UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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HEIDI ANDERSON-BUTLER and PAULA HAUG on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CHARMING CHARLIE INC., a Delaware Corporation; CHARMING CHARLIE LLC, a Delaware Limited Liability Company; and DOES 1 through 50, inclusive,

Defendants.

CIV. NO. 2:14-01921 WBS AC

MEMORANDUM AND ORDER RE: MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs brought this putative class action against Charming Charlie, LLC,[1] alleging defendant illegally required

[1] Plaintiffs originally named both Charming Charlie, Inc., and Charming Charlie LLC in error. Charming Charlie, Inc. no longer exists as a distinct entity because it converted to Charming Charlie LLC in December 2013. (Def.'s Stmt. at 1 (Docket No. 13).)

plaintiffs to provide personal information when making a credit card purchase in violation of California Civil Code section 1747.08. Presently before the court is plaintiffs' motion for preliminary approval of the class action settlement.

I. Factual and Procedural Background

Charming Charlie is a retailer selling women's apparel and accessories in stores across the country, including California. Plaintiffs Heidi Anderson-Butler and Paula Haug visited Charming Charlie stores located in Chino Hills and Folsom, California, respectively. Upon attempting to pay for items with their credit cards, a clerk told both women they were required to provide personal information including their physical address, email address, and phone number. Plaintiffs provided the information to the clerk.[2] Defendant allegedly used the collected information for direct marketing purposes.

Plaintiffs allege defendant violated the Song-Beverly Credit Card Act, Cal. Civ. Code § 1747.08, which provides that a corporation may not "request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which . . . the corporation . . . causes to be written, or otherwise records . . . ." Plaintiffs brought this lawsuit on behalf of a putative class of consumers in California from whom defendant requested personal information during the course of credit card transactions. The case settled before the

[2] Plaintiff Haug refused to provide her physical address and provided only her telephone number and email address. (Compl. ¶ 26 (Docket No. 1-2).)

parties filed any dispositive motions. Plaintiffs now seek preliminary approval of the parties' stipulated class-wide settlement, pursuant to Federal Rule of Civil Procedure 23(e).

II. Discussion

Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing Manual for Complex Litig., Third, § 30.41 (1995)).

This Order is the first step in that process and analyzes only whether the proposed class action settlement deserves preliminary approval. See Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 473 (E.D. Cal. 2010). Preliminary approval authorizes the parties to give notice to putative class members of the settlement agreement and lays the groundwork for a future fairness hearing, at which the court will hear objections to (1) the treatment of this litigation as a class action and/or (2) the terms of the settlement. See id.; Diaz v. Trust Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989) (stating that a district court's obligation when considering dismissal or compromise of a class action includes holding a hearing to "inquire into the terms and circumstances of any dismissal or compromise to ensure that it is not collusive or prejudicial"). The court will reach a final determination as to whether the

parties should be allowed to settle the class action on their proposed terms after that hearing.

The Ninth Circuit has declared a strong judicial policy favoring settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). Nevertheless, where, as here, "the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both [1] the propriety of the certification and [2] the fairness of the settlement." Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).

The first part of this inquiry requires the court to "pay 'undiluted, even heightened, attention' to class certification requirements" because, unlike in a fully litigated class action suit, the court "will lack the opportunity . . . to adjust the class, informed by the proceedings as they unfold." Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997); see Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). The parties cannot "agree to certify a class that clearly leaves any one requirement unfulfilled," and consequently the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement. See Windsor, 521 U.S. at 621-22 (stating that courts cannot fail to apply the requirements of Rule 23(a) and (b)).

The second part of this inquiry obliges the court to "carefully consider 'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall

fairness . . . .'" Staton, 327 F.3d at 952 (quoting Hanlon, 150 F.3d at 1026); see also Fed. R. Civ. P. 23(e) (outlining class action settlement procedures).

A. Class Certification

A class action will be certified only if it meets the four prerequisites identified in Rule 23(a) and additionally fits within one of the three subdivisions of Rule 23(b). See Ontiveros v. Zamora, Civ. No. 2:08-567 WBS DAD, 2014 WL 3057506, at *4 (E.D. Cal. July 7, 2014); Fed. R. Civ. P. 23(a)-(b). Although a district court has discretion in determining whether the moving party has satisfied each Rule 23 requirement, see Califano v. Yamasaki, 442 U.S. 682, 701 (1979); Montgomery v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978), the court must conduct a rigorous inquiry before certifying a class, see Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982); E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403-05 (1977).

