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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

RACHAEL SHAY, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

APPLE INC., a Delaware corporation;
APPLE VALUE SERVICES, LLC, a
Virginia limited liability corporation;
and DOES 1 through 10, inclusive,

Defendants.

Case No. 3:20-cv-1629-JO-BLM

Assigned to: Hon. Jinsook Ohta

**[PROPOSED] ORDER GRANTING
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND
AWARD OF ATTORNEYS' FEES
AND COSTS AND SERVICE
AWARD**

1 **I. INTRODUCTION**

2 Plaintiff Rachel Shay (“Plaintiff”), on behalf of the conditionally certified
3 Settlement Class, moves for final approval of a non-reversionary common fund
4 settlement amount of \$1,800,000, as well as for allocations toward an award of
5 attorneys’ fees and costs to Class Counsel, approval of class administration fees, and
6 a class representative service award to her in this action, initiated May 28, 2020,
7 against Apple Inc. and Apple Value Services (herein referred to collectively as
8 “Defendants” or “Apple”). (*See* Notice of Motion and Motion for Order Granting
9 Order for Final Approval [“Motion for Final Approval”], ECF No. 108.)

10 **II. BACKGROUND**

11 In this Action against Defendants, Plaintiff asserted the following claims: (1)
12 Violations of the Consumers Legal Remedies Act; (2) Violations of the Unfair
13 Competition Law; (3) Negligent Misrepresentation; and (4) Implied Warranty of
14 Merchantability. (*See* ECF No. 18, Second Amended Complaint [“SAC”].) On May
15 3, 2021, the Court Dismissed Plaintiff’s Claim for Breach of Implied Warranty of
16 Merchantability, and, after Defendants filed their Answer to Plaintiff’s remaining
17 claims, the Parties began exchanging discovery. (*See* ECF No. 92-2, ¶¶4–7.)
18 Following extensive discovery, Plaintiff moved for, and Defendants subsequently
19 opposed, class certification. (*Id.*, ¶ 8–9.) Following oral arguments on the motion, but
20 prior to the Court issuing a final decision, the Parties agreed to attend mediation
21 before the Hon. Irma E. Gonzalez (Ret.). (*Id.*, ¶ 10.) Though mediation failed to
22 immediately produce a mutually agreeable settlement, the Parties continued to
23 negotiate under the guidance of Judge Gonzalez, and ultimately accepted a proposal
24 by Judge Gonzalez. (*See* Declaration of James R Hawkins in Support of Motion for
25 Final Approval of Class Action Settlement [“Hawkins Decl.”], ECF No. 108-2, ¶ 7;
26 ECF No. 92-2, ¶ 10.)
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1 The proposed settlement class in this action consists of consumers who
2 purchased Apple App Store & iTunes gift cards in California from May 2017 to
3 March 2018 and in the United States from March 2018 to July 2020 which were (1)
4 prior to purchase, subject to fraudulent pre-activation redemption attempts by
5 unknown third parties, and (2) after purchase, fraudulently drained of value by said
6 unknown third parties, and who were subsequently denied a refund or replacement
7 gift card. (Settlement Agreement and Release [“Settlement”], attached as Exhibit 1
8 hereto, at ¶ EE.)

9 On October 6, 2023, the Court granted Plaintiff’s Motion for Preliminary
10 Approval of the Settlement Agreement and Release. Specifically, the Court
11 preliminarily found that the Settlement was “fair, reasonable and adequate,” and the
12 Settlement “resulted from arm’s length negotiations, has no obvious deficiencies,
13 does not grant preferential treatment, and appeared to be within the range of possible
14 approval.” (See ECF No. 94, ¶ 1.) The Court also found that, for settlement purposes,
15 the prerequisites for a class action under Fed. R. Civ. P. 23(a) were satisfied and that
16 the action was maintainable as class action under Fed. R. Civ. P. 23(b)(3). (*Id.*, ¶¶ 3-
17 4, 6.) In addition, the Court approved the notice plan, finding that it “me[t] the
18 requirements of Federal Rule of Civil Procedure 23(c)(2)(B) and all due process
19 requirements, is the best notice practicable under the circumstances; and constitutes
20 due and sufficient notice to all persons entitled to notice.” (*Id.*) No opposition was
21 filed to the Motion for Preliminary Approval.

22 On December 4, 2023, Plaintiff filed a Motion for Award of Attorneys’ Fees,
23 Costs, and Class Representative Service Award. (See ECF No. 95 “Motion for
24 Attorneys’ Fees”.) Apple filed an opposition to the Motion for Attorneys’ Fees on
25 January 3, 2024 (see ECF No. 105) and Plaintiff filed a reply on January 10, 2024
26 (see ECF No. 107.)
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1 On January 8, 2024, a potential class member, Hassan Chaalan, objected to the
2 terms of the Settlement, arguing that (1) the release of claims is too broad in that it
3 releases claims against non-party retailers arising from the relevant facts; (2) notice
4 was inadequate; (3) the claims process was inadequate; and (4) the class was not
5 adequately represented. (*See* Hasssan Chaalan’s Objection to Proposed Class
6 Settlement [“Objection”], ECF No. 106.) On January 31, 2024, Plaintiff moved for
7 Final Approval, and shortly thereafter, filed a Response in Opposition to Chaalan’s
8 Objection. (*See* Motion for Final Approval; Plaintiff’s Response in Opposition to
9 Objection [“Opposition to Objection”], ECF No. 112.)

