amount that Plaintiffs allege they were overcharged, despite the fact that these individuals are expressly excluded from the class definition. Thus, under Plaintiffs' proposed notice plan, potentially thousands of individuals will be receiving notices informing them of their membership in a class that they are not a part of. As observed in Defendants' Opposition to Plaintiffs' Motion for Class Certification, Plaintiffs have put forth no methodology for identifying individuals who received refunds. Defendants also note that the two cases have different statutes of limitations and different class definitions, meaning some individuals will be members of the class in this case, but not the settlement class in the California case. Furthermore, Defendants note that an email address, without the actual financial transaction from the bank and the consumer to validate their identity is not sufficient evidence to prove that is a valid customer, an identity, nor that any consumer was charged.

THE PROPOSED METHOD OF DISSEMINATING CLASS NOTICE

The proposed notice plan involves a multi-tiered approach to alerting Class members to the Class's certification in this case includes the following elements:

- Direct email notice to class members at the email addresses provided by Class members when ordering Keto Products and maintained in a spreadsheet from The Fulfillment Lab, Inc. for all Class members who provided an email address.
- In the event that email notice for class members is undeliverable or that no email address was provided by at the time of ordering, a direct notice via a postcard mailed through First Class U.S. Mail to the shipping address associated with the Class member in the Fulfillment Lab, Inc.'s shipping spreadsheet.
- A dedicated website replete with information concerning this action, Class Members' rights, and the legal issues that will be decided at trial, as well as a dedicated toll-free number with recorded answers to frequently asked questions.

Plaintiffs represent that a notice of proposed settlements in *Sihler et al. v. The Fulfillment Lab, Inc.*, case no. 3:20-cv-01528 (C.D. Cal.) (the "Fulfillment Lab case") is likely to be distributed at or around the same time as Class certification notice in this case. Defendants are not parties to the Fulfillment Lab case and have not been informed as to the details of the settlement in that case but understand that it does not

involve any recovery for any of the Class Members. Plaintiffs' position is that, in order to minimize the risk that Class Members are confused by receiving multiple notices in short succession, the email and postcard notices concerning Class certification in the case should also contain information regarding the settlement in *Sihler et al. v. The Fulfillment Lab, Inc.*, case no. 3:20-cv-01528 (C.D. Cal.) and the Class certification in this case. Plaintiffs' position is that this approach is particularly appropriate given that the Class definitions in the two cases are virtually identical.

The nationwide Class certified in the Fulfillment Lab case is:

A nationwide class for the RICO claims consisting of all consumers in the United States who, within the applicable statute of limitations period until the date notice is disseminated, were billed for shipments of either three bottles or five bottles of Ultrafast Keto Boost, InstaKeto, or Instant Keto.

Sihler, Case No. 3:20-cv-01528, ECF No. 183 at p. 24 (C.D. Cal. June 23, 2023).

The Class certified in this case is:

All consumers in the United States who, within the applicable statute of limitations period until the date notice is disseminated, were billed for shipments of either three bottles or five bottles of Ultrafast Keto Boost, Insta Keto, or InstantKeto.²

ECF No. 156 at p. 3 (quoting definition of proposed class); 34 (granting motion for Class certification).

² As the Court noted in its Order granting Class certification, "Plaintiffs exclude from the class 'any consumer who received a full refund for the 'free' products for which they were improperly charged, governmental entities, Defendants, any entity in which Defendants have a controlling interest, and Defendants' officers, directors, affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded from the Class is any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.'" ECF No. 156 at p. 3-4.

Defendants' position is that it is unfair and prejudicial for Plaintiffs to utilize the class notice in this case as a vehicle for providing notice to a different class in a separate litigation pending in a separate jurisdiction. Defendants believe that combining notice of certification of a class action with notice of a class settlement in a separate litigation against different defendants in a different court in a different state will increase the likelihood of consumer confusion, as individuals may believe that a class settlement has been reached in this case. This is especially true given that the class definitions in the two cases are not identical, such that any given recipient of the proposed joint notice may not be a member of both classes (but would reasonably assume they are if they receive a notice listing both cases).

A. Direct notice to class members via email and, if necessary, First Class U.S. Mail

The proposed notice plan provides "individual notice to all members who can be identified through reasonable effort." *See* Fed. R. Civ. P. 23(c)(2)(B). Specifically, the Parties propose sending an email substantially similar to that attached as Exhibit 1 or 4 to the email addresses associated with customers living in the U.S. who ordered three or five bottles of Keto Products that were shipped by The Fulfillment Lab, Inc.

In the event that the email notice "bounces back" as undeliverable, the notice administrator (Plaintiffs anticipate working with the nationally-known firm Epiq) will first correct any errors, mistakes, or issues that may have caused the message to be undeliverable and then attempt to resend the email. If no second attempt is viable or if the second email-delivery attempt is unsuccessful, the notice administrator will then

send a postcard notice via First Class U.S. Mail to the mailing address for the Class member. If the initial postcard notice is returned as “undeliverable,” the notice administrator will then seek to identify the correct address for the Class member by looking to: (1) information from USPS, for example, the address provided by the USPS on returned pieces for which the automatic forwarding order has expired; or (2) a third-party lookup service. (This process is commonly referred to as “skip-tracing.”).

