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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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11 Baerbel McKinney-Drobnis, Joseph B. Piccola,
and Camille Berlese, individually and on
12 behalf of all others similarly situated,

13 Plaintiffs,

14 v.

15 MESSAGE ENVY FRANCHISING, LLC, a
Delaware Limited Liability Company,

16 Defendants.

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CASE NO. 3:16-CV-6450-MMC

**[PROPOSED] ORDER ON CLASS
REPRESENTATIVES' MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date:

Time:

Courtroom: 7 – 19th Floor

Judge: Hon. Maxine M. Chesney

Filed/Lodged Herewith:

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2.

1 **ORDER OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

2 On _____, 2019, this Court entered its Order [Dkt. __] preliminarily approving the
3 class action settlement set forth in the Stipulation of Class Action Settlement and Release (the
4 “AGREEMENT”) finding that the settlement appeared fair, adequate, and reasonable, free of
5 collusion or indicia of unfairness, and within the range of likely judicial approval thereby
6 warranting notice to the class. The Court also conditionally certified the CLASS pursuant to Rule
7 23(e) of the Federal Rules of Civil Procedure.

8 Currently pending before the Court is the Motion for Final Approval of the Class Action
9 Settlement and Entry of Final Judgment [Dkt. ____] filed by the CLASS REPRESENTATIVES
10 Baerbel McKinney-Drobnis, Camille Berlese, and Joseph Piccola (collectively, the “CLASS
11 REPRESENTATIVES”). The CLASS REPRESENTATIVES and Defendant Massage Envy
12 Franchising, LLC (“MEF”) are collectively referred to herein as “the PARTIES.” Also pending
13 before the COURT is the CLASS REPRESENTATIVES’ Motion for an Award of Attorneys’
14 Fees, Expenses and Service Awards [Dkt. ____]. Due and adequate notice having been given to
15 the CLASS of the SETTLEMENT, the AGREEMENT, and of the FINAL APPROVAL
16 HEARING as required in the PRELIMINARY APPROVAL ORDER [Dkt. __] and the COURT
17 having considered all papers, including all objections filed, having heard oral argument on
18 _____, 2019, and otherwise being fully informed and good cause appearing:

19 IT IS HEREBY ORDERED THAT:

20 1. This FINAL APPROVAL ORDER incorporates the AGREEMENT, as submitted
21 to the COURT with the Motion for Preliminary Approval of Class Action Settlement, filed ____,
22 2019 [Dkt. ____]. The capitalized terms used in this FINAL APPROVAL ORDER shall have the
23 meanings and/or definitions given to them in the AGREEMENT unless specified herein to the
24 contrary.

25 2. This COURT has jurisdiction over the subject matter of this ACTION, over the
26 CLASS, and over those persons and entities undertaking affirmative obligations under the
27 AGREEMENT.

1 3. The COURT finds that the AGREEMENT is eminently reasonable as it will
2 provide the SETTLEMENT CLASS MEMBERS with substantial and immediate relief and
3 allows the SETTLEMENT CLASS MEMBERS to avoid the risk, expense, complexity, and likely
4 duration of further litigation.

5 4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the COURT hereby
6 certifies for settlement purposes only the CLASS, which it previously conditionally certified,
7 which includes:

8 All Members of an ME LOCATION since November 4, 2006, whose monthly
9 membership fee has been increased above the amount stated in their Membership
10 Agreement (“Fee Increase”) prior to date of the PRELIMINARY APPROVAL
ORDER.

11 The Court further certifies for settlement purposes only the SETTLEMENT CLASS,
12 which is comprised of all CLASS MEMBERS except (i) those ___ individuals, identified on
13 **EXHIBIT 1** hereto, who properly excluded themselves by submitting a timely request for
14 exclusion in accordance with the requirements set forth in the AGREEMENT and CLASS
15 NOTICE; (ii) any person, firm, trust, corporation, or other entity affiliated with MEF; and
16 (iii) any judge, justice, judicial officer, or judicial staff of the Court.

