

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSEPH J. SMITH, an individual, on behalf of
himself and all others similarly situated,
Plaintiff,
vs.
ONE NEVADA CREDIT UNION,
Defendant.

Case No.: 2:16-cv-02156-GMN-NJK

ORDER

This action involves claims brought by Joseph J. Smith ("Plaintiff"), on behalf of himself and others similarly situated, against Defendant One Nevada Credit Union ("Defendant"). Plaintiff alleges that Defendant violated the Fair Credit Reporting Act ("FCRA") by conducting unlawful account reviews, under which Defendant accessed Plaintiff's and the proposed class members' consumer reports without a permissible purpose. (See Am. Compl. ¶¶ 24-31, 40-42, ECF No. 43).

Pending before the Court is the Joint Motion for Preliminary Approval of Class Action Settlement, (ECF No. 55), filed by both parties requesting that the Court grant provisional approval of the proposed settlement agreement ("Proposed Settlement") and preliminarily certify Plaintiff's proposed class ("Putative Class") for purposes of settlement. (See Joint Mot. for Order, ECF No. 55). For the reasons stated herein, the Motion is GRANTED.

I. BACKGROUND

On July 18, 2017, Plaintiff filed his Amended Complaint (the "Complaint") alleging violations of the FCRA, 15 U.S.C. § 1681 et seq. on behalf of a Putative Class comprising similarly situated persons, discussed infra. (Am. Compl. ¶¶ 39-53, ECF No. 43). Plaintiff alleges that in October of 2004, he obtained a loan from Defendant and as of November 2008,

1 the account was reported as closed. (Id. ¶¶ 15–17). On May 15, 2010, Plaintiff filed for
2 bankruptcy in the United States Bankruptcy Court for the District of Nevada and subsequently
3 received a bankruptcy discharge on October 27, 2015, thus extinguishing any relationship
4 between Plaintiff and Defendant. (Id. ¶¶ 18–22).

5 Upon reviewing his credit report dated February 15, 2016, Plaintiff discovered that on
6 January 15, 2016, Defendant submitted an unauthorized credit inquiry to Experian, a credit
7 reporting agency. (Id. ¶ 24). Plaintiff alleges that the credit inquiry, which was undertaken
8 without Plaintiff’s consent, constituted an unlawful and willful violation of the FCRA. (Id. ¶¶
9 25–32). Based upon these allegations, the Complaint alleges one cause of action for violation
10 of the FCRA, for which Plaintiff seeks statutory damages, punitive damages, and reasonable
11 attorneys’ fees and costs from Defendant. (Id. ¶¶ 51–53).

12 On October 6, 2017, the parties reached a settlement through mediation and
13 subsequently submitted the Proposed Settlement now before the Court. (See Joint Mot. for
14 Order 5:12–26, ECF No. 55). Under the Proposed Settlement, Defendant agrees to create a
15 common fund in the amount of \$600,000, of which each class member to make a claim will
16 receive a pro rata share. (Id. 6:15–17). The Putative Class, pursuant to the Proposed
17 Settlement, is defined as:

18 All persons whose consumer credit report from any of the three major credit
19 reporting agencies (Transunion, Equifax, and Experian) reflects an unauthorized
20 consumer credit report inquiry by Defendant within the past 5 years. For purposes
21 of settlement only the parties define this class as all One Nevada Credit Union
members with closed or unclosed memberships within five years preceding the
filing of this action.

22 Excluded from the Class are all current One Nevada Credit Union employees,
23 officers and directors, and the judge and magistrate presiding over this Action and
their respective staff.

24 (Id. 6:6–12; Settlement Agreement ¶ 34, ECF No. 55-5).

25 The Proposed Settlement further provides for a \$5,000 incentive award to be paid to

1 Plaintiff, as Class Representative, out of the settlement fund before payments to other class
2 members are made. (Joint Mot. for Order 11:18–22). In addition, the Proposed Settlement
3 indicates that Plaintiff’s counsel (“Plaintiff’s Counsel”) will move for attorneys’ fees and costs
4 “not to exceed 30% of the amount actually contributed to the Settlement Fund.” (Id. 11:24–26).

