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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIRENA TORRES, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

PICK-A-PART AUTO WRECKING (d/b/a
Pick-A-Part); and DOES 1 through 10,
inclusive,

Defendants.

No. 1:16-cv-01915-DAD-BAM

ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

(Doc. No. 13)

This matter came before the court on November 7, 2017, for hearing on plaintiff's unopposed motion for preliminary approval of a class action settlement. (Doc. No. 13.) Attorney Chant Yedalian appeared on behalf of plaintiff Cirena Torres, and attorney Ted Galfin appeared on behalf of Pick-A-Part Auto Wrecking. Following the hearing, the court directed the plaintiff to submit a supplemental declaration with respect to the pending motion. (Doc. No. 17.) On November 13, 2017, plaintiff and defendant each submitted supplemental declarations in support of the motion for preliminary approval. (Doc. Nos. 18, 19). Defendant submitted an additional declaration in support of the motion on November 22, 2017. (Doc. No. 20.) For the reasons set forth below, the court will grant the plaintiff's unopposed motion for preliminary approval of class action settlement.

1 **BACKGROUND**

2 On December 22, 2016, plaintiff filed a class action complaint against Pick-A-Part Auto
3 Wrecking (“Pick-A-Part”) and Does 1 through 10. (Doc. No. 1.) The complaint alleges that
4 defendant violated the Fair and Accurate Credit Transactions Act (“FACTA”), 15 U.S.C. §§ 1681
5 *et seq.* (*Id.* at 2.) FACTA provides in relevant part that “no person that accepts credit cards or
6 debit cards for the transaction of business shall print . . . the expiration date upon any receipt
7 provided to the cardholder at the point of the sale or transaction.” 15 U.S.C. § 1681c(g).

8 For several years and ending on January 31, 2016, defendant Pick-A-Part operated a
9 motor vehicle wrecking and recycling facility, whose business included maintaining an inventory
10 of used vehicles, from which retail customers could dismantle parts to purchase. (Doc. No. 6 at
11 2.) Plaintiff alleges that defendants willfully violated FACTA by printing the expiration date on
12 receipts provided to credit card and debit card cardholders transacting business with defendant.
13 (Doc. No. 1 at 2.)

14 On October 2, 2017, plaintiff filed an unopposed motion for preliminary approval of a
15 class action settlement. (Doc. No. 13). Plaintiff seeks to represent a class, certified for the
16 purposes of settlement only, composed of “[a]ll consumers who, at any time during the period
17 December 22, 2014 to October 28, 2015, were provided an electronically printed receipt at the
18 point of a sale or transaction at Pick-A-Part (located at 2274 E. Muscat Avenue, Fresno, CA
19 93725), on which receipt was printed the expiration date of the consumer’s credit card or debit
20 card.” (*Id.* at 3.)

21 Plaintiff seeks an order: (i) certifying the settlement class, with appointment of plaintiff as
22 class representative, appointment of attorney Chant Yedalian as class counsel, and appointment of
23 Atticus Administration, LLC as the settlement administrator; (ii) preliminarily approving the
24 settlement agreement; (iii) approving the proposed form and method of notice to the settlement
25 class; and (iv) scheduling the hearing date for the final approval of the class settlement. (*Id.* at 1).

26 **LEGAL STANDARD**

27 Rule 23 mandates that, “[t]he claims, issues, or defenses of a certified class may be
28 settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P.

1 23(e). The following procedures apply to the court’s review of the proposed settlement:

2 The court must direct notice in a reasonable manner to all class
3 members who would be bound by the proposal.

4 If the proposal would bind class members, the court may approve it
5 only after a hearing and on finding that it is fair, reasonable, and
adequate.

6 The parties seeking approval must file a statement identifying any
7 agreement made in connection with the proposal.

8 . . .

9 Any class member may object to the proposal if it requires court
10 approval under this subdivision (e); the objection may be
withdrawn only with the court’s approval.

11 *Id.*

12 “Courts have long recognized that settlement class actions present unique due process
13 concerns for absent class members.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,
14 946 (9th Cir. 2011) (citation and internal quotations omitted). To protect the rights of absent
15 class members, Rule 23(e) requires that the court approve all class action settlements “only after a
16 hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2);
17 *Bluetooth*, 654 F.3d at 946. However, it has been recognized when parties seek approval of a
18 settlement agreement negotiated prior to formal class certification, “there is an even greater
19 potential for a breach of fiduciary duty owed the class during settlement.” *Bluetooth*, 654 F.3d at
20 946. Thus, the court must review such agreements with “a more probing inquiry” for evidence of
21 collusion or other conflicts of interest than what is normally required under the Federal Rules.
22 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Lane v. Facebook, Inc.*,
696 F.3d 811, 819 (9th Cir. 2012).