17 5. The COURT finds on the record before it that the SETTLEMENT CLASS
18 satisfies the requirements for class certification under Federal Rules of Civil Procedure 23(a) and
19 23(b)(3), for settlement purposes only, because (a) the SETTLEMENT CLASS MEMBERS are
20 so numerous that joinder of all SETTLEMENT CLASS MEMBERS is impracticable; (b) there
21 are questions of law and fact common to the SETTLEMENT CLASS; (c) the named CLASS
22 REPRESENTATIVES’ claims are typical of the claims of the SETTLEMENT CLASS members;
23 (d) the named CLASS REPRESENTATIVES and CLASS COUNSEL have adequately
24 represented and will continue to adequately represent and protect the interests of the
25 SETTLEMENT CLASS for purposes of the SETTLEMENT; and (e) class-wide treatment of the
26 disputes raised in the ACTION is superior to other available methods for adjudicating the
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1 controversy before this COURT at this time. Manageability issues do not prevent certification for
2 settlement purposes only because there will be no trial.

3 6. The COURT hereby finds that the individual direct CLASS NOTICE given to the
4 CLASS via email or First Class U.S. Mail (i) fairly and accurately described the ACTION and the
5 proposed SETTLEMENT; (ii) provided sufficient information so that the CLASS MEMBERS
6 were able to decide whether to accept the benefits offered by the SETTLEMENT, exclude
7 themselves from the SETTLEMENT, or object to the SETTLEMENT; (iii) adequately described
8 the manner in which CLASS MEMBERS could submit a VOUCHER REQUEST under the
9 SETTLEMENT, exclude themselves from the SETTLEMENT, or object to the SETTLEMENT
10 and/or appear at the FINAL APPROVAL HEARING; and (iv) provided the date, time, and place
11 of the FINAL APPROVAL HEARING. The COURT hereby finds that the CLASS NOTICE was
12 the best notice practicable under the circumstances and complied fully with Federal Rule of Civil
13 Procedure Rule 23, due process, and all other applicable laws.

14 7. The COURT hereby finds there were very few timely written objections and
15 requests for exclusion from the SETTLEMENT. Only ___ objections and ___ opt-outs were
16 received, out of _____ CLASS MEMBERS. The small number of opt-outs and objections
17 indicates that the vast majority of the CLASS found the SETTLEMENT and the AGREEMENT
18 to be fair, reasonable, and adequate. Furthermore, the PARTIES demonstrated that none of the
19 asserted bases for objection are valid and, accordingly, any and all objections to the
20 SETTLEMENT and the AGREEMENT are hereby overruled.

21 8. The COURT further finds that a full and fair opportunity has been afforded to the
22 CLASS MEMBERS to opt out of and to object to the SETTLEMENT and to participate in the
23 hearing convened to determine whether the SETTLEMENT should be given final approval.
24 Accordingly, the COURT hereby determines that SETTLEMENT CLASS MEMBERS are bound
25 by this FINAL APPROVAL ORDER.

26 9. The COURT hereby finds that the SETTLEMENT set forth in the AGREEMENT
27 is in all respects fair, reasonable, and adequate and in the best interests of the SETTLEMENT
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1 CLASS, taking into account that (a) the CLASS REPRESENTATIVES and CLASS COUNSEL
2 have adequately represented the CLASS; (b) the SETTLEMENT was negotiated at arm's length;
3 (c) the relief provided to the CLASS is adequate, in light of the costs, risks, and delay of trial and
4 appeal; the effectiveness of the proposed method of distributing relief to the CLASS; and the
5 terms of the proposed Award of Attorneys' Fees, Expenses and Service Awards; and (d) the
6 SETTLEMENT treats CLASS members equitably relative to each other. In addition, the COURT
7 finds that there was no collusion in connection with the SETTLEMENT, that the SETTLEMENT
8 was the product of informed and arm's-length negotiations among competent counsel, and that
9 the record is sufficiently developed to have enabled the CLASS REPRESENTATIVES and MEF
10 to adequately evaluate and consider their respective positions. Accordingly, the Court hereby
11 finally and unconditionally approves the SETTLEMENT set forth in the AGREEMENT.

