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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERI BROWN,
Plaintiff,
v.
JONATHAN NEIL AND ASSOCIATES,
INC.,
Defendant.

Case No. 1:17-cv-00675-SAB
ORDER GRANTING JOINT MOTION FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AND VACATING
NOVEMBER 28, 2018 HEARING
(ECF No. 58)
FINAL APPROVAL HEARING:
FEBRUARY 13, 2019

Plaintiff Teri Brown filed this action on behalf of herself and others similarly situated against Defendant Jonathan Neil and Associates, Inc. alleging violations of the Fair Debt Collections Practices Act (“FDCPA”), 15 U.S.C. § 1692 et seq. Currently before the Court is the parties’ joint motion for preliminary approval of the class action settlement. (ECF No. 58.) The parties have consented to the magistrate judge for all purposes. (ECF Nos. 34, 35, 36.)

The Court, having reviewed the record, finds this matter suitable for decision without oral argument. *See* Local Rule 230(g). Accordingly, the previously scheduled hearing set on November 28, 2018, will be vacated and the parties will not be required to appear at that time.

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1 I.

2 **FACTUAL BACKGROUND**

3 At some time, Plaintiff incurred an obligation to Mercury Insurance Company. (Compl.
4 ¶ 23.) Mercury Insurance Company contracted with Defendant to collect the debt. (Compl. ¶
5 27.) Around March 14, 2017, Defendant sent Plaintiff a collection letter regarding the debt owed
6 to Mercury Casualty Insurance Company. (Compl. ¶ 29.) Plaintiff received and read the letter
7 which stated “RE: MERCURY CASUALTY INSURANCE”. (Compl. ¶¶ 31, 32.)

8 On May 16, 2017, Plaintiff filed this action, on behalf of herself and others similarly
9 situated, alleging that the letter failed to accurately identify the creditor in violation of the
10 FDCPA; and California’s Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), Cal. Civ.
11 Code § 1788 et seq. (ECF No. 1.) Defendant filed an answer on June 22, 2017. (ECF No. 7.)
12 The scheduling order issued on July 28, 2017, setting the deadline to file a motion for class
13 certification. (ECF No. 10.)

14 On January 12, 2018, Plaintiff filed a motion for class certification. (ECF No. 19.)
15 Defendant filed an opposition on January 31, 2018. (ECF No. 20.) Plaintiff filed a reply on
16 February 9, 2018. (ECF No. 24.) A hearing on the motion was held on February 14, 2018, and
17 the parties were to provide supplemental briefing to address the Court’s authority to expand the
18 class beyond that requested by the plaintiff and additional authority on limiting the class from
19 that proposed in the complaint filed in the action. (ECF No. 26.) On March 22, 2018, a notice of
20 settlement was filed and the motion for preliminary approval of the class action settlement was to
21 be filed on or before May 7, 2018. (ECF No. 31.) On May 7, 2018, the parties filed a motion for
22 preliminary approval of the class action settlement. (ECF No. 32.)

23 On May 10, 2018, Defendant consented to the jurisdiction of the United States magistrate
24 judge. (ECF No. 35.) On May 11, 2018, Plaintiff consented to the jurisdiction of the United
25 States magistrate judge. (ECF Nos. 35, 36.) On May 14, 2018, this matter was reassigned to the
26 undersigned. (ECF No. 37.) On June 5, 2018, an order issued denying the joint motion for
27 preliminary approval of the class action settlement and the parties were to inform the Court if
28 they were continuing to pursue settlement or if a scheduling conference need be set. (ECF No.

1 38.) On June 12, 2018, the parties filed a stipulation requesting additional time to respond which
2 was granted. (ECF Nos. 39, 40.)

3 An informal teleconference was held on July 11, 2018, and the parties were required to
4 file a notice re class settlement on or before July 26, 2018. (ECF Nos. 44, 45.) On July 26,
5 2018, the parties filed a notice that this action had not settled and a briefing schedule issued for a
6 motion for class certification to be filed. (ECF No. 46, 47.) Plaintiff filed a motion for class
7 certification on August 10, 2018, and Defendant filed a statement of non-opposition on August
8 24, 2018. (ECF Nos. 50, 51.) On August 29, 2018, an order issued granting Plaintiff's
9 unopposed motion for class certification. (ECF No. 52.) On September 18, 2018, Plaintiff filed
10 a proposed class notice for court approval. (ECF No. 53.) On September 27, 2018, the parties
11 filed a notice that the action had settled and an order issued requiring the motion for preliminary
12 approval of the class action settlement to be filed on or before October 26, 2018. (ECF Nos. 55,
13 57.)

