UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 18-3093-JFW(ASx)** Date: March 1, 2019

Title: Lisa Kim *-v-* Tinder, Inc., et al.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING PLAINTIFF LISA KIM'S MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS [filed 1/20/19; Docket No.52]**

On January 20, 2019, Plaintiff Lisa Kim ("Plaintiff") filed a Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class ("Motion"). On January 30, 2019, Defendants Tinder, Inc., Match Group, LLC, and Match Group, Inc. (collectively, "Defendants") filed their Notice of Non-Opposition. On February 4, 2019, Putative Class Member Allan Candelore ("Candelore") filed an Opposition.[1] On February 11, 2019, Plaintiff filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's February 25, 2019 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

A. Factual Background

Tinder is a smartphone based dating application that is used by consumers throughout the

[1] Although the Court considered the objections and issues raised in Candelore's Opposition, the Court concludes that the objections and issues raised by Candelore are more appropriately considered at the Final Fairness Hearing, after all Class Members have been given notice and an opportunity to object or opt out of the Settlement.

world, including in California. Plaintiff is a user over the age of 29 who alleges that when she and other users over the age of 29 purchased Tinder premium services, such as Tinder Plus or Tinder Gold, Defendants discriminated against them based on their age by charging them a higher price for the same services than Defendants charged consumers who were younger than 29 years old.

On April 12, 2018, Plaintiff filed her class action Complaint against Defendants. On June 22, 2018, Plaintiff filed a First Amended Complaint, alleging claims for: (1) violation of the Unruh Civil Rights Act, California Civil Code §§ 51 *et seq.*; and (2) violation of the Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq.*

On June 11, 2018, Defendants filed a Motion to Compel Arbitration, claiming that Plaintiff had entered into an arbitration agreement based on her alleged assent to the arbitration provision in the Tinder application's Terms of Use through the use of "sign-up wrap" consent in order to access the application. On July 5, 2018, the Court granted Defendants' Motion to Compel Arbitration. On July 16, 2018, Plaintiff appealed the Court's ruling granting Defendants' Motion to Compel Arbitration.

On November 29, 2018, the parties attended a mediation with Judge Louis Meisinger (Ret.). The parties reached a settlement on December 1, 2018, after subsequent discussions with Judge Meisinger (the "Settlement"), which was memorialized in the Settlement Agreement. The Court has reviewed the Settlement Agreement, which was entered into on December 31, 2018 and is attached as Exhibit A to the Declaration of Todd M. Friedman (Docket No. 52-1), and the relevant provisions are discussed below.

B. The Settlement Class

The "Settlement Class" is defined in the Settlement Agreement as:

> Every California subscriber to Tinder Plus or Tinder Gold during the Class Period who at the time of subscribing was at least 29 years old and was charged a higher rate than younger subscribers, except those who choose to opt out of the Settlement Class.

Settlement Agreement, § 2.21. The Class Period is from March 2, 2015 through the date that the Court grants preliminary approval of the Settlement. The Settlement Class contains approximately 230,000 consumers.

C. The Terms of the Settlement

Pursuant to the Settlement Agreement, Class Notice will be sent via email to the Class Members. Settlement Agreement, § 1.4, 4.3-4.4; Exh. A-2. The Class Notice will explain that if the Class Member has a Tinder account, or reactivates a Tinder account associated with the same email address as used with his or her previous account, the Class Member will automatically receive 50 Super Likes (equivalent to $50 in value). *Id*. This benefit will be issued to each and every Class Member irrespective of whether the Class Member submits a claim. In addition, each Class Member may submit a claim to obtain one of the following additional benefits: (1) $25.00 in cash; (2) 25 Super Likes (but only if the Class Member has a current Tinder account); or (3) a