1. Rule 23(a) Requirements

Rule 23(a) restricts class actions to cases where:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

a. Numerosity

Under the first requirement, "[a] proposed class of at least forty members presumptively satisfies the numerosity requirement." Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450,

456 (C.D. Cal. 2012); see also, e.g., Collins v. Cargill Meat Solutions Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wanger, J.) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members."). The proposed class, which the plaintiffs estimate will contain approximately 200,000 members, (see Pls.' Mem. at 1 (Docket No. 11-1)), easily satisfies this requirement.

b. Commonality

Commonality requires that the class members' claims "depend upon a common contention" that is "capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011). "[A]ll questions of fact and law need not be common to satisfy the rule," and the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon, 150 F.3d at 1019.

The proposed class includes "[a]ll persons who, between July 9, 2013 and the date of entry of the Preliminary Approval Order, engaged in a credit card transaction at a California Charming Charlie Store and whose Personal Identification Information was requested and recorded by Charming Charlie at the Charming Charlie Store for purposes other than shipping, delivery or special orders." (Pls.' Mem. at 1-2.) The class would be comprised of individuals alleging facts similar to the named plaintiffs, that a Charming Charlie clerk asked for personal

information in conjunction with a credit card transaction. The class members' claims depend on a common contention that requesting and recording this information violated section 1747.08. Lastly, the statutory damages could be resolved on a class-wide basis. See Cal. Civ. Code § 1747.08(e) (providing for a civil penalty of no greater than $250 for the first violation and $1,000 for subsequent violations). The proposed class therefore meets the commonality requirement.

c. Typicality

Typicality requires that named plaintiffs have claims "reasonably coextensive with those of absent class members," but their claims do not have to be "substantially identical." Hanlon, 150 F.3d at 1020. The test for typicality "'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted).

The putative class members allege a simple set of facts that are similar to those alleged by the named plaintiffs. The class injury for all class members was being asked to provide personal information in connection to a credit card transaction, which was then recorded. Such injury was caused by the same conduct of the store clerk. Plaintiffs seek the remedy of statutory damages, which would presumably be the same award for each individual injury. (See Compl. at 10.) While there could conceivably be nuances with respect to a class member's experience at a Charming Charlie store, class members' claims

appear to be reasonably coextensive with those of the named plaintiffs. The proposed class therefore meets the typicality requirement.

d. Adequacy of Representation

Finally, to resolve the question of adequacy, the court must make two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon, 150 F.3d at 1020. These questions involve consideration of a number of factors, including "the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." Brown v. Ticor Title Ins., 982 F.2d 386, 390 (9th Cir. 1992).

The named plaintiffs' interests are generally aligned with the putative class members. The putative class members suffered a similar injury as the named plaintiffs, and the definition of the class is narrowly tailored and aligns with the named plaintiffs' interests. See Windsor, 521 U.S. at 625-26 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."); Murillo, 266 F.R.D. at 476 (finding that an appropriate class definition ensured that "the potential for conflicting interests will remain low while the likelihood of shared interests remains high").

The settlement agreement provides for an incentive award of $5,000 to each of the named plaintiffs, to be paid

separate from and in addition to the class recovery of $350,000 in vouchers. Although the Ninth Circuit has specifically approved the award of "reasonable incentive payments" to named plaintiffs, the use of an incentive award nonetheless raises the possibility that plaintiffs' interest in receiving that award will cause their interests to diverge from the class's interest in a fair settlement. Staton, 327 F.3d at 977–78 (declining to approve a settlement agreement where size of incentive award suggested that named plaintiffs were "more concerned with maximizing [their own] incentives than with judging the adequacy of the settlement as it applies to class members at large"). As a result, the court must "scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." Radcliffe v. Experian Info. Sys., Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).

An incentive award of $5,000 to each of the named plaintiffs does not on its face appear to create a conflict of interest. "In general, courts have found that $5,000 incentive payments are reasonable." Hopson v. Hanesbrands Inc., Civ. No. 08-0844 EDL, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) (citing In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir. 2000); In re SmithKline Beckman Corp., 751 F. Supp. 525, 535 (E.D. Pa. 1990); Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008)).