B. Dedicated website and toll-free number

Both the email and postcard notices will direct Class members to a website created and maintained by the notice administrator. Plaintiffs propose that the website provide Class members access to copies of select pleadings and briefs as well as Orders and Opinions of the Court in this case and also select pleadings, briefs and order of the court in *Sihler et al. v. The Fulfillment Lab, Inc.*, case no. 3:20-cv-01528 (C.D. Cal.). Plaintiffs anticipate working with the notice administrator to ensure that the site’s design and format clearly delineate which pleadings are from which case. While Defendants do not oppose inclusion of select pleadings, briefs, Orders and Opinions of the Court from this litigation, Defendants do oppose materials from an entirely different case with different Defendants and a different class. Plaintiffs’ proposed website content will also contain a detailed notice specifically outlining and addressing questions about Class certification in this case, in particular. *See* Ex. 3. The website will also reference a toll-free number which will provide recorded answers to frequently asked questions. Defendants do not oppose any of this content as it relates to this lawsuit.

This benefits of this website for the Notice Plan are two-fold. First, and most obviously, it will provide a centralized space where Class members can access extensive information about this case and their rights in connection with it. But secondarily, the maintenance of this webpage also means that the postcard and email notices can more selectively highlight the most important information for Class members about their rights and then refer those who want additional information to the website. The website will be maintained on an easy to remember URL which is descriptive of the class action and the website will be linked to from a blog posting on Class counsel's firm website.

C. Timing of Notice

The Parties propose that the Court set an "Exclusion Deadline" by which time exclusion requests must be postmarked. The Parties propose that the Exclusion Deadline be approximately ninety days after the date of any order approving this proposed notice plan. Because the notice method proposed here involves a multi-tiered approach where some Class members may receive notice before others, the Parties believe that having a single deadline—as opposed to multiple opt-out deadlines tethered to notices disseminated on different dates—would promote administrative efficiency. The Parties also propose the court order the notice administrator to begin disseminating the notice within thirty days of any order directing notice.

Regarding the deadline by which exclusion and opt-out notices must be filed with the court, the Parties propose that the court order the notice administrator to provide counsel for both parties with a list of all timely requests for exclusion within

10 days after the Exclusion Deadline set by the court and also order Plaintiffs' counsel to file the timely exclusion requests received from the notice administrator within 7 days thereafter, i.e., approximately 17 days after the Exclusion Deadline.

In summary, the deadlines the Parties request the court impose in any order directing notice to the Class are:

- **Dissemination Deadline:** approximately thirty days after any order directing notice of certification to the Class by which the notice administrator must begin the first round of notice dissemination via email.
- **Exclusion Deadline:** approximately ninety days after any order directing notice of certification to the Class by which exclusion requests must be postmarked.
- **Deadline for notice administrator to provide exclusion requests to the Parties' counsel:** approximately 10 days after the Exclusion Deadline.
- **Deadline for Plaintiffs' counsel to file all exclusion notices with the court:** approximately seventeen days after the Exclusion Deadline.

THE PROPOSED NOTICES

A copy of the email Plaintiffs propose sending to Class Members is attached hereto as **Exhibit 1**. A copy of the email Defendants propose sending to Class Members is attached hereto as **Exhibit 4**. Plaintiffs' proposed email notice will combine information about Class certification in this case with information about a recent settlement in *Sihler et al. v. The Fulfillment Lab, Inc.*, case no. 3:20-cv-01528 (C.D. Cal.). Defendants' proposed email notice omits references to the Fulfillment Lab case. Plaintiffs maintain that the use of a "joint" notice is appropriate where, as here, it will

promote Class members' understanding of their rights and minimize confusion. *See In re Fedex Ground Package Sys.*, No. 3:05-MD-527 RM (MDL-1700), 2008 U.S. Dist. LEXIS 28010, at *9 (N.D. Ind. Apr. 4, 2008) (ordering the parties to confer about integrating two similar notices into one and observing "if absent class members received these two notices that are nearly identical, there is a strong possibility many absent class members may ignore one notice or the other as a duplicate"); *Makaeff v. Trump Univ., Ltd. Liab. Co.*, No. 10-cv-0940-GPC-WVG, 2015 U.S. Dist. LEXIS 126147, at *12 (S.D. Cal. Sep. 21, 2015) (approving joint notice in two class actions and finding "that the proposed notice provides an opportunity for class members in both cases to participate in the litigation, to opt-out of the litigation, to monitor the performance of class representatives and class counsel, and to ensure that predictions of adequate representation are fulfilled").