23 When parties seek class certification only for purposes of settlement, Rule 23 “demand[s]
24 undiluted, even heightened, attention” to the certification requirements. *Amchem Prods., Inc. v.*
25 *Windsor*, 521 U.S. 591, 620 (1997). The district court must examine the propriety of certification
26 under Rule 23 both at this preliminary stage and at a later fairness hearing. *See, e.g., Ogbuehi v.*
27 *Comcast*, 303 F.R.D. 337, 344 (E.D. Cal. 2014); *West v. Circle K Stores, Inc.*, No. CIV. S-04-cv-
28 0438 WBS GGH, 2006 WL 1652598, at *2 (E.D. Cal. June 13, 2006).

1 Review of a proposed class action settlement ordinarily proceeds in three stages. *See*
2 MANUAL FOR COMPLEX LITIGATION (4th) § 21.632. First, the court conducts a preliminary
3 fairness evaluation and, if applicable, considers class certification. Second, if the court makes a
4 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms,
5 the parties are directed to prepare the notice of certification and proposed settlement to the class
6 members. *Id.* (noting that if the parties move for both class certification and preliminary
7 approval, the certification hearing and preliminary fairness evaluation can usually be combined).
8 Third, the court holds a final fairness hearing to determine whether to approve the settlement. *Id.*;
9 *see also Narouz v. Charter Commc 'ns, LLC*, 591 F.3d 1261, 1266–67 (9th Cir. 2010).

10 Here, plaintiff moves for preliminary approval of a class settlement and preliminary class
11 certification. (Doc. No. 13.) The motion is unopposed. Though Rule 23 does not explicitly
12 provide for such a procedure, federal courts generally find preliminary approval of settlement and
13 notice to the proposed class appropriate if the proposed settlement “appears to be the product of
14 serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly
15 grant preferential treatment to class representatives or segments of the class, and falls within the
16 range of possible approval.” *Lounibos v. Keypoint Gov’t Sols. Inc.*, No. 12-cv-00636-JST, 2014
17 WL 558675, at *5 (N.D. Cal. Feb. 10, 2014) (quoting *In re Tableware Antitrust Litig.*, 484 F.
18 Supp. 2d 1078, 1079 (N.D. Cal. 2007)); *see also* NEWBERG ON CLASS ACTIONS § 13:13 (5th ed.
19 2011); *Dearaujo v. Regis Corp.*, Nos. 2:14-cv-01408-KJM-AC, 2:14-cv-01411-KJM-AC, 2016
20 WL 3549473 (E.D. Cal. June 30, 2016) (“Rule 23 provides no guidance, and actually foresees no
21 procedure, but federal courts have generally adopted [the process of preliminarily certifying a
22 settlement class.]”).

23 ANALYSIS

24 I. Preliminary Fairness Evaluation

25 Under Rule 23(e), a court may approve a class action settlement only if the settlement is
26 fair, reasonable, and adequate. *Bluetooth*, 654 F.3d at 946. In particular, preliminary approval of
27 a settlement and notice to the proposed class is appropriate “[i]f the proposed settlement appears
28 to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies,

1 does not improperly grant preferential treatment to class representatives or segments of the class,
2 and falls within the range of possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
3 at 1079. While it is not a court’s province to “reach any ultimate conclusions on the contested
4 issues of fact and law which underlie the merits of the dispute,” a court should weigh, among
5 other factors, the strength of a plaintiff’s case; the risk, expense, complexity, and likely duration
6 of further litigation; the extent of discovery completed; and the value of the settlement offer.
7 *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *see also Officers for Justice*
8 *v. Civil Serv. Comm’n of City & Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

9 A. Negotiations

10 The court must first consider whether the process by which the parties arrived at their
11 settlement is truly the product of arm’s length bargaining, rather than collusion or fraud. *Millan*
12 *v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 613 (E.D. Cal. 2015). A settlement is presumed
13 fair if it “follow[s] sufficient discovery and genuine arms-length negotiation.” *Adoma v. Univ. of*
14 *Phx., Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (quoting *Nat’l Rural Telecomms. Coop. v.*
15 *DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)). In addition, participation in mediation
16 “tends to support the conclusion that the settlement process was not collusive.” *Palacios v. Penny*
17 *Newman Grain, Inc.*, No. 1:14-cv-01804-KJM, 2015 WL 4078135, at *8 (E.D. Cal. July 6, 2015)
18 (citation omitted).

19 Here, the parties negotiated directly and did not participate in mediation. (Doc. No. 15 at
20 ¶¶ 2–3.) Direct negotiations may be reasonable in situations where, as may be the case here, the
21 relatively low value of the action does not justify the cost of mediation. *See Millan*, 310 F.R.D. at
22 613 (“In light of the cost of mediation and the relatively low value of the action, the decision to
23 negotiate directly is reasonable.”). Nonetheless, when a settlement is achieved without third party
24 mediation, the presumption of non-collusion does not apply. *Id.* (“[B]ecause the negotiation was
25 direct and the settlement took place prior to certification, the Court reviews this agreement
26 without a presumption of non-collusion.”).

