SWIGART LAW GROUP, APC
JOSHUA B. SWIGART (SBN 225557)
2221 Camino del Rio S, Ste. 308
San Diego, CA 92108
Telephone: (866) 219-3343

THE BARRY LAW OFFICE, LTD
Peter F. Barry(MN SBN 266577)
(*Pro Hac Vice*)
pbarry@lawpoint.com
333 Washington Ave No, Suite 300-9038
Minneapolis, MN 55401-1353
Telephone: (612) 379-8800

Attorneys for Plaintiff
DAVID GREENLEY AND THE
PUTATIVE CLASS

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID GREENLEY, individually and on behalf of others similarly situated,

Plaintiffs,

v.

MAYFLOWER TRANSIT, LLC,

Defendant.

CASE NO. 21cv339-WQH-MDD

[Judge: Hon. William Q. Hayes]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date Action Filed: February 25, 2021
Date: August 4, 2022 at 10:30 a.m.
Courtroom: 14B

Table of Contents

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Plaintiff David Greenley ("Greenley") submits this memorandum in support of Plaintiff's Motion for Final Approval of the Settlement in this Class Action. This Motion is brought upon the grounds that (1) a class exists for settlement purposes and that the "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 v. Boeing, Co.*, 327 F. 3d 938, 952 (9th Cir. 2003). Indeed, as set forth herein, the proposed settlement easily meets and exceeds this standard for approval being an exceptional result for the class.

The proposed settlement "is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F. 2d 615, 625 (9th Cir. 1982) As set forth more fully herein, approval of the Settlement is supported by an analysis of relevant factors, including (1) the strength of the 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; and (7) the reaction of class members to the proposed settlement. *See Linney v. Cellular Alaska P'ship*, 151 F. 3d 1234, 1242 (9th Cir. 1998); *Torrisi v. Tucson Elec. Power Co.*, 8 F. 3d 1370, 1376 (9th Cir. 1993) (holding that only one factor was necessary to demonstrate that the district court was acting within its discretion in approving the settlement).

The results achieved by Plaintiff in this case have been frankly extraordinary. More than 28% of the eligible class members have filed valid claims (45/158). Nearly of 92% of the class members actually received the class notices in this action. There were zero objectors and zero opt-outs. (Thompson Decl., Ex. 3.) For good reason. Each class member who filed valid

claims will receive nearly $23,000. (Id.) That is a recovery unheard of in CIPA class actions. The undersigned knows of no other CIPA settlement that even comes close.

For example, another recent CIPA class action settled for nearly the exact same amount as this class—but covered 37,031 persons versus the 158 that this case did. *Franklin v. Ocwen Loan Servicing, LLC*, 3:18-cv-03333-SI, Dkt. 157 (N.D. Cal. Mar. 9, 2022). Assuming that the *Franklin* court awards the 1/3 attorney's fee request that was disclosed in the preliminary approval motion, that will leave those class members with only $27 each. In other words, Plaintiff's instant action will have recovered 852 times more money for each class member than a comparable settlement which has sought far more attorney's fees. This case is undoubtedly a home run for California consumers. Accordingly, for the reasons set forth more fully below, Plaintiff David Greenley requests that this Court grant Final Approval of the Proposed Settlement.

I. FACTS AND PROCEDURAL BACKGROUND

This case arises from Mayflower's establishment of a marketing program around May 2020 to permit customers to do online bookings for moving services and minimize or eliminate the need for telephonic communications to place or confirm an order for moving services.[1] The Gemini program was only available to customers who (a) met size of residence restrictions (apartments, townhomes and one-bedroom homes) and (b) were moving both from and to a geographic area with participating Mayflower affiliated providers. Gemini was a national program but not all Mayflower affiliated local movers participated.

[1] The summary of facts presented in this motion is an abridged version of the statement of facts submitted by Plaintiff in support of his Motion for Class Certification which was pending before this court at the time the settlement was reached. The Declaration of Joshua Swigart in Support of the Motion for Class Certification includes, as exhibits, the evidentiary support for the statement of fact herein. Because these facts are not contested in the context of the present motion and the statement of facts is presented as background, the prior declaration and supporting evidence are not resubmitted with the present motion.