While the proposed award amount tends to be viewed as reasonable in the Ninth Circuit, it is disproportionate to the recovery of other class members. See, e.g., Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 463 (E.D. Cal. 2013) (England,

J.) (finding $7,500 incentive award unreasonable when average class member would receive $65.79 and reducing the award to $2,500). The settlement agreement provides that if there are 17,500 or fewer authorized claimants, then each will receive a $20 store voucher. If there are greater than 17,500 claimants, the value of each voucher shall be reduced pro rata. Plaintiffs represent that their discovery and investigation have revealed that the class is comprised of approximately 200,000 individuals. (Pls.' Mem. at 1.) If all of the estimated 200,000 class members participate, then each member will recover a $1.75 voucher.

Plaintiffs' counsel anticipates that only 5 to 10% of class members will actually return the claim form to the Claim Administrator. (Pls.' Mem. at 7.) The court questions why the average recovery should be based on such a small portion of the putative class. Plaintiffs have represented for the purpose of class certification that the class contains 200,000 members eligible to recover, which they state is an informed estimate based on discovery and investigation. (Id. at 1.) At the hearing, plaintiffs' counsel was unable to explain to the court's satisfaction why, given his experience with the method of notice used in this case, such a small proportion of class members tend to file claims. The court will therefore assume at this preliminary stage that the expected recovery amount per class member is a $1.75 voucher.

In their moving papers, plaintiffs do not provide a justification for such a comparatively high incentive award of $5,000 to each of the named plaintiffs. The settlement agreement vaguely notes that the awards are for financial risk and the time

and effort spent on the litigation, without any further explanation. At the hearing plaintiffs' counsel failed to provide the court with further guidance. While the incentive award is not dispositive of the named plaintiffs' adequacy of representation, the court will further explore the appropriateness of the award at the final fairness hearing. See Alberto, 252 F.R.D. at 662-63, 669 (certifying plaintiff as an adequate class representative "pending the introduction at the final fairness hearing of evidence in support of counsel's findings").

Accordingly, the court preliminarily finds that the proposed incentive award does not render plaintiffs inadequate representatives of the class. On or before the date of the fairness hearing, however, the parties shall present or be prepared to present evidence of the named plaintiffs' asserted "financial risk" and of named plaintiffs' efforts taken as class representatives, such as their hours of service or an itemized list of their activities, to justify the discrepancy between their award and those of the absent class members.[3]

The second prong of the adequacy inquiry examines the vigor with which the named plaintiff and her counsel have pursued the common claims. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an

[3] Relevant factors for the evaluation of the amount of incentive payments made to the named plaintiff include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . and reasonabl[e] fear[s of] workplace retaliation." Staton, 327 F.3d at 977 (citation omitted).

assessment of the rationale for not pursuing further litigation." Hanlon, 150 F.3d at 1021.

Plaintiffs' counsel states he has represented millions of consumers in numerous class actions asserting violations of California's consumer protection statutes. (Pls.' Mem. at 7.) In the last decade, counsel has brought twenty class actions under the Song-Beverly Act to judgment. (Id.) The court finds no reason to doubt that plaintiffs' attorney is well qualified to conduct the proposed litigation and assess the value of the settlement.

Plaintiffs' counsel asserts that to arrive at his decision to settle the action, he seriously considered the risks of further litigation. Counsel recognized that there are exceptions to section 1747.08 that could preclude recovery of the full permissible civil penalty, and class certification would be challenged. (Pls.' Mem. at 5.) Counsel weighed these risks along with the strength of the case to arrive at the decision to settle. (Id. at 4-5.) At this stage, the court agrees that these factors weighed in favor of settlement. The named plaintiffs and their counsel appear to be prepared to prosecute the action vigorously on behalf of the class.

2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may only be certified as a class action if it also satisfies the requirements of one of the three subdivisions of Rule 23(b). Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013). Plaintiffs presumably seek certification under Rule 23(b)(3), which provides that a class action may be maintained

only if (1) "the court finds that questions of law or fact common to class members predominate over questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

"Because Rule 23(a)(3) already considers commonality, the focus of the Rule 23(b)(3) predominance inquiry is on the balance between individual and common issues." Murillo, 266 F.R.D. at 476 (citing Hanlon, 150 F.3d at 1022); see also Windsor, 521 U.S. at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

The class members' contentions appear to be similar, if not identical. Again, although some nuances among the class members' allegations could exist, there is no indication that those variations are "sufficiently substantive to predominate over the shared claims." See id. For instance, one of the named plaintiffs refused to give the clerk her home address but still provided other information. The statute, however, requires only that personal information be requested and then recorded for a violation to occur. Whether one plaintiff provided a telephone number and another a home address is not material to the shared claims. Accordingly, the court finds that common questions of law and fact predominate over the class members' claims.