27 Although the presumption of non-collusion does not apply here, the court is satisfied that
28 the parties’ negotiation in this case constituted genuine, informed, arm’s length bargaining.

1 Plaintiff asserts that “a substantial amount of information was obtained and exchanged, including
2 specific figures concerning transactions during the Settlement Class Period.” (Doc. Nos. 13 at 19;
3 15 at ¶ 16.) Counsel for both parties made additional representations at oral argument regarding
4 the type of information obtained, and the difficulty of obtaining such information. Based on these
5 representations, the court finds that the process at arriving at the settlement was procedurally fair.

6 B. Obvious Deficiencies

7 A proposed settlement does not meet the test for preliminary fairness if there are any
8 obvious deficiencies in the proposed agreement. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d
9 at 1079. The proposed settlement provides that Pick-A-Part will establish a non-reversionary
10 cash fund in the amount of \$195,000, from which the class counsel’s attorney’s fees and costs, an
11 incentive payment to the class representative, and administration costs will be paid. (Doc. No. 13
12 at 3.) The proposed settlement provides for the payment of attorney’s fees and costs of up to
13 \$65,000, plus an award of class counsel’s litigation costs of up to \$3,000. (*Id.* at 5–6.) The
14 settlement provides that the class representative will receive an incentive payment of up to
15 \$4,000. (*Id.* at 5.) Plaintiff further estimates that administration costs will be approximately
16 \$12,000. (Doc. No. 15-1 at 2.)

17 The remaining funds will be divided by the total number of class members who submit a
18 valid and timely claim, but not to exceed \$250 per class member. (*Id.* at 2.) Each class member
19 may only submit one claim, regardless of how many credit or debit card transactions he or she
20 engaged in with defendant during the settlement class period. (*Id.* at 3.) The proposed settlement
21 provides no reversion to Pick-A-Part; any residual funds would be given *cy pres* to Legal
22 Assistance for Seniors. (Doc. No. 13 at 4.)

23 The settlement provides a means for class members to exclude themselves from the
24 settlement. (Doc. No. 15-1 at 4.) The release of liability appears reasonably tailored to the claims
25 presented in the action. (*Id.* at 6.) In addition, the settlement agreement provides that the validity
26 and enforceability of the agreement shall not be affected by any intervening change of law. (*Id.* at
27 7.) The court is satisfied there are no obvious deficiencies with the proposed settlement.

28 ////

1 C. Preferential Treatment

2 In making a preliminary fairness determination, the court must assure itself that the
3 proposed settlement does not provide preferential treatment to certain members of the class or the
4 named plaintiffs. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. The court will
5 examine the attorneys' fee provision, incentive payment, and *cy pres* distribution in turn.

6 i. *Attorneys' Fees*

7 Federal Rule 23(h) provides that “[i]n a certified class action, the court may award
8 attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.”
9 Fed. R. Civ. P. 23(h). The district court “must exercise its inherent authority to assure that the
10 amount and mode of payment of attorneys’ fees are fair and proper.” *Zucker v. Occidental Petrol.*
11 *Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999). The Ninth Circuit has approved two methods of
12 calculating attorney’s fees. *See Hanlon*, 150 F.3d at 1029. In “common-fund” cases where the
13 settlement creates a fund to be distributed to the class, “the district court has discretion to use
14 either a percentage or lodestar method.” *Id.* The “lodestar” calculation takes the number of hours
15 reasonably expended and multiplies that by a reasonable hourly rate. *Id.* (citation omitted). The
16 lodestar method is typically used where the settlement is primarily injunctive relief, and the net
17 value of the settlement is difficult to gauge. *Id.* The percentage method, in contrast, awards the
18 attorneys a percentage of the fund “sufficient to provide class counsel with a reasonable fee.” *Id.*
19 (citation omitted). The Ninth Circuit has established 25 percent as the benchmark for attorney’s
20 fees under this latter method. *Id.* (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904
21 F.2d 1301, 1311 (9th Cir. 1990)). Courts may deviate from this 25 percent benchmark when
22 there are special circumstances justifying a departure. *Six (6) Mexican Workers*, 904 F.2d at
23 1311. Special circumstances may include, for example:

24 [T]he extent to which class counsel achieved exceptional results
25 for the class, whether the case was risky for class counsel, whether
26 counsel’s performance generated benefits beyond the cash
27 settlement fund, the market rate for the particular field of law (in
28 some circumstances), the burdens class counsel experienced while
litigating the case (e.g., cost, duration, foregoing other work), and
whether the case was handled on a contingency basis.

1 *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015) (internal
2 quotation marks omitted).