5 **II. LEGAL STANDARD**

6 The Ninth Circuit has declared that a strong judicial policy favors settlement of class
7 actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). However, a
8 class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties
9 to a putative class action reach a settlement agreement prior to class certification, “courts must
10 peruse the proposed compromise to ratify both the propriety of the certification and the fairness
11 of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). At the preliminary
12 stage, the court must first assess whether a class exists. *Id.* (citing *Amchem Prods. Inc. v.*
13 *Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine whether the proposed
14 settlement “is fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler Corp.*, 150
15 F.3d 1011, 1026 (9th Cir. 1998). If the court preliminarily certifies the class and finds the
16 proposed settlement fair to its members, the court schedules a fairness hearing where it will
17 make a final determination as to the fairness of the class settlement. Third, the court must
18 “direct notice in a reasonable manner to all class members who would be bound by the
19 proposal.” Fed. R. Civ. P. 23(e)(1).

20 **III. DISCUSSION**

21 The Motion contends that the Court should (1) certify the proposed Putative Class; (2)
22 approve appointment of class counsel and a class representative; (3) grant preliminary approval
23 of the parties’ Proposed Settlement; and (4) grant approval of the parties’ proposed plan to
24 provide notice to the Putative Class. (See Joint Mot. for Order 2:8–3:1). As discussed *infra*, the
25 Court finds that the Putative Class meets the class certification criteria and the Proposed

1 Settlement meets the threshold standards of fairness, reasonableness, and adequacy.
2 Accordingly, the Court grants class certification for the purposes of settlement and approves the
3 Proposed Settlement on a preliminary basis as fair and adequate.

4 **A. Conditional Class Certification**

5 Plaintiff seeks conditional certification of a settlement class under Rule 23(a) and (b)(3).
6 (See Joint Mot. for Order 13:4–15). To obtain class certification, a plaintiff must satisfy the
7 four prerequisites identified in Rule 23(a) as well as one of the three subdivisions of Rule 23(b).
8 *Amchem Prods.*, 521 U.S. at 614. “The four requirements of Rule 23(a) are commonly referred
9 to as ‘numerosity,’ ‘commonality,’ ‘typicality,’ and ‘adequacy of representation’ (or just
10 ‘adequacy’), respectively.” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus.*
11 *& Serv. Workers Int’l Union, AFL–CIO v. ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir.
12 2010). Certification under Rule 23(b)(3) is appropriate where common questions of law or fact
13 predominate and class resolution is superior to other available methods. *Fed. R. Civ. P.*
14 *23(b)(3)*. The party seeking class certification bears the burden of affirmatively demonstrating
15 that the class meets Rule 23’s requirements. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,
16 350–51 (2011).

17 In general, “[b]efore certifying a class, the trial court must conduct a ‘rigorous analysis’
18 to determine whether the party seeking certification has met the prerequisites of Rule 23.”
19 *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (citations omitted).
20 However, when evaluating class certification in the context of a proposed settlement, courts
21 “must pay undiluted, even heightened, attention to class certification requirements” because the
22 court will lack the opportunity, present when a case is litigated, to adjust the class, informed by
23 the proceedings as they unfold. *Hanlon*, 150 F.3d at 1019; see also *Amchem Prods.*, 521 U.S. at
24 620. The Court finds that the Putative Class meets the numerosity, commonality, typicality,
25 and adequacy-of-representation requirements under Rule 23(a) as well as the certification

1 requirements under Rule 23(b).

2 **i. Rule 23(a)**

3 **1. Numerosity**

4 Rule 23(a)(1) requires that a class be so numerous that joinder of all members is
5 impracticable. Generally, courts have held that numerosity is satisfied when the class size
6 exceeds forty members. See, e.g., *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654–56 (C.D. Cal.
7 2000); *In re Cooper Cos. Inc. Secs. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009).

8 In this case, the Putative Class consists of approximately 115,000 persons, representing
9 the number of One Nevada Credit Union members “with closed or unclosed memberships
10 within five years preceding the filing of this action.” (Joint Mot. for Order 14:5–6, 6 n.5).
11 Therefore, the Court can safely conclude that the Putative Class is sufficiently numerous such
12 that the joinder of each member would be impracticable.

