
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: 8:15-cv-01936-JLS-KES

Date: February 20, 2018

Title: Jordan Kissel v. Code 42 Software Inc., et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING PLAINTIFF’S
MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT (Doc. 53) AND PLAINTIFF’S MOTION FOR
ATTORNEYS’ FEES, COSTS, AND CLASS
REPRESENTATIVE INCENTIVE FEE (Doc. 52)**

Before the Court are two unopposed Motions filed by Plaintiff Jordan Kissel. One motion seeks final approval of the class action settlement, (Final Approval Mot., Doc. 53), and the other motion seeks approval of the requested attorneys’ fees, costs, and class representative incentive fee. (Fee Mot., Doc. 52). The Court requested supplemental briefing regarding the class administration fees, which the parties filed on February 15, 2018. (Supp’l Brief, Doc. 57.) Having reviewed the papers, held a fairness hearing, and taken the matter under submission, the Court GRANTS the Motion for Final Approval of the Class Action Settlement and GRANTS the Motion for Attorneys’ Fees, Costs, and Class Representative Incentive Fee.

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I. BACKGROUND

A. Procedural History

On November 19, 2015, Plaintiff Jordan Kissel filed a class action lawsuit against Defendant Code 42 Software Inc. (“Code42”). (Compl., Doc. 1.) On February 10, 2016, Kissel filed a First Amended Complaint. (FAC, Doc. 17.) In the FAC, Kissel alleges the following claims: (1) failure to present automatic renewal offer terms or continuous service offer terms clearly and conspicuously and in visual proximity to the request for consent offer in violation of Cal. Bus. & Prof. Code § 17602(a)(1); (2) failure to obtain affirmative consent before the subscription is fulfilled in violation of Cal. Bus. & Prof. Code §§ 17602(a)(2) and 17603; (3) failure to provide an acknowledgment with automatic renewal terms and information regarding cancellation policy in violation of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b); and (4) violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*

On February 29, 2016, Code42 moved to dismiss the FAC. (MTD, Doc. 19.) The Court denied the motion on April 14, 2016. Code42 filed an Answer to the FAC on April 28, 2016. (Doc. 29.) The parties then engaged in informal discovery and settlement negotiations. Plaintiff filed a Joint Notice of Proposed Class Action Settlement on March 3, 2017. (Doc. 33.)

On October 4, 2017, the Court conditionally certified a class for settlement purposes, preliminarily approved the proposed settlement, and approved the appointment of JND Class Action Administration as the claims administrator in this action. (Prelim. Approval Order, Doc. 47.) The class consists of “[a]ll ‘Consumers’ . . . within the State of California who purchased any product or service from Code42 as part of an ‘Automatic Renewal’ or ‘Continuous Service’ plan or arrangement . . . between November 19, 2011 and November 19, 2015” and “were subsequently charged by and paid Code42 one or more fees for the renewal of the product or service beyond the original term prior to July 24, 2017.” (Mot. for Prelim. Approval, Ex. 1, “Settlement Agreement” ¶ 2.01, Doc. 43-4.) The Court then set a final fairness hearing for February 9, 2018. (Prelim. Approval Order at 23.) However, the Court’s order required the parties

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to make certain modifications to the proposed content of class notice. (*Id.* at 21–22.) On October 23, 2017, the Court approved the form and content of the revised class notice. (Order Approving Class Notice, Doc. 49.)

B. The Settlement

The settlement provides for a full-distribution, non-reversionary settlement fund of \$400,000. (Settlement Agreement ¶ 3.01) After deducting attorneys’ fees, litigation costs, Plaintiff’s service payments, and the costs of administering the settlement fund, the net settlement amount will be used to provide settlement payments to each class member. (*Id.*) The remaining \$259,309.00 will be divided evenly between Class Members, and it is anticipated that each Class Member will receive approximately \$8.30 each from the settlement fund. (*Id.*)

The settlement provides that Class Counsel will request an award of attorneys’ fees, costs, and expenses of up to 25% of the settlement fund. (*Id.* ¶¶ 4.21.) The settlement further provides that Kissel may apply for an incentive award not to exceed \$2,500.00. (*Id.*) Code42 agrees to not oppose applications seeking the above attorneys’ fees, costs, and incentive payments. (*Id.*) The settlement administrator will also be paid from the settlement fund; its costs are \$38,191. (Supp’l Brief at 1.)