3 Under the proposed settlement agreement now before the court, plaintiff seeks an award
4 of up to \$65,000 for attorney’s fees plus an award of \$3,000 for class counsel’s litigation costs,
5 both of which would be paid from the settlement fund. (Doc. No. 13 at 5–6.) This \$65,000 figure
6 would represent 33.3 percent of the overall settlement fund. This fee amount is above the
7 benchmark for this circuit. *See Bluetooth*, 654 F.3d at 947 (setting a 25% benchmark); *Staton v.*
8 *Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (same); *Six (6) Mexican Workers*, 904 F.2d at 1311
9 (same). However, the proposed percentage for attorney’s fees is not inherently unreasonable as
10 an upper bound. Accordingly, the court will grant preliminary approval. *See Vizcaino v.*
11 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (observing that percentage awards of
12 between twenty and thirty percent are common); *In re Activision Sec. Litig.*, 723 F. Supp. 1373,
13 1377 (N.D. Cal. 1989) (“This court’s review of recent reported cases discloses that nearly all
14 common fund awards range around 30% even after thorough application of either the lodestar or
15 twelve-factor method.”). In connection with the final fairness hearing, however, the court will
16 consider any objections as well as the evidence presented by counsel in determining whether the
17 award of an above-benchmark percentage in attorney’s fees is reasonable in this case. *See*
18 *Powers v. Eichen*, 229 F.3d 1249, 1256–57 (9th Cir. 2000) (noting that an explanation is
19 necessary when the district court departs from the twenty-five percent benchmark).

20 ii. *Incentive Award*

21 While named plaintiffs are eligible to receive incentive payments, a court must “evaluate
22 their awards individually” for any indication that “the agreement was reached through fraud or
23 collusion.” *Staton*, 327 F.3d at 975. In determining whether an incentive payment is excessive, a
24 court should balance “the number of named plaintiffs receiving incentive payments, the
25 proportion of the payments relative to the settlement amount, and the size of each payment.” *Id.*

26 Here, plaintiff has requested an incentive payment of up to \$4,000, subject to the approval
27 of the court. (Doc. No. 13 at 5.) This would represent approximately 2 percent of the overall
28 settlement. The maximum settlement recovery a class member could receive under the settlement

1 proposed here is \$250. (Doc. No. 13 at 3.) Therefore, an incentive award of \$4,000 is 16 times
2 the maximum amount that a class member could expect to receive in this litigation. Courts in this
3 circuit have previously approved incentive awards in this range, and the court finds that the
4 proposed incentive award is “not outside the realm of what has been approved as reasonable by
5 other courts.” *Aguilar v. Wawona Frozen Foods*, No. 1:15-cv-00093-DAD-EPG, 2017 WL
6 2214936, at *8 (E.D. Cal. May 19, 2017) (and cases cited therein); *see also Brown v. Hain*
7 *Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016 WL 631880, at *9 (N.D. Cal. Feb. 17, 2016)
8 (approving an incentive award of \$7,500 to each class representative).

9 The requested incentive payment is thus approved on a preliminary basis. At the final
10 fairness hearing, the court will review plaintiff’s evidence in determining whether the requested
11 incentive award is warranted here—i.e., evidence of the specific amount of time plaintiff spent on
12 the litigation, the particular risks and burdens carried by plaintiff as a result of the action, or the
13 particular benefit that plaintiff provided to counsel and the class as a whole throughout the
14 litigation. *See Bautista v. Harvest Mgmt. Sub LLC*, No. CV 12-10004 FMO (CWx), 2013 WL
15 12125768, at *15 (C.D. Cal. Oct. 16, 2013).

16 iii. *Cy Pres Distribution*

17 The parties predict that, due to the nature of this case and defendants’ lack of information
18 regarding absent class members, few claims will be made and a residue will result. (Doc. No. 13
19 at 4.) Plaintiff’s motion indicates that any such residue will be distributed *cy pres* to Legal
20 Assistance for Seniors (“LAS”), a 501(c)(3) charity. (*Id.*) A *cy pres* remedy is one where the
21 class members receive an indirect, rather than a direct, benefit. *Lane*, 696 F.3d at 819. *Cy pres*
22 awards “must be guided by (1) the objectives of the underlying statutes and (2) the interests of the
23 silent class members.” *Nachshin v. AOL*, 663 F.3d 1034, 1040 (9th Cir. 2011).

24 At oral argument, the court requested additional information from plaintiff regarding how
25 a *cy pres* award to LAS would likely benefit the class members or promote the underlying
26 objectives of FACTA. (Doc. No. 17.) On November 13, 2017, plaintiff submitted a declaration
27 from James Treggiari, the Executive Director of LAS, stating that seniors “are a class of
28 consumers who are particularly vulnerable to consumer fraud, including identity theft scams.”

1 (Doc. No. 18 at ¶ 5.) In his declaration, Mr. Treggiari further attests that LAS provides legal
2 representation and other advocacy services for seniors who fall victim to financial elder abuse,
3 and provides counseling and community education to seniors to help protect them from consumer
4 fraud and identity theft, including credit card or debit card fraud and other scams. (*Id.* at ¶¶ 6–8.)
5 Based on this supplemental information, the court is satisfied that LAS is an appropriate
6 beneficiary of the *cy pres* award in this case.