Defendants note that, in both *In re Fedex* and *Makaeff* – the two cases Plaintiffs cite in support of joint notice – the joint notices were approved when both actions were (1) pending before the same court and (2) in the same procedural posture (an initial notice sent out after the court's order granting certification). Neither case concerned two different actions pending in different jurisdictions or the joinder of an initial notice of a certified class with a notice of class *settlement*. In fact, the *In re Fedex* court *rejected* the plaintiffs' efforts to reference separate MDL lawsuits in a single notice, holding that the "individual identity" of each case must be preserved and observing that a joint notice "gives the appearance of some kind of giant, super class action." *In re Fedex*, 2008 WL 927654, at *4.

A copy of the postcard Plaintiffs proposed sending to Class Members who can't be reached via email is attached hereto as **Exhibit 2**. A copy of the postcard Defendants propose sending to Class Members who can't be reached via email is attached hereto as **Exhibit 5**.

A copy of the longform notice Plaintiffs propose providing on the website that the notice administrator will establish for the Class is attached hereto as **Exhibit 3**. A copy of the longform notice the Defendants propose providing on the website that the notice administrator will establish for the Class is attached hereto as **Exhibit 6**.

Two points are particularly salient for understanding why the Parties maintain their respective proposed notices, comport with due process.

First, the multi-tier “waterfall” approach to notice where Class members receive an email notice, if possible, and a postcard notice only if email notice bounces back or is not possible due to a lack of an email address is reasonable and will provide the Class adequate notice. Federal Rule of Civil Procedure 23(c)(2)(B) specifically provides that the notice of certification provided to classes certified under Rule 23(b)(3) “may be by one or more of the following: United States mail, electronic means, or other appropriate means.” Further, numerous other courts have approved similar “waterfall” approaches to notice. *See, e.g., Cleveland v. Whirlpool Corp.*, No. 20-cv-1906 (WMW/KMM), 2021 U.S. Dist. LEXIS 240411, at *24-25 (D. Minn. Dec. 16, 2021) (stating “[i]t appears to the Court that the proposed Notice Plan described herein, and detailed in the Settlement Agreement, comports with due process, Rule 23, and all

other applicable law” where “Class Notice consists of email notice and postcard notice when email addresses are unavailable”); *All. Ophthalmology, PLLC v. ECL Grp., LLC*, No. 1:22-CV-296, 2024 U.S. Dist. LEXIS 113914, at *36 (M.D.N.C. June 27, 2024) (explaining that “[t]he court-approved notice process was reasonable and provided the class members with adequate notice” where “[t]he Settlement Administrator sent email notice to each class member for whom it had a valid email address” and then “[i]f a Physician Settlement Class Member did not have an email address on file or the email bounced back, the Settlement Administrator took steps to ensure it had a valid mailing address and then sent a postcard notice via first class mail” (citation omitted)); *Gaston v. Fabfitfun, Inc.*, No. 2:20-cv-09534-RGK-E, 2021 U.S. Dist. LEXIS 147383, at *24 (C.D. Cal. Apr. 2, 2021) (granting preliminary approval of settlement agreement in case where “notice will be given to the class members via email with a postcard mailed in those instances where the emails bounce back as undeliverable, and by posting a long form notice on a dedicated settlement website”).

Second, the proposed plan complies with the dictates of Rule 23(c)(2)(B), which specifies that the notice of Class certification provided to a 23(b)(3) Class must:

clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;

- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Federal Rules of Civil Procedure Rule 23(c)(2)(B)(i)-(vii).

The Proposed notice plan was drafted with these requirements in mind and all of the information required by Rule 23(c)(2)(B) can be found in each of the proposed notices. Further, the Proposed Notices are clear and skip the legalese in favor of everyday words and short sentences. *Cf.* Fed. R. Civ. P. 23 advisory committee's note (2003) ("The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members."). The tone of the Proposed Notices is also neutral and does not endorse the merits of Plaintiffs' claims.

CONCLUSION

If implemented, each of the proposed notice plans will provide a neutral-in-tone, easy-to-understand notice about this action to a significant number of Class members. Plaintiffs advocate an approach they believe would reduce consumer confusion and promote efficiency: combining notice of certification in this case with notice of proposed settlements in a related case. Plaintiffs contend that such a proposed joint

email notice will minimize the risk that Class members will erroneously disregard the notice of certification in this case as duplicative of the notice of settlement in *Sihler et al. v. The Fulfillment Lab, Inc.*, case no. 3:20-cv-01528 (C.D. Cal.), which Plaintiffs anticipate will be disseminated around the same time as the notice in this case. Defendants contend that what Plaintiffs request is unprecedented and confusing as it involves a single notice to two non-duplicative classes from different cases in different states against different defendants. Putting aside Plaintiffs' joint notice proposal, the Parties agree that the multi-tiered approach to notice proposed here represents a reasonable effort to directly inform Class members of the certification in this case and complies with the requirements of Rule 23. Under the circumstances, it the best notice practicable.

Date: August 27, 2024.

/s/A. Lorraine Weekes

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by the Court's CM/ECF electronic mail system, on August 27 2024, to all counsel of record. /s/A. Lorraine Weekes