13 **2. Commonality**

14 “A class has sufficient commonality ‘if there are questions of fact and law which are
15 common to the class.’” *Hanlon*, 150 F.3d at 1019 (internal citation omitted). As clarified in
16 *Dukes*, a plaintiff must demonstrate that the class members “have suffered the same injury” and
17 that their claims “depend upon a common contention . . . of such a nature that it is capable of
18 classwide resolution—which means that determination of its truth or falsity will resolve an
19 issue that is central to the validity of each one of the claims in one stroke.” 564 U.S. at 350.

20 Here, the Complaint raises common questions of law and fact including whether each
21 member of the Putative Class’ consumer reports were obtained; whether Defendants had a
22 permissible purpose in reviewing the consumer reports; and whether Defendant acted willfully.
23 (Am. Compl. ¶¶ 40, 42, 45, 53). In addition, the Putative Class members each seek the same
24 relief pursuant to the FCRA, 15 U.S.C. § 1681 et seq. (*Id.* ¶ 42). The Court is therefore
25 satisfied that, if Plaintiff were to continue to pursue this action, the answers to these questions

1 would result in class-wide resolution of the claims asserted. Therefore, the Court finds that
2 Plaintiff has satisfied the commonality requirement.

3 **3. Typicality**

4 To demonstrate typicality, a plaintiff must show that her claims are typical of that of the
5 class. Fed. R. Civ. P. 23(a)(3). “The test of typicality ‘is whether other members have the same
6 or similar injury, whether the action is based on conduct which is not unique to the named
7 plaintiffs, and whether other class members have been injured by the same course of conduct.’”
8 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “Typicality refers to the
9 nature of the claim or defense of the class representative, and not to the specific facts from
10 which it arose or the relief sought.” *Id.*

11 In this case, like the Putative Class, Plaintiff obtained a consumer report that reflected an
12 unauthorized credit report inquiry by Defendant within the past five years. (Am. Compl. ¶¶ 24,
13 40). The Putative Class is defined to encompass persons whose consumer report, obtained
14 from one of the three major credit reporting agencies, indicates an unauthorized credit report
15 inquiry by Defendant within the past five years. (See Joint Mot. for Order 6:6–12). Thus, the
16 named Plaintiff’s claim and the nature of his alleged losses are sufficiently similar to the
17 Putative Class’s claim and alleged losses.

18 **4. Adequacy of Representation**

19 “To satisfy constitutional due process concerns, absent class members must be afforded
20 adequate representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at
21 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)). In *Hanlon*, the Ninth Circuit
22 identified two issues for determining the adequacy of representation: (1) whether the named
23 plaintiffs and their counsel have any conflicts of interest with other class members, and (2)
24 whether the named plaintiffs and their counsel will “prosecute the action vigorously on behalf
25 of the class.” *Id.*

1 In the instant case, the Court is satisfied at this stage that the named Plaintiff will
2 adequately represent the Putative Class. (See Smith Decl., ECF No. 55-4). As discussed infra,
3 however, upon final fairness review the Court will require more analysis of Plaintiff's efforts
4 and the way in which the Putative Class benefited from the same. The Court further finds that
5 Plaintiff's Counsel have significant experience in consumer protection class action lawsuits and
6 have adequately demonstrated their vigorous advocacy on behalf of the Putative Class' interests
7 in the instant suit. (See Kazerounian Decl. ¶¶ 33–61, ECF No. 55-1). Therefore, the Court finds
8 that Rule 23(a) is satisfied at this time.

9 **ii. Rule 23(b)**

10 Rule 23(b)(3) permits certification where “the court finds that questions of law or fact
11 common to the members of the class predominate over any questions affecting only individual
12 members, and that a class action is superior to other available methods for the fair and efficient
13 adjudication of the controversy” in light of, among other things, “the difficulties likely to be
14 encountered in the management of a class action.” Fed. R. Civ. P. 23(b)(3).