7 D. Range of Possible Approval

8 To evaluate the fairness of the settlement award, the court should “compare the terms of
9 the compromise with the likely rewards of litigation.” *See Protective Comm. for Indep.*
10 *Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). “It is well-
11 settled law that a cash settlement amounting to only a fraction of the potential recovery does not
12 per se render the settlement inadequate or unfair.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
13 454, 459 (9th Cir. 2000). To determine whether a settlement “falls within the range of possible
14 approval” a court must focus on “substantive fairness and adequacy,” and “consider plaintiffs’
15 expected recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust*
16 *Litig.*, 484 F. Supp. 2d at 1080.

17 Here, the proposed settlement is for \$195,000. Plaintiff does not provide an estimate of
18 how much she would expect to be awarded were she to succeed on all claims at trial. Plaintiff
19 does note, however, that the settlement’s maximum award of \$250 per class member amounts to
20 250 percent of the minimum statutory damages (\$100), and 25 percent of the maximum statutory
21 damages (\$1000).

22 If each of the 4,422 credit card and debit card transactions represents unique individuals,
23 plaintiff and the class would be entitled to minimum statutory damages of \$100 per class member,
24 or \$442,200 total. If each individual received the maximum statutory damages amount of \$1000,
25 defendant’s maximum liability would be \$4,422,000. The proposed settlement of \$195,000 thus
26 represents approximately 44 percent of plaintiff’s minimum possible recovery, and 4.4 percent of
27 plaintiff’s maximum possible recovery. Plaintiff notes and acknowledges the risks involved in
28 proceeding with this litigation, given the mixed case law on standing in FACTA class actions, and

1 disputes between the parties regarding the willfulness of defendant’s conduct and the
2 appropriateness of class certification other than for the purpose of settlement. (Doc. No. 13 at
3 17–19.) Because of the concrete risks attendant with this litigation, the court finds that the
4 amount offered in settlement weighs in favor of preliminary approval.

5 **II. Preliminary Certification of Class**

6 In order to preliminarily certify a class, the court must find all of the requirements of rule
7 23(a) are met. *See Hanlon*, 150 F.3d at 1019. As a threshold matter, in order to certify a class, a
8 court must be satisfied that:

9 (1) the class is so numerous that joinder of all members is
10 impracticable (the “numerosity” requirement); (2) there are
11 questions of law or fact common to the class (the “commonality”
12 requirement); (3) the claims or defenses of representative parties are
13 typical of the claims or defenses of the class (the “typicality”
14 requirement); and (4) the representative parties will fairly and
15 adequately protect the interests of the class (the “adequacy of
16 representation” requirement).

17 *In re Intel Sec. Litig.*, 89 F.R.D. 104, 112 (N.D. Cal. 1981) (citing Fed. R. Civ. P. 23(a)).

18 Once each of these threshold requirements set out under Rule 23(a) is satisfied, a class
19 may be certified if the class action satisfies the predominance and superiority requirements of
20 Rule 23(b)(3). *See Amchem*, 521 U.S. at 615 (“To qualify for certification under Rule 23(b)(3), a
21 class must meet two requirements beyond Rule 23(a) prerequisites: Common questions must
22 ‘predominate over any questions affecting only individual members,’ and class resolution must
23 be ‘superior to other available methods for the fair and efficient adjudication of the
24 controversy.’”). First, the common questions must “predominate” over any individual questions.
25 While this requirement is similar to the Rule 23(a)(2) commonality requirement, the standard is
26 much higher at this stage of the analysis. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359
27 (2011); *Amchem*, 521 U.S. at 624–25; *Hanlon*, 150 F.3d at 1022. While Rule 23(a)(2) can be
28 satisfied by even a single question, Rule 23(b)(3) requires convincing proof the common
29 questions “predominate.” *Amchem*, 521 U.S. at 623–24; *Hanlon*, 150 F.3d at 1022. “When
30 common questions present a significant aspect of the case and they can be resolved for all
31 members of the class in a single adjudication, there is clear justification for handling the dispute

1 on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022. Rule 23(b)(3)
2 also requires a court to find “a class action is superior to other available methods for the fair
3 adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). As one district court has summarized:

4 In resolving the Rule 23(b)(3) superiority inquiry, the court should
5 consider class members’ interests in pursuing separate actions
6 individually, any litigation already in progress involving the same
7 controversy, the desirability of concentrating in one forum, and
8 potential difficulties in managing the class action—although the last
9 two considerations are not relevant in the settlement context.

8 *Palacios v. Penny Newman Grain, Inc.*, No. 1:14-cv-01804-KJM, 2015 WL 4078135, at *6 (E.D.
9 Cal. July 2, 2015) (citing *Schiller v. David’s Bridal Inc.*, No. 10-0616, 2012 WL 2117001, at *10
10 (E.D. Cal. June 11, 2012)).