In return for the consideration described above, Kissel and settlement class members fully release and discharge Released Persons from the following:

[A]ny claim, right, demand, charge, complaint, action, cause of action, obligation, or liability of any and every kind or nature whatsoever, whether currently known or unknown, asserted or unasserted, suspected or unsuspected, open or concealed, contingent or noncontingent, that any of the Releasing Persons have, may have had, or may have in the future against any of the Released Persons under any source of law (whether federal, state, or local, and whether based upon common law or a statute or ordinance) that were asserted in the Action, that could have been asserted in the Action,

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or that otherwise arise out or relate to disclosures or the alleged failure to make adequate disclosures during the Class Period regarding the terms and conditions of the sale of, or the offering for sale of, or the cancellation policy that applies to, an Automatically Renewing Service or of any other product or service that has a term that renews automatically from time to time or is in effect for a continuous period until cancelled (the “Released Claims”).

(Settlement Agreement ¶ 6.01.) The “Released Persons” include (a) all of Code42’s past, present and future parents, predecessors, successors, partners, assigns, joint venturers, subsidiaries, affiliates, and divisions; and (b) the owners, shareholders, officers, directors, vendors, employees, attorneys, insurers, and agents of these entities. (*Id.*) In addition, Kissel herself releases claims pursuant to California Civil Code section 1542. (*Id.* ¶ 6.03.)

C. Notice and Response

Notice was sent to class members pursuant to the method approved by the Court. The Notice (and subsequent corrections) adequately describes the litigation and the scope of the involved class. (*See Revised Class Notice, Doc. 48-1.*) Additionally, the Notice explains (1) the amount and makeup of the Settlement Fund; (2) the plan of allocation; (3) that Kissel’s Counsel and Kissel will apply for attorneys’ fees, costs, and a service award; and (4) class members’ options to participate, opt out, or object to the settlement. (*Id.*)

Code42 provided the settlement administrator JND with a list including the names, email addresses, and current addresses on file for each of the 31,258 Class Members. (Keough Decl. ¶ 4, Doc. 53-3.) On November 3, 2017, JND emailed the Class Notice to Class Members; 1,627 were returned as undeliverable. (*Id.* ¶ 5.) On November 10, 2017, JND mailed a physical copy of the notice via U.S. Mail to the 1,627 Class Members for whom the email Notice was returned as undeliverable. (*Id.* ¶ 6.) Prior to doing so, JND

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updated the addresses using data from the National Change of Address Database. (*Id.*) The Notice advised Settlement Class Members they could exclude themselves or object to the settlement within 45 days of the mailing (via email or U.S. mail) of the notice. (*Id.* ¶¶ 10-11) As of December 20, 2017, JND received four requests for exclusion. (*Id.* ¶ 10.) Class Counsel received one objection, from a class member who contended that the website disclosures were already adequate. (Mot. for Final Approval at 18.) Kissel filed a supplemental notice on January 5, 2018 indicating that as of that date, no additional objections had been received. (Doc. 55.)

Kissel now moves for final approval of the class action settlement and attorneys' fees of twenty-five percent of the Maximum Settlement Amount, inclusive of costs, and a class representative enhancement award of \$2,500 to Kissel. (Fee Mem. at 2, Doc. 52-1.)

II. CONDITIONAL CERTIFICATION OF THE CLASS

In its Preliminary Approval Order, the Court discussed the propriety of conditional class certification for the purposes of settlement. (Prelim. Approval Order at 7–12.) The Court also discussed Kissel's adequacy as Class Representative and Kissel's Counsel as Class Counsel. (*Id.* at 9, 11-12.) The Court sees no reason to depart from its previous conclusion regarding the existence of a proper settlement class, its appointment of Kissel as Class Representative, or its appointment of Class Counsel. The Court therefore incorporates its class certification analysis from the Preliminary Approval Order into the instant Order.