The Gemini program commenced in approximately May of 2020 and terminated at the end of 2020. Thus, while the program was a national program, the number of participants in the program was in the hundreds rather than thousands.

After booking online through the Gemini Program, the next step was for the customer to receive a computer-generated confirmation email which included the following: "Questions ? We are here to help you Every Step of the Way.® call us at (866) ***-1439, text us at (844) ***-2260, or simply respond to this email." Customers within the Gemini Program were instructed to contact Mayflower by phone using the "1439" phone number. Calls by Gemini customers to the "1439" number were recorded – allegedly without prior notice to the customers. Those recordings are alleged to be in violation of CIPA and are at the heart of this case.

Mayflower represented through discovery and as a material term to the settlement negotiations that the class consists of 159 individuals consisting of 691 telephone calls. As part of the Settlement Agreement, Mayflower agreed to cooperate in confirmatory discovery to verify the size of the settlement class. Confirmatory discovery confirmed these representations.

II. THE CLASS DEFINITION

The parties agreed to the following class definitions for settlement purposes only:

A. The Confidential Communication Class for Violation of Penal Code §632, consisting of:

All persons in California who booked a move online through the Mayflower Gemini program and whose conversations were recorded without their consent, by Defendant, and or its agents, within the one year prior to the filing of the Complaint.

B. The Cellular Phone Communication Sub-Class for Violation of Penal Code §632.7, consisting of:

All persons in California who booked a move online through the Mayflower Gemini program and whose cellular telephone conversations

were recorded without their consent, by Defendant, and or its agents, within the one year prior to the filing of the Complaint.

III. THE PROPOSED SETTLEMENT

The terms of the settlement are simple and straightforward. It is a purely cash settlement. Mayflower has agreed to pay the sum of one million four hundred and fifty thousand dollars ($1,450,000 USD) for the settlement of the claims asserted in the class action complaint. Mayflower has further agreed to certification of a settlement class and subclass as set forth above. The class consists of 159 individuals and 691 telephone calls. The parties agreed that an accurate class size was a material term to the negotiations and the class settlement agreement. Based on the agreed upon gross amount of the settlement fund, the amount to be paid to each class member – prior to deduction of costs and fees – is approximately $9,119 per class member.

On a per call basis, the amount is $2,098 per call assuming a 100% claims rate. This represents $41.9% of the maximum recovery that could have been obtained if Plaintiff prevailed on every claim and recovered for every call at trial (California Penal Code §637.2 provides statutory damages of $5,000 may be awarded for each violation). By any standard, that is an exceptional result to be obtained through pretrial settlement.

The payment to individual class claimants will be made on a pro rata basis pursuant to the following formula: Net Settlement Fund/Total Class Members Submitting Claims = Net Payment to Each Class Member. If the Court approves all requested fees, litigation costs, service awards, and administration costs, the net settlement fund available for pro rata distribution to class members (exclusive of administrative costs) would be $1,034,125. If 100% of the class members submit claims, the payment to each class member would be approximately $6,504. At a 50% claims participation rate the payment to each claimant would be approximately $13,008. At a 25% claims submission rate that number would rise to approximately $26,016. At a 10% claims submission rate, which is still a high claims submission

rate for this type of class action, the number rises to approximately $65,040 per claimant.

The common settlement fund of $1,450,000 is nonreversionary. The terms of the settlement agreement are more fully set forth in the Memorandum of Understanding (Swigart Decl., Ex. 1) and the formal Settlement Agreement (Swigart Decl., Ex. 2).