11 Plaintiff seeks certification for the following class: “All consumers who, at any time
12 during the period December 22, 2014 to October 28, 2015, were provided an electronically
13 printed receipt at the point of a sale or transaction at Pick-A-Part (located at 2274 E. Muscat
14 Avenue, Fresno, CA 93725), on which receipt was printed the expiration date of the consumer’s
15 credit card or debit card.” (Doc. No. 13 at 3.)

16 A. Rule 23(a) Requirements

17 i. *Numerosity*

18 Numerosity is met if “the class is so numerous that joinder of all members is
19 impracticable.” Fed. R. Civ. P. 23(a)(1). The numerosity requirement demands “examination of
20 the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of Nw., Inc. v.*
21 *EEOC*, 446 U.S. 318, 330 (1980). Courts have found the requirement satisfied when the class is
22 comprised of as few as thirty-nine members, or where joining all class members would serve only
23 to impose financial burdens and clog the court’s docket. *See Murillo v. Pac. Gas & Elec. Co.*,
24 266 F.R.D. 468, 474 (E.D. Cal. 2010) (citing *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319
25 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810) (discussing Ninth Circuit thresholds for
26 numerosity); *In re Itel Sec. Litig.*, 89 F.R.D. at 112.

27 Here, plaintiff alleges that there were 4,422 credit and debit card transactions with
28 defendant during the settlement class period. (Doc. Nos. 13 at 7; 14 ¶ 3.) Plaintiff argues that

1 from this figure, the court may infer a “sheer number of class members” for which joinder would
2 be impracticable. (Doc. No. 13 at 7.) It is certainly possible that each of these transactions
3 represents a unique customer, but even assuming the more likely scenario that this figure includes
4 repeat customers of defendant, it is still reasonable to conclude that the putative class is
5 sufficiently numerous that joinder would be impracticable. *See, e.g., Brown v. 22nd Dist. Agric.*
6 *Ass’n*, No. 15-cv-2578-DHB, 2016 WL 7242092, at *4 (S.D. Cal. Dec. 13, 2016) (finding
7 numerosity in a FACTA class action based on 100,000 noncompliant receipts); *In re Toys R Us -*
8 *Del., Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 300 F.R.D. 347, 368
9 (C.D. Cal. 2013) (finding numerosity in a FACTA class action based on more than 29 million
10 noncompliant receipts).

11 ii. *Commonality*

12 Commonality is met if “there are questions of law or fact common to the class.” Fed. R.
13 Civ. P. 23(a)(2). To satisfy this requirement, plaintiff’s claims must depend upon a common
14 contention such that “determination of its truth or falsity will resolve an issue that is central to the
15 validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350. “Commonality is
16 generally satisfied where . . . ‘the lawsuit challenges a system-wide practice or policy that affects
17 all of the putative class members.’” *Franco v. Ruiz Food Prods., Inc.*, No. 1:10-cv-02354-SKO,
18 2012 WL 5941801, at *5 (E.D. Cal. Nov. 27, 2012) (quoting *Armstrong v. Davis*, 275 F.3d 849,
19 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05
20 (2005)).

21 Here, the proposed class members allegedly suffered the same injury: they were all
22 provided an electronically printed receipt upon transacting business with defendant that allegedly
23 printed the expiration date of their credit card or debit card, in violation of FACTA. Defendant’s
24 alleged unlawful practice thus affected all of the putative class members. Accordingly, the
25 proposed settlement class meets the commonality requirement.

26 iii. *Typicality*

27 Typicality requires that “the claims or defenses of the representative parties [be] typical of
28 the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Typicality is satisfied “when each

1 class member’s claim arises from the same course of events, and each class member makes
2 similar legal arguments to prove the defendant’s liability.” *Armstrong*, 275 F.3d at 868; *see also*
3 *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995) (claims are typical where named
4 plaintiffs have the same claims as other members of the class and are not subject to unique
5 defenses). While representative claims must be “reasonably co-extensive with those of absent
6 class members,” they “need not be substantially identical.” *Hanlon*, 150 F.3d at 1020; *see also*
7 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

8 Here, plaintiff’s claims arise from the same facts of those of the class. She purchased
9 vehicle parts from defendants and received a receipt containing the expiration date of the credit
10 card or debit card she used. (Doc. No. 13 at 9.) Moreover, plaintiff bases her claim on the same
11 legal theories as those of the class, and also seeks the same relief as all class members. (*Id.*)
12 Therefore, plaintiff meets the typicality requirement.

13 iv. *Adequacy*

14 For adequacy to be met, the representative parties must be able to “fairly and adequately
15 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This prong involves two inquiries:
16 “(a) do the named plaintiffs and their counsel have any conflicts of interest with other class
17 members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on
18 behalf of the class?” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 462; *see also Pierce v. County*
19 *of Orange*, 526 F.3d 1190, 1202 (9th Cir. 2008).

