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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JACOB FIGUEROA and MARY
12 JACKSON, on behalf of themselves and
13 all others similarly situated,
14 Plaintiffs,
15 v.
16 CAPITAL ONE, N. A.,
17 Defendant.

Case No.: 18cv692 JM(BGS)

**ORDER ON JOINT MOTION TO
APPROVE SETTLEMENT
ADMINISTRATION FEES FOR
SECONDARY DISTRIBUTION OF
SETTLEMENT FUNDS AND
DESIGNATION OF CY PRES
RECIPIENT**

18 On September 9, 21, 2023, the Parties filed Joint Motion to Approve Settlement
19 Administration Fees for Secondary Distribution of Settlement Funds and Designation of
20 *Cy Pres* Recipient, (“Joint Motion”) (Doc. No. 95). Upon review of the Joint Motion, the
21 court determined that supplemental briefing would be beneficial. Subsequently, the Parties
22 submitted their supplemental briefing, and the court now finds the Joint Motion suitable
23 for submission on the papers and without oral argument in accordance with Civil Local
24 Rule 7.1(d)(1). For the reasons set forth below, the Joint Motion is granted.

25 **Discussion**

26 **1. Settlement Administrator Fees**

27 On January 21, 2021, this court entered a Final Approval Order regarding the
28 proposed settlement agreement in this class action suit. (Doc. No. 93.) The Final Order

1 approved class settlement administrator fees not to exceed \$900,000, “absent further order
2 of the court.” *Id.* at 25. The high settlement administrator fees sought by BrownGreer,
3 PLC, were approved based on a declaration it provided estimating costs of \$997,933 and
4 Class Counsel relaying a revised estimate of \$850,000 to the court at the final approval
5 hearing. *Id.* at 22. Indeed, when the court questioned Class Counsel on BrownGreer’s
6 final bill at the hearing, Mr. Kaliel anticipated it would be “in the \$850,000 range” and he
7 was certain it would be “south of \$1 million.” *Id.* at 3 fn. 2.

8 The Joint Motion states that the settlement administrator has now completed both
9 the initial and second round of disbursements as contemplated by the settlement agreement,
10 and that the secondary distribution “which includes class member checks, postage, data
11 storage, coordinating and processing of mail and checks, amounted to \$112,245.49.” Doc.
12 No. 95 at 2. No further information was provided. Because BrownGreer’s fees now exceed
13 over one-million dollars, the court’s request for additional briefing ordered the Parties to
14 provide the court “by way of declarations from BrownGreer **and** Counsel, a full accounting
15 regarding the costs incurred by BrownGreer, along with any other pertinent information
16 that would explain” these costs. Doc. No. 96 at 2.

17 The additional briefing provides that BrownGreer’s expenses have not exceeded the
18 \$900,000 cap imposed by the court. (Doc. No. 97 at 2.) Indeed, the Parties represent that
19 Brown Green discounted its invoices by approximately \$19,000 “in order to come in at the
20 cap set by the Court.” *Id.* at 2. They contend that the settlement administrator fees of
21 \$112,245.40 were not contemplated in the settlement agreement and were for the optional
22 services related to the secondary distribution not contemplated by the settlement
23 agreement, stating “the Parties did not understand the court’s cap to apply to these
24 additional services.” *Id.* at 2-3.

25 While it is true that the settlement agreement is silent regarding administrator fees
26 for a secondary distribution, section 3:4 of the agreement provides:

27 Residual. In the event that there is any residual in the Settlement Fund
28 Account after the distributions required by this Agreement are completed, said

1 funds shall in no circumstance revert to Capital One. At the election of Class
2 Counsel and counsel for Capital One, and subject to the approval of the Court,
3 the funds may be distributed to Settlement Class Members via a secondary
4 distribution if economically feasible or through a residual *cy pres*
5 organization, which will be an entity jointly agreed by the Parties and
6 approved by the Court. Any residual secondary distribution or *cy pres*
7 distribution shall be paid as soon as reasonably possible following the
8 completion of distribution of funds to the Settlement Class Members.

9 Doc. No. 75 at 15. The Parties did not however ask for court approval before making the
10 secondary distribution, which the supplemental briefing provides was in excess of
11 \$2 million. Rather, after receiving a cost estimate for the secondary distribution, the Parties
12 determined that a secondary distribution made the most sense. Since the secondary
13 distribution involved Class Members receiving a share of unused funds in excess of
14 \$2 million (*see* Doc. 97 at 3), the court takes no issue with this decision. Accordingly, the
15 court **APPROVES** the additional settlement fees in the amount of \$112,245.49.

16 **2. *Cy Pres* Funds**

17 Additionally, the Parties request the court approve the distribution of the residual
18 \$440,998.02 left in the settlement fund to a *cy pres* recipient they have chosen, Jump\$
19 start Coalition for Personal Financial Literacy (“Jump\$start Coalition”).