b. Superiority

Rule 23(b)(3) also requires a showing that "a class action is superior to other available methods for fairly and

efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It sets forth four non-exhaustive factors to consider in making this determination:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Id. The parties settled this action prior to certification, making factors (C) and (D) inapplicable. See Murillo, 266 F.R.D. at 477 (citing Windsor, 521 U.S. at 620). Section 1747.08 limits an individual's recovery of statutory civil penalties to $250 for the first violation, see Cal. Civ. Code § 1747.08(e), so most class members' recovery would be relatively small, and they might have little interest in controlling the prosecution of separate actions. The court is also unaware of any concurrent litigation already begun by class members regarding 1747.08 violations at Charming Charlie stores. Objectors at the fairness hearing may reveal otherwise. See Alberto, 252 F.R.D. at 664. At this stage, the class action device appears to be the superior method for adjudicating this controversy.

3. Rule 23(c)(2) Notice Requirements

If the court certifies a class under Rule 23(b)(3), it "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and

content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D. 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172–77 (1974)). Although that notice must be "reasonably certain to inform the absent members of the plaintiff class," actual notice is not required. Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (citation omitted).

The settlement agreement provides that the Claims Administrator will provide notice to the class using several methods: (1) via a website displaying full notice of the settlement, the claim form, the settlement agreement, and other court filings; (2) by email, to class members for whom defendant collected a valid email address; (3) by U.S. mail, to class members for whom defendant collected a valid mailing address; and (4) by displaying a sign in all of California Charming Charlie stores in a location visible to customers. (See Lindsay Decl. Ex. 1 ("Settlement Agreement") at 9 (Docket No. 11-3).) To be eligible to receive a voucher, class members must accurately complete and submit a claim form to the Claims Administrator by mail or e-mail within forty-five calendar days after the notice period has closed. The court is satisfied that this system of providing notice is reasonably calculated to provide notice to class members and is the best form of notice available under the circumstances.

The parties supplied the full "Notice of Class Action and Proposed Settlement," (Lindsay Decl. Ex. B), which will be available on the settlement website. The full notice explains the proceedings; defines the scope of the class; informs the class member of the claim form requirement and the binding effect

of the class action; describes the procedure for opting out and objecting; and provides the time and date of the fairness hearing. The content of the full notice therefore satisfies Rule 23(c)(2)(B). See Fed. R. Civ. P. 23(c)(2)(B); see also Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" (quoting Mendoza v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352 (9th Cir. 1980)).

B. Preliminary Settlement Approval

After determining that the proposed class satisfies the requirements of Rule 23, the court must determine whether the terms of the parties' settlement appear fair, adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2); Hanlon, 150 F.3d at 1026. This process requires the court to "balance a number of factors," including:

> the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. Many of these factors cannot be considered until the final fairness hearing, so the court need only conduct a preliminary review at this time to resolve any "glaring deficiencies" in the settlement agreement before authorizing notice to class members. Ontiveros, 2014 WL 3057506,

at *12 (citing Murillo, 266 F.R.D. at 478).

1. Terms of the Settlement Agreement

(1) **Settlement Class**: All persons who, between July 9, 2013 and the date of entry of the Preliminary Approval Order, engaged in a credit card transaction at a California Charming Charlie Store and whose personal identification information was requested and recorded by Charming Charlie and the Charming Charlie Store for purposes other than shipping, delivery, or special orders. (Pls.' Mem. at 2.)

(2) **Notice**: Within thirty days of the court's granting preliminary approval, the Claims Administrator will provide notice to class members using the methods detailed above, all of which will direct class members to the class settlement website for further information. The class settlement website will be active for a minimum of forty-five days. (Settlement Agreement ¶ 3.3.)

(3) **Opt-out Procedure**: To opt out of the settlement, a class member must, within forty-five after the last day for notice to be provided, submit by U.S. mail a letter or postcard addressed to the Claims Administrator indicating (a) the name and case number of the action; (b) the full name, address, and telephone number of the person requesting exclusion; and (c) a statement that he/she does not wish to participate in the Settlement. If more than 200 class members request exclusion, then Charming Charlie may elect to terminate the settlement agreement. (Id. ¶ 3.10.)