20 Here, plaintiff and her counsel have no conflicts of interest with other class members.
21 Plaintiff’s claims are typical of those of other class members, and plaintiff and the class members
22 share the common goal of protecting themselves and other consumers against identity theft and
23 credit and debit card fraud. (Doc. Nos. 13 at 9–10; 15 at ¶ 53.) Furthermore, plaintiff’s counsel
24 has experience in class action litigation, including lawsuits involving violations of FACTA.
25 (Doc. Nos. 13 at 10; 15 ¶¶ 17–18, 31–51.) Therefore, plaintiff and her counsel meet the adequacy
26 requirement.

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1 B. Rule 23(b) Requirements

2 Class actions under 23(b)(3) must meet two additional requirements. First, the common
3 questions must predominate over individual questions; and second, the class action device must
4 be “superior to other available methods for fairly and efficiently adjudicating the controversy.”
5 Fed. R. Civ. P. 23(b)(3).

6 a. *Predominance*

7 Predominance requires that common questions predominate over individual questions.
8 Fed. R. Civ. P. 23(b)(3). In contrast to Rule 23(a)(2)’s commonality requirement, which can be
9 satisfied by even a single question, predominance under Rule 23(b)(3) requires convincing proof
10 the common questions “predominate.” *Amchem*, 521 U.S. at 623–24; *Hanlon*, 150 F.3d at 1022.

11 Here, common issues easily predominate over the class members’ individual claims. As
12 plaintiff notes, whether defendant violated FACTA willfully—as is required under 15 U.S.C.
13 § 1681n to entitle class members to the award of statutory damages—is a central issue involving
14 defendant’s conduct, which applies uniformly to all class members. (Doc. No. 13 at 10.) Each
15 class member’s claim is also predicated upon the same alleged conduct by defendant, that is, the
16 printing of non-compliant receipts. Where, as here, “common questions present a significant
17 aspect of the case and they can be resolved for all members of the class in a single adjudication,
18 there is clear justification for handling the dispute on a representative rather than on an individual
19 basis.” *Hanlon*, 150 F. 3d at 1022.

20 b. *Superiority*

21 Superiority requires that the class action device is superior to individual actions. Rule
22 23(b)(3)(A)–(D) provides a list of four factors to assess whether this requirement is met,
23 including the interest of the members of the class in individually controlling the prosecution or
24 defense of separate actions; the extent and nature of any litigation concerning the controversy
25 already commenced by or against members of the class; the desirability or undesirability of
26 concentrating the litigation of the claims in the particular forum; and the difficulties likely to be
27 encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

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1 Here, the individual claimants likely have no interest in controlling the prosecution of
2 their own actions, because any individual legal costs could far outstrip any potential recovery. A
3 class member who pursues an individual action for damages can recover actual damages, if any,
4 or statutory damages of between \$100 and \$1,000. 15 U.S.C. § 1681n. This likely deters
5 individuals from pursuing valid claims, where the cost of litigation significantly outweighs any
6 potential recovery. Moreover, the parties before the court have stated that they are not aware of
7 any other pending litigation concerning the violations alleged in this case. (Doc. No. 13 at 13.)
8 Thus, superiority is satisfied here. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 710–11
9 (9th Cir. 2010) (holding that the district court abused its discretion in denying certification to a
10 FACTA class based upon its application of the superiority requirement); *but see Rowden v. Pac.*
11 *Parking Sys., Inc.*, 282 F.R.D. 581, 585–87 (C.D. Cal. 2012) (holding that FACTA class was not
12 ascertainable and class action was not superior to other methods of resolving the parties’
13 controversy because class members had an effective alternative remedy in the form of an
14 administrative grievance).

15 **III. Proposed Class Notice and Administration**

16 For proposed settlements under Rule 23, “the court must direct notice in a reasonable
17 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1); *see*
18 *also Hanlon*, 150 F.3d at 1025 (“Adequate notice is critical to court approval of a class settlement
19 under Rule 23(e).”). A class action settlement notice “is satisfactory if it generally describes the
20 terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate
21 and to come forward and be heard.” *Churchill Vill., LLC v. Gen. Elec.*, 561 F.3d 566, 575 (9th
22 Cir. 2004) (internal quotations and citations omitted). Moreover, in class actions certified under
23 Rule 23(b)(3), notice should be the “best notice that is practicable under the circumstances,” Fed.
24 R. Civ. P. 23(c)(2)(B), in a manner that is “reasonably calculated, under all the circumstances, to
25 apprise interested parties of the pendency of the action and afford them an opportunity to present
26 their objections. *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

27 Here, plaintiff provides a proposed notice (“Newspaper Notice”) that summarizes the
28 claims in the litigation, who qualifies as a class member, and the options available to class

1 members to either remain in the class or opt out. (Doc. No. 15-1, Ex. B.) Plaintiff proposes that
2 Newspaper Notice will be made by publication in the Fresno Bee on three separate dates, the first
3 to occur within 20 days of the court’s preliminary approval, the second to occur within 30 days of
4 the first date, and the third date to occur within 70 days of the first date. (Doc. No. 15-1 at 4.)
5 The settlement also provides for the creation of a settlement website, which will house an online
6 long-form notice (“Full Notice”). (*Id.*) The full notice provides a description of the settlement
7 terms; the options available to class members, including objecting to the settlement and speaking
8 at the fairness hearing; the attorneys’ fee amount; and the time, place, and date of the final
9 approval hearing before this court. (Doc. No. 15-1, Ex. C.) The newspaper notice, settlement
10 website, and full notice will include the toll-free telephone number of the settlement
11 administrator. (Doc. No. 15-1 at 4.)