20 “A *cy pres* remedy, sometimes called ‘fluid recovery,’ *Mirfasihi v. Fleet Mortg.*
21 *Corp.*, 356 F.3d 781, 784 (7th Cir. 2004), is a settlement structure wherein class members
22 receive an indirect benefit (usually through defendant donations to a third party rather than
23 a direct monetary payment.” *Lane v. Facebook, Inc.* 696 F.3d 811, 819 (9th Cir. 2012).
24 The “*cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions
25 of a class action settlement fund to the ‘next best’ class of beneficiaries.” *In re Google Inc.*
26 *Street View Elec. Commc’ns. Litig.* 21 4th 1102, 1111 (9th Cir. 2021) (quoting *Nachshin*
27 *v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)). The requirement “that a *cy pres*
28 remedy must be the ‘next best distribution’ of settlement funds means only that a district
court should not approve a *cy pres* distribution unless it bears a substantial nexus to the
interests of the class members.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012)

1 (quoting *Nachshin*, 663 F.3d at 1036) (finding a substantial nexus between Facebook
2 privacy claims and charity giving grants promoting online privacy and security). The
3 district court’s review of a class-action settlement that calls for a *cy pres* remedy is not
4 substantively different from that of any other class-action settlement except that the court
5 should not find the settlement fair, adequate, and reasonable unless the *cy pres* remedy
6 ‘account[s] for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes,
7 and the interests of the silent class members’ *Lane*, 696 F.3d at 819-20 (quoting
8 *Nachshin* 663 F.3d at 1036).

9 Here, Plaintiffs alleged violations of numerous consumer protection laws designed
10 to protect a consumer’s rights, along with associated breach of contract claims. All of
11 Plaintiffs’ claims centered around the fees Defendant, Capital One, N.A., charges its
12 customers for using Out-of-Network (“OON”) automatic teller machines. Plaintiffs
13 alleged that the fees for OON balance inquiries, or “third” fees, were wrongly charged and
14 were in violation of Defendant’s standardized account agreement, Fee Schedule, and
15 Electronic Funds Transfers Agreement and Disclosure. The settlement agreement provides
16 that any residual left in the settlement fund will be distributed to a “*cy pres* organization,
17 which will be jointly agreed by the Parties and approved by the Court.” Doc. No. 75 at 15.

18 Aside from the name of the proposed recipient of the *cy pres* award, no further
19 information was provided in the original Joint Motion, prompting this court to require the
20 Parties to demonstrate how their proposed *cy pres* remedy considers the nature of Plaintiffs’
21 lawsuit, the objectives of the statutes underlying Plaintiffs’ claims, and the interests of the
22 silent class members, including their geographic diversity. *See, e.g., In re Google Inc.*,
23 21 F.4th at 1112-13. The court is now informed that Jump\$tart Coalition “consists of more
24 than 100 national organizations and a network of 51 independent, affiliated state coalitions
25 that share a commitment to advancing youth financial literacy and raising public awareness
26 about the importance of financial literacy.” Doc. No. 99 at 2. *See also* Doc. No. 99-1 at
27 ¶ 2, Declaration of Amina Carter, Director of Operations and Marketing for Jump\$tart
28 Coalition. Thus, the Parties contend that Jump\$tart Coalition’s work can help class

1 members and the public, writ large, better understand and decipher financial disclosures,
2 including the fees and costs associated with the services provided by financial institutions
3 in order to make informed decisions when selecting a banking provider. Doc. No 99 at 2.
4 Relatedly, the Parties submit that improved financial literacy will better help class members
5 (and their family members) develop a greater comprehension when and how fees
6 associated with financial transactions are incurred, how such fees accrue over time, and
7 what impact those fees may have on one's finances. *Id.* at 2-3. Accordingly, the
8 substantial nexus requirement is satisfied.

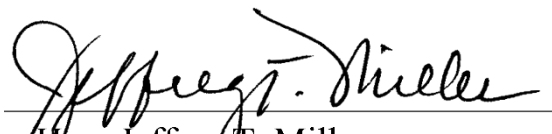
9 Thus, in accordance with section 3.4 of the settlement agreement (*see* Doc. No. 75
10 at 15), the court **APPOINTS** JumpStart Coalition as the *cy pres* recipient and **AWARDS**
11 it the \$440,998.02 in residual funds.

12 **Conclusion**

13 In accordance with the foregoing, the court **GRANTS** the Parties' Joint Motion to
14 Approve Settlement Administration Fees for Secondary Disbursement of Settlement Funds
15 and Designation of Cy Pres Recipient (Doc. No. 95). All residual funds in the settlement
16 fund following the payment of \$112,245.49 to the settlement administrator for the
17 secondary distribution shall be distributed to JumpStart Coalition for Personal Financial
18 Literacy as the *cy pres* recipient.

19 IT IS SO ORDERED.

20 Dated: December 1, 2023

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22 Hon. Jeffrey T. Miller
23 United States District Judge
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