12 10. The CLASS REPRESENTATIVES and each of the SETTLEMENT CLASS
13 MEMBERS hereby expressly and fully release and forever discharge the RELEASED PARTIES
14 and further expressly agree that they shall not now or thereafter institute, maintain, or assert
15 against the RELEASED PARTIES, either directly or indirectly, on their own behalf, or on behalf
16 of any class or other person or entity, in any action, regulatory action, arbitration, or court or other
17 proceeding of any kind, any causes of action, claims, damages, equitable, legal, and
18 administrative relief, interest, demands, rights, or remedies, including, without limitation, claims
19 for injunctive relief, declaratory relief, damages, mental anguish, unpaid costs, penalties,
20 liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution,
21 disgorgement, or equitable relief against the RELEASED PARTIES, whether based on federal,
22 state, or local law, statute, ordinance, regulation, the Constitution, contract, common law, or any
23 other source, that relate to the RELEASED CLAIMS as set forth in the AGREEMENT.

24 11. The CLASS REPRESENTATIVES and each of the SETTLEMENT CLASS
25 MEMBERS hereby expressly waive and relinquish, to the extent permitted by law, the
26 provisions, rights, and benefits of Section 1542 of the California Civil Code and any and all
27 provisions, rights, and benefits of any similar statute or law of California or of any other
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1 jurisdiction as to all known or unknown claims as against the RELEASED PARTIES with respect
2 to the RELEASED CLAIMS.

3 12. The RELEASED PARTIES may file this FINAL APPROVAL ORDER in any
4 other action that may be brought against them to support a defense or counterclaim based on
5 principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or
6 reduction, or any other theory of claim preclusion or issue preclusion or similar defense or
7 counterclaim.

8 13. In its PRELIMINARY APPROVAL ORDER [Dkt. ____], the Court appointed and
9 designated The Garden City Group, Inc. to act as the SETTLEMENT ADMINISTRATOR. The
10 Garden City Group, Inc. shall continue to act as the SETTLEMENT ADMINISTRATOR to
11 perform those duties and responsibilities that remain under the AGREEMENT and this FINAL
12 APPROVAL ORDER.

13 14. CLASS COUNSEL are hereby awarded the sum of \$_____ in
14 attorneys' fees and reimbursement of expenses, which sum the COURT finds to be fair and
15 reasonable and fairly compensates them for their contributions to the prosecution of this ACTION
16 and the SETTLEMENT. The payment of attorneys' fees and costs shall be pursuant to the terms
17 of the AGREEMENT.

18 15. Each of the CLASS REPRESENTATIVES is hereby awarded an INCENTIVE
19 AWARD in the amount of \$_____, which the COURT finds to be fair and reasonable and in
20 recognition of their efforts in prosecuting the action and the SETTLEMENT. Payment of the
21 INCENTIVE AWARDS shall be pursuant to the terms of the AGREEMENT.

22 16. Within sixty (60) days after the EFFECTIVE DATE of the SETTLEMENT, as
23 defined and in accordance with the AGREEMENT, the SETTLEMENT ADMINISTRATOR
24 shall issue via email a VOUCHER to each SETTLEMENT CLASS MEMBER who timely
25 submitted a valid VOUCHER REQUEST in accordance with the instructions in the
26 AGREEMENT and the CLASS NOTICE, for use consistent with the AGREEMENT's terms.

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1 The email containing the VOUCHER and the VOUCHER shall conspicuously state the
2 VOUCHER's expiration date.

3 17. Within five (5) days after the EFFECTIVE DATE of the SETTLEMENT, the
4 SETTLEMENT ADMINISTRATOR shall disclose on the SETTLEMENT WEBSITE that (i) the
5 SETTLEMENT is final and its EFFECTIVE DATE; (ii) the date by which the VOUCHERS will
6 be emailed to SETTLEMENT CLASS MEMBERS who timely submitted a valid VOUCHER
7 REQUEST in accordance with the instructions in the AGREEMENT and the CLASS NOTICE;
8 and (iii) the date on which the issued VOUCHERS shall expire.

