UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE ROE,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Case No.14-cv-00751-HSG

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND GRANTING IN PART AND DENYING IN PART MOTION FOR CLASS COUNSEL'S ATTORNEYS' FEES AND COSTS

Re: Dkt. Nos. 108, 109

I. INTRODUCTION

Pending before the Court are two motions in this putative class action dispute. First, Plaintiff Jane Roe moves the Court for an order granting final approval of the parties' proposed settlement. Dkt. No. 108. Second, Plaintiff moves the Court for an award of attorneys' fees and costs. Dkt. No. 109. The Court held a final fairness hearing on both motions on February 9, 2017. For the reasons stated below, the Court GRANTS final approval. The Court also GRANTS IN PART AND DENIES IN PART Plaintiff's motion for attorneys' fees and costs.

II. BACKGROUND

A. Litigation History

Plaintiff Jane Roe's operative class action complaint alleges a single claim for violations of the Fair Credit Reporting Act ("FCRA") against Defendant Frito-Lay, Inc. Dkt. No. 27 ("FAC"). Specifically, Plaintiff alleges that Defendant violated 15 U.S.C. § 1681b(b)(3)(A) by failing to provide notice to prospective and existing employees before taking adverse employment action based on information disclosed in consumer reports. Id. ¶¶ 12, 28, 30–34, 38. Without proper notice, putative class members could not challenge the accuracy or relevancy of the report. Id.

¶¶ 6, 33. Defendant answered on October 3, 2014, denying Plaintiff's allegations and arguing that the case is not appropriate for class certification. Dkt. No. 28 ¶¶ 18–43, 46–50. Defendant also raised twenty-five affirmative defenses. See id. at 11–16.

The settlement process was protracted. Following lengthy mediation sessions with mediator Mark Rudy, Esq., see Dkt. No. 31, 35, Plaintiff filed its initial motion for preliminary approval on October 14, 2015. See Dkt. No. 53. Nevertheless, at the November 19, 2015, hearing on the motion, the Court determined that the parties were not actually in agreement. The parties consequently engaged Mr. Rudy to assist with further settlement negotiations. The parties notified the Court that they had reached a new settlement on May 11, 2016, see Dkt. No. 93, and filed another motion for preliminary approval of class action settlement on June 23, 2016. Dkt. No. 100. On August 5, 2016, the Court granted preliminary approval. Dkt. No. 103. The Court also appointed Plaintiff as class representative; appointed Devin H. Fok, Joshua E. Kim of A New Way of Life Reentry Project, and John A. Girardi Keese as class counsel; and provisionally certified a Rule 23(b)(3) damages class. Id. Plaintiff represented that it would file a motion for attorneys' fees not to exceed thirty-three and one-third percent and for reasonable costs. Dkt. No. 100-5 at 16.

B. Overview of Settlement Agreement

On June 23, 2016, the parties submitted a class action settlement agreement that details the provisions of the proposed settlement. See SA. The key terms are as follows:

Class Definition: All individuals residing in the United States who were the subject of a consumer report obtained by Frito Lay, Inc. for employment between December 20, 2011, and February 28, 2014, and (1) for whom a disposition of "Background Check Review – Fail" or "Criminal Background Fail" was entered in Frito-Lay, Inc.'s applicant tracking system; and/or (2) whose report was updated following a dispute with Frito-Lay's background check vendor; and/or (3) whose applicant file includes a letter sent to the applicant on the basis of the applicant's failure of a pre-employment background check. Dkt. No. 100-5 ("SA") at 9. The parties have represented that there are a total of 2,931 persons who fall within this class definition. Dkt. No. 108 at 4.

Monetary Relief: In full settlement of the claim asserted in the FAC, Defendant agrees to pay a gross settlement sum of $950,000. This includes any award of attorneys' fees and costs, an incentive award to the named Plaintiff, and all costs of administration, including settlement administration fees. SA at 3. Given the currently estimated class size and fees, each class member will receive a payment of approximately $193.45. Dkt. No. 108 at 7. To the extent that any funds remain after all claims are paid, the National Consumer Law Center will receive the balance as a cy pres recipient. SA at 15–16.