15 This case satisfies Rule 23(b)(3)'s requirements. The common questions of whether
16 Plaintiff and the Putative Class were subjected to Defendant's systematic account reviews
17 predominate over any individual questions. Moreover, adjudicating this matter as a class action
18 is a superior approach to resolving the instant controversy because it avoids the dangers of
19 duplicative litigation and the unfairness of inconsistent judgments.

20 Accordingly, because the Putative Class satisfies the requirements of Rule 23(a) and
21 23(b), the Court hereby certifies the proposed class for settlement purposes.

22 **B. Preliminary Approval of the Proposed Settlement**

23 The Court next considers whether the terms of the Proposed Settlement are fair,
24 reasonable, and adequate towards the absent Putative Class members. See Fed. R. Civ. P.
25 23(e)(2). Courts have long recognized that “settlement class actions present unique due process

1 concerns for absent class members.” Hanlon, 150 F.3d at 1026. One inherent risk is that class
2 counsel may collude with the defendants, “tacitly reducing the overall settlement in return for a
3 higher attorney’s fee.” Knisley v. Network Assocs., Inc., 312 F.3d 1123, 1125 (9th Cir. 2002);
4 see Evans v. Jeff D., 475 U.S. 717, 733 (1986).

5 To guard against this potential for class action abuse, Rule 23(e) requires court approval
6 of all class action settlements, which may be granted only after a fairness hearing and a
7 determination that the settlement taken as a whole is fair, reasonable, and adequate. Fed. R.
8 Civ. P. 23(e)(2); see Staton, 327 F.3d at 972 n. 22 (noting that the court’s role is to police the
9 “inherent tensions among class representation, defendant’s interests in minimizing the cost of
10 the total settlement package, and class counsel’s interest in fees”); Hanlon, 150 F.3d at 1026
11 (“It is the settlement taken as a whole, rather than the individual component parts, that must be
12 examined for overall fairness.”).

13 The factors in a court’s fairness assessment will naturally vary from case to case, but
14 courts in the Ninth Circuit generally must weigh the Churchill factors:

- 15 (1) the strength of the plaintiff’s case; (2) the risk, expense,
16 complexity, and likely duration of further litigation; (3) the risk of
17 maintaining class action status throughout the trial; (4) the amount
18 offered in settlement; (5) the extent of discovery completed and the
19 stage of the proceedings; (6) the experience and views of counsel;
20 (7) the presence of a governmental participant; and (8) the reaction
21 of the class members of the proposed settlement.

22 In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) (quoting
23 Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004)). However, where, as
24 here, “a settlement agreement is negotiated prior to formal class certification, consideration of
25 these eight Churchill factors alone is not enough.” Id.

Prior to formal class certification, there is an even greater potential for a breach of
fiduciary duty owed the class during settlement. Accordingly, “such agreements must

1 withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest
2 than is ordinarily required under Rule 23(e) before securing the court’s approval as fair.” Id.
3 (citing Hanlon, 150 F.3d at 1026); accord *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank*
4 *Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) (cautioning that courts must be “even more
5 scrupulous than usual in approving settlements where no class has yet been formally certified”);
6 *Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir.
7 1987) (“[W]hen class certification is deferred, a more careful scrutiny of the fairness of the
8 settlement is required.”); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (noting that
9 reviewing courts must employ “even more than the usual care”); see also *Manual for Complex*
10 *Litig.* § 21.612 (4th ed. 2004). Therefore, before approving a precertification settlement, the
11 Court must not only show that it “has explored [the Churchill] factors comprehensively, but
12 also that the settlement is not the product of collusion among the negotiating parties.” *In re*
13 *Bluetooth*, 654 F.3d at 947.

14 Because collusion is unlikely to be evident from the face of the settlement itself, “courts
15 must be particularly vigilant not only for explicit collusion, but also for more subtle signs that
16 class counsel have allowed pursuit of their own self-interests and that of certain class members
17 to infect the negotiations.” Id. A few such signs include: (1) “when counsel receive a
18 disproportionate distribution of the settlement”; (2) “when the parties negotiate a ‘clear sailing’
19 arrangement providing for the payment of attorneys’ fees separate and apart from class funds”;
20 and (3) “when the parties arrange for fees not awarded to revert to defendants rather than be
21 added to the class fund.” Id.