one-month subscription to Tinder Plus or Tinder Gold, depending on which of those services the Class Member had previously purchased (this option is not available to any Class Member who has a current subscription to Tinder Plus or Tinder Gold). Settlement Agreement, § 3.2-3.3. Moreover, Defendants have agreed to change their practices and largely terminate their price differentiation practices in California as they pertain to age. *Id.*, at ¶ 3.4. Plaintiff estimates this revision to Tinder pricing discrimination is worth at least $5.75 million to the Settlement Class. Declaration of Todd M. Friedman (Docket No. 52-1) ("Friedman Decl."), ¶ 34. Defendants have also agreed to retain a Settlement Administrator and to pay for any and all costs associated with administering the Settlement, including Class and CAFA Notices, handling of claims and the distribution of monetary payments to Class Members who choose that option, and developing and maintaining the Settlement Website. Settlement Agreement, §§ 4.3-4.5, 5.4. Defendants have also agreed not to oppose the proposed $5,000.00 incentive payment to Plaintiff or the proposed attorneys' fees award of up to $1,200,000.00 plus reasonable cost reimbursement to Class Counsel, pending approval by the Court. Settlement Agreement, §§ 7.1 and 7.2.

CAFA notice was to be provided within 10 days after the filing of this Motion[2], and Class Notice will be provided within 30 days after Defendants provide the Settlement Administrator with the necessary Class information, which Defendants will provide within seven days after Preliminary Approval. Settlement Agreement, § 4.9. Before Class Notice is provided, the Settlement Administrator will develop the Settlement Website, which shall contain relevant documents pertaining to the Settlement. Settlement Agreement, §§ 4.5, 5.2.

D. The Scope of the Release

The Settlement Agreement provides that Class Members who do not request exclusion from the Settlement will release any and all claims, known or unknown, against the Released Parties arising from the claims that subscribers to Tinder Plus or Tinder Gold were charged a higher price depending on their age. Settlement Agreement, § 8.1.

E. Opportunity to Opt Out and Object

Class Members will have the right to object to the terms of the Settlement or to opt out of the Settlement. A Class Member who wishes to opt out of the Settlement must, no later than 30

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[2] When a settlement is reached in a class action case, CAFA requires that, "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]" 28 U.S.C. § 1715(b). The statute provides detailed requirements for the contents of such a notice. *See id.* The Court is precluded from granting final approval of a class action settlement until the CAFA notice requirement is met. "An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under [28 U.S.C. § 1715(b)]." 28 U.S.C. § 1715(d). Therefore, the parties shall provide the Court with evidence that Defendants have complied with Section 1715 when Plaintiff files her motion for final approval of the Settlement.

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days after the Class Notice Date, mail in accordance with the instructions in the Class Notice, a valid request to opt out. Settlement Agreement, § 4.8. A Class Member who does not opt out and who wishes to object to the Settlement may do so by filing with the Court and mailing to counsel for the Parties, no later than 30 days after the Class Notice Date, a notice of objection and/or request to be heard at the Final Fairness Hearing that complies with the instructions in the Class Notice. Settlement Agreement, § 4.7.

F. Class Representative's Proposed Incentive Award

The Settlement contemplates that Class Counsel will request an Incentive Award in the amount of $5,000.00 to be distributed to the Class Representative, subject to Court approval. Defendants have agreed not to oppose this request. Settlement Agreement, § 7.2.

G. Class Counsel's Application for Fees, Costs, and Expenses

The Settlement contemplates that Class Counsel may apply to the Court for an award of attorneys' fees in the amount of $1,200,000.00 (plus reimbursement of costs), representing 5 percent of the total estimated value of the Settlement (including the value of the injunctive component), which counsel agrees provides significant value to the Class. Defendants have agreed not to oppose an application by Class Counsel for an award of attorneys' fees and costs, as long as it does not exceed this stated amount. Settlement Agreement, § 7.1.