Release: The class will release Defendant from all claims, whether known or unknown, that were alleged or asserted or that could have been asserted based on the factual allegations forth in the operative complaint. Id. at 10–12. Named Plaintiff Roe also provides a general release to Defendant for any past, present, or future claims under state and federal law in connection with any act or omission by Defendant. Id. at 12–13.

Attorneys' Fees and Costs: The settlement agreement authorizes class counsel to seek attorneys' fees not to exceed thirty-three and one-third percent of the gross settlement fund and to seek reasonable costs. Id. at 16. It further provides that class counsel may seek an incentive award for named Plaintiff not to exceed $10,000. Id.at 17.

III. ANALYSIS

A. Final Settlement Approval

1. Class Certification

Final approval of a class action settlement requires, as a threshold matter, an assessment of whether the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b). Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019–1022 (9th Cir. 1998). Because no facts that would affect these requirements have changed since the Court preliminarily approved the class on August 5, 2016, this order incorporates by reference its prior analysis under Rules 23(a) and (b) as set forth in the order granting preliminary approval. See Dkt. No 103 at 3–8. The Court affirms its previous findings and certifies the settlement class.

2. The Settlement

"The claims, issues, or defenses of a certified class may be settled . . . only with the court's

approval." Fed. R. Civ. P. 23(e). The Court may finally approve a class settlement "only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); Officers *for Justice v. Civil Serv. Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("The district court's role in evaluating a proposed settlement must be tailored to fulfill the objectives outlined above. In other words, the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties . . . ."). To assess whether a proposed settlement comports with Rule 23(e), the Court "may consider some or all" of the following factors: (1) the strength of plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. Rodriguez v. *West Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); see also Hanlon, 150 F.3d at 1026. "The relative degree of importance to be attached to any particular factor" is case specific. Officers for Justice, 688 F.2d at 625.

In addition, "[a]dequate notice is critical to court approval of a class settlement under Rule 23(e)." Hanlon, 150 F.3d at 1025. As discussed below, the Court finds that the proposed settlement is fair, adequate, and reasonable, and that class members received adequate notice.

a. Adequacy of Notice

Under Federal Rule of Civil Procedure 23(e), the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The notice must "clearly and concisely state in plain, easily understood language" the nature of the action, the class definition, and the class members' right to exclude themselves from the class. Fed. R. Civ. P. 23(c)(2)(B). Although Rule 23 requires that reasonable efforts be made to reach all class

members, it does not require that each class member actually receive notice. See Rannis v. Recchia, 380 F. App'x 646, 650 (9th Cir. 2010) (noting that "due process requires reasonable effort to inform affected class members through individual notice, not receipt of individual notice").

The Court finds that the notice and notice plan previously approved by the Court, Dkt. No. 103 at 13–15, was implemented and complies with Rule 23(c)(2)(B). The Court ordered that third-party settlement administrator, Rust Consulting, Inc., send class notice via first class mail to each putative class member at their last known address, as provided by Defendant and updated as appropriate. Id. at 14. Prior to sending class notice, Rust Consulting verified the addresses for the class members with the National Change of Address Database. Dkt. No. 108-1 ¶ 5. It also set up a website and a toll free number to field any questions about the proposed settlement. Id. ¶ 4. Rust Consulting states that class notice was provided as directed. Id. ¶ 6. Fifteen notices were returned as undeliverable with no forwarding address or further information provided by the U.S. Postal Service. Id. ¶¶ 7–8; Dkt. No. 117 ¶ 5; Dkt. No. 108 at 10. The parties received no objections to the settlement and no requests for exclusion from the settlement. Dkt. No. 108-1 ¶¶ 9–10; Dkt. No. 117 ¶¶ 6–7. In light of these facts, the Court finds that the parties have sufficiently provided the best practicable notice to the class members.

b. Fairness, Adequacy, and Reasonableness

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

i. Strength of Plaintiff's Case and Litigation Risk

Approval of a class settlement is appropriate when plaintiffs must overcome significant barriers to make their case. Chun-Hoon v. McKee Foods Corp., 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010). Courts "may presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." Garner v. State Farm Mut. Auto. Ins. Co., No. 08-cv-1365-CW, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010). Additionally, difficulties and risks in litigating weigh in favor of approving a class settlement. Rodriguez, 563 F.3d at 966. "Generally, unless the settlement is clearly

inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." Ching v. Siemens Indus., Inc., No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) (quotation omitted).