10 The Court held the final fairness hearing on February 28, 2024, during which the
11 Parties expressed that they were still finalizing their *cypres* proposal. The Court now
12 issues its decision as follows: (1) Plaintiff’s Motion for Final Approval is granted;
13 (2) Plaintiff’s Motion for Attorneys’ Fees, Costs, and Class Representative Service
14 Award is granted, as modified; and (3) Objector Chaalan’s objections are overruled.
15 The Court also approves the Parties’ proposal to distribute 70% of the remaining
16 Unclaimed Settlement Amount to the Consumer Federation of America (“CFA”) and
17 30% of the remaining Unclaimed Settlement Amount to the Consumer Federation of
18 California (“CFC”).

19 **III. ANALYSIS**

20 **A. Jurisdiction**

21 This Court has subject matter jurisdiction over this litigation (the “Action”)
22 under 28 U.S.C. § 1332(d)(2), the Class Action Fairness Act. It also concludes that it
23 has personal jurisdiction over the Parties to the Settlement, including Plaintiff, all
24 members of the Settlement Class, and Defendants by virtue of their business practices
25 in California, and at the very least by virtue of their failure to contest such jurisdiction
26 in this action.
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2 **B. Notice**

3 Notice is adequate if it is “reasonably calculated, under all of the
4 circumstances, to apprise interested parties of the pendency of the action and afford
5 them an opportunity to present their objections.” *Mendoza v. Tucson Sch. Dist. No.*
6 *1*, 623 F.2d 1338, 1351 (9th Cir. 1980). The notice process the Court ordered and the
7 parties followed involved direct Mail Notice and/or Email Notice to Known
8 Settlement Class Members—those for whom Apple had an email address or physical
9 address, as a result of their prior attempts to report the fraudulent redemption of an
10 Eligible Gift Card¹—and Publication Notice for Unknown Class Members. (*See*
11 *Declaration of Julie N. Green Regarding Execution of Notice Plan and*
12 *Administration Process in Support of Motion for Final Approval of Class Action*
13 *Settlement* [“Green Decl.”], ECF No. 108-3, ¶¶ 13-18 & Exh. A, B, C, D, E, F and
14 G.) Email Notice was sent to 960 Known Settlement Class Members for whom Apple
15 located an email address and Mail Notice was sent to 81 Known Settlement Class
16 Members for whom a valid mailing address was located but not an email address.
17 (*See id.* ¶¶ 13-16 & Exh. D, E.) Of the 960 Known Settlement Class Members who
18 received Email Notice, only 20 emails bounced and were determined to be ultimately
19 undeliverable, and therefore were sent a Mail Notice. Of the 81 Known Settlement
20 Class Members who received Mail Notice, only 5 were *ultimately* undeliverable
21 because no new address was found through skip trace, or because the notice was
22 returned a second time. (*See id.*)

23
24 In addition, the Settlement Administrator implemented a multi-channel digital
25 advertising campaign that included paid search using sponsored links on Google and
26 Bing platforms, a social media campaign delivering advertisements through
27 Facebook and Instagram Ad Exchange platforms, and a Nationwide Press Release
28

¹ Capitalized terms not defined herein shall have the same meaning ascribed to the, in the Settlement.

1 distributed to 900 associated press outlets and 452 influencers. (*See id.*, ¶¶ 17-18,
2 Exh. F, G.)

3 The Court has determined that the notice issued here was reasonably calculated
4 to apprise interested parties of the pendency of this action and to afford them the
5 opportunity to object. *See* Fed. R. Civ. P. 23(e). Accordingly, such notice satisfies
6 the due process requirements of the Fifth Amendment. *See Rodriguez v. West Publ'g*
7 *Corp.*, 563 F.3d 948, 962 (9th Cir. 2009); *Brown v. Ticor Title Inc.*, 982 F.2d 386,
8 392 (9th Cir.1992); *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 835
9 (9th Cir. 1976).

10 C. Certification of the Class

11 At the preliminary approval stage, the Court certified the following Settlement
12 Class under Federal Rule of Civil Procedure 23(c) for settlement purposes:

13 “Nationwide Class” shall mean all consumers who purchased an
14 Eligible Gift Card in the United States from March 2018 to July 2020,
15 whose Eligible Gift Card was subject to a redemption attempt prior to
16 activation, whose gift card was redeemed by an unknown third party
17 prior to attempted redemption by the consumer or intended user, and
18 who did not receive a refund or replacement gift card from Defendants
or any third party.

19 “California Subclass” shall mean all consumers who purchased an
20 Eligible Gift Card in the State of California from May 2017 to February
21 2018, whose gift card was subject to a redemption attempt prior to
22 activation, whose gift card was redeemed by an unknown third party
23 prior to attempted redemption by the consumer or intended user, and
who did not receive a refund or replacement gift card from Defendants
or any third party.

24 (Settlement, ¶¶ EE.a–b.) The Settlement Class excludes Defendants, their
25 parents, subsidiaries, affiliates, officers, directors, and employees; any entity in
26 which Defendants have a controlling interest; and all judges assigned to hear any
27 aspect of this litigation, as well as their staff and immediate family members. (*Id.* at
28 ¶ EE.c)

1 As there is no indication that anything has changed in terms of the
2 requirements for a settlement-related certification, the Court now makes the
3 certification of the Settlement Class final (for settlement purposes) for the reasons
4 addressed in connection with the preliminary approval proceedings. (See ECF No.
5 94, ¶¶ 2-4; ECF No. 92-1, at pgs. 11-16.)