14 On October 26, 2018, a joint motion for preliminary approval of the class action
15 settlement was filed. (ECF No. 58.)

16 II.

17 LEGAL STANDARD

18 The Ninth Circuit has declared that a strong judicial policy favors settlement of class
19 actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). To certify a
20 class, a plaintiff must demonstrate that all of the prerequisites of Rule 23(a), and at least one of
21 the requirements of Rule 23(b) of the Federal Rules of Civil Procedure have been met. Wang v.
22 Chinese Daily News, Inc., 737 F.3d 538, 542 (9th Cir. 2013). This requires the court to “conduct
23 a ‘rigorous analysis’ to determine whether the party seeking class certification has met the
24 prerequisites of Rule 23.” Wright v. Linkus Enterprises, Inc., 259 F.R.D. 468, 471 (E.D. Cal.
25 2009).

26 Federal Rule of Civil Procedure 23(e)(2) requires that any settlement in a class action be
27 approved by the court which must find that the settlement is fair, reasonable, and adequate. The
28 role of the district court in evaluating the fairness of the settlement is not to assess the individual

1 components, but to assess the settlement as a whole. Lane v. Facebook, Inc., 696 F.3d 811, 818-
2 19 (9th Cir. 2012) reh'g denied 709 F.3d 791 (9th Cir. 2013).

3 **A. Terms of Proposed Settlement**

4 The parties have agreed to settle the claims of a class defined as

5 All consumers with an address located in Kern County, California who were sent
6 an initial collection letter and/or notices from Defendant, during the period of
7 May 16, 2016 to present, attempting to collect a consumer debt owed which stated
"Re: Mercury Casualty Insurance."

8 (Settlement Agreement and Release of All Claims ("Settlement Agreement") ¶ 5, ECF No. 58-2.)

9 The class definition is substantially similar to the class which was certified in the August 29,
10 2018 order granting Plaintiff's motion for class certification.¹

11 The Class Members who do not opt-out will release and discharge all claims asserted in
12 or that could have been asserted in this action. (Id. at ¶ 6(A). This includes all known or
13 unknown claims under federal or California law arising out of Defendant's alleged failure to
14 clearly and concisely identify the current creditor in violation of the Fair Debt Collection Act, 15
15 U.S.C. § 1692g(a)(2) et seq., and the Rosenthal Fair Debt Collection Act, Cal. Civ. Code §
16 1788.17, et seq. (Id. at ¶ 6(A).) Plaintiff agrees to release all known and unknown claims
17 against Defendant. (Id. at ¶ 6(B)(C).)

18 Defendant will pay \$10,000.00 in statutory damages to the Settlement Class. (Id. at ¶ 7.)
19 The Settlement Class is comprised of approximately 281 individuals. (Id. at ¶ 8.) The class
20 members that do not opt out will receive a pro rata share of the settlement fund. (Id. at ¶ 9(a).)
21 All unclaimed funds will first be used to pay the class action administrative costs and if any fund
22 remain they shall be donated as a *cy pres* award to a charitable organization subject to the
23 Court's approval. (Id. at ¶ 9(c).) Plaintiff shall receive statutory damages of \$1,000.00 and a

24 ¹ The class that was certified in the August 29, 2018 order was defined as:

25 All consumers with an address in Kern County, California, who, beginning May 16, 2016 through
26 and including the final resolution of this case, were sent an initial letter from Jonathan Neil &
27 Associates, Inc. attempting to collect a consumer debt allegedly owed to Mercury Casualty
Insurance, which stated "Re: Mercury Casualty Insurance" without specifically identifying the
"current creditor".

28 (ECF No. 52 at 9:2-6.)

1 service award of \$1,500.00 for a total of \$2,500.00. (Id. at ¶ 9(b).)

2 Class counsel will receive attorney fees of \$36,000.00 to cover all fees and costs
3 associated with the litigation which will not come from the settlement fund. (Id. at ¶ 10.) The
4 Class Administrator will mail notice providing address forwarding within twenty days of
5 preliminary approval of the settlement. (Id. at ¶ 11, 12.) If a notice is returned with a forwarding
6 address provided the Class Administrator will forward the notice to the address provided, and if
7 the notice is returned without a forwarding address, the Class Administrator shall make
8 reasonable efforts to obtain the current address of the class members. (Id. at ¶¶ 11, 17.)

9 Class members have forty-five days after the notice is mailed to exclude themselves
10 from, or object to the settlement. (Id. at ¶ 12(a).)² Class members may be excluded from the
11 settlement agreement by opting out within the set time-period. (Id. at ¶ 12(b).)