This action reached settlement before the Court had an opportunity to consider the merits of the claims. Yet Plaintiff would face both factual and legal hurdles were she to continue litigating. First, in its answer, Defendant denied all of Plaintiff's substantive allegations. See Dkt. No. 28 ¶¶ 18–43. Second, statutory damages under the FCRA — ranging from $100 to $1,000 — are only available if Plaintiff establishes that Defendant violated the FCRA willfully. 15 U.S.C. § 1681n(a)(1)(A). Plaintiff acknowledges that this would be challenging due to the Supreme Court's opinion in Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57–59 (2007), which left open a defense for a defendant's reasonable or even careless construction of a statute. See Dkt. No. 53 at 15. In light of Defendant's apparent willingness to defend against this action and the uncertain state of the law, Plaintiff would not be guaranteed a favorable result. In reaching a settlement, however, Plaintiff has ensured a favorable recovery for the class. See Rodriguez, 563 F.3d at 966 (finding litigation risks weigh in favor of approving class settlement). Accordingly, these factors weigh in favor of approving the settlement. See Ching, 2014 WL 2926210, at *4 (favoring settlement to protracted litigation).

ii. Risk of Maintaining Class Action Status

In considering this factor, the Court looks to the risk of maintaining class certification if the litigation were to proceed. Certifying a class encompassing approximately 2,931 prospective employees presents complex issues that could undermine certification. Accordingly, this factor also weighs in favor of settlement.

iii. Settlement Amount

The amount offered in the settlement is another factor that weighs in favor of approval. Based on the facts in the record and the parties' arguments at the final fairness hearing, the Court finds that the $950,000 settlement amount falls "within the range of reasonableness" in light of the risks and costs of litigation. Each class member will receive an estimated pro rata share of $193.45 after deductions for attorneys' fees and costs, settlement administration costs, and an

enhancement award for Plaintiff. That is still within the range of potential statutory damages. See 15 U.S.C. § 1681n(a)(1)(A). And as discussed above, Plaintiff and the class could only receive statutory damages if they proved that Defendant willfully failed to provide the proper notice. The Ninth Circuit has cautioned that just because a settlement could have been better "does not mean the settlement presented was not fair, reasonable or adequate." Hanlon, 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.").

iv. Extent of Discovery Completed and Stage of Proceedings

The Court finds that class counsel had sufficient information to make an informed decision about the merits of the case. See In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000). Here, Plaintiff conducted an in-depth investigation into Defendant's use of consumer reports in its hiring practices. Plaintiff propounded and reviewed discovery, including third-party subpoenas and "thousands of lines of data," and conducted multiple depositions. Dkt. No. 108 at 8–9; see also Dkt. No. 100 at 5–6. The Court thus finds that the parties have received, examined, and analyzed information, documents, and materials that sufficiently enabled them to assess the likelihood of success on the merits. This factor weighs in favor of approval.

v. Reaction of Class Members

The reaction of the class members supports final approval. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural* Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); In re Linkedin User Privacy Litig., 309 F.R.D. 573, 589 (N.D. Cal. 2015) ("A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval.").

Class notice, which was served on each class member in accordance with the methods approved by the Court, advised the class of the requirements to object or opt out of the settlement. See Section III.A.2.a. No objections were received and no class members opted out. The Court finds that the absence of objections and opt-outs indicates overwhelming support among the class

members and weighs in favor of approval. See, e.g., Churchill Village LLC v. Gen. Elec., 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement where 45 of approximately 90,000 class members objected); Rodriguez v. West Publ. Corp., Case No. CV05–3222 R, 2007 WL 2827379, at *10 (C.D. Cal. Sept. 10, 2007) (finding favorable class reaction where 54 of 376,301 class members objected).

* * *

After considering and weighing the above factors, the Court finds that the settlement agreement is fair, adequate, and reasonable, and that the settlement class members received adequate notice. Accordingly, Plaintiffs' motion for final approval of class action settlement is GRANTED.

B. Attorneys' Fees and Costs

In its unopposed motion, class counsel asks the Court to approve an award of $316,666.67 in attorneys' fees and $24,071.95 in costs for a total of $340,738.62. Dkt. No. 109 at 2. Class counsel also seeks $35,158 for Rust Consulting's settlement administration costs and a $10,000 incentive award for the named Plaintiff for her assistance in this case. Id.