6 **D. The Merits of the Settlement**

7 1. Legal Standards Governing Settlement

8 Settlement of a class action lawsuit requires court approval. See Fed. R. Civ.
9 P. 23(e). The court must find that a proposed settlement is fundamentally fair,
10 adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2); *Staton v. Boeing Co.*, 327
11 F.3d 938, 959 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026
12 (9th Cir. 1998)). The Ninth Circuit previously instructed district courts that, in
13 determining whether or not to approve a class settlement in accordance with Rule
14 23(e), the court could consider any or all of the following factors, if applicable:

15 the strength of the plaintiffs' case; the risk, expense, complexity, and
16 likely duration of further litigation; the risk of maintaining class action
17 status throughout the trial; the amount offered in settlement; the extent
18 of discovery completed and the stage of the proceedings; the experience
19 and views of counsel; the presence of a governmental participant; and
the reaction of the class members to the proposed settlement.

20 *Hanlon*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Officers for Justice v. Civil Serv.*
21 *Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); see also *Campbell v. Facebook, Inc.*,
22 951 F.3d 1106, 1121 (9th Cir. 2020). That list was not intended to be exhaustive, and
23 a court is required to consider the applicable factors in the context of the case at hand.
24 See *Officers for Justice*, 688 F.2d at 625.

25 Amendments to Rule 23 of the Federal Rules of Civil Procedure have
26 formalized the consideration somewhat further. Now, in order for a court to
27 determine that a settlement is "fair, reasonable, and adequate," the court must first
28 consider whether:

- 1
- 2 (A) the class representatives and class counsel have adequately
- 3 represented the class;
- 4 (B) the proposal was negotiated at arm's length;
- 5 (C) the relief provided for the class is adequate, taking into account:
 - 6 (i) the costs, risks, and delay of trial and appeal;
 - 7 (ii) the effectiveness of any proposed method of distributing relief
 - 8 to the class, including the method of processing class-member
 - 9 claims;
 - 10 (iii) the terms of any proposed award of attorney's fees, including
 - 11 timing of payment; and
 - 12 (iv) any agreement required to be identified under Rule 23(e)(3)²;
 - 13 and
- 14 (D) the proposal treats class members equitably relative to each other.

12 Fed. R. Civ. P. 23(e)(2). These rule-based mandatory considerations overlap with
13 factors previously established by Ninth Circuit as permissible to consider.
14 Consideration of the factors the Ninth Circuit has customarily employed remains
15 appropriate after the recent Rule 23 amendments. *See, e.g., McKinney-Drobnis v.*
16 *Oreshack*, 16 F.4th 594, 609 n.4 (9th Cir. 2021); *Kim v. Allison*, 8 F.4th 1170, 1178
17 (9th Cir. 2021).

18 In addition to fairness, the court must also be mindful of the Ninth Circuit's
19 policy favoring settlement, particularly in class action lawsuits. *See, e.g., Officers for*
20 *Justice*, 688 F.2d at 625 ("Finally, it must not be overlooked that voluntary
21 conciliation and settlement are the preferred means of dispute resolution. This is
22 especially true in complex class action litigation . . ."). While balancing all of these
23 interests, the court's inquiry is ultimately limited "to the extent necessary to reach a
24 reasoned judgment that the agreement is not the product of fraud or overreaching by,
25 or collusion between, the negotiating parties." *Id.* The court, in evaluating the
26 agreement(s) of the parties, is not to reach the merits of the case or to form
27 conclusions about the underlying questions of law or fact. *See id.*
28

² Rule 23(e)(3) provides that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3).

1 The court must determine the fairness of the settlement as a whole and cannot
2 consider its individual components as severable parts; “[t]he settlement must stand
3 or fall in its entirety.” *Hanlon*, 150 F.3d at 1026. *Id.* Thus, the court may not delete,
4 modify, or rewrite particular provisions of a settlement. *See id.* “Settlement is the
5 offspring of compromise; the question . . . is not whether the final product could be
6 prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.”
7 *Id.* at 1027.

8 2. The Settlement is Fair

9 a. *The Settlement is Fair, Adequate, and Reasonable*

10 i. The Strength of the Case

11 Plaintiff’s remaining claims, which are to be resolved by the Settlement, have
12 twice survived Defendants’ motions to dismiss. (*See* ECF No. 92-2, ¶¶ 5–6; ECF No.
13 21.) Defendants’ willingness to settle these claims for \$1.8 Million, and in particular,
14 to refund one hundred percent of lost funds to all class members who have submitted
15 a valid claim, suggests Defendants recognize the risk they would face at trial.
16 Although Plaintiff and Class Counsel continue to assert the strength of Plaintiff’s
17 case on the merits, they also acknowledge the inherent obstacles to successful class
18 litigation, including the difficulty in achieving and maintaining class certification,
19 substantially increased costs, and drawn-out length of court proceedings. The
20 uncertainties in outcome, expense, and duration of this litigation are ameliorated by
21 this Settlement, and Plaintiff and Class Counsel believe this Settlement is fair,
22 adequate, and reasonable. (*See* ECF No. 108-2 Hawkins Decl., ¶¶ 10, 17–18.) The
23 Court is likewise convinced that this factor favors a finding of reasonableness.

24 ii. The Risk, Expense, Complexity, and Likely
25 Duration of Further Litigation

26 The expense and possible duration of the litigation should be considered in
27 evaluating the reasonableness of a settlement. *See Dunleavy v. Nadler (In re Mego*
28

1 *Fin. Corp. Sec. Litig.*), 213 F.3d 454, 458 (9th Cir. 2000); *see also Nat'l Rural*, 221
2 *F.R.D.* at 526 (“[U]nless the settlement is clearly inadequate, its acceptance and
3 approval are preferable to lengthy and expensive litigation with uncertain results.”).

4 This case, having been filed on May 28, 2020, is approaching four years of
5 litigation, and has been subject to multiple dismissal attempts and an attack on
6 certification by Defendants. Plaintiff’s investigation required the evaluation of
7 thousands of documents produced by Defendants and multiple depositions of
8 Defendants. Because the parties initiated mediation and settlement negotiations prior
9 to the Court’s ruling on class certification, no class has yet been certified outside of
10 the settlement context.