22 **i. Churchill Factors**

23 With respect to the first two Churchill factors, the Court must weigh the “strength of
24 [the plaintiff’s] case relative to the risks of continued litigation.” *Lane v. Facebook, Inc.*, 696
25 F.3d 811, 823 (9th Cir. 2012). Approval of a class settlement is appropriate in cases in which

1 “there are significant barriers plaintiffs must overcome in making their case.” *Chun-Hoon v.*
2 *McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010). Similarly, difficulties and
3 risks in litigating weigh in favor of approving a class settlement. *See Rodriguez v. West Publ’g*
4 *Corp.*, 563 F.3d 948, 966 (9th Cir. 2009).

5 While Plaintiff’s counsel represents that the “claims asserted in the actions have merit,”
6 (see Kazerounian Decl. ¶ 29, ECF No. 55-1); (Kind Decl. ¶ 34, ECF No. 55-2), Defendant
7 denies any liability and asserts it has meritorious defenses to all claims. (See Joint Mot. for
8 Order 4:9–19). In particular, Defendant states that even if “the credit pull was impermissible
9 under the FCRA, it was not the result of willful conduct.” (Id. 4:10–11). Plaintiff’s counsel
10 acknowledges that even if it were able to prove Defendant’s conduct was unlawful, Plaintiff
11 faces challenges in “proving that Defendant’s actions were willful and proving the damages, if
12 any, sustained by the class members.” (Id. 18:13–15); *see Edwards v. Toys “R” Us*, 527 F.
13 Supp. 2d 1197, 1210 (C.D. Cal. 2007) (noting that “[w]illfulness under the FCRA is generally a
14 question for the jury.”) (citing *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333
15 (9th Cir. 1995)). Accordingly, the Court finds that the first two Churchill factors weigh in
16 favor of approval.

17 Regarding the third Churchill factor, the Court considers the risk of maintaining class
18 action status through the duration of the case. Under Federal Rule of Civil Procedure 23(c), an
19 “order that grants or denies class certification may be altered or amended before final
20 judgment.” Fed. R. Civ. P. 23(c)(1)(C). Defendant’s position is that its support for certification
21 for settlement purposes “shall not be deemed a concession that certification of a litigation class
22 is appropriate,” and states that it may challenge class certification in future proceedings should
23 the Court not approve the Proposed Settlement. (See Joint Mot. for Order 7:14–19). The Court
24 is satisfied that there are risks associating with pursuing and maintaining the instant class action
25 suit. Therefore, this factor weighs in favor of approval.

1 Under the fourth Churchill factor, the Court considers the amount offered in settlement.
2 In assessing the consideration obtained by class members in a class action settlement, “[i]t is
3 the complete package taken as a whole, rather than the individual component parts, that must be
4 examined for overall fairness.” *Officers for Justice v. Civil Service Com’n of City & Cnty. of*
5 *San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). In this regard, “[t]he fact that a proposed
6 settlement may only amount to a fraction of the potential recovery does not, in and of itself,
7 mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney v.*
8 *Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

9 Plaintiff’s counsel argues that the instant Proposed Settlement “exceeds the results in
10 other similar FCRA impermissible account review cases.” (Joint Mot. for Order 21:25–26).
11 For this proposition, Plaintiff cites to *Duncan*, where a court approved an \$8,750,000 settlement
12 for a class of approximately 2.2 million members, and *Pastor*, in which the court approved a
13 \$1.6 million settlement for a class of 537,000 members. See *Duncan v. JP Morgan Chase Bank,*
14 *N.A.*, No. SA-14-CA-00912-FB, 2016 WL 4419472, at *10 (W.D. Tex. May 24, 2016); (see
15 also Order Granting Preliminary Approval, *Pastor v. Bank of Am., NA*, No. 3:15-cv-03831-VC
16 (N.D. Cal. July 7, 2017), Ex. 4 to Kazerounian Decl., ECF No. 55-8)). Plaintiff’s Counsel also
17 point out that “[o]ther known class action [FCRA] account review cases that have settled have
18 provided non-cash relief.” (Joint Mot. for Order 22:2–3).

