Richards et al v. Chime Financial, Inc. et al

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

RYAN RICHARDS, et al.,

Plaintiffs, v. CHIME FINANCIAL, INC., et al.,

Defendants.

Case No. 19-cv-06864-HSG ORDER GRANTING MOTION FOR FINAL APPROVAL AND GRANTING IN PART AND DENYING IN PART Re: Dkt. Nos. 49, 52

Pending before the Court are the motions for final approval of class action settlement and

Brandy Terbay, and Tracy Cummings. Dkt. Nos. 49, 52. The Court held a final fairness hearing on April 29, 2021. For the reasons detailed below, the Court GRANTS final approval. The Court also GRANTS IN PART and DENIES IN PART and incentive award.

I. BACKGROUND

A. Factual Background Plaintiffs filed this putative class action against Defendant Chime Financial, Inc., The Bancorp Inc., and Galileo Financial Technologies, LLC based on a disruption in Defendant -only banking services. 1

See fs allege that on October 16, 2019, Chime had a system- approximately 72 hours. See id.

1 Plaintiffs allege that Chime is an online-only bank; Galileo makes the Application Programming Interfaces that Chime uses to offer credit and debit cards, as well as banking and money transfer services; and Bancorp is a financial holding company whose wholly owned subsidiary, The Bancorp Bank, provides licensed banking services for Chime. See id. at ¶¶ 11 14.

approximately 5 million people, could not access their funds, including through card purchases and ATM withdrawals. Id. at ¶¶ 23, 31, 36, 43, 50 51. Following the Service Disruption, some customers reported incorrect account balances and unauthorized charges. See id. at ¶¶ 28, 33, 40.

Plaintiffs bring this action on behalf of a putative nationwide class of Chime customers who were

denied access to their accounts beginning on October 16, 2019, as well as subclasses of customers denied access to their accounts who reside in Florida, Texas, Illinois, and Georgia. See id. at ¶ 57. And based on the above facts, Plaintiffs allege causes of action for negligence; unjust enrichment; breach of contract; conversion; breach of fiduciary duty; violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201; violation of the Illinois Consumer Fraud Act, 815 Ill. Comp. Stat. §§ 505/1 et seq.; and violation of the Illinois Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. §§ 510/2 et seq. See Compl. at ¶¶ 70 127.

B. Procedural History Plaintiffs initially filed this action on November 22, 2019. See Dkt. No. 1. The parties did not engage in motions practice, and instead attended two settlement conferences with Magistrate Judge Laurel Beeler. See Dkt. Nos. 28, 31, 35. With Judge Bee , the parties reached an agreement in principle on May 12, 2020. See Dkt. No. 40-8, Ex. B at ¶ 19. The parties entered into a written settlement agreement in early August 2020. See Dkt. No. 40-1, Ex. A. Following the hearing on the unopposed motion for preliminary settlement approval, the parties submitted a revised settlement agreement that addressed concerns that the Court raised about the scope of the release, as well as the process for any objectors to object to the proposed settlement. See Dkt. No. 45- The Court granted the motion on October 28, 2020. See Dkt. No. 46. The parties now seek final approval of the class action settlement and Plaintiffs seek Plaintiffs. See Dkt. Nos. 49, 52.

i. Settlement Agreement

Class Definition: The Settlement Class is defined as:

All consumers who attempted to and were unable to access or utilize the functions of their accounts with Chime, as confirmed by a failed

beginning on October 16, 2019 through October 19, 2019, as a result of the Service Disruption. SA at ¶ III.1.

Settlement Benefits: The parties have agreed to monetary relief that incorporates an offset for credits that Chime already provided to the accounts of active customers because of the outage:

Approximately a month after the outage, Chime credited $10 to the accounts of all

IV.1.a.