1. Attorneys' Fees

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). The Court has discretion in a common fund case to choose either (1) the lodestar method or (2) the percentage-of-the-fund when calculating reasonable attorneys' fees. Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002).

Under the lodestar method, a "lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011) (citing Staton v. Boeing Co., 327 F.3d 938, 965 (9th Cir. 2003)). Whether the Court awards the benchmark amount or some other rate, the award must be supported "by findings that take into account all of the circumstances of the case." Vizcaino, 290 F.3d at 1048.

Under the percentage-of-recovery method, twenty-five percent of a common fund is the benchmark for attorneys' fees awards. See, e.g., In re Bluetooth, 654 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure."); Six Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990).

Although "the choice between lodestar and percentage calculation depends on the circumstances, . . . either method may . . . have its place in determining what would be reasonable compensation for creating a common fund." Id. To guard against an unreasonable result, the Ninth Circuit has encouraged district courts to cross-check any calculations done in one method against those of another method. Vizcaino, 290 F.3d at 1050–51. The Ninth Circuit has approved factors that may be relevant to the Court's determination under either method, including: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. See id. at 1048–50.

Here, class counsel seeks thirty-three and a third percent of the settlement amount — a total of $316,666.67 — which is significantly above the twenty-five percent benchmark for a reasonable fee award. To justify this upward departure, class counsel states that this figure is still less than its attorneys' fees under the lodestar method. See Dkt. No. 109 at 6–7. Yet class counsel did little more than summarily list the hourly rate and number of hours for each of the four attorneys who worked on this case. See id. It also provided no other explanation for this large fee request aside from a cursory recitation of the Vizcaino factors. See Dkt. No. 109 at 8. Because the Court could not properly determine the lodestar with this meager information, the Court requested supplemental briefing. See Dkt. No. 118.

Class counsel initially failed to respond at all and the Court issued an order to show cause why it missed this deadline. See Dkt. No. 119. Class counsel then belatedly provided billing records showing that it has expended a combined 932.3 hours on this case from 2012 through February 2017. See Dkt. No. 121. Four attorneys worked on this case, requesting billing rates of $800, $650, $600, and $450 per hour respectively. See Dkt. No. 109 at 6–7; see also Dkt. No.

109-1 ¶¶ 34–51 (listing relevant consumer class action experience). Class counsel calculates a lodestar of $481,560, see Dkt. No. 109 at 2, though its supplemental documentation indicates a lodestar of $500,080, see Dkt. No. 121.

After reviewing class counsel's time records and billing reports in detail, the Court still finds class counsel's fees request is too high.

As a preliminary matter, the Court finds that the billing rates used by class counsel to calculate the lodestar are reasonable and in line with prevailing rates in this District for personnel of comparable experience, skill, and reputation. See, e.g., Watkins v. Hireright, Inc., 2016 U.S. Dist. LEXIS 136200, *9 (S.D. Cal. Sept. 30, 2016) (approving class counsel's rates and similar attorneys' rates as reasonable in three-year class action settlement).

However, class counsel seeks fees for 6.5 hours, or $3,900, billed in 2012, almost two years before the original complaint was filed in Alameda County Superior Court. See Dkt. No. 121; see also Dkt. No. 1-2 (original class action complaint filed December 20, 2013). The Court also finds unnecessary and duplicative billing. For example, class counsel billed over 100 hours, or $67,370, for its initial mediation efforts and preliminary approval motion. Class counsel suggests that the two rounds of settlement discussions actually warrant an enhanced fee, but the Court disagrees. At the November 2015 hearing on the first motion for preliminary approval, Plaintiff withdrew its request for approval because it no longer thought the settlement amount would fairly compensate the putative class. Class counsel argues that he realized the day before the hearing that the number of class members was substantially larger than he had originally anticipated, see, e.g., Dkt. No. 109 at 3, and withdrew the motion to protect the class. Id. Yet the onus is on class counsel to thoroughly investigate its case prior to moving for preliminary approval. Rather than adequately investigate the case beforehand, class counsel inverted that process, spending over 700 hours after the hearing on the first motion for preliminary approval. That is almost 80% of class counsel's total time spent working on this case.