19 Here, the Settlement Agreement provides for the creation of a \$600,000 common fund,
20 “inclusive of all attorneys’ fees, costs, expenses, the Service Award, as well as the costs of
21 Settlement Administration and the Notice Program.” (Settlement Agreement ¶ 72). The
22 remainder will be available to a class of potentially 115,000 persons, with each person
23 receiving a pro rata share. (*Id.* ¶ 69; Joint Mot. for Order 14:5–6). At this stage, the Court is
24 satisfied that the amount offered in settlement is within the range of reasonableness.

25 Next, the Court turns to the extent of discovery completed and the stage of the

1 proceedings. This action was initially filed on September 13, 2016. (Compl., ECF No. 1). On
2 June 27, 2017, the Court granted in part and denied in part Defendant’s motion to dismiss
3 Plaintiff’s initial complaint. (See Order, ECF No. 39). To date, Plaintiff has served written
4 discovery requests on Defendant, Plaintiff took Defendant’s Rule 30(b)(6) deposition as well as
5 depositions of three of Defendant’s executives, and Defendant deposed Plaintiff. (Kazerounian
6 Decl. ¶¶ 19, 22–23). Plaintiff filed an Amended Complaint on July 18, 2017, after discovery
7 revealed that the size of the potential class would be much greater than anticipated. (Id. ¶ 24);
8 (Am. Compl., ECF No. 48). The parties also engaged in two mediation sessions and ultimately
9 reached a settlement on October 6, 2017. (Id. ¶¶ 20, 26–27). The Court finds that based upon
10 this litigation history, the extent of discovery completed, and the parties’ two mediation
11 sessions that “counsel had a good grasp on the merits of their case before settlement talks
12 began,” and, therefore, this factor weighs in favor of approval. *Rodriguez*, 563 F.3d at 967.

13 Under the sixth Churchill factor, the Court considers the experience and views of class
14 counsel. The Ninth Circuit has declared that “[p]arties represented by competent counsel are
15 better positioned than courts to produce a settlement that fairly reflects each party’s expected
16 outcome in litigation.” *Id.* (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.
17 1995)). Plaintiff’s Counsel asserts that the Proposed Settlement is fundamentally fair. (See,
18 e.g., *Kazerounian Decl.* ¶ 15); (*Kind Decl.* ¶ 50). With respect to Plaintiff’s Counsel’s
19 experience, the Court is satisfied that Plaintiff’s Counsel have extensive experience including
20 personal involvement in complex class action suits and settlements in consumer rights cases.
21 (See *Kazerounian Decl.* ¶ 33–61).

22 The final Churchill factor, the reaction of the class members to the proposed settlement,
23 is inapplicable at this time. However, upon final fairness review, the Court will consider how
24 this factor impacts the Churchill analysis.

1 **ii. In re Bluetooth Factors**

2 As discussed *infra*, the Court finds that Plaintiff’s Counsel’s proposed award of
3 attorneys’ fees is not per se disproportionate. Additionally, the Proposed Settlement does not
4 provide for a “clear sailing” provision by which class counsel is compensated from a fund
5 separate from that available to the Putative Class. Rather, the Proposed Settlement specifies
6 that the award of attorneys’ fees, costs, and expenses “shall be payable solely out of the
7 Settlement Fund.” (Settlement Agreement ¶ 79). Finally, the settlement mechanism in this case
8 provides that residual funds that “remain in the Settlement Fund within 180 days of the date the
9 Settlement Administrator mails the last Settlement Fund Payment,” will be “distributed through
10 a residual cy pres program.” (Id. ¶ 75). Therefore, the third In re Bluetooth factor—whether the
11 agreement provides for a reversion of unclaimed awards back to Defendant—is not at issue in
12 this case. Accordingly, the Court is satisfied that the Proposed Settlement does not implicate
13 the signs of collusion identified by the Ninth Circuit in *In re Bluetooth*.

14 **C. Proposed Award of Attorneys’ Fees**

15 The Court recognizes that it need not directly address a proposed allocation of attorneys’
16 fees until the settlement becomes final. However, the parties must, to some degree, justify the
17 proposed award at this stage because any award of fees will directly reduce the amount payable
18 to the Putative Class, and thus bears on the present fairness inquiry. *Martinez v. Realogy Corp.*,
19 No. 3:10-cv-00755-RCJ-VPC, 2013 WL 5883618, at *6 (D. Nev. Oct. 30, 2013).