Id. at ¶ IV.1.b. The parties agree that these courtesy payments and transaction credits total $5,960,563.00 already paid to active Chime account holders due to the outage. Id. at ¶ IV.1.c. Defendants also concede g these payments. SA at ¶ X.3. Pursuant to the settlement agreement, Defendants have agreed to further compensate settlement class members who submit verified claims under a two-tier system:

Tier 1: Class members who claim they suffered loss due to the outage, but who do

not have or do not wish to provide documentation to substantiate their loss will be entitled to up to $25 for verified claims. See id. at ¶ maximum payment under Tier 1 is $4 million. See id. at ¶ IV.2.c. If the amount of verified claims under Tier 1 is less than $4 million, Defendants will retain any unclaimed amount, except to the extent that such funds are necessary to fully or partially satisfy Tier 2 claims. Id. Tier 2: Class members who claim they suffered loss due to the outage and have

but not more than their verified loss. See id. at ¶ IV.3. Those who fail to provide documentation will be considered under Tier maximum payment under Tier 2 is $1.5 million, and any residual money unclaimed under Tier 1 can be used to pay Tier 2 claims in excess of the $1.5 million cap. See id. at

¶ IV.6.d. All claims under both Tiers will be verified using a two-step system. See id. at ¶ IV.6.b. Under both Tiers, putative class members will have to submit a brief explanation, under penalty of perjury, as to how the outage caused them loss and what amount of loss they purport to have suffered. See id. Those submitting claims under Tier 2 will also be required to submit reasonable documentation to support their claims. Id. at ¶ IV.6.c. Defendants and the settlement member (a) held a Chime account at the time; and (b) either attempted a financial transaction that failed or had their card locked as a result of the outage. Id. at ¶ IV.6.b. During the hearing, Defendants confirmed that despite the service disruption, they have accurate records of attempted transactions during the relevant time period.

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payment. See id. at ¶¶ IV.3.a, IV.3.b. Thus, any verified claims under Tier 1 and Tier 2 will be reduced by the amount the class member already received as a (1) courtesy payment; or (2) transaction credit. See id. At a minimum, however, Defendants will pay $1.5 million under the settlement agreement. See id. at ¶ IV.5.

Cy Pres Distribution: If the claim payments under Tiers 1 and 2 do not reach the $1.5 million minimum under the settlement agreement, Defendants will distribute funds to reach this minimum to the East Bay Community Law Center as the cy pres recipient. See SA at ¶ IV.5. Defendants will, however, keep any money available for settlement but unclaimed above this $1.5 million threshold. Id.

Release: All settlement class members will release:

[A]ny and all claims, demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, penalties, remedies, matters and issues of any kind or nature whatsoever, whether known or unknown, contingent or absolute, existing or potential, suspected or unsuspected, disclosed or undisclosed, matured or unmatured, liquidated or unliquidated, legal, statutory or equitable, that have been or could have been asserted, or in the future might be asserted,

in the Actions or in any court, tribunal or proceeding by or on behalf of the Named Plaintiffs, any and all of the

members of the Settlement Class, and their respective present or past heirs, spouses, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, lenders, and any other representatives of any of these Persons, whether individual, class, direct, representative, legal, equitable or any other type or in any other capacity whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against any or all of the Released Parties, which the Named Plaintiffs or any member of the Settlement Class ever had, now has, or hereinafter may have, by reason of, resulting from, arising out of, relating to, or in connection with, the allegations, facts, events, transactions, acts, occurrences, statements, representations, omissions, or any other matter, thing or cause whatsoever, or any series thereof, embraced, involved, set forth or otherwise related to the alleged claims or events in the Action or the Service Disruption, including, but not limited to, use by a class member of their Chime Account up to and extending through the Service Disruption. SA at ¶ II.20. In addition, class members:

waive any rights they may have under California Civil Code Section 1542, Section 20-7-11 of the South Dakota Codified Laws, and any other similar law, each of which provides that a general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor, and a waiver of any similar, comparable, or equivalent provisions, statute, regulation, rule, or principle of law or equity of any other state or applicable jurisdiction.

Id. at ¶ IX.4.

Class Notice: A third- n email Notice and (2) a Notice on the Settlement Website. See

SA at ¶¶ V.I VII.11; see also Dkt. No. 45-2, Ex. 2. The settlement administrator will send the e settlement. See id. at ¶ II.15, VII.1, VII.5. The settlement administrator will make reasonable efforts to locate updated email addresses for class members whose Notices are returned as undeliverable. Id. at ¶ VII.1. The Notice will include: the nature of the action, a summary of the settlement terms, and instructions on how to object to and opt out of the settlement, including relevant deadlines. See Dkt. No. 45-2, Ex. 2.