The Court also notes that although the class period changed, the class size did not ultimately change significantly from the parties' first motion for preliminary approval (estimating 3,142 class members), Dkt. No. 53 at 8, and its second motion for preliminary approval (2,928

class members), Dkt. No. 100 at 12. See St. Bernard v. State Collection Serv., Inc., 782 F. Supp. 2d 823, 828 (D. Ariz. 2010) (declining to credit time spent correcting "error of counsel's own making"). Class counsel also failed to identify any similar awards against which the Court could compare this request. Vizcaino, 290 F.3d at 1048–50. Rather, it filed a conclusory motion for attorneys' fees without any supporting documentation and failed to timely respond to the Court's request for additional briefing.

Although the Court calculates a lodestar of $429,600 with deductions for the time in 2012 and for the first preliminary motion for approval, the Court is still not persuaded that a fees award of thirty-three and a third percent of the settlement is warranted. Class counsel's efforts are not atypical of those required in any large class action, and the quality of class counsel's work simply does not justify the requested award. Class counsel's performance on this motion for attorneys' fees is illustrative: the motion lacked even the bare minimum analysis necessary for Court approval. The Court then had to order class counsel (more than once) to provide support for the award sought before counsel provided any explanation for its request. Class counsel's requested fees would also substantially reduce the cash settlement pool available to the individual class members. The Court acknowledges the significant results that class counsel achieved for the class and the detailed discovery it conducted over the course of several years, and finds that a benchmark award of twenty-five percent of the settlement fund is appropriate. The Court accordingly GRANTS IN PART class counsel's motion for attorneys' fees in the amount of $237,500.

2. Attorneys' Costs

Class counsel seeks reimbursement of $24,071.95 in out-of-pocket costs. Class counsel is entitled to recover "those out-of-pocket expenses that would normally be charged to a fee paying client." Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994) (quotation omitted).

Plaintiff has submitted Mr. Devin H. Fok's statement that his records and those of his co-counsel indicate that they incurred this amount in litigation-related costs and expenses. Dkt. No. 109-1 ¶ 53. Yet class counsel did not initially itemize each expense incurred during this case to allow the Court to evaluate whether the costs were reasonable and properly expended. See Gaudin

v. Saxon Mortgage Servs., Inc., No. 11-CV-01663-JST, 2015 WL 7454183, at *9 (N.D. Cal. Nov. 23, 2015) ("To support an expense award, Plaintiffs should file an itemized list of their expenses by category and the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable."). Consequently, the Court was required to order class counsel to file an itemization with supporting documentation. See Dkt. No. 123. Having reviewed the additional documentation, the Court is satisfied that these costs were reasonably incurred and GRANTS in full the motion for costs in the amount of $24,071.95.

3. Settlement Administration Costs

Class counsel seeks $35,158 for the costs of class administration conducted by Rust Consulting. Dkt. No. 109 at 2. The parties selected Rust Consulting as it was the lowest bid from among the three reputable class action administrative firms class counsel contacted. Dkt. No. 109 at 7; see also Dkt. No. 124-3 at 1–4 (class notice proposal from Rust Consulting).

Rust Consulting's duties included: verifying all class members' mailing addresses, preparing and disseminating the class notice, and operating and maintaining a toll-free phone number and website for the settlement. See SA 20–25; see also Dkt. No. 108-1; Dkt. No. 117. Rust Consulting also conducted an additional round of skip-tracing to identify missing mailing addresses for class members. See Dkt. No. 108-1 ¶¶ 5–8; Dkt. No. 117 ¶ 5 . The class notice informed class members that administration costs would be deducted from the $950,000 settlement fund, Dkt. No. at 3, and no class member objected. Dkt. No 108-1; Dkt. No. 117. Courts regularly award administrative costs associated if notice is provided to the class. See, e.g., Smith v. Am. Greetings Corp., No. 14-CV-02577-JST, 2016 WL 2909429, at *11 (N.D. Cal. May 19, 2016); Bellinghausen v. Tractor Supply Co., 306 F.R.D. 245, 266 (N.D. Cal. 2015). Given the scope of Rust Consulting's administrative duties in this case, the Court concludes that Rust Consulting's costs were reasonably incurred for the benefit of the class and GRANTS the full amount of $35,158.