Accordingly, the Court GRANTS the Motion as to final approval of conditional class certification for the purposes of settlement.

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III. FINAL APPROVAL OF CLASS ACTION SETTLEMENT

A. Legal Standard

Before approving a class-action settlement, Rule 23 of the Federal Rules of Civil Procedure requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). “To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: (1) the strength of plaintiffs’ 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 the class members to the proposed settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (citation and internal quotation marks omitted).¹ “The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). “It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety.” *Staton*, 327 F.3d at 960 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

In addition to these factors, where “a settlement agreement is negotiated *prior* to formal class certification,” the Court must also satisfy itself that “the settlement is not the product of collusion among the negotiating parties.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011) (citations and internal quotation marks omitted) (emphasis in original). Accordingly, the Court must look for explicit collusion and “more subtle signs that class counsel have allowed pursuit of their own self-interests

¹ Factor (7), the presence of a governmental participant, does not apply to this case.

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and that of certain class members to infect the negotiations.” *Id.* at 947. Such signs include (1) “when counsel receive a disproportionate distribution of the settlement,” (2) “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of attorneys’ fees separate and apart from class funds,” and (3) “when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.” *Id.* (internal citations and quotation marks omitted).

B. Discussion

In its Preliminary Approval Order, the Court evaluated each of the factors identified above to determine whether the Settlement is fair, reasonable, and adequate under Rule 23. (Prelim. Approval Order at 12–18.) The Court determined that the following factors weighed in favor of approval: (1) the strength of Kissel’s case; (2) the risk, complexity, and likely duration of further litigation; (3) the risk of maintaining class certification; (4) the amount offered in settlement; (5) the stage of the proceedings and extent of discovery completed; and (6) the experience and views of class counsel. (*Id.*) The Court was also satisfied that there were no signs of collusion between the parties. (*Id.* at 18.) The Court sees no reason to depart from its previous conclusion as to these factors. The Court therefore incorporates its analysis from the Preliminary Approval Order into the instant Order.

At the time of preliminary approval, however, Kissel did not provide evidence of Class Members’ reactions to the proposed Settlement Agreement. (*Id.*) Since that time, JND sent 31,253 Notices to Settlement Class Members by e-mail. (Keough Decl. ¶ 5.) JND received four timely Requests for Exclusion and one written objection to the Settlement. (*Id.* ¶¶ 9-10.) A small number of objections at the time of the fairness hearing may raise a presumption that the settlement is favorable to the class. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043. At the final fairness hearing, counsel represented that they had solicited reactions from class members but had not received any reactions aside from four exclusions and one objection. Given the minimal number of objections and opt-outs, this factor weighs in favor of granting final approval.

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Considering all of the factors together, the Court concludes that the settlement is fair, reasonable, and adequate. Accordingly, the Court GRANTS Plaintiff’s Motion for Final Approval of the Class Action Settlement.

IV. CLAIMS ADMINISTRATOR COSTS

The settlement agreement provides that the chosen Claims Administrator will be provided payment for its services out of the settlement fund. (Settlement Agreement ¶ 3.05.) Kissel requests a payment of \$38,191 to the claims administrator, JND. (Supp’l Brief at 1.) This is below the original estimate of \$40,000. (*Id.*) The Court finds Kissel’s request reasonable as it is less than the originally estimated cost.

Accordingly, the Court GRANTS the Motion as to this payment.