12 Defendant shall pay costs and expenses through its insurance carrier to the Class
13 Administrator, including but not limited to, the costs of printing and mailing notice and issuing
14 and mailing settlement checks to the class members. (Id. at ¶ 16.)

15 **B. Certification of Class**

16 To certify a class, a plaintiff must demonstrate that all of the prerequisites of Rule 23(a),
17 and at least one of the requirements of Rule 23(b) of the Federal Rules of Civil Procedure have
18 been met. Wang, 737 F.3d at 542. This requires the court to “conduct a ‘rigorous analysis’ to
19 determine whether the party seeking class certification has met the prerequisites of Rule 23.”
20 Wright, 259 F.R.D. at 471.

21 The Court has previously found that the class meets the prerequisites of numerosity,
22 commonality, typicality, and adequacy of representation. (Order Granting Plaintiffs’ Motion for
23 Class Certification, ECF No. 52.) Further, the Court found that common questions predominate
24 and allowing this action to proceed as a class action is the superior method of adjudicating the
25 controversy of these claims and the class was certified. (Id.) The class sought to be certified
26 here, although not using the identical language of the class previously certified, is substantially

27 _____
28 ² The settlement agreement contains two paragraphs numbered 12. The Court distinguishes the terms by referring to the first paragraph 12 as 12(a) and the second paragraph 12 as 12(b).

1 similar to the class certified in the August 29, 2018 order. Accordingly, the Court certifies the
2 class for the reasons set forth in the August 29, 2018 order. (ECF No. 52.)

3 **C. Fairness, Adequacy, and Reasonableness of Proposed Settlement**

4 Having found that certification of the class is appropriate, the Court addresses Federal
5 Rule of Civil Procedure 23(e)(2) which requires that any settlement in a class action be approved
6 by the court which must find that the settlement is fair, reasonable, and adequate. Review of the
7 proposed settlement of the parties proceeds in two phases. True v. American Honda Motor Co.,
8 749 F.Supp.2d 1052, 1062 (C.D. Cal. 2010). At the preliminary approval stage, the court
9 determines whether the proposed agreement is within the range of possible approval and whether
10 or not notice should be sent to class members. True, 749 F.Supp.2d at 1063. At the final
11 approval stage, the court takes a closer look at the settlement, taking into consideration
12 objections and other further developments in order to make the final fairness determination. Id.

13 “To determine whether a settlement falls within the range of possible approval, a court
14 must focus on substantive fairness and adequacy, and “consider plaintiffs’ expected recovery
15 balanced against the value of the settlement offer.” Lusby v. Gamestop, Inc., 297 F.R.D. 400,
16 415 (N.D. Cal. 2013) (quoting In re Tableware Antitrust Litig., 484 F.Supp.2d 1078, 1080 (N.D.
17 Cal. 2007)). “If the proposed settlement appears to be the product of serious, informed, non-
18 collusive negotiations, has no obvious deficiencies, does not improperly grant preferential
19 treatment to class representatives or segments of the class, and falls within the range of possible
20 approval, then the court should direct that the notice be given to the class members of a formal
21 fairness hearing.” In re Tableware Antitrust Litigation, 484 F.Supp.2d at 1079 (quoting Manual
22 for Complex Litigation, Second § 30.44 (1985)).

23 Upon consideration of the settlement agreement as a whole, the Court finds that it is fair,
24 adequate, and reasonable for the reasons discussed below.

25 1. Reasonableness, Adequacy, and Fairness of Settlement to Class Members

26 The parties have been conducting arm’s length settlement negotiations while adjudicating
27 the class certification of this action. The parties have exchanged discovery which has identified
28 approximately 281 class members and two depositions of the defendant have been taken. (Decl.

1 of Ari H. Marcus, Esq. in Support of Plaintiff's Motion for Class Certification, ECF No. 58-6.)
2 Discovery has been conducted and two motions for class certification have been filed, as well as
3 a previous motion for preliminary approval of a class action settlement.

4 Counsel for the parties have analyzed the legal and factual issues that are presented in
5 this action, the likelihood of recovering damages in excess of those obtained by this settlement,
6 the protracted nature of the litigation and the potential costs and outcome of further litigation and
7 have determined that settlement of this action is appropriate.