Opt-Out Procedure: Putative class members may opt out of or object to the settlement II.17 II.18, VII.4 VIII.

Incentive Award: Named Plaintiffs as class representatives may apply for incentive awards of no

more than $500 each. SA at ¶ X.1.

exceed $750,000. SA at ¶ X.2. II. ANALYSIS

A. Final Settlement Approval

i. Class Certification Final approval of a class action settlement requires, as a threshold matter, an assessment of whether the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b). Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 1022 (9th Cir. 1998). Because no facts that would affect these requirements have changed since the Court preliminarily approved the class on October 28, 2020, this order incorporates by reference prior analysis under Rules 23(a) and (b) as set forth in the order granting preliminary approval. See Dkt. No. 46 at 6 10.

ii. The Settlement claims, issues, or defenses of a certified class may be settled . . . hearing and on finding that it is fair, reasonable, and adequate. Officers

, 688 F.2d 615, 625 (9th the objectives ou private consensual agreement negotiated between the parties to a lawsuit must be limited to the

extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties . . . . (2) the risk, expense, complexity, and likely

duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Rodriguez v. , 563 F.3d 948, 963 (9th Cir. 2009); see also Hanlon, 150 F.3d Officers for

Justice, 688 F.2d at 625.

notice is critical to court approval of a class settlement under Rule Hanlon, 150 F.3d at 1025. As discussed below, the Court finds that the proposed settlement is fair, adequate, and reasonable, and that Class Members received adequate notice.

a. Adequacy of Notice

acticable under the circumstances, including

class definiti P. 23(c)(2)(B). Although Rule 23 requires that reasonable efforts be made to reach all class members, it does not require that each class member actually receive notice. See Silber v.

Mabon,

The Court finds that the notice and notice plan previously approved by the Court was implemented and complies with Rule 23(c)(2)(B). See Dkt. No. 46 at 5 6, 15 16. The Court ordered that the third-party settlement administrator send class notice via email based on a class list Defendant provided. Id. at 16. Epiq Class Action & Claims Solutions, Inc., the third-party settlement administrator, represents that class notice was provided as directed. Dkt. No. 52-1, Ex. A at ¶¶ 6, 8 12. Epiq received a total of 527,505 records for potential Class Members, including their email addresses. See id. at ¶ 9. If the receiving email server could not

undeliverable. See id. at ¶ 11. Epiq made two additional attempts to deliver the email notice. Id. As of Mach 1, 2021, a total of 495,006 email notices were delivered, and 32,499 remained undeliverable. See id. at ¶ 12.

In light of these facts, the Court finds that the parties have sufficiently provided the best practicable notice to the Class Members.

b. Fairness, Adequacy, and Reasonableness Having found the notice procedures adequate under Rule 23(e), the Court next considers whether the entire settlement comports with Rule 23(e).

1. Approval of a class settlement is appropriate when plaintiffs must overcome significant barriers to make their case. Chun-Hoon v. McKee Foods Corp., 716 F. Supp. 2d 848, 851 (N.D. arri Garner v. State Farm Mut. Auto. Ins. Co., No. 08-cv-1365-CW, 2010 WL 1687832, at *9 (N.D.

Cal. Apr. 22, 2010). Additionally, difficulties and risks in litigating weigh in favor of approving a class settlement. Rodriguez, inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with Ching v. Siemens Indus., Inc., No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) (quotations omitted).

The Court finds that the amount offered in settlement is reasonable in light of the complexity of this litigation and the substantial risk that Plaintiffs would face in litigating the case given the nature of the asserted claims. See Dkt. No. 52 at 12 15. Were the case to proceed, Defendants would likely move to compel individual Id. at 12 13. Defendants contend that under the express terms of the agreement between Chime and Class

Id. at 13. Additionally, Defendants would likely argue that the temporary loss of access to funds from the

Service Disruption does not constitute compensable harm. See id. at 13, & n.7. In reaching a settlement, Plaintiffs have ensured a favorable recovery for the class. See Rodriguez, 563 F.3d at 966 (finding litigation risks weigh in favor of approving class settlement). Accordingly, these factors

weigh in favor of approving the settlement. See Ching, 2014 WL 2926210, at *4 (favoring settlement to protracted litigation).