V. ATTORNEYS’ FEES

Rule 23 permits a court to award “reasonable attorneys’ fees . . . 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 Headset Prods.*, 654 F.3d at 941. In the Ninth Circuit, the benchmark for a fee award in common fund cases is 25% of the recovery obtained. *See id.* at 942 (“Where a settlement produces a common fund for the benefit of the entire class, . . . courts typically calculate 25% of the fund as the ‘benchmark’ for a reasonable fee award, providing adequate explanation in the record of any ‘special circumstances’ justifying a departure.”). Courts must “justify any increase or decrease from this amount based on circumstances in the record.” *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 455 (E.D. Cal. 2013) (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). The Ninth Circuit has identified a number of factors the Court may consider in assessing whether an award is reasonable, including: (1) the results achieved, (2) the risk of litigation, (3) the skill required and quality of work, and (4) the contingent nature of

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the fee and the financial burden carried by the plaintiffs. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002). Counsel’s lodestar may also “provide a useful perspective on the reasonableness of a given percentage award.” *Id.* at 1050.

Kissel seeks an attorneys’ fee award, inclusive of costs, of \$100,000.00, which is twenty-five percent of the Maximum Settlement Amount. (Fee Mem. at 2.) The requested fee award is consistent with the Ninth Circuit’s 25% benchmark, and the Court finds that the following factors weigh in favor of granting final approval of the requested fee.

A. Results Achieved

Because the maximum potential liability was uncertain in this case, counsel provided a range of possibilities based on different litigation scenarios; the amount offered in settlement is as low as 3.7 percent to as high as 93 percent of the maximum potential liabilities. (*See Order re Preliminary Approval at 15-16.*) Even taking into account the lowest of these percentages, the percentage of recovery falls within the typical range of accepted renewal settlements. *See Noll v. eBay, Inc.*, 309 F.R.D. 593, 607 (approving settlement representing 50% of the first month renewal fees and nine percent of all renewal fees); *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-350, 2013 WL 6114379 at *4 (November 20, 2013) (approving settlement recovery of 1.8% or 16%). The Court finds that the degree of success obtained in this settlement weighs in favor of finding the fee request reasonable.

B. Risk of Litigation

The risks presented by this litigation also support approval of the 25% fee request. As discussed in the Order preliminarily approving the settlement, Kissel believes that her claims are meritorious but observes that Code42 had numerous legal and factual challenges at the ready, including that Kissel did not have standing. (Order on

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Preliminary Approval at 14.) In light of these considerations, the Court finds that this factor weighs in favor of finding the fee request reasonable.

C. Skill Required and Quality of Work

Kissel points out that her counsel conducted significant evaluation into the strengths and weaknesses of her case and the settlement offered, relying on their experience in litigating consumer class actions. (Fee Mem. at 14-15.) The quality of Class Counsel’s work is further evidenced by the favorable settlement achieved, including both monetary and prospective relief without lengthy and expensive litigation. Accordingly, the Court finds that this factor weighs in favor of finding the fee request reasonable.

D. Contingent Nature of the Fee

Counsel took this case on a contingent basis and invested a total of 159.50 hours prosecuting and resolving the case. (Ferrell Fee Decl. ¶ 18, Doc. 52-2.) Class Counsel have received no compensation for their efforts during the course of litigation, and they undertook representation despite substantial risk that none of their expenses on behalf of the class would be recouped. (Fee Mem. at 10) “Courts have long recognized that the attorneys’ contingent risk is an important factor in determining the fee award and may justify awarding a premium over an attorney’s normal hourly rates.” *Monterrubio*, 291 F.R.D. at 457 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)). Accordingly, this factor weighs in favor of finding the fee request reasonable.

E. Lodestar Cross-Check

To determine the reasonableness of a fee award, courts may compare the percentage-of-the-common-fund with the counsel’s lodestar calculations. *Vizcaino*, 290