20 This is a common fund case. (Joint Mot. for Order 6:15–17). Under regular common
21 fund procedure, the parties settle for the total amount of the common fund and shift the fund to
22 the court’s supervision. The plaintiffs’ lawyers then apply to the court for a fee award from the
23 fund. See *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 271 (9th Cir. 1989). In
24 setting the amount of common fund fees, the district court has a special duty to protect the
25 interests of the class. On this issue, the class’ lawyers occupy a position adversarial to the

1 interests of their clients. *Staton*, 327 F.3d at 970. As the Ninth Circuit has explained,

2 [b]ecause in common fund cases the relationship between plaintiffs
3 and their attorneys turns adversarial at the fee-setting stage, courts
4 have stressed that when awarding attorneys' fees from a common
5 fund, the district court must assume the role of fiduciary for the class
6 plaintiffs. Accordingly, fee applications must be closely scrutinized.
7 Rubber-stamp approval, even in the absence of objections, is
8 improper.

9 *Id.* (emphasis added); see also *In re Coordinated Pre-trial Proceedings in Petroleum Prods.*
10 *Antitrust Litig.*, 109 F.3d 602, 608 (9th Cir. 1997) (“In a common fund case, the judge must
11 look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial
12 benefit after the lawyers are paid. Their interests are not represented in the fee award
13 proceedings by the lawyers seeking fees from the common fund.”).

14 An award of attorneys' fees for creating a common fund may be calculated in one of two
15 ways: (1) a percentage of the funds created; or (2) “the lodestar method, which calculates the
16 fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and
17 then enhancing that figure, if necessary, to account for the risks associated with the
18 representation.” *Grauly*, 886 F.2d at 272. The Ninth Circuit has approved either method for
19 determining a reasonable award of fees. *Id.* However, the fee award must always be reasonable
20 under the circumstances. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296
21 (9th Cir. 1994).

22 The typical range of acceptable attorneys' fees in the Ninth Circuit is 20% to 30% of the
23 total settlement value, with 25% considered a benchmark percentage. *Vizcaino v. Microsoft*
24 *Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.
25 2000). In assessing whether the percentage requested is fair and reasonable, courts generally
consider the following factors: (1) the results achieved; (2) the risk of litigation; (3) the skill
required; (4) the quality of work performed; (5) the contingent nature of the fee and the

1 financial burden; and (6) the awards made in similar cases. *Vizcaino*, 290 F.3d at 1047–50. In
2 circumstances where a percentage recovery would be too small or too large in light of the hours
3 worked or other relevant factors, the “benchmark percentage should be adjusted, or replaced by
4 a lodestar calculation.” *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

5 Here, Plaintiff’s Counsels’ request for “up to 30% of the Settlement Fund,” (Settlement
6 Agreement ¶ 79), is within the range of reasonableness as determined by the Ninth Circuit and
7 in light of the relevant Churchill factors discussed *supra*. However, upon final fairness review,
8 Plaintiff’s Counsel must thoroughly examine the *Vizcaino* factors and provide a Lodestar cross-
9 check to assist the Court in determining the reasonableness of the award. See *In re Online*
10 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) (“One way that a court may
11 demonstrate that its use of a particular method or the amount awarded is reasonable is by
12 conducting a cross-check using the other method.”). At this preliminary stage, the Court finds
13 that the proposed award of attorneys’ fees is within the range of reasonableness and, therefore,
14 the Court conditionally approves this award.