9 18. As of the date of the PRELIMINARY APPROVAL ORDER, the SETTLEMENT
10 CLASS MEMBERS are bound by the new template MEMBERSHIP AGREEMENT attached
11 hereto as **EXHIBIT 1**. This new MEMBERSHIP AGREEMENT includes a provision that ME
12 LOCATIONS may increase the MEMBER's stated monthly MEMBERSHIP fee following the
13 initial term only by providing at least forty-five (45) days' advance written notice to the
14 MEMBER's email address on record with the MEMBER's HOME CLINIC or to the
15 MEMBER's last physical address known to the MEMBER's HOME CLINIC, and that such
16 notice shall be effective on the date sent. Forty-five (45) days' advance written notice will
17 allow the CLASS MEMBERS a reasonable opportunity to cancel his/her MEMBERSHIP
18 before incurring a noticed price increase. MEF shall keep this portion of the template
19 MEMBERSHIP AGREEMENT attached hereto as **EXHIBIT 1** in force as a system standard
20 for at least two (2) years after the SETTLEMENT's EFFECTIVE DATE.

21 21. Nothing in this FINAL APPROVAL Order shall restrict MEF or any ME
22 LOCATION from otherwise modifying the terms of a SETTLEMENT CLASS MEMBERS'
23 MEMBERSHIP or the template MEMBERSHIP AGREEMENT attached hereto as **EXHIBIT 1**,
24 including during the two years MEF shall keep the portion of that agreement as a system standard
25 as described in Paragraph 20 of this FINAL APPROVAL ORDER, provided it does not decrease
26 the forty-five (45) days' advance written notice described in Paragraph 20 of this FINAL
27 APPROVAL ORDER.

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1 22. In the event that the SETTLEMENT does not become effective in accordance with
2 the AGREEMENT's terms, then this FINAL APPROVAL ORDER shall be rendered null and
3 void and be vacated, the AGREEMENT and all orders entered in connection therewith shall be
4 rendered null and void *ab initio*, and this ACTION shall be reinstated as it existed prior to the
5 making of the AGREEMENT. In that case, all communications, documents, filings, negotiations,
6 and other actions taken to negotiate and pursue settlement through the AGREEMENT, including
7 the AGREEMENT itself, shall be considered confidential settlement communications that cannot
8 be used as evidence for any purposes whatsoever in the ACTION or any proceedings between the
9 PARTIES or in any other action related to the RELEASED CLAIMS or otherwise involving the
10 PARTIES, any ME LOCATION, or any RELEASED PARTY.

11 23. Nothing in this FINAL APPROVAL ORDER or the AGREEMENT shall be
12 construed as an admission or concession by any Party. The AGREEMENT and this resulting
13 FINAL APPROVAL ORDER simply represent a compromise of disputed allegations.

14 24. All PARTIES to the AGREEMENT and CLASS COUNSEL are directed to carry
15 out their obligations under the AGREEMENT.

16 25. Without impacting the finality of this FINAL APPROVAL ORDER, the COURT
17 hereby retains continuing jurisdiction to assure compliance with all terms of this SETTLEMENT
18 in accordance with the AGREEMENT and this FINAL APPROVAL ORDER.

19 26. CLASS COUNSEL shall serve a copy of this FINAL APPROVAL ORDER on all
20 named PARTIES and their counsel, the Objectors and any of their counsel, and the
21 SETTLEMENT ADMINISTRATOR within seven (7) days of receipt, and the SETTLEMENT
22 ADMINISTRATOR shall post a copy of this Final Order on the SETTLEMENT WEBSITE
23 within five (5) days of receipt.

24 IT IS SO ORDERED

25 DATED: ____ __, 2019

26 _____
27 Hon. Maxine M. Chesney
28 JUDGE OF THE UNITED STATES
 DISTRICT COURT