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F.3d at 1050-51. Here, Class Counsel assert they have spent a total of 159.50 hours litigating this action. (Ferrell Fee Decl. ¶ 18.) Class Counsel have also provided records of the time spent on this case. (See Fee Mot. Ex C., Doc. 52-4.) Scott J. Ferrell used a rate of \$750 per hour; David W. Reid and Richard H. Hikida each used a rate of \$625 per hour; Victoria C. Knowles used a rate of \$500 per hour; Roger E. Borg used a rate of \$450 per hour, and the firm’s paralegal used a rate of \$125 per hour. (*Id.*) Using the above figures, Class Counsel calculated a collective lodestar of \$85,965. (*Id.*) Not considering costs, therefore, the lodestar multiplier to reach \$100,000 is 1.15. The Court concludes that the minimal upward adjustment from the lodestar is justified in this case, particularly because remaining legal work prior to the fairness hearing will increase the lodestar and reduce the requested multiplier. Moreover, Ferrell notes that more than \$5,000 in costs were also included in the fee request, further reducing the multiplier. (Ferrell Fee Decl. ¶ 19.) Overall, the Court concludes that this factor weighs in favor of finding the fee request reasonable.

VI. LITIGATION COSTS

Kissel requests the Court to approve the reimbursement of \$5,000 in litigation expenses and costs, included in the \$100,000 attorneys’ fee award. (Fee Mem. at 20.) “Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters.” *In re Omnivision*, 559 F. Supp. 2d at 1048. Class Counsel have documented their expenses incurred in court filing fees, travel fees, and research and document production. (Ferrell Fee Decl. ¶ 19.) The Court finds the various expenses adequately documented and reasonable, particularly because they are included within the attorneys’ fee award.

Accordingly, the Court GRANTS the Motion as to Kissel’s request for litigation costs.

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VII. CLASS REPRESENTATIVE INCENTIVE FEE

Kissel seeks a class representative enhancement award of \$2,500. (Fee Mem. at 2.) Service awards are “discretionary . . . and 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.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009) (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000)). “To [further] assess whether an incentive payment is excessive, district courts balance ‘the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment.’” *Monterrubio*, 291 F.R.D. at 462 (quoting *Staton*, 327 F.3d at 977). Courts “must ‘evaluate [such] awards individually’ to detect ‘excessive payments to named class members’ that may indicate ‘the agreement was reached through fraud or collusion.’” *Id.* (quoting *Staton*, 327 F.3d at 975, 977).

Here, Kissel asserts that she spent numerous hours helping with the case, including: (1) providing facts and follow-up related to her underlying allegations; (2) providing documentary support; and (3) reviewing court documents and staying in constant communication with counsel. (Kissel Fee Decl. ¶¶ 22; Kissel Decl ¶ 5, Doc. 53-2.) Her actions have resulted in a settlement that will provide monetary relief to the settlement class. The Court therefore finds that granting approval of a service award is reasonable and appropriate under the circumstances.

However, the Court finds the requested award to be unreasonably high. \$2,500 is more than 350 times the average payout to class members. Moreover, the tasks undertaken by Kissel do not justify such a high award. *See, e.g., Monterrubio*, 291 F.R.D. at 463 (reducing incentive award where there was “no evidence that Plaintiff spent more time assisting counsel than occurs in the average case.”) Upon weighing the services rendered, the risks undertaken, the broader release executed by Kissel, and the proportion of the requested award relative to the settlement amount and individual class payments, the Court finds an award of \$1,000 to be more appropriate.

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Accordingly, Kissel is awarded a service payment of \$1,000.

VIII. CONCLUSION

The Court finds the settlement to be fair, adequate, and reasonable, and accordingly GRANTS final approval of the settlement. The Court also GRANTS Plaintiff's motion for attorneys' fees, costs, and service payments. The Court awards Class Counsel \$100,000 in attorneys' fees and litigation costs, based on an award of 25% of the Maximum Settlement Amount. The Court also awards a service payment of \$1,000 to Kissel. Finally, the Court awards \$38,191 in claims administration services and expenses to JND. Distribution of the settlement fund to class and collective action members shall be made in accordance with the method outlined in the settlement.

Plaintiff filed a proposed judgment along with her Motion for Fees, but no proposed judgment was filed to accompany the Motion for Final Approval. Accordingly, Plaintiff is ORDERED to file a proposed final judgment encompassing all of the issues before the Court within **seven (7) days** of this Order.

Initials of Preparer: tg