11 Even if the class had been certified, it would likely need to survive a motion
12 for summary judgment and would still need to overcome its burden of proof and
13 Defendants’ affirmative defenses at trial, as well as any challenges raised on appeal.
14 Such extended proceedings would delay and possibly diminish Plaintiff’s and the
15 Class’s opportunity to obtain relief. Likewise, attorneys’ fees and costs could have
16 ended up consuming a large portion of any eventual recovery. Against all of this, the
17 Settlement offers the parties immediate and certain relief, especially considering
18 Defendants’ concession that all Class members deemed Valid Claimants will be
19 made entirely whole. This factor therefore weighs in favor of approving the
20 Settlement.

21
22 **iii. The Risk of Maintaining Class Action Status**

23 As discussed above, the Court did not rule on the class certification motion
24 due to the Parties’ decision to mediate Plaintiff’s claims and negotiate a settlement.
25 Nevertheless, there is a risk that the Court would have narrowed the proposed classes,
26 that Defendants would have filed a petition to appeal pursuant to Rule 23(f), or of
27 decertification at a later stage. In contrast, this Settlement provides for provisional
28 certification and ensures each member of the class has an equal opportunity to

1 achieve relief through Plaintiff's lawsuit. For this reason, this factor also favors final
2 approval of the Settlement.

3 iv. The Amount Offered in the Settlement

4 The Court's evaluation of a proposed settlement looks primarily to compare
5 "the terms of the compromise with the likely rewards of litigation." *Protective Comm.*
6 *for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-
7 25 (1968). Thus, in determining whether the relief offered by way of settlement is
8 fair, the Ninth Circuit has suggested that the Court compare the settlement to the
9 parties' "estimates of the maximum [recovery] in a successful litigation." *See*
10 *Dunleavy*, 213 F.3d at 459; *see also Rodriguez*, 563 F.3d at 965. *But see Lane v.*
11 *Facebook, Inc.*, 696 F.3d 811, 823 (9th Cir. 2012) ("While a district court must of
12 course assess the plaintiffs' claims in determining the strength of their case relative
13 to the risks of continued litigation, it need not include in its approval order a specific
14 finding of fact as to the potential recovery for each of the plaintiffs' causes of action.")
15 (omitting internal citation).

16 Plaintiff has achieved a non-reversionary settlement in the total gross amount
17 of \$1,800,000. As noted at the preliminary approval stage, Plaintiff estimates a
18 potential recovery of \$2.52 million. Thus, at \$1.8 million, the Settlement Amount in
19 this case represents approximately 71% of the Settlement Class's potential recovery,
20 making the Settlement Amount a fair and reasonable result for the Settlement Class
21 considering the risks and expenses avoided. (*See* ECF No. 92-1, at 6.) Because the
22 Settlement is designed to provide refunds for the fraudulently drained gift cards, class
23 members who provided proof of purchase are being made entirely whole, without
24 having to engage in an even lengthier litigation process. Nor is there any risk here of
25 overcompensation. Because the Settlement adequately remedies all known class
26 members' harms, provides for present litigation and administrative costs, and
27 provides Plaintiff with compensation for her personal efforts, the Court believes that
28

1 the amount offered in settlement reflects a fair compromise and weighs in favor of
2 final approval of the Settlement.

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

5 Extensive discovery and a thorough investigation are essential before a Class
6 Plaintiff can reasonably assess strengths and value to broker a fair class settlement.
7 It was established at the preliminary approval stage that the Parties engaged in
8 substantial fact discovery, including thousands of pages of document discovery and
9 numerous depositions, completed significant motion practice including two rounds
10 of motions to dismiss and a motion for class certification, and attended a full-day
11 mediation. (*See* Hawkins Decl. ¶ 8d; ECF No. 92-2, ¶ 7.) In total, Plaintiff issued and
12 Apple answered thirty-one interrogatories, thirty-one requests for production, and
13 thirty-eight requests for admission. Apple issued and Plaintiff responded to twenty-
14 two interrogatories, eighteen requests for production, and sixteen requests for
15 admission. (*Id.*) Apple produced and Plaintiff reviewed more than 2,500 documents,
16 consisting of approximately 20,500 pages. Class Counsel deposed three Rule
17 30(b)(6) designees for Apple, and Apple’s counsel also deposed Plaintiff. (*Id.*)

18 Class Counsel’s investigation was sufficient to clearly understand the strengths
19 and weaknesses of all claims and defenses raised and to contemplate the risks to both
20 sides incurred by continued litigation. (*See* Hawkins Decl. ¶ 8-10.) While more
21 discovery may have been taken – at some expense – had this case proceeded, the
22 information Plaintiff and her counsel obtained allowed them to feel comfortable
23 about their ability to value the potential recovery. (*See, e.g.*, Hawkins Decl. ¶ 13.) At
24 this stage, the Court sees no reason to doubt that Plaintiff was in a sufficient position
25 to know the strengths (and weaknesses) of her case, its value, and whether or not the
26 settlement figure “output” properly accounted for those “inputs.” As such, this factor
27 also favors final approval of the Settlement.
28

vi. The Experience and Views of Counsel

1
2 In assessing the adequacy of the terms of a settlement, the trial court is entitled
3 to, and should rely upon, the judgment of experienced counsel for the parties. *See*
4 *Nat'l Rural*, 221 F.R.D. at 528 (“Great weight is accorded to the recommendation of
5 counsel, who are most closely acquainted with the facts of the underlying litigation”)
6 (internal quotations and citations omitted). The basis for such reliance is that
7 “[p]arties represented by competent counsel are better positioned than courts to
8 produce a settlement that fairly reflects each party’s expected outcome in litigation.”
9 *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Throughout the
10 litigation, Plaintiff was represented by counsel with ample experience handling class
11 action/complex litigation. (*See* ECF No. 92-1 at p. 13-14.) Class Counsel utilized
12 their ample experience to thoroughly investigate and evaluate the strength of
13 Plaintiff’s claims and Defendants’ defenses. (*See id.* at p. 17-18.) Having conducted
14 such an investigation and relying on experience with similarly complex class actions,
15 Class Counsel considers the instant Settlement to be fair, adequate, and reasonable.
16 (*See* Hawkins Decl. ¶¶ 15.) This factor, therefore, weighs in favor of approving the
17 Settlement.