12 At oral argument, the court inquired whether the parties had considered posting notice at
13 2274 E. Muscat Avenue, Fresno, CA 93725, the location of defendant’s former business
14 premises. Counsel for both parties indicated that they had not contacted the new owner of the
15 premises regarding such notice. On November 13, 2017, counsel for defendant Ted A. Galfin
16 submitted a declaration attesting that he contacted Robert L. Young, legal counsel for Vehicle
17 Recycling Services, LLC (“VRS”), the current occupant of the premises formerly occupied by the
18 defendant. (Doc. No. 19, at ¶ 2.) According to Galfin’s declaration, VRS would not consent to
19 the posting of a public notice of the proposed settlement on the defendant’s former business
20 premises. (*Id.* at ¶ 3.)

21 In light of this supplemental information, the court is satisfied that newspaper publication
22 constitutes the best notice practicable under the circumstances and is reasonably calculated to
23 apprise interested parties of the settlement. *See, e.g., Brown*, 2016 WL 7242092, at *8–9
24 (approving publication of notice in FACTA class action via newspaper, defendant’s website, and
25 a settlement website); *In re Toys R Us*, 295 F.R.D. at 448–49 (“Because Toys does not have the
26 mailing addresses of purchasers who used debit or credit cards during the class period, the court
27 approved notice by means of publication and a settlement website. . . . When the court certifies a
28 nationwide class of persons whose addresses are unknown, notice by publication is reasonable.”);

1 *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080 (“Because defendants do not have a list
 2 of potential class members, the court agrees with plaintiffs that notice by publication is the only
 3 reasonable method of informing class members of the pending class action and the Lenox
 4 settlement.”).

5 Plaintiff proposes the following implementation schedule:

Event	Time
Deadline for defendant to establish non-reversionary cash fund	No later than three business days after the court enters an order granting preliminary approval of the settlement
Publication of newspaper notice (x3)	Within 20 days after the court’s preliminary approval of the settlement; within 30 days of the first date; and within 70 days of the first date
Settlement Administrator will provide the full notice on the settlement website	Within 10 days after the court’s preliminary approval of the settlement
Deadline for settlement class members to submit a claim form	Within 180 days from the date full notice is posted on the settlement website
Deadline for settlement class members to object to or opt out of the settlement	60 days after the first date of posting the full notice to the settlement website
Deadline for plaintiff to file a motion for final approval of the settlement and a motion for an award of attorney’s fees and costs and for the class representative’s incentive award	At least 30 days before the final fairness hearing
Deadline for settlement class members to object to class counsel’s motion for an award of attorney’s fees and costs and/or the class representative’s motion for incentive award	21 days before the final fairness hearing
Deadline for settlement class members to file a Notice of Intention to Appear at the final fairness hearing	No later than 21 calendar days before the fairness hearing if the appearance concerns class counsel’s motion for an award of attorney’s fees and costs and/or the class representative’s motion for incentive award; no later than 60 calendar days after the first date of posting the full notice for any other matter concerning the settlement agreement

Distribution of settlement checks	Beginning no earlier than 30 days after the settlement date; and ending no later than 60 days after the last day to submit claims or the settlement date, whichever is later
Settlement Administrator shall issue checks to class counsel and the class representative	Within 10 days of the settlement date

The court finds that the notice and the manner of notice proposed by plaintiff meets the requirements of Federal Civil Procedure Rule 23(c)(2)(B) and 29 U.S.C. § 216(b).

CONCLUSION

For the reasons stated above,

1. Plaintiff’s motion for preliminary approval of class action settlement (Doc. No. 13) is granted;
2. Preliminary class certification under Rule 23 is approved;
3. Plaintiff’s counsel, Chant Yedalian, is appointed as class counsel;
4. The named plaintiff, Cirena Torres, is appointed as class representative;
5. The proposed notice and claim form conform with Federal Rule of Civil Procedure 23 and 29 U.S.C. § 216(b) and are approved;
6. Atticus Administration, LLC is approved as claims administrator;
7. The proposed settlement detailed herein is approved on a preliminary basis as fair and adequate;
8. The hearing for final approval of the proposed settlement is set for July 17, 2018, at 9:30 a.m. before the undersigned in Courtroom 5, with the motion for final approval of class action settlement to be filed twenty-eight (28) days in advance of the final approval hearing, in accordance with Local Rule 230; and
9. Plaintiff’s proposed settlement implementation schedule is adopted.

IT IS SO ORDERED.

Dated: January 5, 2018


 UNITED STATES DISTRICT JUDGE