II. Legal Standard

The settlement approval procedures take place over three stages. First, the parties present a proposed settlement asking the Court to provide "preliminary approval" for both (a) the settlement class and (b) the settlement terms. *See, e.g., Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (discussing the district court's use of a preliminary approval order). Second, if the court does preliminarily approve the settlement and class: (1) notice is sent to the class describing the terms of the proposed settlement; (2) class members are given an opportunity to object or opt out; and (3) the court holds a fairness hearing at which class members may appear and support or object to the settlement. *Id.* Third, taking account of all of the information learned during the aforementioned processes, the court decides whether or not to give final approval to the settlement and class certification. *Id.*

III. Discussion

In her Motion, Plaintiff seeks: (1) preliminary certification of the Class for purposes of settlement; (2) preliminary approval of the class action Settlement; (3) provisional appointment of Class Counsel and Class Representative; (4) appointment of a Settlement Administrator; and (5) a hearing date for final approval of the Settlement.

A. The Settlement Class Meets the Requirements for Preliminary Class Certification

In the settlement context, courts must pay "undiluted, even heightened, attention" to class certification requirements, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997), and

conduct a "rigorous analysis." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The party seeking class certification bears the burden of demonstrating that the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have been satisfied. *Id.*

Under Rule 23(a), a class action is only proper if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

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

If the Rule 23(a) prerequisites are met, the Court must decide if certification is appropriate under Rule 23(b). In this case, Plaintiff seeks certification of the Class under Rule 23(b)(3), which authorizes certification if:

> [T]he court finds 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. The matters pertinent to these findings include:
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> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule -- that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. "When considering class certification under Rule 23, district courts are not only at liberty to, but must perform 'a rigorous analysis [to ensure] that the prerequisites of Rule 23(a) have been satisfied.'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) (quoting *Wal-Mart*, 131 S. Ct. at 2551). "In many cases, 'that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.'" *Id.*

1. Numerosity is Satisfied

To satisfy the numerosity requirement of Rule 23(a), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Joinder need not be impossible so long as potential class members would suffer a strong litigation hardship or inconvenience if joinder were required." *Rannis v. Recchia*, 2010 WL 2124096, at *3 (9th Cir. May 27, 2010) (citing *Harris v. Palms Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). Courts routinely find the numerosity requirement satisfied when the class consists of 40 or more members. *See EEOC v. Kovacevich "5" Farms*, 2007 WL 1174444, at *21 (E.D. Cal. Apr. 19, 2007). In this case, the numerosity requirement is easily satisfied as Plaintiff's proposed Class consists of approximately 230,000 consumers.

2. Commonality is Satisfied

The commonality requirement is satisfied "if there are questions of fact and law which are common to the class." Fed. R. Civ. P. 23(a)(2). "The Supreme Court has recently emphasized that commonality requires that the class members' claims 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke.'" *Mazza v. Am. Honda Motor* Co., 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Wal-Mart*, 131 S. Ct. at 2551) (internal alteration omitted). "What matters to class certification is not the raising of common 'questions' – even in droves – but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 1331 S. Ct. at 2551 (quotations and citations omitted). "This does not, however, mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" *Abdullah v. U.S. Security Associates, Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Mazza*, 666 F.3d at 589).

The Court concludes that Plaintiff has met her burden of demonstrating that there are common questions of law and fact that will generate common answers likely to drive the resolution of the litigation. In this case, the proposed Class Members' claims all arise from the same factual circumstances, specifically that consumers age 29 and older who subscribed to Tinder Plus or Tinder Gold paid a higher price than those under the age of 29. In addition, whether or not this policy by Defendants violated the Unruh Act and the UCL is common to all potential Class Members and does not depend on individual factual or legal issues.

3. Typicality is Satisfied

Typicality exists when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir.1998). "Although the claims of the purported class representative need not be identical to the claims of other class members, the class representative 'must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Lymburner v. U.S. Financial Funds, Inc.*, 263 F.R.D. 534, 540 (N.D. Cal. 2010) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)). To assess whether or not the representative's claims are typical, the Court examines "'whether other members have the same or similar injury, whether the

action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.Cal.1985)). In addition, "class certification is inappropriate where the putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Id*. (citing cases).

The Court concludes that Plaintiff's claims are typical of the claims of the Class because they arise from the same factual circumstances and raise the same legal issues.