8 The FDCPA caps a class recovery at the lesser of one percent of the debt collector's net
9 worth or \$500,000.00. 15 U.S.C. § 1692k(a)(2)(B). Therefore, financial statements provided
10 during discovery have led counsel for Plaintiff to conclude that the settlement amount is the
11 maximum that the class can receive under the statute. Based on the number of class members,
12 each class member who does not opt out of the class is expected to receive approximately \$35.50
13 and courts have found lesser amounts reasonable in similar FDCPA class action cases. See
14 Schuchardt v. Law Office of Rory W. Clark, 314 F.R.D. 673, 684 (N.D. Cal. 2016) (class
15 members received \$15.10); Gonzalez v. Germaine Law Office PLC, No. CV-15-01427-PHX-
16 ROS, 2016 WL 3360700, at *4 (D. Ariz. June 1, 2016) (class members expected to receive
17 \$17.00); Harper v. Law Office of Harris & Zide LLP, No. 15-CV-01114-HSG, 2017 WL
18 995215, at *4 (N.D. Cal. Mar. 15, 2017) (class members received \$10.00); Salazar v. Midwest
19 Servicing Grp., Inc., No. CV 17-0137 PSG (KSX), 2018 WL 4802139, at *4 (C.D. Cal. Oct. 2,
20 2018) (class members expected to receive \$20.00). Further, attorney fees and the class
21 representative payments will not be deducted from the settlement fund. The benefit that the class
22 members will receive is not insubstantial. The Court finds that the settlement falls within the
23 reasonable range.

24 2. Notice

25 The class in this action was certified under Rule 23(b)(3) of the Federal Rules of Civil
26 Procedure. The Federal Rules provide the for "[a]ny class certified under Rule 23(b)(3) . . . the
27 court must direct to class members the best notice that is practicable under the circumstances,
28 including individual notice to all members who can be identified through reasonable effort."

1 Fed. R. Civ. P. 23(c)(2)(B). The notice must also clearly and concisely state in plain, easily
2 understood language:

- 3 (i) the nature of the action;
- 4 (ii) the definition of the class certified;
- 5 (iii) the class claims, issues, or defenses;
- 6 (iv) that a class member may enter an appearance through an attorney if the
7 member so desires;
- 8 (v) that the court will exclude from the class any member who requests exclusion;
- 9 (vi) the time and manner for requesting exclusion; and
- 10 (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

11 Fed. R. Civ. P. 23(c)(2)(B).

12 The proposed notice includes information about the nature of the action and the claims
13 involved. However, the class definition on the notice is consistent with the order granting class
14 certification, but is not the language that is used for the class description in the current motion.
15 Accordingly, Plaintiff shall correct the language on the notice to be identical to the current class
16 definition prior to sending the notice.

17 The notice informs the class that a class member may obtain their own attorney and also
18 provides notice that if the class member does not seek exclusion from the class they will be
19 bound by the final judgment and will not be able to bring another law suit against the defendant
20 regarding the claims or issues in this action. The class notice states that objections should be
21 sent to the Robert T. Matsui U.S. Courthouse 501 I Street, Sacramento, California 95184. Since
22 this action is in the Fresno Division of the Eastern District of California, Plaintiff shall correct
23 the notice to have objections sent to the Robert E. Coyle Federal Courthouse, 2500 Tulare Street,
24 Room 1501, Fresno, California 93721.

25 The notice is to be sent by U.S. mail to the last known address of the settlement class
26 members. (Settlement Agreement ¶ 17.) Notices returned with a forwarding address will be re-
27 mailed to the forwarding address. If notices are returned without a forwarding address provided
28 the settlement administrator shall make reasonable efforts to obtain the current address of the
class member.

The Court finds that the notice, with the noted corrections, is the best notice practicable
under the circumstances. The Court shall preliminarily approve the settlement agreement. The

1 motion for final approval of the class action settlement will be required to address the factors to
2 be considered in making the fairness determination including: “the strength of the plaintiffs’
3 case; the risk, expense, complexity, and likely duration of further litigation; the risk of
4 maintaining class action status throughout the trial; the amount offered in settlement; the extent
5 of discovery completed and the stage of the proceedings; the experience and views of counsel;
6 the presence of a governmental participant; and the reaction of the class members to the
7 proposed settlement.” Lane, 696 F.3d at 819 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011,
8 1026 (9th Cir. 1998)).

9 3. Representation

10 However, the Court advises the parties of the following concerns that will need to be
11 addressed at the final approval of the class action settlement. The Court has previously
12 appointed the class representative and class counsel finding that they are adequate
13 representatives of the class. (ECF No. 52.)