(4) **Objections to Settlement:** Any class member who has not submitted a timely written exclusion request and who wishes to object to the fairness, reasonableness, or adequacy of the settlement must deliver written objections to class counsel and defendant's counsel, and must file such objection with the court, no later than forty-five calendar days after the last day for notice to be provided. Written objections must include identifying information, a statement of each objection, and a written brief detailing legal and factual support the objector wishes to bring to the court's attention. A class member who has objected in writing has the option of appearing at the fairness hearing in person or through counsel. However, a class member intending to object at the hearing must file with the court a "Notice of Intention to Appear" no later than forty-five calendar days after the last day for notice to be provided. (Id. ¶ 3.9.)

(5) **Settlement Amount:** Defendant agrees to comply with section 1747.08 in its California stores, although the agreement does not require defendant to notify plaintiffs of changes to its policies, practices, and procedures. In addition, defendant will pay up to $350,000 in the form of store vouchers to class members valid for six months after issuance and redeemable for in-store purchases of merchandise at Charming Charlie stores. The amount of each voucher will depend on the number of class members who return the claim form. If there are 17,500 claimants, each will receive a $20 voucher. The

remainder will be redistributed as "remainder vouchers." If there are greater than 17,500 claimants, the value of each voucher shall be reduced pro rata. For example, if there are 20,000 claimants, each will receive a $17.50 voucher. (Id. ¶¶ 2.1-2.2.)

(6) **Attorney's Fees, Costs, and Plaintiffs' Incentive Award:** Plaintiffs will apply to the court for an award of attorney's fees and costs of $140,000 total to be paid separate and apart from the award to the class. Defendant agrees not to oppose class counsel's application. Plaintiffs also request, and defendant does not oppose, an incentive award of $5,000 to each of the named plaintiffs to be paid separate and apart from the award to the class. (Id. ¶ 2.4.)

(7) **Release:** Class members who participate in the settlement who have not timely opted out agree to release from claims arising out of acts, omissions, or other conduct that could have been alleged or otherwise referred to in the action, including but not limited to any and all violations of California Civil Code Section 1747.8.

2. Preliminary Determination of Adequacy

At the preliminary stage, "the court need only 'determine whether the proposed settlement is within the range of possible approval.'" Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). This generally requires consideration of "whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of

class representatives or segments of the class, or excessive compensation of attorneys." Id. (quoting W. v. Circle K Stores, Inc., Civ. No. 04-0438 WBS GGH, 2006 WL 1652598, at *11-12 (E.D. Cal. June 13, 2006)). Courts often begin by examining the process that led to the settlement's terms to ensure that those terms are "the result of vigorous, arms-length bargaining" and then turn to the substantive terms of the agreement. See, e.g., West, 2006 WL 1652598, at *11-12; In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("[P]reliminary approval of a settlement has both a procedural and a substantive component.").

a. Negotiation of the Settlement Agreement

Prior to settling, the parties engaged in some formal discovery, (Lindsay Decl. ¶ 3), which presumably informed the parties' decision to settle. The parties represent that the settlement is the result of arms-length settlement negotiations, including a full day of mediation before a former San Diego superior court judge with significant experience in consumer class actions. (Id.; Def.'s Stmt. at 3 (Docket No. 13)); see La Fleur v. Med. Mgmt. Int'l, Inc., Civ. No. 5:13-00398, 2014 WL 2967475, at *4 (N.D. Cal. June 25, 2014) ("Settlements reached with the help of a mediator are likely non-collusive."). Plaintiffs' counsel state that the settlement was reached after "strenuous advocacy of the litigation and extensive negotiations." (Lindsay Decl. ¶ 5.) He declares that both plaintiffs and he took into account the uncertain outcome and risks of litigation, particularly the delay often inherent in class actions. (Id. ¶ 4.) In light of these considerations, the

court finds no reason to doubt the parties' representations that the settlement was the result of vigorous, arms-length bargaining.

b. Amount Recovered and Distribution

In determining whether a settlement agreement is substantively fair to the class, the court must balance the value of expected recovery against the value of the settlement offer. See Tableware, 484 F. Supp. 2d at 1080. This inquiry may involve consideration of the uncertainty class members would face if the case were litigated to trial. See Ontiveros, 2014 WL 3057506, at *14.