IV. LEGAL STANDARD APPLICABLE TO FINAL APPROVAL OF A CLASS ACTION SETTLEMENT

"The Ninth Circuit has declared that a strong judicial policy favors settlement of class actions." *West v. Circle K Stores, Inc.*, No. CIV S-04-0438 WBS GGH, 2006 LEXIS 42074, at *3, 2006 WL 1652598 at *1 (E.D. Cal. Jun. 13, 2006) (citing *Class Plaintiffs v. City of Seattle*, 955 F. 2d 1268, 1276 (9th Cir. 1992); *Franklin v. Kaypro Corp.*, 884 F. 2d 1222, 1229 (9th Cir. 1989) (citing *Van Bronkhorst v. Safeco Corp.*, 529 F. 2d 943, 950 (9th Cir. 1976))); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). This judicial policy applies with particular emphasis to a CIPA class action. Public policy supports class certification of CIPA claims because CIPA violations are otherwise likely to go unredressed. *Reyes v. Educational Credit Management Corporation*, 322 F.R.D. 552, 563 (2017) *vacated and remanded on other grounds* 773 Fed. Appx. 989 (2019). CIPA protections are "unlikely to achieve optimal deterrence without the prospect of a class action suit designed to vindicate many individual claims at once." *Id*. at 571 (the court observed that "[v]iolations of CIPA, which aims to 'protect[ ] California residents from secret recording,' are likely to go unrecognized due to the secretive nature of invasions of privacy") (citing *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1009 (C.D. Cal. 2004)).

However, when presented with a motion to finally approve a class action settlement, "judges have the responsibility of ensuring fairness to all members of the class presented for certification." *Staton v. Boeing, Co.*, 327 F. 3d 938, 952 (9th Cir. 2003). Particularly "in the context of a case in which the parties

reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Id*. In determining whether to approve a class action settlement, a district court must (1) "assess whether a class exists," and (2) "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 . . . .'" *Id.* (citing *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998)); *see also Clark v. Michaels Stores, Inc.*, No. 05-CV-1678 WQH JMA, 2007 WL 4058758, at *1 (S.D. Cal. Nov. 14, 2007.

Courts require a higher standard of fairness when a settlement takes place prior to formal class certification to ensure class counsel and Defendant have not colluded in settling the case. *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998). Ultimately, "[t]he 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, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F. 2d 615, 625 (9th Cir. 1982). "The question [the Court] address[es] is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

Courts consider several factors when determining whether a proposed "settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Rodriguez v. West Publ 'g Corp.*, 563 F. 3d 948, 965 (9th Cir. 2009) (*quoting Hanlon*, 150 F.3d at 1027). These factors may include one or more of the following: (1) the strength of the 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 class members to the proposed settlement. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998); *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (holding that only one factor was necessary to demonstrate that the district court was acting within its discretion in approving the settlement). *See Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH BLM, 2014 WL 109194, at *4 (S.D. Cal. Jan. 9, 2014).

Here, the analysis of these factors clearly supports final approval of the proposed settlement.

V. ANALYSIS

a. The Existence of a Settlement Class

"To obtain certification of a class action ... under Rule 23(b)(3), a plaintiff must satisfy Rule 23(a)'s [ ] prerequisites of numerosity, commonality, typicality, and adequacy of representation, and must also establish that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 460 (2013) (internal citations omitted). In this case, the Court previously preliminarily certified the proposed settlement class. (ECF No. 42). At that time, the Court preliminarily determined that the proposed class satisfied the requirements of Fed. R. Civ. P. Rule 23(a) for numerosity, commonality, typicality, adequacy of representation as well as the Rule 23(b) predominance and superiority requirements.

Public policy supports class certification of CIPA claims because CIPA violations are otherwise likely to go unredressed. *Reyes v. Educational Credit Management Corporation*, 322 F.R.D. 552, 563 (2017) *vacated and remanded on*