15 **D. Proposed Incentive Award**

16 The Proposed Settlement provides for a “service award up to \$5,000 for Plaintiff.”
17 (Settlement Agreement ¶ 82). The Court finds that this incentive award is in line with awards
18 the Ninth Circuit has approved as reasonable. See, e.g., *In re Online DVD-Rental Antitrust*
19 *Litig.*, 779 F.3d at 947–48; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir.
20 2000). During final fairness review, however, the Court will require analysis of the relevant
21 factors including “the proportion of the payments relative to the settlement amount,” “the size
22 of [the] payment,” “the actions the plaintiff has taken to protect the interests of the class,” “the
23 degree to which the class has benefited from those actions,” and “the amount of time and effort
24 the plaintiff expended in pursuing the litigation.” *Staton*, 327 F.3d at 977. See *Deatricks v.*
25 *Securitas Sec. Servs. USA, Inc.*, No. 13-cv-05016-JST, 2016 WL 5394016, at *8 (N.D. Cal.

1 Sept. 27, 2016) (finding that while \$5,000 was a presumptively reasonable incentive award in
2 the Ninth Circuit, such an award in that case was not warranted because plaintiff did not offer
3 details regarding the actions the plaintiff had taken to protect the interests of the class).
4 Without satisfactory elaboration on these points, the Court will reduce the incentive award
5 following the final fairness hearing to a reasonable amount. See, e.g., *Wolph v. Acer Am. Corp.*,
6 No. C 09-01314 JSW, 2013 WL 5718440, at *6 (N.D. Cal. Oct. 21, 2013).

7 **E. Proposed Class Notice and Administration**

8 For proposed settlements under Rule 23, “the court must direct notice in a reasonable
9 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1);
10 see also *Hanlon*, 150 F.3d at 1025 (“Adequate notice is critical to court approval of a class
11 settlement under Rule 23(e).”). A class action settlement notice “is satisfactory if it generally
12 describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints
13 to investigate and to come forward and be heard.” *Churchill*, 561 F.3d at 575.

14 The Court finds that the notice and exclusion forms proposed by Plaintiff meet the
15 requirements of Rule 23(c)(2)(B) and that the proposed mail delivery is also appropriate in
16 these circumstances. (See Joint Mot. for Order 6:19–9:16). The Proposed Settlement provides
17 that the claims administrator will provide three forms of notice to the Putative Class including a
18 mailed “double post-card” notice with a detachable claim form,” a long-form notice to be
19 posted online, and publication notice. (Settlement Agreement ¶ 18). All of these notices
20 adequately describe the terms of the settlement, inform the class of the proposed award, provide
21 information concerning the time, place, and date of the final approval hearing, and inform
22 absent class members that they may enter an appearance through counsel. (See Proposed
23 Notices, Exs. A, B, D to Settlement Agreement, ECF Nos. 55-5, 55-6); see also *Churchill*, 561
24 F.3d at 575. Therefore, the Court approves the parties’ notice mechanism as sufficient.

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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that the Joint Motion for an Order, (ECF No. 55), is
3 **GRANTED** as follows:

- 4 1. Preliminary class certification is approved;
- 5 2. Plaintiff's Counsel are appointed as Class Counsel;
- 6 3. Joseph J. Smith is appointed as Class Representative;
- 7 4. Kurtzman Carson Consultants, LLC ("KCC") is appointed as claims administrator;
- 8 5. The proposed settlement agreement is preliminarily approved as fair and adequate;
- 9 6. Within forty (40) days of this Order, KCC shall direct notice to class members
10 online, through direct mail, and through publication ("Notice Deadline");
- 11 7. The deadline for class members to submit a claim ("Claims Deadline"), opt-out, or
12 file an objection shall be ninety (90) days after the date of the Notice Deadline.
- 13 8. The deadline for Class Counsel to file a motion for attorneys' fees, costs, and an
14 incentive award shall be thirty (30) days before the Claims Deadline.
- 15 9. The deadline for Plaintiffs to file a motion for final approval of class action
16 settlement, as well as the Claims Administrator to file a declaration of due diligence
17 and proof of mailing, is February 5, 2019.
- 18 10. A final fairness hearing shall take place on March 5, 2019, at 11:00 am in Courtroom
19 7D before Chief Judge Gloria M. Navarro. The matter of Class Counsels' motion for
20 attorneys' fees, costs, and incentive awards to the Class Representative will be
21 considered at the final fairness hearing.

22 **DATED** this 16 day of September, 2018.

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Gloria M. Navarro, Chief Judge
UNITED STATES DISTRICT COURT