4. Adequacy is Satisfied

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). To satisfy constitutional due process concerns, "absent class members must be afforded adequate representation before entry of a judgment which binds them." *Hanlon.*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-3 (1940)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

Plaintiff and Class Counsel have no conflicts of interest with other Class Members because, for purposes of the Settlement, Plaintiff's claims are typical of those of other Class Members. Plaintiff and other Class Members share the common goal of protecting and improving consumer and privacy rights throughout California, and there is no conflict among them. In addition, Plaintiff and Class Counsel have been prosecuting this action vigorously on behalf of the Class. Class Counsel have extensive experience in business and corporate litigation, including the prosecution of class actions seeking to protect privacy and consumer rights. Class Counsel is qualified to represent the interests of the Class. Therefore, Rule 23(a)(4) is satisfied for purposes of preliminarily certifying the Settlement Class. Because Rule 23(a)(4) is satisfied for purposes of preliminarily certifying the Settlement Class, the Court also preliminarily appoints Plaintiff as Class Representative, and preliminarily appoints the Law Offices of Todd M. Friedman, P.C. and Kristenen Weisberg L.L.P. as Class Counsel.[3]

5. Preliminary Class Certification Under 23(b)(3) is Appropriate

Having concluded that the Rule 23(a) requirements are satisfied, the Court must consider whether certification is appropriate under Rule 23(b)(3). In order to certify a class pursuant to Rule 23(b)(3), Plaintiff must demonstrate that (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and that (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). A showing of commonality under Rule 23(a)(2) is not sufficient to fulfill the

[3] In addition, the parties have agreed upon and propose that the Court appoint Epiq Class Action & Claims Solutions, Inc. ("Equip") to serve as Settlement Administrator. Based upon the recommendations of the parties and information contained in the Motion, the Court appoints Equip as Settlement Administrator.

requirements of Rule 23(b)(3). *See Hanlon*, 150 F.3d at 1022. To satisfy the requirements of Rule 23(b)(3), common questions must constitute a significant aspect of the case which can be resolved for members of the class in a single action. *Id.* "[T]o meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof.'" *In re Visa Check/Master Money Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001). "The overarching focus [is] whether trial by class representation would further the goals of efficiency and judicial economy." *Vinser v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009).

In this case, the Court concludes that Plaintiff has demonstrated that common issues predominate and that a class action is superior for the proposed Class. The central inquiry for purposes of the proposed Settlement is whether Defendants violated the Unruh Act and the UCL with their pricing scheme. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon,* 150 F.3d at 1022.

Accordingly, because the requirements of Rule 23(a) and 23(b)(3) have been satisfied, the Court **GRANTS** Plaintiffs' Motion requesting preliminary certification of the Class for settlement purposes, provisional appointment of Class Counsel, provisional appointment of a Class Representative, and appointment of a Settlement Administrator.

B. The Settlement Agreement Meets the Requirements for Preliminary Approval

1. The Settlement Agreement Satisfies Notice Requirements Under Rule 23(c)(2)(B)

For proposed settlements under Rule 23, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1). When a class is certified under Rule 23(b)(3), the notice must meet the requirements of Rule 23(c)(2)(B), which requires the "best notice ... practicable under the circumstances ... to all members who can be identified through reasonable effort." However, actual notice is not required under Rule 23(c)(2)(B). *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir.1994).

In this case, the Settlement Agreement provides that CAFA notice will be provided within 10 days after the filing of this Motion, and Class Notice will be provided within 30 days after Defendants provide the Settlement Administrator with the necessary information to contact Class Members, which Defendants will provide within seven days after Preliminary Approval. Settlement Agreement, § 4.9. Before Class Notice is provided, the Settlement Administrator will develop the Settlement Website, which will contain relevant documents pertaining to the Settlement. Settlement Agreement, §§ 4.5 and 5.2.

The parties' notice procedure is the best practicable means available to provide notice under the circumstances, and is reasonably calculated to provide notice to potential Class Members. Therefore, the Court concludes that the Settlement Agreement satisfies the Rule 23(c)(2) (B) requirement that the Court direct the "best notice that is practicable under the

circumstances."

Rule 23(c)(2)(B) also requires that the notice must state in clear, concise, plain, and easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The parties' proposed Notice includes information about the nature of the litigation, the scope of the class involved, and claims against Defendants. The proposed Notice also clearly explains that Class Members may enter an appearance, or "opt-out" of the proposed Class and the binding effect of a judgment. However, the proposed Notice does not explain that a Class Member may enter an appearance through an attorney if the Class Member so desires as required by Rule 23(c)(2)(B)(iv). Although the Court concludes that the proposed Notice generally "alerts those with adverse viewpoints to investigate and to come forward and be heard" (*In re Online DVD*, 779 F.3d 934, 946 (9th Cir. 2015)) and otherwise satisfies the requirements of Rule 23(c)(2)(B), the Court hereby orders the parties to submit a revised proposed Notice that fully complies with the requirements of Rule 23(c)(2)(B)(iv).

2. The Settlement Agreement Meets the Requirements for Preliminary Approval under Rule 23(e)

(a) Legal Standard Under Rule 23(e)

Settlements "that takes place prior to formal class certification," such as in this case, "require[ ] a higher standard of fairness" and a "more probing inquiry." *See Hanlon*, 150 F.3d at 1026. This is because "settlements in class actions present unique due process concerns for absent class members, including the risk that class counsel may collude with the defendants." *In re Online DVD*, 779 F.3d at 944 (internal quotations omitted). Overall, the Court must review the relevant documents and conduct a searching inquiry "to determine whether [the proposed settlement] is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

In determining whether a settlement that took place prior to certification is fair, adequate, and free from collusion, courts must "comprehensively" consider a number of factors including: (1) a defendant's ability to pay a larger settlement; (2) the strength of the plaintiff's case; (3) the extent of discovery completed and the stage of the proceedings; (4) the risk, expense, complexity, and likely duration of further litigation; (5) the amount offered in settlement; (6) the experience and views of counsel; (7) the reaction of the class members to the proposed settlement; (8) the presence of a governmental participant; (9) whether the attorney fees request is indicative of collusion; and (10) whether distribution favors certain class members at the expense of others. *See In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011); *see also Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) ("The district court must show that it has explored these factors comprehensively to survive appellate review.").

Several of the aforementioned factors cannot be properly examined until the Final Fairness

Hearing. Therefore, at this preliminary approval stage, the Court conducts a less searching inquiry of each factor and only requires that the proposed settlement be within the range that would likely receive final approval by the Court. *See Alberto v. GMRI, Inc*., 252 F.R.D. 652, 665 (E.D. Cal. 2008) (discussing that at the preliminary stage courts merely conduct a "cursory" analysis of fairness, seeking merely to identify any "glaring deficiencies" prior to sending notice to class members).

(b) The Settlement Award for Each Class Member

This case involves complex legal and factual issues and the Settlement Agreement has been proposed after almost a year of arms-length and adversarial litigation, including an all day mediation session before Judge Meisinger. *See In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 612 (S.D. Cal. 2008) (holding that time and effort spent examining and investigating claims militates in favor of preliminary approval of a proposed settlement because it indicates that there was no collusion). Defendants have vigorously contested the claims asserted by Plaintiff, and although both sides strongly believe in the merits of their respective cases, there are risks to both sides in continuing to litigate this case. *See* Friedman Decl, ¶¶ 47-50. For example, if this case continued, the primary initial challenge for Plaintiff would be overcoming on appeal this Court's ruling that Plaintiff's claims are subject to arbitration. However, whether claims against Defendants are subject to arbitration is not just an issue for this Plaintiff but also for the majority of the Class Members because, according to Defendants, over 95 percent of the Class Members entered into the same or similar "sign-up wrap" arbitration agreements. *Id.* at ¶ 22. The Ninth Circuit has recently held that similar types of arbitration agreements can be a bar to class certification under the right circumstances. *See O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087 (9th Cir. 2018); *see also Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171, 1175-76 (9th Cir. 2014). Both parties are represented by counsel with experience in class action litigation, who have considered the challenges of continuing to litigate this case, and counsel believe that the proposed Settlement Agreement accounts for the expense, delay, and uncertainty that continued litigation, including resolution of the pending appeal, would necessarily entail and that the proposed Settlement is fair, reasonable, and adequate.

In addition, the terms of the Settlement Agreement will directly and meaningfully benefit the Settlement Class. *See Staton*, 327 F.3d at 961 (holding that for settlement approval in the Ninth Circuit, district courts must evaluate whether "fees and relief provisions clearly suggest the possibility that class interests gave way to self interests"); *see also Shames v. Hertz Corp*., 2012 WL 5392159 at *13 (S.D. Cal. Nov. 5, 2012) (settlement was fair where the parties "negotiated a settlement that provide[d] direct payment to class members"). Defendants have agreed to provide substantial benefits to the Class Members, of which more than $17 million is guaranteed to directly benefit the Class, which consists of approximately $11.5 million in Super Likes and injunctive relief valued at an estimated $5.75 million, even if no Class Members submit claims. Moreover, up to $5.75 million in cash or cash equivalents will be paid to the Class Members who make claims ($25 cash each). Furthermore, Defendants will separately pay all of the costs of notice, administration, the Incentive Award, attorneys' fees and costs of the litigation.

After carefully considering the terms of the Settlement Agreement, the Court concludes that the Settlement award that each Class Member will receive is fair, appropriate, and reasonable given the purposes of the Unruh Act and UCL. *See Shames*, 2012 WL 5392159 at *13 (holding

that settlement was fair where the parties "negotiated a settlement that provide[d] direct payment to class members"); *Hopson v. Hanesbrands Inc*., 2009 WL 928133, at *11 (N.D. Cal. Apr. 3, 2009) ("the benefits can be accurately traced because they are monetary payments directly to Class Members"); *Briggs v. United States*, 2010 WL 1759457 (N.D. Cal. Apr. 30, 2010) (holding that settlement agreement was fair where it did not require class members to file claim forms). Moreover, although the Unruh Act provides for statutory damages of $4,000.00 per violation, it is well settled that a proposed settlement may be acceptable even though it amounts to only a percentage of the potential recovery that might be available to the class members at trial. *See e.g., National Rural Tele. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 527 (C.D. Cal. 2004) (holding that it is "well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"). Courts have also upheld the reasonableness of Unruh Act class action settlements that provided for no monetary relief, but rather only injunctive relief. *See, e.g., Carter v. City of Los Angeles*, 224 Cal. App. 4th 808 (2014).

(c) The Incentive Award for Plaintiff

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. It is within the Court's discretion to grant such an award. *In re Mego*, 213 F.3d at 463. These awards "are intended 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. Awards are generally sought after a settlement or verdict has been achieved." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).

In this case, the Court concludes that the proposed Incentive Award to Plaintiff in the amount of $5,000 provided for in the Settlement Agreement appears reasonable. *See Faigman v. AT & T Mobility LLC*, 2011 WL 672648, *5 (N.D. Cal. Feb. 16, 2011) (approving incentive payment of $3,333.33 and noting that "[i]n [the Northern] [D]istrict, incentive payments of $5,000 are presumptively reasonable"); *In re Toys R Us–Delaware, Inc—Fair & Accurate Credit Transactions Act (FACTA) Litig*., 295 F.R.D. 438, 472 (C.D.Cal. 2014) (approving $5,000 incentive award)

(d) The Attorneys' Fees Provision

"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). "[C]ourts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth*, 654 F.3d at 941. "The reasonableness of a fee award must be considered against the backdrop of the 'American Rule,' which provides that courts generally are without discretion to award attorneys' fees to a prevailing plaintiff unless" an exception applies. *Id.* "The award of attorneys' fees in a class action settlement is often justified by the common fund or statutory fee-shifting exceptions to the American Rule, and sometimes both." *Id*.

In this case, the Settlement Agreement contemplates a maximum award of attorneys' fees of $1,200,000 plus reimbursement of costs to Class Counsel, and Defendants have agreed not to contest the amount of attorneys' fees to be awarded as long as the award is less than $1,200,000.

In general, such "clear sailing" provisions[4] are considered troubling and a possible sign of collusion. "[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *In re Bluetooth*, 654 F.3d at 948 (citation omitted); *see also Malchman v. Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring) ("It is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a 'clear sailing' clause without obtaining something in return. That something will normally be at the expense of the plaintiff class"), *abrogated on other grounds in Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997). "Such a clause deprives the court of the advantages of the adversary process. The source of the proposed payment renders it improbable that class members will come forward to challenge the reasonableness of the requested fee. Meanwhile, the payor is bound by contract not to contest the application." *Weinberger*, 925 F.2d at 525. "[W]hen confronted with a clear sailing provision, the district court has a heightened duty to peer into the provision and scrutinize carefully the relationship between attorney's fees and benefit to the class, being careful to avoid awarding 'unreasonably high' fees simply because they are uncontested." *In re Bluetooth*, 654 F.3d at 948 (*citing Staton*, 327 F.3d at 954).

In this case, the clear sailing provision and the amount of attorneys' fees raise an issue of possible collusion during the settlement negotiations. However, Class Counsel states that although the Settlement and the attorneys' fees provision were both negotiated at the mediation, the attorneys' fees provision was not negotiated until after the parties had agreed to the other settlement terms. *See In re Bluetooth*, 654 F.3d at 948 (holding that although it is not dispositive, the presence of a neutral mediator during the negotiation of a clear sailing attorneys' fees provision weighs "in favor of a finding of non-collusiveness"). Specifically, Todd M. Friedman, counsel for Plaintiff, states in his January 20, 2019 declaration that:

> It was very important to me in agreeing to this Settlement that the amount received by Class Members was negotiated completely separately from any discussion of attorney's fees, so that we put the interests of the Class Members first, and that Class Members received meaningful relief. In fact, without revealing the confidential nature of mediation discussions, I can say that Plaintiff did not even discuss the treatment of attorney's fees in this action with the Mediator until after we had come to a complete and final agreement in principle with respect to the benefits that were going to be made available to the Class.

Friedman Decl., ¶ 37 (Docket No. 52-1). Although the Court is satisfied at this stage of the proceedings that the contemplated attorneys' fee award, which Class Counsel represents will be approximately 5 percent of the total estimated value of the Settlement, appears to be within the range that would likely receive final approval, the Court will closely scrutinize the attorneys' fees requested at the Final Fairness Hearing. *In re Bluetooth*, 654 F.3d at 947 (discussing signs of possible collusion in class action settlement agreements, particularly with respect to attorneys' fees provisions).

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[4] "In general, a clear sailing agreement is one where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 520 n. 1 (1st Cir. 1991).

For purposes of preliminary approval, the Court concludes that the terms of the proposed Settlement are fair, adequate, and reasonable. However, the Court's conclusion will be subject to further review for fairness, and evidence of overreaching and/or collusion, particularly with respect to the Court's concern regarding the attorneys' fees, following Notice to the Class Members and a Final Fairness Hearing. Accordingly, because each of the factors weighs in favor of preliminary approval, the Court **GRANTS** Plaintiffs' Motion requesting preliminary approval of the class action Settlement.

IV. Conclusion

For all the foregoing reasons, Plaintiff's Motion is **GRANTED**. The parties shall file a revised proposed Notice that conforms to all the requirements of Rule 23(c)(2)(B) by **March 8, 2019**. In addition, the parties shall lodge a joint proposed Order Granting Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class consistent with this Court's Order and setting forth the date for the Final Fairness Hearing on any Monday in June, at 1:30 p.m., and all related dates by **March 8, 2019.**

IT IS SO ORDERED.

Initials of Deputy Clerk sr