14 The class representative has an incentive to advance his own interests over that of the
15 class and class counsel owes the ultimate fiduciary responsibility to the class as a whole and is
16 not bound by the views of the named plaintiff regarding settlement. Staton v. Boeing Co., 327
17 F.3d 938, 959-60 (9th Cir. 2003). Therefore, in assessing the fairness of the settlement, the court
18 is to ensure that “the agreement is not the product of fraud or overreaching by, or collusion
19 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
20 adequate to all concerned.” Hanlon, 150 F.3d at 1027 (quoting Officers for Justice v. Civil Serv.
21 Comm’n of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982)). “To determine the
22 reasonableness of an incentive payment, courts consider the proportionality between the
23 incentive payment and the range of class members’ settlement awards.” Dyer v. Wells Fargo
24 Bank, N.A., 303 F.R.D. 326, 335 (N.D. Cal. 2014).

25 Here, the Court previously expressed concern because the plaintiff is receiving her full
26 statutory damage award of \$1,000.00 as well as an enhancement award of \$1,500.00 while the
27 class members are receiving only a fraction of the statutory damage amount they could receive.
28 (See ECF No. 38 at 9:3-10:7.) “An individual who joins his claims with those of a class

1 ‘disclaim[s] any right to a preferred position in the settlement [of those claims].’ ” In re Toys R
2 Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig. (“In re Toys R
3 Us”), 295 F.R.D. 438, 470 (C.D. Cal. 2014) (quoting Razilov v. Nationwide Mut. Ins. Co., No.
4 01–CV–1466–BR, 2006 WL 3312024, *4 (D. Or. Nov. 13, 2006). “An incentive award may be
5 appropriate when a class representative will not gain any benefit beyond that he would receive as
6 an ordinary class member.” In re Toys R Us, 295 F.R.D. at 472.

7 As Plaintiff is receiving a benefit beyond that of the other class members by receiving her
8 full statutory benefit award, this factor will weigh heavily against granting an incentive award in
9 this matter. Further, in Staton, the Ninth Circuit found it was an abuse of discretion to approve a
10 settlement where the class representatives received an incentive award that was, on average
11 sixteen times greater than the award that the unnamed class members would receive. 327 F.3d at
12 946. The district court must evaluate the fairness of the incentive award by considering “relevant
13 factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the
14 degree to which the class has benefitted from those actions, ... the amount of time and effort the
15 plaintiff expended in pursuing the litigation ... and reasonabl[e] fear[s of] workplace retaliation.”
16 Id. at 977 (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998)). Should Plaintiff seek
17 an enhancement payment she will be expected to address the factors that the court considers in
18 issuing such an award.

19 At the final approval hearing, the Court will employ the lodestar method to the request
20 for attorney fees as a cross check on the percentage method to ensure a failure and reasonable
21 result. Alberto v. GMRI, Inc., 252 F.R.D. 652, 668 (E.D. Cal. 2008). Therefore, counsel is
22 advised that in submitting the final approval of class action settlement they will be required to
23 provide a thorough fee award petition that details the hours reasonably spent representing the
24 class in this action.

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1 **IV.**

2 **CONCLUSION AND ORDER**

3 Upon review of the proposed settlement agreement, the Court finds that it is fair,
4 adequate, and reasonable.

5 Based on the foregoing, IT IS HEREBY ORDERED that:

- 6 1. The parties' joint motion for preliminary approval of the class action settlement is
7 GRANTED;
- 8 2. The Court finds that the proposed manner of the notice of settlement constitutes
9 the best notice practicable under the circumstances;
- 10 3. The Court approves the proposed notice of settlement with the corrections
11 addressed in this order;
- 12 4. Class members shall have until **January 11, 2019**, to opt out, exclude themselves
13 from, or object to the proposed settlement. Any Settlement Class members
14 desiring to exclude themselves from the action must serve copies of the request on
15 counsel for both Plaintiff and Defendant by that date. Any Settlement Class
16 members who wish to object to the settlement must submit an objection in writing
17 to the Clerk of the United States District Court for the Eastern District of
18 California, and serve copies of the objection on counsel for both Plaintiff and
19 Defendant by that date. Any objection must include the name and number of the
20 case and a statement of the reason why the objector believes that the Court should
21 find that proposed settlement is not in the best interests of the class. Objectors
22 who have filed written objections to the settlement may also appear at the hearing
23 and be heard on the fairness of the settlement. To be effective, the request for
24 exclusion or objection must be postmarked by **January 11, 2019**.
- 25 5. The final approval hearing shall be held on **February 13, 2019, at 10:00 a.m. in**
26 **Courtroom 9**;
- 27 6. If not already filed, Defendant shall file with the Court proof of compliance with
28 the notice requirements of the Class Action Fairness Act of 2005, 28 U.S.C.

1 §1715(b); and

2 7. The November 28, 2018 hearing is VACATED and the parties need not appear on
3 that date.

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5 IT IS SO ORDERED.

6 Dated: November 5, 2018



UNITED STATES MAGISTRATE JUDGE

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