4. Incentive Award

Class counsel requests a service award of $10,000 for named Plaintiff. "[N]amed plaintiffs . . . are eligible for reasonable incentive payments." Staton, 327 F.3d at 977; Rodriguez v. West

Publ'g Corp., 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive awards are fairly typical in class action cases."). They are designed to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." Rodriguez, 563 F.3d at 958–59. Nevertheless, the Ninth Circuit has cautioned that "district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives . . . ." Radcliffe v. Experian Info. Solutions, Inc., 715 F.3d 1157, 1165 (9th Cir. 2013) (quotation omitted). This is particularly true where "the proposed service fees greatly exceed the payments to absent class members." Id. The district court must evaluate an incentive award using "relevant factors includ[ing] 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] the amount of time and effort the plaintiff expended in pursuing the litigation . . . ." Id. at 977.

Here, the Court finds that Plaintiff added substantial value to this case. She participated in regular meetings with class counsel to discuss case strategy. Dkt. No. 109-2 ¶ 9. She also assisted in drafting and reviewing several filings, including the motion for class certification and two motions for preliminary approval. Dkt. No. 109-2 ¶¶ 9–12. Plaintiff was intimately involved in the lengthy settlement process and had to be "available on a moment's notice." Id. ¶ 13. She took several days off work to ensure her availability and also took time away from personal activities to litigate this action over the past three years. Id. ¶¶ 13–14. She conservatively estimates spending ninety-six hours on this case. Id. ¶ 15. The Court also acknowledges that to act as named Plaintiff, she gave up the ability to seek actual damages for any lost wages. See id. ¶¶ 5–6.

The Court finds that a $5,000 service award is reasonable to compensate Plaintiff. Plaintiff's contributions, though significant, would be necessary in any class action. A reduced award of $5,000 is also in keeping with numerous courts' findings that a $5,000 incentive award is "presumptively reasonable" in the Ninth Circuit. See, e.g., Smith, No. 14-CV-02577-JST, 2016 WL 362395, at *10 (rejecting $7,500 incentive award where class members were estimated to receive $1,608.16); Willner v. Manpower Inc., No. 11-CV-02846-JST, 2015 WL 3863625, at *9 (N.D. Cal. June 22, 2015) (rejecting $11,000 incentive award where class members were estimated

to receive between $600 and $4,000); Ko v. Natura Pet Prod., Inc., No. C 09-02619 SBA, 2012 WL 3945541, at *15 (N.D. Cal. Sept. 10, 2012) (awarding $5,000 incentive award for 50–100 hours in contributions over two-year litigation). Neither class counsel nor Plaintiff has identified any conduct that warrants doubling this presumption, particularly in light of the overall settlement amount. A $10,000 incentive award is substantially disproportionate to class members' anticipated recovery of $193.45. See, e.g., Zepeda v. PayPal, Inc., No. C 10-1668 SBA, 2017 WL 1113293, at *19 (N.D. Cal. Mar. 24, 2017) (rejecting proposed $2,500 incentive award as "wholly disproportionate" to the approximately $3 recovery of other class members); cf. Staton, 327 F.3d at 976–77 (citing cases approving a $5,000 incentive award in a $1.725 million settlement; a $2,000 incentive award for $3 million settlement; a $5,000 award for $22 million settlement). Accordingly, class counsel's request for an incentive award is GRANTED IN PART in the amount of $5,000 for the named Plaintiff.

IV. CONCLUSION

For the foregoing reasons it is hereby ordered that:

1. Plaintiff's Motion for Final Approval of Class Action Settlement is hereby GRANTED.

2. Plaintiff's Motion for class counsel's Attorneys' Fees and Costs is hereby GRANTED IN PART AND DENIED IN PART.

3. The Court approves the settlement amount of $950,000, including payments of attorneys' fees in the amount of $237,500; costs in the amount of $24,071.95; claims administration fees in the amount of $35,158.00; and an incentive fee for the named Plaintiff in the amount of $5,000.

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The parties and settlement administrator are directed to implement this Final Order and the settlement agreement in accordance with the terms of the settlement agreement. The Court directs the Clerk of the Court to enter Final Judgment consistent with this order, and to close the case. The Court retains jurisdiction over the parties to enforce the terms of the judgment.

IT IS SO ORDERED.

Dated: 4/7/2017

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California