other grounds 773 Fed. Appx. 989 (2019). CIPA protections are "unlikely to achieve optimal deterrence without the prospect of a class action suit designed to vindicate many individual claims at once." *Id*. at 571 (the court observed that "[v]iolations of CIPA, which aims to 'protect[ ] California residents from secret recording,' are likely to go unrecognized due to the secretive nature of invasions of privacy") (citing *Ades v. Omni Hotels Mgmt. Corp.*, 46 F. Supp. 3d 999, 1009 (C.D. Cal. 2004)). The court "agree[d] with Plaintiff that the potential damages are unlikely to adequately incentivize potential plaintiffs to assume the cost of litigating contentious CIPA claims such as those presented in this case on an individual basis." *Reyes v. Educ. Credit Mgmt. Corp.*, 322 F.R.D. 552, 563 (S.D. Cal. 2017), *vacated and remanded*, 773 F. App'x 989 (9th Cir. 2019). The Court concluded "one of the strongest justifications for the class action device is its regulatory function. *See Bee, Denning, Inc.*, 310 F.R.D. at 630. Violations of CIPA, which aims to "protect[ ] California residents from secret recording," are likely to go unrecognized due to the secretive nature of invasions of privacy. *See Ades v. Omni Hotels Management Corp.*, 46 F.Supp.3d 999, 1009 (C.D.Cal. 2014). Consequently, the statute is unlikely to achieve optimal deterrence without the prospect of a class action suit designed to vindicate many individual claims at once." *Reyes v. Educ. Credit Mgmt. Corp.*, 322 F.R.D. 552, 570 (S.D. Cal. 2017), *vacated and remanded*, 773 F. App'x 989 (9th Cir. 2019).

Courts have approved settlement classes in CIPA cases such as this. *See e.g.*, *Ronquillo-Griffin v. TransUnion Rental Screening Sols., Inc.*, No. 17CV129 JM (BLM), 2019 WL 2058596, at *3 (S.D. Cal. May 9, 2019); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1128 (9th Cir. 2020); *Shvager v. ViaSat, Inc.*, No. CV1210180MMMPJWX, 2014 WL 12585790, at *2 (C.D. Cal. Mar. 10, 2014); *Romero v. Securus Techs., Inc.*, No. 16CV1283 JM (MDD), 2020 WL 3250599, at *2 (S.D. Cal. June 16, 2020); *Raffin v. Medicredit, Inc.*, No. CV154912MWFPJWX, 2018 WL 8621204, at *1 (C.D. Cal. Nov. 30, 2018).

The proposed Class and Sub-class definitions are clearly defined and based on objective criteria. It is enough that the class definition describes "a set of

common characteristics sufficient to allow" a prospective plaintiff to "identify himself or herself as having a right to recover based on the description." *Moreno v. AutoZone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (citation and internal quotations omitted). Courts are "able to make common-sense assumptions in determining numerosity.'" *Gusman v. Comcast Corp*., 298 F.R.D. 592, 596 (S.D. Cal. 2014) (citation omitted). "Although there is no absolute threshold, courts generally find numerosity satisfied when the class includes at least forty members." *Reyes,* 322 F.R.D. at 565. Here there are 159 class members and 691 recorded calls. Thus, numerosity is met.

For efficiency, the commonality prerequisite under Fed. R. Civ. P. 23(a)(2) and predominance requirement under Rule 23(b)(3) are discussed together. See *Ades,* 2014 WL 4627271, at *8 ("if plaintiffs show predominance, they necessarily show commonality"). Rule 23(a)(2) requires at least one significant common question of law or fact to certify a class. See *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1988) (quoting Fed. R. Civ. P. 23(a)(2)); *Abdullah v. U.S. Sec. Assocs., Inc*., 731 F. 3d 952, 957 (9th Cir. 2013). The focus is on whether certification will offer a more economical approach to resolving the underlying disputes than would individual litigation. In the present case the predominant and common question is whether Defendant Mayflower provided notice/warning of recording to incoming callers prior to recording their telephone conversations. *See Saulsberry v. Meridian Fin. Servs*., No. CV146256JGBJPRX, 2016 WL 3456939, at *14 (C.D. Cal. Apr. 14, 2016) (finding the CIPA Late Advisory Cell Phone putative class members are common with regards to the question of whether a notification must be made with the first 30 seconds of a call); *Raffin*, at *8–9 (finding commonality in CIPA case where the defendant relied on agents to give a call recording advisement based on a script that required verification of identification before the agent was instructed to advise of call recording). Thus, commonality and predominance are met.

The typicality requirement is met because Plaintiff David Greenley's claims are typical of the class members, i.e., that his telephone calls with Mayflower

were recorded without advance notice. Mr. Greenley is himself a member of the class that he seeks to represent because his call was recorded without his consent and with no prior warning. Mr. Greenley's CIPA claims are typical of those of the class members, as the harm suffered by Mr. Greenley (the proposed class representative) is identical to the type of harm suffered by the absent class members, in that their statutory rights to privacy under CIPA were violated by Defendant through its practice of failing to advise of call recording on each telephone call. *See Steven Ades & Hart Woolery v. Omni Hotels Mgmt. Corp.*, No. 2:13-CV-02468-CAS, 2014 WL 4627271 (C.D. Cal. Sept. 8, 2014).

Finally, Mr. Greenley is an adequate class representative and has so demonstrated by his actions in this case representing the putative class members. Mr. Greenley does not have any conflicts of interest with the other class members and he has prosecuted the action vigorously on behalf of the class. *See Staton v. Boeing Co*., 327 F. 3d 938, 957 (9th Cir. 2003).

Importantly, although Defendant Mayflower vigorously opposed Plaintiff's Motion for Class Certification, Defendant has stipulated to a class for settlement purposes and does not oppose certification of a class for settlement purposes in the context of the present motion.

Accordingly, the Court should certify a settlement class.

b. Notice to the Class

Notice to the Class was provided through direct mail and email notice in a form approved by this court at the time of Preliminary Approval. This form of Notice was determined (1) the best notice practicable under the circumstances, (2) notice that was reasonably calculated, under the circumstances, to apprise the putative Class members of the pendency of the action, and of their right to object and to appear at the Final Approval Hearing or to exclude themselves from the Settlement, (3) reasonable and constituted due, adequate, and sufficient notice to all persons entitled to be provided with notice, and (4) fully complied with due process principles and Federal Rule of Civil Procedure 23.

c. The Settlement is Fundamentally Fair, Reasonable, and Adequate

i. The Strength of the Plaintiff's Case and the Risk, Expense, Complexity, and Likely Duration of Further Litigation

"To determine whether the proposed settlement is fair, reasonable, and adequate, the Court must balance against the risks of continued litigation (including the strengths and weaknesses of Plaintiff's case), the benefits afforded to members of the Class, and the immediacy and certainty of a substantial recovery. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000).

"The court shall consider the vagaries of the litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future after protracted and expensive litigation. In this respect, 'It has been held proper to take the bird in hand instead of a prospective flock in the bush.'" *Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH BLM, 2014 WL 109194, at *5 (S.D. Cal. Jan. 9, 2014) *quoting Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

Litigation is always a risky proposition. Plaintiff's counsel believes that Plaintiff has a strong case. However, both class certification and liability are vigorously contested. "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

Although Plaintiff and his counsel believe they have a strong case the risks of continued litigation clearly are a factor in favor of approving the settlement.

ii. The Risk of Maintaining Class Action Status Throughout the Trial

The risk of obtaining and maintaining class certification raises additional risks. *See Rodriguez v. El Toro Med. Invs. Ltd. P'ship*, No. 8 :16-cv-00059-JLS-KES, 2017 WL 11627501, at *7 (C.D. Cal. Dec. 6, 2017) ("Settlement

eliminates the risks inherent in certifying a class, prevailing at trial, and withstanding any subsequent appeals, and it may provide the last opportunity for class members to obtain relief. This factor therefore weighs in favor of granting preliminary approval . . . the Court finds that there is some risk of maintaining class certification in this action and that this factor weighs in favor of preliminary approval"); *Schuchardt v. L. Off. of Rory W. Clark*, 314 F.R.D. 673, 683 (N.D. Cal. 2016) ("if this case had not settled, Defendant may have opposed Plaintiffs' motion for class certification, and even if the Class was certified, the Court could still re-evaluate the appropriateness of class certification at any point"); *Klee v. Nissan N. Am., Inc.*, No. CV1208238AWTPJWX, 2015 WL 4538426, at *7 (C.D. Cal. July 7, 2015), *aff'd* (Dec. 9, 2015) ("Although the class is certifiable for settlement purposes, if litigation continued [Defendant] intends to oppose class certification for litigation purposes. . . [Defendant]'s arguments are not watertight. . . . But they are also not baseless, and they introduce at least some risk of failing to maintain class certification"); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 392 (C.D.Cal. 2007) (noting that class certification "undeniably represents a serious risk for plaintiffs in any class action lawsuit).

iii. The Amount Offered in Settlement

California Penal Code §637.2 provides a potential award of statutory damages in the amount of $5,000 for each violation. There were 691 calls at issue here and therefore a maximum of 691 violations. With statutory damages of $5,000 per call, the absolute maximum that could have been recovered at trial was $3,455,000. The amount obtained for the class in settlement is $1,450,000. On a per call basis, the amount is $2,098 per call. This represents 41.9% of the maximum recovery that could have been obtained if Plaintiff prevailed on every claim and recovered for every call at trial.

There was a total of 42 valid, timely submitted claims. Three additional claims were submitted late. Class Counsel suggests the Court accept the three late claims bringing up the final total to 45 valid claims. The estimated amount paid to

each claiming class member will then be approximately $22,980.[2] Decl. Swigart, ¶ 1 and Decl. of Carole Thompson, ¶¶ 12 and 13.

By any standard that is an exceptional result to be obtained at pretrial settlement.

iv. Whether the Class Has Been Fairly and Adequately Represented in the Settlement Process

Plaintiff's attorneys are well qualified to conduct this litigation and to assess its settlement value. The Class has been fairly and adequately represented in discovery, motion practice, and during settlement negotiations. *Hunter v. Nature's Way Prod., LCC,* No. 3:16-CV-532-WQH-AGS, 2020 WL 71160, at *6 (S.D. Cal. Jan. 6, 2020); *Morey v. Louis Vuitton N. Am., Inc*., No. 11CV1517 WQH BLM, 2014 WL 109194, at *7 (S.D. Cal. Jan. 9, 2014).

Accordingly, this factor supports approval of the settlement.

v. The Extent of Discovery Completed and the Stage of the Proceedings

This action was filed on February 25, 2021, (ECF. No. 1). Defendant filed an Answer to the Complaint on March 19, 2021, (ECF. No. 4) The matter was vigorously litigated and the parties engaged in substantial discovery, including (a) Interrogatories, (b) Requests for Admission, (c) Requests for Production of Documents, (d) third party subpoena duces tecum; and (e) depositions. The parties also engaged in significant motion practice concerning various discovery disputes. Plaintiff filed a motion for class certification (ECF. No. 15) on or about October 7, 2021. Defendant filed its opposition to the motion for class certification on October 25, 2021, (ECF No. 36).

In short, the litigation had reached a stage where all counsel were well informed as to the strengths and weaknesses of their respective cases and were able to properly assess the risks associated with further litigation. Accordingly, this factor supports approval of the settlement.

[2] The anticipated net settlement fund divided by the anticipated claims of 45 result in an estimated claimant payout of $22,980.

vi. The Experience and Views of Counsel

"In reviewing the opinions of counsel, 'great weight' is accorded to the recommendation of the attorneys. *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997). They are the ones who are most closely acquainted with the facts of the underlying litigation." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac Enters. Sec. Litig.*, 47 F. 3d 373, 378 (9th Cir. 1995); *Rodriguez v. West Publ 'g Corp.*, 563 F. 3d 948, 967 (9th Cir. 2009).

Here, Class Counsel are qualified and highly experienced in litigating complex consumer class actions. [*See* Declarations of Counsel filed concurrently herewith]. Given Class Counsel's extensive experience in litigating similar type cases, the Class Counsel are well positioned to assess the risks of continued litigation and benefits obtained by the settlement.

Class counsel actively researched, conducted discovery, and litigated contested motions prior to entering into the settlement. Class Counsel are fully aware of the potential benefits of settlement as well as the substantial risks of continued litigation and have determined that the proposed settlement is in the best interests of the class.

"Here, class counsel understood the complex risks and benefits of any settlement and concluded that the proposed Settlement was a just, fair, and certain result. This factor weighs in favor of approval." *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 490 (E.D. Cal. 2010).

vii. The Absence of Collusion in The Settlement Process

Ultimately, "[t]he 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, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). The Court has an obligation to "satisfy itself that the settlement was not the product of collusion." *Browning v. Yahoo! Inc.*, No. 04CV01463(HRL), 2007 WL 4896699, at *38 (N.D. Cal. Nov.16, 2007).

In the present case, the settlement was reached following hotly contested discovery practice and after the Defendant had filed a vigorous opposition to the Motion for Class Certification. The case was vigorously litigated and only after the parties had reached a position to ascertain the risks associated with their respective positions did the parties conduct a full day mediation. The final agreement resulted from a settlement mediation conducted under the auspices of Hon. Edward Infante, Retired Magistrate Judge of the United States District Court for the Southern District of California and Northern District of California.

"Participation of a mediator is not dispositive, but is 'a factor weighing in favor of a finding of non-collusiveness.' *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011); *Amunrud v. Sprint Commc'ns Co.*, 2012 WL 443751, at * 10 (D. Mont. Feb. 10, 2012) (finding absence of signs of collusion based, in part, on mediator's participation); *In re HP Laser Printer Litig.*, 2011 WL 3861703, at * 12–13 (C.D. Cal. Aug. 31, 2011) (same)." *Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH BLM, 2014 WL 109194, at *7 (S.D. Cal. Jan. 9, 2014).

Thus, the proposed settlement meets procedural criteria for fairness of a class action settlement and is NOT the result of collusion.

viii. The Presence of A Governmental Participant

This factor is inapplicable because there is no governmental participant in this case.

ix. The Reaction of Class Members to the Proposed Settlement

"The Ninth Circuit has held that the number of class members who object to a proposed settlement is a factor the Court may consider in its settlement approval analysis." *Shames v. Hertz Corp.*, 2012 WL 5392159, at *8 (S.D. Cal.

Nov. 5, 2012) (*citing Mandujano v. Basic Vegetable Prods. Inc.*, 541 F. 2d 832, 837 (9th Cir. 1976)). "The absence of a large number of objectors supports the fairness, reasonableness, and adequacy of the settlement." *Id.* (*citing In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement"); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal. 1979) (finding "persuasive" the fact that 84% of the class filed no opposition)); *Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH BLM, 2014 WL 109194, at *4–8 (S.D. Cal. Jan. 9, 2014).

In the present case there have been no objections or requests for exclusion. "The lack of objections and the small number of Class members who opted out of the settlement, compared to the large number of Class members who received Notice, favors approval of the settlement." *Morey*, 2014 WL 109194, at *7; *Hunter v. Nature's Way Prod., LCC*, No. 3:16-CV-532-WQH-AGS, 2020 WL 71160, at *6 (S.D. Cal. Jan. 6, 2020).

x. Class Action Fairness Act ("CAFA") Considerations

When applicable, special considerations arise in cases involving coupon settlements. CAFA allows a court to approve a coupon settlement "only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). Although the "fair, reasonable, and adequate" standard is identical to that contained in Rule 23(e)(2), 'several courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing such [coupon] settlements.'" *Morey*, No. 11CV1517 WQH BLM, 2014 WL 109194, at *8 (*quoting True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010).

This is NOT a coupon settlement. The settlement here is a simple straightforward cash settlement and only affects California class members. Therefore, CAFA considerations do not come into play.

VI. CONCLUSION

For the foregoing reasons, Plaintiff requests that this court enter an order:

1. Accepting two late claims to the settlement, which brings the total number of valid claims to 45;
2. Finally approving the class action settlement, including the common fund in the amount of $1,450,000;
3. Approving attorney fees of $362,500 equal to twenty five percent (25%) of the settlement common fund and approving Plaintiff Counsels' hourly rates;
4. Approving reimbursement of litigation expenses in the aggregate amount of $30,874.12;
5. Approving Settlement Administration expenses of $12,500; and
6. Approving a service award to Representative Plaintiff in the amount of $10,000.

Date: May 10, 2022

SWIGART LAW GROUP, APC

By: /s/ Joshua B. Swigart
Joshua B. Swigart

THE BARRY LAW OFFICE, LTD

By: /s/Peter F. Barry
Peter F. Barry

Attorneys for Plaintiff