Section 1747.08 provides that "[a]ny person who violates this section shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation and one thousand dollars ($1,000) for each subsequent violation . . . ." Cal. Civ. Code § 1747.08(e). Assuming that plaintiffs' estimate is correct and the class is comprised of 200,000 members who can prove one-time-only violations, then prevailing at trial would lead to a recovery of $250 per class member, or $50 million.

The expected recovery as a result of the settlement is a voucher with the maximum value of $20, redeemable at a Charming Charlie retail establishment in California. Individual recovery will be reduced pro rata if greater than 17,500 class members submit claims. Again, plaintiffs state that discovery revealed the numbers of class members is approximately 200,000. (Pls.' Mem. at 1.) If all 200,000 proposed class members submit claims, then individual recovery will be $1.75. The contrast between the

value of expected recovery and the value of the settlement offer is stark.

Even if fewer than 200,000 class members submit claim forms, and individual recovery is higher than $1.75, there are concerns regarding the adequacy of the settlement. This settlement is technically opt out, in that a class member must affirmatively opt out of the class or else they will be bound by judgment. The settlement agreement provides that a class member who fails to timely opt out automatically releases defendant from their claims under section 1747.08 or any claims arising from conduct that could have been alleged or referred to in the Complaint. (settlement agreement ¶ 4.4.) A class member must also, however, take the affirmative step of submitting a claim form to recover a voucher. If, as plaintiff's counsel projects, only 5 to 10% of class members return claim forms, 90% of class members, upon taking no action, will opt in by default and release defendant but get no recovery simply because they fail to timely return the claim form.

There are some uncertainties in this litigation. Firstly, it appears that under section 1747.08, no civil penalty shall be assessed if the defendant can show by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error. Cal. Civ. Code § 1747.08(e). Courts have also held that section 1747.08 is violated "only if the request [for personal information] is made under circumstances in which the customer could reasonably understand that the email address was required to process the credit card transaction . . . ." Harold v. Levi Strauss & Co., 236 Cal. App. 4th 1259, 1268

(1st Dist. 2015). Under this view, plaintiffs prevail only if they reasonably believed that payment by credit card was conditioned on providing personal information. Moreover, plaintiffs' counsel notes broadly that "certifying a class is risky," that "trial would likely consume several weeks with uncertain results," and that the actual penalty awarded "could be very small under certain circumstances," without much further elaboration. (See Pls.' Mem. at 5.)

In light of these albeit unelaborated uncertainties, the court will grant preliminary approval to the settlement because it is within the range of possible approval. Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). However, plaintiffs' counsel should be prepared to explain to the court, either before or at the fairness hearing, why the settlement is adequate given the stark disparity between the settlement amount and the apparent value of the case. In particular, counsel should be prepared to explain to the court all risks and uncertainties with specificity, as well as an explanation for why the civil penalty awarded at trial would likely be "very small" under these circumstances, as plaintiffs vaguely suggested.

c. Attorney's Fees

If a negotiated class action settlement includes an award of attorneys' fees, that fee award must be evaluated in the overall context of the settlement. Knisley v. Network Assocs., 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio, 291 F.R.D. at 455. The court "ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the

parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011).

The settlement agreement provides that plaintiffs' counsel will apply to the court for a fee award of up to $140,000, to be paid by defendant separate and apart from the recovery of the class. Defendant has agreed not to oppose this award.

In deciding the attorney's fees motion, the court will have the opportunity to assess whether the requested fee award is reasonable, by multiplying a reasonable hourly rate by the number of hours counsel reasonably expended. See Van Gerwen v. Gurantee Mut. Life. Co., 214 F.3d 1041, 1045 (9th Cir. 2000). As part of this lodestar calculation, the court may take into account factors such as the "degree of success" or "results obtained" by plaintiff's counsel. See Cunningham v. County of Los Angeles, 879 F.2d 481, 488 (9th Cir. 1988). If the court, in ruling on the fees motion, finds that the amount of the settlement warrants a fee award at a rate lower than what plaintiffs' counsel requested, then it will reduce the award accordingly. The court will therefore not evaluate the fee award at length here in considering whether the settlement is adequate.