vii. The Reaction of the Members of the Class to the
Proposed Settlement

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21 “It is established that the absence of a large number of objections to a proposed
22 class action settlement raises a strong presumption that the terms of a proposed class
23 settlement action [sic] are favorable to the class members.” *Nat'l Rural*, 221 F.R.D.
24 at 529. Here, the Parties received only a single objection and zero opt-outs, in
25 comparison with the 1,071 valid claims which will result in Class Member
26 compensation. (Green Decl. ¶¶ 28, 31.) Therefore, this factor strongly supports
27 approving the Settlement.

28

viii. Signs of Collusion

1
2 Based on the record before the Court, nothing explicitly or implicitly suggests
3 the instant Settlement was in any way the product of collusion. In particular, the Court
4 notes the absence of the signs identified by the Ninth Circuit as potentially presenting
5 such an issue. This settlement agreement is the product of good faith, arm's length
6 negotiations, which were informed and guided by the neutral perspective of a
7 respected Mediator—Hon. Irma E. Gonzalez (Ret.)—and during these negotiations,
8 Class Counsel continued to zealously advocate on behalf of the Plaintiff and the Class
9 even in working towards a mutually agreeable compromise with Defendants. (*See*
10 *Hawkins Decl.* ¶ 7; ECF 92-2, ¶ 35.) As a result, the Court safely concludes that there
11 is no concern here with respect to potential collusion.

ix. Adequate Representation of the Class (Rule
23(e)(2)(A))

14 Representation of a class will be adequate where Plaintiff and Class Counsel
15 have no conflicts of interest with the members of the class, and where those
16 representative parties have taken steps to vigorously prosecute the action on the
17 class's behalf. *Espinosa v. Ahearn* (In re *Hyundai & Kia Fuel Econ. Litig.*), 926 F.3d
18 539, 566 (9th Cir. 2019) (citing *Hanlon*, 150 F.3d at 1020). Such conflicts of interest
19 are apparent where higher value claims of some class members are “compromised by
20 a class representative with lesser injuries who may settle more valuable claims
21 cheaply,” or where subgroups among the class have “differing, even adversarial,
22 interests in the allocation of limited settlement funds.” *Partl v. Volkswagen, AG* (In
23 re *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*), 895
24 F.3d 597, 607–08 (9th Cir. 2018).

26 Objector Chaalan has not challenged Plaintiff and Class Counsel's prosecution
27 of this action, and so it is presumed to be sufficient. Further, Chaalan's contention
28 that the Settlement unfairly releases class members' claims against non-party

1 retailers does not persuade the Court that any conflict of interests exists. Any such
2 claims against these non-party retailers concern an identical injury and ultimately
3 arise from the same facts as those claims against Defendants, and failure to instate
4 such a release would allow for potential unlawful double recovery. Further, Chaalan
5 fails to identify any conflict of interest presented by the Notice and Claims Processes.
6 Because class payments consist of refunds from purchased gift cards, the amount
7 each class member will receive is tailored to that member's specific harm and in no
8 way prejudices others in the class.

9 Therefore, the Court concludes Plaintiff and Class Counsel adequately
10 represented the class. They achieved a significant monetary outcome by way of the
11 Settlement. There is nothing to suggest inadequacy.

12 x. Arm's-Length Negotiation (Rule 23(e)(2)(B))

13 As discussed above, settlement followed a mediation and further post-
14 mediation negotiations, all under the guidance of an experienced mediator and retired
15 Federal Judge. (*See* Hawkins Decl. ¶ 7.) The Court is consequently satisfied that the
16 Settlement resulted from arm's length negotiations.

17 xi. Adequate Relief for the Class (Rule 23(e)(2)(C))

18 The Court has already considered "the costs, risks, and delay of trial and
19 appeal." With respect to "the effectiveness of any proposed method of distributing
20 relief to the class, including the method of processing class-member claims," known
21 class members will receive full relief regardless of whether they submitted a claim,
22 as will unknown class members who provided adequate proof of purchase of an
23 Eligible Gift Card (those subject to reactivation redemption attempts during the Class
24 Period). The Settlement is also non-reversionary, with uncashed checks (if any)
25 ultimately reverting to a cy pres.
26

27 The Court discusses the proposed award of attorneys' fees in the following
28 section. For purposes of settlement approval, however, there is nothing glaring in the

1 Settlement insofar as attorneys' fees are concerned that causes the Court to pause in
2 giving its approval. The Court is not aware of any agreement amongst the parties
3 other than their Settlement. There is nothing here to trouble the Court in connection
4 with a determination that the Settlement is fair, adequate, and reasonable.

5 *b. Resolution of Objections*

6 After a court issues preliminary approval of a proposed class-action settlement,
7 class members have the opportunity to object. Fed. R. Civ. P. 23(e)(5)(A). The
8 objection must (1) "state whether it applies only to the objector, to a specific subset
9 of the class, or to the entire class," and (2) "state with specificity the grounds for the
10 objection." *Id.* Objectors must also have standing to object, and only "aggrieved"
11 class members have standing. *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084,
12 1088 (9th Cir. 2011). Thus, "[i]f [effecting the objectors' requested change] would
13 not actually benefit the objecting class member, the class member lacks standing."
14 *Id.* (cleaned up). Objectors must also "provide evidence to show that [they are] a class
15 member," at least where a prior court order requires them to do so. *In re Apple Inc.*
16 *Sec. Litig.*, No. 5:06-cv-05208-JF (HRL), 2011 WL 1877988, at *3 n.4 (N.D. Cal.
17 May 17, 2011). In addition to meeting standing requirements, the objector also "bears
18 the burden of proving any assertions they raise challenging the reasonableness of a
19 class action settlement." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 583
20 (N.D. Cal. 2015) (citing *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990)).

21 The proposed Settlement received only one objection featuring four specific
22 challenges, which are addressed in turn. (*See* Objection, ECF No. 106.)

23 *i. Release of Claims Against Non-Parties*

24 Objector Chaalan challenges the release terms of the Settlement, particularly
25 the release of non-party retailers who sold Apple Gift Cards subject to fraudulent
26 redemption, as overly broad. (Objection, ECF No. 106 at 4.)
27
28

1 The release of non-party retailers is common practice in cases such as this,
2 where the released claims against these non-parties concern an identical injury arising
3 from common facts. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590–91 (9th Cir. 2010)
4 (quoting *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008)); *Reyn's Pasta*
5 *Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006). Here, potential claims
6 against non-party retailers would be identical to those presently brought against
7 Defendants, and the restrictive nature of the class limits released claims only to those
8 who purchased gift cards subject to pre-activation attempts. Accordingly, the release
9 terms are not overly broad.

10 ii. Adequacy of Notice

11 Objector Chaalan challenges the use of notice by publication to reach
12 unknown class members, in comparison with the direct mail and email notice
13 provided to known class members who had previously complained to Apple and
14 provided proof of purchase. (Objection, ECF No. 106 at 7.)

15 Under Rule 23(e)(1)(B), prior to final approval of a settlement, notice must be
16 given to all class members “in a reasonable manner.” Fed. R. Civ. P. 23(e)(1)(B).
17 Reasonable notice is that which “is practicable under the circumstances, including
18 individual notice to all members who can be identified through reasonable effort,”
19 and such notice may be made using “United States mail, electronic means, or other
20 appropriate means.” Fed. R. Civ. P. 23(c)(1)(2)(B). Although direct notice must be
21 given, when possible, notice by publication may be appropriate “where it is not
22 reasonably possible or practicable” to ascertain those members’ identities. *Mullane*
23 *v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *Tuttle v. Audiophile*
24 *Music Direct, Inc.*, 2023 U.S. Dist. LEXIS 229241, *14–15, 17 (W.D. Wash. Dec.
25 26, 2023) (finding that use of publication, taken together with direct mail and direct
26 email efforts where identities of class members were known, provided adequate
27 notice).
28

1 The Court concludes based on the record, as discussed above, that direct
2 notice was not practicable given the lack of contact information for unknown class
3 members, and that the notice provided was consistent with minimum due process
4 and the law. *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 775 (9th Cir.
5 2022). The Court approved this plan at the preliminary approval stage and sees no
6 reason now to withdraw that approval.

7
8 iii. Adequacy of Claims Process

9 Objector Chaalan asserts that the claims process created by the Settlement is
10 unduly burdensome because it requires unknown class members to provides proof of
11 purchase upon filing their claim. (Objection, ECF No. 106 at 11.)

12 Under Rule 23, “the effectiveness of any proposed method of distributing relief
13 to the class, including the method of processing class-member claims” must be “fair,
14 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). Essentially, a claims process may
15 not be “so burdensome as to discourage class members from submitting claims.”
16 *Gehrich v. Chase Bank United States*, 316 F.R.D. 215, 232 (2016). In evaluating these
17 processes, courts have generally upheld “proof of purchase” requirements in such
18 class action settlements, as these requirements “ensure that payment is properly made
19 to individuals belonging to the settlement class.” *Tuttle v. Audiophile Music Direct,*
20 *Inc.*, 2023 U.S. Dist. LEXIS 229241, *32–33 (W.D. Wash. Dec. 26, 2023). *See e.g.,*
21 *Craft Brew Alliance, Inc.*, No. 17-cv-01027, 2020 U.S. Dist. LEXIS 74801, 2020 WL
22 1972505, at *21 (N.D. Cal. Feb. 5, 2020) (upholding a claims process that required
23 both proof of purchase and age certification, in order “to ensure that only those who
24 are legally allowed to purchase Kona Beers received compensation under the
25 Settlement Agreement”).

26 Here, although only unknown class members must provide proof of purchase
27 at the time of filing their claim, all class members were required to provide proof of
28 purchase at one point in the process. Known class members, who received direct

1
2 notice, provided proof of purchase at the time they first complained to Defendants.
3 This proof of purchase requirement was successful at weeding out many fraudulent
4 claims, which was especially important here given that this is a case “premised on
5 fraudulent activity.” (Green Decl., ¶¶ 24, 27.)

6 Further, any class member unable to submit proof of purchase at the settlement
7 stage would likewise be precluded from recovery had the case proceeded to trial, for
8 lack of proof of damages. *See In re Whirlpool Corp. Front-Loading Washer Prods.*
9 *Liab. Litig.*, 2016 U.S. Dist. LEXIS 130467, *43–44 (N.D. Ohio Sept. 23, 2016).
10 Thus, the process is no more burdensome than the evidentiary requirements to
11 recover damages at trial.

12 It is clear to the Court that the claims process was not unduly burdensome and
13 was in fact both reasonable and necessary.

14 iv. Adequacy of Representation

15 Based on his first three challenges, Chaalan asserts that Plaintiff and Class
16 Counsel do not provide adequate representation of the class. (Objection, ECF No.
17 106 at 13.) As indicated above, however, the Court finds these concerns do not make
18 representation of the class inadequate.³

19 3. Cy Pres

20 The *cy pres* doctrine allows a court to distribute unclaimed or non-
21 distributable portions of a class action settlement fund to the “next best” class of
22 beneficiaries. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301,
23 1307-08 (9th Cir. 1990). *Cy pres* distributions must account for the nature of the
24 plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the
25 silent class members, including their geographic diversity. *See id.*

26 The Settlement provides that if there are funds remaining in the Unclaimed
27 Settlement Amount after paying the Administrative and Notice Costs and the
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³ *See supra* section II.2.a.iv, Adequate Representation of the Class.

1 Attorneys' Fees and Costs, the Parties would present a proposal to the Court
2 regarding a *cy pres* distribution. The Parties propose distributing the remainder of
3 the Unclaimed Settlement Amount to the Consumer Federation of America ("CFA")
4 and the Consumer Federation of California ("CFC"). The remainder of the
5 Unclaimed Settlement Amount will be allocated 70% to the CFA and 30% to the
6 CFC in roughly the same proportion to the number of Eligible Gift Cards sold
7 outside of California and the number of Eligible Gift Cards sold in California during
8 the Class Period, and in light of Plaintiff's claim under the Consumer Legal
9 Remedies Act. The Court finds that the proposed *cy pres* recipients have a sufficient
10 nexus to the class claims in this Action and thus approve the proposed distribution
11 of the remainder of the Unclaimed Settlement Amount to the CFA and CFC.

12 **E. Attorneys' Fees, Costs, and Service Award**

13 Class Counsel moved for approval of their request for \$600,000 in attorneys'
14 fees, representing 33.33% of the gross settlement amount, reimbursement of
15 \$22,653.30 in costs, a class representative enhancement award of \$10,000 to Plaintiff,
16 and approval of \$204,000 in settlement administration costs. Defendants filed an
17 opposition to the attorney's fees request, arguing that Class Counsel should be
18 awarded only twenty-five percent of the settlement amount, or \$450,000. The Court
19 awards the requested costs and the \$10,000 class representative enhancement award
20 to Plaintiff, but only \$450,000 in attorney's fees, with the outstanding amount
21 reverting to the *cy pres*.

22 **1. Attorneys' Fees**

23
24 "In a certified class action, the court may award reasonable attorney's fees and
25 nontaxable costs that are authorized by law or by the parties' agreement." Fed. R.
26 Civ. P. 23(h). However, the Court is not bound by the Parties' Settlement as to the
27 amount of fees. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941–43
28

1 (9th Cir. 2011). Instead, the Court must ensure that the award is reasonable. *Id.* at
2 941. The Court must review fee awards with special rigor:

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

7
8 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (cleaned up).

9 When counsel recovers a common fund that confers a "substantial benefit" on
10 a class of beneficiaries, counsel is "entitled to recover their attorney's fees from the
11 fund." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th
12 Cir. 2002). In common-fund cases, courts may calculate a fee award under either the
13 "lodestar" or "percentage of the fund" method. *Id.*; *Hanlon*, 150 F.3d at 1029. The
14 "percentage of the fund" method is typically used.

15 Finally, Ninth Circuit precedent requires courts to award class counsel fees
16 based on the total benefits made available to class members rather than the actual
17 amount ultimately claimed. *Young v. Polo Retail, LLC*, No. C-02-4546-VRW, 2007
18 WL 951821, at *8 (N.D. Cal. Mar. 28, 2007) ("district court abused its discretion in
19 basing attorney fee award on actual distribution to class" instead of amount made
20 available) (citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th
21 Cir. 1997)).

22 If a court applies the percentage method, it will generally also calculate the
23 lodestar as a "cross-check to assess the reasonableness of the percentage award." *See*,
24 *e.g.*, *Weeks v. Kellogg Co.*, No. CV-09-8102-MMM-RZx, 2013 WL 6531177, at *25
25 (C.D. Cal. Nov. 23, 2013); *see also Serrano v. Priest*, 20 Cal. 3d 25, 48–49 (1977);
26 *Fed-Mart Corp. v. Pell Enters.*, 111 Cal. App. 3d 215, 226–27 (1980). "The lodestar
27 . . . is produced by multiplying the number of hours reasonably expended by counsel
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1 by a reasonable hourly rate.” *Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 26
2 (2000).

3 In support of their attorneys’ fees request, Class Counsel have emphasized the
4 unusual complexity of this action, “even for a nationwide consumer class action.”
5 (Motion for Attorneys’ Fees, Costs and Class Representative Service Award [“Motion
6 for Attorneys’ Fees”], ECF No. 95-1 at 7.) Plaintiff and Class Counsel also contend
7 the Court should consider the “total settlement package” when determining the
8 attorneys’ fee award. Specifically, Plaintiff and Class Counsel argued they negotiated
9 an award of attorneys’ fees and costs to be paid by Defendants *in addition to* the
10 settlement amount of \$1,800,000 and therefore the “total settlement package” value
11 was between \$2.4 Million and \$2.6 Million. (*Id.*; *Apple Comput., Inc. v. Superior*
12 *Court*, 126 Cal. App. 4th 1253, 1269 (2005) [“The award to the class and the
13 agreement on attorney fees represent a package deal. Even if the fees are paid directly
14 to the attorneys, those fees are still best viewed as an aspect of the class’ recovery.”].)
15 Further, Plaintiff and Class Counsel assert that the resulting settlement amount,
16 achieved in spite of the considerable risks and complexity of subject matter in this
17 case, provides a substantial benefit on Plaintiff and the Settlement Class and favors
18 an award of 33.33%. *Id.* at 16. Plaintiff and Class Counsel contend that their request
19 for fees is supported by a cross-check based on Class Counsel’s lodestar. Prior to
20 receipt of Objector Chaalan’s objection and the preparation and filing of the final
21 approval motion, Class Counsel asserts its lodestar amount was approximately
22 \$553,415, and that at the time of the Final Approval Hearing, its lodestar would surely
23 surpass the requested \$600,000. *Id.* at 20. Finally, Class Counsel asserts that as a state
24 case being adjudicated in federal court on the basis of diversity jurisdiction, the issue
25 of attorneys’ fees ought to be governed by state law, which favors a thirty-three
26 percent benchmark. *Id.* at 11.

1 Defendants dispute the applicability of state law in calculating the percentage
2 of fees and argued at the final approval hearing that Plaintiff's own motion for
3 attorneys' fees applied federal law. (ECF No. 105, at 6-8.) Defendants also contend
4 Plaintiff and Class Counsel failed to prove the existence of factors warranting a fee
5 award in excess of 25%, arguing that the case at hand is not unusually complex, and
6 the resulting Settlement is good but not particularly exceptional, pointing to the
7 dismissal of some of Plaintiff's claims throughout the process as evidence of the
8 banality of the result. (*Id.* at 8-10.) Defendants assert that the mere fact that the case
9 was taken on contingency basis and litigated for a number of years "does not justify
10 an upward deviation," nor does the market rate for similar cases. (*Id.* at 11-12.)

11 In considering the Parties' arguments and the existing record, the Court agrees
12 with Defendant. Regardless of whether federal or state law applies, the Court finds
13 that Class Counsel recovered a common fund that confers a substantial, but not
14 exceptional, benefit on the Settlement Class and therefore grants an award of
15 attorneys' fees to Class Counsel of \$450,000.

16 2. Litigation Costs

17 Class Counsel is also entitled to reimbursement of reasonable out-of-pocket
18 expenses. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 20 (9th Cir.
19 1994) (attorneys may recover reasonable expenses that would typically be billed to
20 paying clients in non-contingency matters); *Van Vranken v. Atl. Richfield Co.*, 901 F.
21 Supp. 294, 299 (N.D. Cal. 1995) (approving reasonable costs in class action
22 settlement). Costs compensable include "nontaxable costs that are authorized by law
23 or by the parties' agreement." Fed. R. Civ. P. 23(h).

24 Defendants challenge the award of litigation costs in this case, in particular,
25 the costs attributed to the use of experts. Defendants suggest that Plaintiff and Class
26 Counsel have provided insufficient documentation to justify the extent of that use.
27 The representative parties contend, however, that the information and analysis
28

1 provided by the experts enabled Class Counsel to obtain a favorable settlement for
2 Plaintiff and the Settlement Class.

3 The Court finds that the record sufficiently establishes the reasonableness of
4 the requested costs, including those for Plaintiff’s expert expenses. The Court
5 approves the requested amount of \$22,653.30.

6 3. Class Representative Service Award

7 When awarding a proposed Class Representative Service Award, district courts
8 generally evaluate “the actions the plaintiff has taken to protect the interests of the
9 class, the degree to which the class has benefitted from those actions, . . . [and] the
10 amount of time and effort the plaintiff expended in pursuing the litigation.” *Staton*,
11 327 F.3d at 977 (cleaned up). “Such awards are discretionary . . . and are intended to
12 compensate class representatives for work done on behalf of the class, to make up
13 for financial or reputational risk undertaken in bringing the action” *Rodriguez v.*
14 *W. Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009) (cleaned up).

15 Here, Plaintiff and Class Counsel move for an award of \$10,000 for Plaintiff’s
16 work on the case. The Court has reviewed Plaintiff’s declaration and finds the
17 requested award is reasonable given the actions Plaintiff took to protect the interests
18 of the class and the amount of time and effort she expended. The absence of
19 objections to the award by class members, including the objection by Chaalan, further
20 suggests the award is not unreasonable.

21 Thus, the Court finds the award to plaintiff of \$10,000 is appropriate.

22 4. Administrative and Notice Costs

23 CPT Group, Inc., the independent settlement administrator selected by the
24 Parties and approved by the Court, requests \$204,000 for providing notice and claims
25 administration services as provided in the Settlement. (ECF No. 108-3, ¶¶ 32-33.)
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Based on the Court’s assessment of the administration fees and notice costs associated with administering the Settlement, the Court grants the Administrative and Notice Costs to CPT Group, Inc. in the amount of \$204,000.

IV. CONCLUSION

For the foregoing reasons, Plaintiff’s Motion for Final Approval of Class Action Settlement and Entry of Judgment is GRANTED, Plaintiff’s Motion for Award of Attorneys’ Fees, Costs, and Class Representative Service Award is GRANTED AS MODIFIED, and the Objection of Hassan Chaalan to Proposed Class Settlement is OVERRULED.

The Court retains jurisdiction over the Parties, including Class Members, for the purposes of construing, enforcing, and administering the Order and Judgment, as well as the Settlement itself.

The Court finds, pursuant to Rules 54(a) and (b) of the Federal Rules of Civil Procedure, that Final Judgment of Dismissal with prejudice as to the Defendants [“Judgment”] should be entered forthwith and further finds that there is no just reason for delay in the entry of the Judgment, as Final Judgment, in accordance with the Settlement. The Clerk is DIRECTED to enter this Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

Dated: 3/17/24



HON. JINSOOK OHTA
U.S. DISTRICT COURT JUDGE