2. Risk of Maintaining Class Action Status In considering this factor, the Court looks to the risk of maintaining class certification if the litigation were to proceed. Certifying a class encompassing approximately over 500,000 Chime account holders presents complex issues, including factual inquiries about the impact of the Service Disruption on individual account holders across the country, that could undermine certification. See Dkt. No. 52 at 13. Accordingly, this factor also weighs in favor of settlement.

3. Settlement Amount The amount offered in the settlement is another factor that weighs in favor of approval.

finds that the costs of litigation. See Dkt. No. 52 at 13 15; Dkt. No. 36-1 at ¶ 55; see also Villanueva v. Morpho Detection, Inc., No. 13-cv-05390-HSG, 2016 WL 1070523 *4 (N.D. Cal. March 18, 2016) (citing cases).

Here, Class Members already received $5,960,563 from Defendants, including a $10 courtesy payment received by all class members and transaction credits to cover certain fees that some Chime account holders incurred during the Service Disruption. See SA at ¶¶ IV.1.a b. Although the parties have acknowledged the difficulty in assessing the precise scope of any further damages, the Settlement Agreement provided a means for class members to receive compensation for additional losses. Class Members could recoup up to $25 without documentation and up to $750 if they provided documentation. Under this process, Defendants agreed to pay up to $5.5 million for any verified damages suffered during the 72-hour Service Disruption. Epiq confirmed that as of April 28, 2021, it received 22,325 unique Claim Forms (26 were duplicates). See Dkt. No. 67- 7. Epiq received 16,843 Claim Forms under Tier 1 (eligible for up

to $25); 5,434 Claim Forms under Tier 2 (eligible for up to $750); and 48 Claim Forms that did not specify whether they were under Tier 1 or 2. Id. Following the claims adjustment process, Epiq verified 22,128 of the 22,325 claims. 2

Id. at ¶¶ 7, 13. Epiq identified 22,033 valid claims under Tier 1, which after offsets for money previously received by those Class Members for the Service Disruption, total $330,495.00, or an average of $15 per claim. Id. at ¶ 13. Epiq also identified 95 valid claims under Tier 2, which after offsets for money previously received by those Class Members for the Service Disruption, total $7,375.32, or an average of approximately $77.63 per claim. Id.

Given the relatively short duration of the Service Disruption and the significant litigation risks discussed above, the Court finds that this factor weighs in favor of approval. See, e.g., Lewis v. Green Dot Corp., Case No. 2:16-cv-03557, ECF No. 109 at 13 (C.D. Cal. Nov. 22, 2017) (approving similar

tiered settlement amount based on service disruption); Fuentes v. UniRush, LLC, Case No. 1:15-cv-08372, ECF No. 49 (S.D.N.Y. Sept. 12, 2016) (same).

4. Extent of Discovery Completed and Stage of Proceedings The Court finds that Class Counsel had sufficient information to make an informed decision about the merits of the case. See In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000). The parties settled only after they had informally exchanged significant See Dkt. No. 40 at 15; Dkt. No. 40-8, Ex. B at ¶ 46. Thus, the Court is persuaded that the Class Counsel entered the settlement discussions with a substantial understanding of the factual and legal issues, sufficient to allow them to assess the likelihood of success on the merits. This factor weighs in favor of approval.

5. Experience and Views of Counsel The Court next considers the experience and views of competent counsel are better positioned than courts to produce a settlement that fairly reflects each Rodriguez, 563 F.3d at 967 (quotations omitted).

2 Epiq explained that 197 claims were not approved: 184 claims were ineligible because they did not answers to the eligibility questions on the Claim Form. See Engler Decl. at ¶ 13.

In re Omnivision Techs., Inc., 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008).

Class Counsel has substantial experience in similar class actions. See Dkt. No. 40-8, Ex. B at ¶¶ 11 13; see also Dkt. No. 40-9, Ex. 1. The Court recognizes, however, that courts have Compare Carter v. Anderson Merch., LP, ccorded considerable with Chun-Hoon

6. Reaction of Class Members The reacti number of objections to a proposed class action settlement raises a strong presumption that the

Na Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528 29 (C.D. Cal. 2004); In re Linkedin

User Privacy Litig. -outs and objections in comparison to class size is typically a factor

Class notice, which was served in accordance with the method approved by the Court, advised the Class of the requirements to object to or opt out of the settlement. The deadline to do so was February 1, 2021. See Dkt. No. 48. Epiq received one objection and only six requests for exclusion, out of the 495,006 Class Members who received email notice. See Azari Decl. at ¶¶ 12, 18. The objection itself, filed by Pamela Sweeney, is not directed at the settlement amount or settlement process itself. See Dkt. No. 51. Rather, Ms. Sweeney raises concerns with the Id. concerns and discusses this in more depth in Section II.B.i below. Nevertheless, the Court finds that the minimal number of objections and opt-outs in comparison to the size of the class indicate overwhelming support among the Class Members and weigh in favor of approval of the settlement. See, e.g., Churchill Village LLC v. Gen. Elec., 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement where 45 of approximately 90,000

class members objected); Rodriguez v. West Publ. Corp., Case No. CV05 3222 R, 2007 WL 2827379, at *10 (C.D. Cal. Sept. 10, 2007)

(finding favorable class reaction where 54 of 376,301 class members objected).

* * * After considering and weighing the above factors, the Court finds that the settlement agreement is fair, adequate, and reasonable, and that the settlement Class Members received adequate notice GRANTED.

B. In its unopposed motion, Class Counsel asks the Court to approve an award of $750,000 in es and costs. Dkt. No. 49 at 1 22. Class Counsel also seeks a $500 incentive award for each of the four Named Plaintiffs. Id. at 22 24.

i. & Costs

a. Legal Standard and nontaxable law action like this one See Vizcaino

v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002). Nevertheless, the Court may still look to See Apple Computer, Inc. v. Superior Court authority

Laffitte retion to conduct a lodestar cross- Id. multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the In re Bluetooth, 654 F.3d at 941 (citing Staton v. Boeing Co., 327 F.3d -check and use other mean Laffitte, 1 Cal. 5th at 506. Class Counsel is also -of-pocket expenses that would

Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994) (quotations omitted).

b. Discussion Class Counsel here seeks $ See Dkt. No. 49 at 1 22. Under the settlement agreement, this amount will not reduce the monetary relief available to Class Members. Class Counsel acknowledges that its lodestar and accrued litigation expenses are significantly less than the $750,000 requested. See id. at 6. As of the filing of the $295,915.20 in fees for approximately 380 hours of work, and $8,146.75 in litigation expenses. 3

See Dkt. No. 49- Yanchunis at ¶¶ 12, 23. Nevertheless, Class Counsel urges that the full $750,000 is appropriate under of method. See Dkt. No. 49 at 7.

Using federal law for guidance, 25% of the common fund is the benchmark for attorney fee awards. See, e.g., In re Bluetooth typically calculate 25% of the fund

the percentage requested in light of the factors endorsed by the Ninth Circuit, with the 25% award as

a starting point. The Ninth Circuit has identified several factors that a court should consider to determine whether to adjust a fee award from the benchmark: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. See Vizcaino, 290 F.3d at 1048 50.

Class Counsel argues that of $12,462,563.00. See Dkt. No. 49 at 9 11, & n.10. In particular, Counsel points to the following:

3 As discussed in more detail below, when the Court directed counsel to provide billing records to support its lodestar calculation, counsel added an additional 110.9 hours of work and approximately $85,000 more in fees. See Dkt. No. 70. Almost $20,000 of this newly-claimed time was incurred over two days in 2019 by a single attorney who discussed the case and retainer agreement with Plaintiffs. It gives the Court pause that counsel did not show more attention to detail before being pressed by the Court.

Prior to entering into the settlement agreement, Defendants paid all customers a

also credited some incurred because of the Service Disruption. See SA at ¶ IV.1.a b. The parties agree that these courtesy payments and transaction credits total $5,960,563.00. Id. at ¶ IV.1.c. Under the settlement agreement, Class Members may make claims for losses

under Tiers 1 and 2 up to an aggregate total of $5.5 million. See SA at ¶¶ IV.2 3, 5. Under the settlement agreement, Defendants separately have agreed to pay for

costs of notice and claims administration up to $250,000. See SA at ¶¶ VI.3, VII.8. Under the settlement agreement, Defendants also separately agreed to pay up to

$750,000 $2,000 in incentive awards to the named Plaintiffs. See SA at ¶¶ X.1, X.2. they are seeking less than 6% of this constructive common fund. See Dkt. No. 49 at 2, 11.

The Ninth Circuit has explained that based on the entire common fund created for the class, even if some class members make no

claims against the fund so that money remains in it that otherwise would be returned to the Williams v. MGM Pathe Commc ns Co., 129 F.3d 1026, 1027 (9th Cir. 1997) (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 480 81 (1980)). However, the court also clarified that

courts may instead apply the lodestar approach. See id. .

First, Defendants the courtesy payments and transaction credits of $5,960,563. SA at ¶ X.3. But these

payments were made before the parties settled this case, and Defendant does not state that this litigation was the only motivation for these payments.

4

See Dkt. No. 70 at ¶ 7. Moreover, if this $5 million were part of the current settlement, then the parties should have sought approval in advance of the payment as required by Federal Rule of Civil Procedure 23(e), as they have with the rest of the proposed settlement. The parties did not do so. As the parties confirmed during the final fairness hearing, if the Court were to deny final approval of this settlement for whatever reason, Defendants would not be able to recoup the money they already paid as courtesy payments and transaction credits. The courtesy payments and transaction credits therefore appear to be at least in part a business decision that Defendants made following the Service Disruption. The Court therefore has concerns with retroactively deeming the entire $5,960,563 to be part of the settlement fund.

Second, during the final fairness hearing, first held on April 1, 2021, the parties could only speculate as to the actual amount of damages that Class Members suffered from the Service Disruption. Even in discussion with counsel, it was unclear whether the Class had incurred any additional harm beyond the money Defendants already paid in courtesy payments and transaction credits. The Court raised concerns that this $5.5 million for losses under Tiers 1 and 2 was therefore largely illusory. This was borne out by the low number of Claim Forms received. Epiq confirmed that it received just 22,325 Claim Forms out of the 495,006 email notices delivered (or less than 5%). And of the 22,325 Claim Forms received, Epiq only verified 22,128 of them. These verified claims represent just a small fraction of the $5.5 million that Defendants have proffered to pay Claims under Tiers 1 and 2.

Moreover, under the settlement agreement only $1.5 million of the $5.5 million that Defendants made available to pay verified claims under Tier 1 and 2 is non-reversionary. In other words, only $1.5 million of the $5.5 million is guaranteed to be paid no matter how many

4 During the final approval hearing, counsel represented that he had sent a demand letter to Defendants, which prompted these courtesy payments and transaction credits. Counsel later clarified that it was a phone call, and not a formal letter. See Dkt. No. 70 at ¶¶ 8 9. As a result, there is no record of what counsel actually said to Defendants and how, if at all, it prompted -settlement payments.

verified claims there are either to Class Members or to the East Bay Community Law Center as a cy pres recipient. See id. at ¶ IV.5. If there were few verified claims (as unsurprisingly turned out to be the case), Defendants would retain the rest (or $4 million) of the available funds. Following the claims adjustment process, Epiq confirmed that Defendants will pay $337,870.32 total for these verified claims. Thus, $337,870.32 will be paid to Class Members under Tiers 1 and 2; $1,162,129.68 (i.e., the substantial bulk of the non-reversionary $1.5 million) will be distributed to the East Bay Community

Law Center; and $4 million will revert to Defendants. Just 6% of the $5.5 million will therefore be paid to Class Members at all. The Court finds that much of the asserted relief for the Class is illusory.

Both in the briefs and during the hearing, Class Counsel argued that he has nevertheless similarly-structured settlements in other cases. See, e.g., Dkt. No. 49 at 17 (citing Green Dot, Case No. 2:16-cv-03557, ECF No. 109 at 13 (C.D. Cal. Nov. 22, 2017); UniRush, Case No. 1:15-cv-08372, ECF No. 49 (S.D.N.Y. Sept. 12, 2016)). The Court finds it notable, however, that it appears that claims adjustment process was complete. Thus, it is unclear whether these cases shared similarly low rates of verified (and paid) claims. Moreover, in Green Dot, the court awarded based on the lodestar, and not the percentage of the fund. In any event, the Court is not persuaded that counsel should be entitled to the full amount of its requested fees simply because it may have been successful in persuading a court to award such fees before. The Court has an independent obligation to ensure the reasonableness of any fee award. . During the April 29, 2021 hearing, the Court requested that counsel provide the underlying billing records in support of the motion for attorneys fees. See Dkt. No. 68. In response, counsel supplemented its lodestar based on time spent (1) by attorney Michael Braun investigating this matter for two days in October 2019; and (2) by Class Counsel since it pr to prepare for the final fairness hearing. See Dkt. No. 70. discovered hours were missing when preparing the time entries for submission to the Court. See id. at 4. Counsel now represents that in sum it has spent 490.9 hours on this case, and calculates its

lodestar as $380,968.80. See id. at 5. This time includes:

[P]re-suit investigation and analysis; interviewing members of the class to determine how those members were affected by the problems associated with the Service Disruption; reviewing and analyzing information produced by Defendants; preparing for and participating in settlement discussions; participating in a number of telephonic settlement negotiations; drafting settlement documents; drafting papers in support of preliminary approval of the Settlement; working the notice program; and working with the class in connection with notice and administration issues.

See Dkt. No. 49 at 17; see also Yanchunis Decl. at ¶¶ 12 17, & Ex. A.

lodestar calculation contains some inefficient and unreasonable time. See Jankey v. Poop Deck, 537 F.3d 1122, 1132 (9th Cir. 2008) (directing courts to exclude from a fee request any hours that . For example, the records indicate that the attorneys spent significant time discussing the case via intraoffice meetings, emails, and phone calls with co-counsel. The Ninth Circuit has indicated that the Court has discretion to discount such time. See Terry v. City of San Diego, 583 Fed. Appx 786, 790 91 (9th Cir. 2014) (permitting reductions for time counsel spent conferring among themselves and co-counsel editing each other briefs because this time could be considered duplicative). The Court also has reservations about the amount of time that counsel spent preparing the motions in this case. Class counsel claims that it spent 185.80 hours December 29, 2020. See Yanchunis Decl., Ex. A. Only the preliminary approval motion and the end of December 2020, and no other motions practice

occurred in this case. Counsel therefore spent almost 200 hours on two motions. In contrast, Class Counsel appears to have spent approximately 30 hours preparing the motion for final approval. Although the motion for preliminary approval may have required the coordination of additional information, including the settlement agreement and proposed notices, the Court finds

costs is still excessive. The Court finds that a five percent reduction of is thus

warranted to account for the inefficiencies presen .

Class Counsel also billed substantial time for travel to and from the settlement conference. Courts in this district have frequently reduced travel time by half to create a reasonable rate. See, e.g., In re Washington Public Power Supply Sys. Sec. Lit., 19 F.3d 1291, 1298 99 (9th Cir. 1994)

see also In re Volkswagen Clean Diesel Mktg., Sales Practices, & Prod. Liab. Litig., No. 6903, 2020 WL 2086368, at *8 (N.D. Cal. Apr. 30, 2020). Here, Class Counsel billed for travel, largely irrespective of any preparation for the settlement conference or work on this case. Counsel also appears to have included time spent during layovers in transit. The Court finds that a reduction of fifty percent of this time is appropriate under the circumstances.

Name Date Task Rate Hours Total Patrick A. Barthle

2/4/2020 Travel to

settlement conference

$658 6.50 $4,277

John Yanchunis

2/5/2020 Travel to San

Francisco to attend mediation

$950 11.10 $10,450

Patrick A. Barthle

2/5/2020 Travel to San

Francisco for mediation via layover in Seattle and prepare for mediation

$658 8.50 $5,593

John Yanchunis

2/7/2020 Travel from

San Francisco through Atlanta to Tampa after mediation

$950 11.00 $10,450

Patrick A. Barthle

2/7/2020 Return travel

from San Francisco via layover in Atlanta

$658 10.90 $7,172

TOTAL $37,942 Reduced by

50%

$18,971

The Court is also concerned with time that appears unrelated to this case or is otherwise pro hac vice applications, but there was never a hearing on any pro hac vice applications. There are also

se entries were also notably after the parties had settled this case.

Name Date Task Rate Hours Total Patrick A. Barthle

12/12/2019 Email string

with co-counsel re hearing on PHVs

$658 .30 $197.40

John Yanchunis

3/2/2020 Email exchange

with Sean Unger confirming that there is not an in person meeting this Friday

$950 .30 $285

John Yanchunis

12/24/2020 Review Judge

on final judgment

$950 2.40 $2,280

Patrick A. Barthle

1/18/2021 Correspond

with co-counsel and opposing re breach/issues with customer ID theft

$658 .40 $263.20

Patrick A. Barthle

1/19/2021 Correspond

with co-counsel victims

$658 .1 $65.80

Patrick A. Barthle

1/26/2021 S.

Johnson and research re same

$658 .3 $197.40

John Yanchunis

3/14/2021 Email

exchanges with consumer regarding

$950 1.00 $950

service disruption she is presently experiencing (.5); email to Sean Unger, two emails, regarding news of another service disruption and sending him photos of instant messages with another consumer[] (.5) TOTAL $4,238.80

amounts identified above, the Court calculates a revised lodestar of $338,719.56. 5

Considering the procedural posture of the case, the amount of substantive litigation, the minimal issues in dispute, and the lack of motion practice, the Court finds that an award of this lodestar is reasonable under the circumstances. The Court also finds that the $8,146.75 in costs that counsel identified is also reasonable. See Yanchunis Decl. at 10; Dkt. No. 49-2, Ex. 2 at 7. total amount of $346,857.31. 6

ii. Incentive Awards Lastly, Class Counsel requests an incentive award of $500 for each of the Named Plaintiffs. See Dkt. No. 49 at 22 24. District courts have discretion to award incentive fees to named class representatives. See In re Mego Fin. Corp. Secs. Litig., 213 F.3d 454, 463 (9th Cir.

routinely to receive special awards in addition to their share of the recovery, they may be tempted

5 *.95 = $361,920.36. The Court then subtracted the other inefficient or duplicative time identified above: $361,920.36 - $18,971 (50% reduction in travel fees) - $4,238.80 (time unrelated to case) = $338,710.56. 6 $338,719.56 (fees) + $8,146.75 (costs) = 346,857.31.

to accept suboptimal settlements at the expense of the class members whose interests they are See Staton v. Boeing Co., 327 F.3d 938, 975 (9th Cir. 2003); Radcliffe v. Experian Information Sols. Inc., 715 F.3d 1157, 1163 64 (9th Cir. 2013) (noting that the Ninth

incentive awards may be proper but . . Indeed, the Ninth Circuit has ca

incentive awards to determine whether they destroy the adequacy of the class representatives . . . Radcliffe e proposed

Id.

The Court has concerns about the requested incentive awards in a case in which the average monetary recovery for each Class Member is $11.94. 7

Thus, if the Court were to grant the significantly more money as compared to the other Class Members. The Court further notes that counsel has not provided any detailed discussion of what the named Plaintiffs did to contribute to this litigation or how long they spent doing any particular task.

Rather, counsel devotes just two sentences to summarizing at a high level the types of work that the named Plaintiffs performed. See Dkt. No. 49 at 23; see also Dkt. No. 49-1, Ex. 1 at ¶ 29. The Court accordingly DENIES the request for incentive awards in its entirety. III. CONCLUSION

Accordingly, the Court GRANTS the motion for final approval of class action settlement and GRANTS IN PART the moti awards $346,857.31, but DENIES the request for an incentive award for the named Plaintiffs.

The parties and settlement administrator are directed to implement this Final Order and the settlement agreement in accordance with the terms of the settlement agreement. The parties are further directed to file a short stipulated final judgment of two pages or less within 21 days from

7 $5,960,563.00 (in courtesy payments and transaction credits) + $337,870.32 (under Tiers 1 and 2) / 527,505 records for potential Class Members = $11.94.

the date of this order. The judgment need not, and should not, repeat the analysis in this order.

IT IS SO ORDERED. Dated:

_____ HAYWOOD S. GILLIAM, JR. United States District Judge