IT IS THEREFORE ORDERED that plaintiffs' motion for preliminary certification of a conditional settlement class and preliminary approval of the class action settlement be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that:

(1) Defendant shall notify class members of the settlement in the manner specified under section 3.3 of the

settlement agreement;

(2) Class members who want to receive a voucher under the settlement agreement must accurately complete and deliver a Claim Form to the Claims Administrator no later than forty-five (45) calendar days after the last day for notice to be provided under section 3.3(b) and (c) of the settlement agreement;

(3) Class members who have not submitted a timely written exclusion request and who want to object to the settlement agreement must deliver written objections to class counsel and Charming Charlie's counsel, and must file such objection with the Court, no later than forty-five (45) calendar days after the last day for notice to be provided under Section 3.3(b) and (c) of the settlement agreement. The delivery date is deemed to be the date the objection is deposited in the U.S. Mail as evidenced by the postmark. The objection must include: (a) the name and case number of the Action "Anderson-Butler v. Charming Charlie, Inc., Case No. 14-cv-01921-WBS-AC"; (b) the full name, address, and telephone number of the person objecting; (c) the words "Notice of Objection" or "Formal Objection"; and (d) in clear and concise terms, the legal and factual arguments supporting the objection, including an attestation under the penalty of perjury of facts demonstrating that the person objecting is a class member. Any class member who files and serves a written objection, as described in this paragraph, may appear at the fairness hearing, either in person or through personal counsel hired at the class member's expense, to object to the settlement agreement. Class members, or their attorneys, intending to make an appearance at the fairness hearing, however,

must also deliver to class counsel and Charming Charlie's counsel, and file with the court, no later than forty-five (45) calendar days after the last day for notice to be provided under Section 3.3(b) and (c) of the settlement agreement, a Notice of Intention to Appear. Only class members who file and serve timely Notices of Intention to Appear may speak at the fairness hearing. The objection will not be valid if it only objects to the lawsuit's appropriateness or merits.

(4) Class members who fail to object to the settlement agreement in the manner specified above will: (1) be deemed to have waived their right to object to the settlement agreement; (2) be foreclosed from objecting (whether by a subsequent objection, intervention, appeal, or any other process) to the settlement agreement; and (3) not be entitled to speak at the fairness hearing.

(5) Class members who want to be excluded from the settlement must send a letter or postcard to the Claims Administrator stating: (a) the name and case number of the Action "Anderson-Butler v. Charming Charlie, Inc., Case No. 14-cv-01921-WBS-AC"; (b) the full name, address, email address, and telephone number of the person requesting exclusion; and (c) a statement that the person does not wish to participate in the Settlement, postmarked no later than forty-five (45) calendar days after the last day for notice to be provided under Section 3.3(b) and (c) of the settlement agreement.

(6) The class is provisionally certified as a class of all persons who, between July 9, 2013 and the date of entry of this Order, engaged in a credit card transaction at a California

Charming Charlie Store and whose personal identification information was requested and recorded by Charming Charlie at the Charming Charlie store for purposes other than shipping, delivery or special orders. Also excluded from the class are defendant's counsel, defendant's officers and directors, and the judge presiding over the Action.

(7) Plaintiffs Heidi Anderson-Butler and Paula Haug are conditionally certified as the class representatives to implement the Parties' settlement in accordance with the settlement agreement. The law firm of Lindsay Law Corporation, through James M. Lindsay, Esq., is conditionally appointed as class counsel. Plaintiffs and Lindsay Law Corporation must fairly and adequately protect the Class's interests.

(8) If the settlement agreement terminates for any reason, the following will occur: (a) Class certification will be automatically vacated; (b) Plaintiffs will stop functioning as class representatives; and (c) this action will revert to its previous status in all respects as it existed immediately before the parties executed the settlement agreement.

(9) All discovery and pretrial proceedings and deadlines, are stayed and suspended until further notice from the court, except for such actions as are necessary to implement the settlement agreement and this Order.

(10) The fairness hearing is set for November 2, 2015, at 2:00 p.m., in courtroom 5, to determine whether the settlement agreement should be finally approved as fair, reasonable, and adequate.

(11) Based on the date this Order is signed and the date of the fairness hearing, the following are the certain associated dates in this settlement:

(a) Defendant shall send email and U.S. mail notice is 30 days after entry of this Order;

(b) Pursuant to Local Rule 293, plaintiffs shall file a motion for attorney's fees no later than 28 days prior to the final fairness hearing;

(c) The last day for class members to file a claim, request exclusion, or object to the settlement is 75 days after entry of this Order;

(d) The parties shall file briefs in support of the final approval of the settlement no later than 14 days before the fairness hearing.

(12) In the case that the fairness hearing be postponed, adjourned, or continued, the updated hearing date shall be posted on the settlement website.

Dated: July 29, 2015

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE