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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JEFFREY CHEN, Plaintiff, v. CHASE BANK USA, N.A., and DOES 1-100, Defendants.	Case No. 3:19-cv-01082-JSC **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** Date: December 12, 2019 Time: 9:00 AM Judge: Hon. Jacqueline Scott Corley Courtroom: F - 15th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 12, 2019, at 9:00 AM, before the Hon. Jacqueline Scott Corley, in Courtroom F, 15th Floor of the San Francisco Courthouse of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, Plaintiff Jeffrey Chen, on behalf of himself and all others similarly situated, will, and hereby does, move under Rule 23 of the Federal Rules of Civil Procedure for an order: (1) preliminarily approving the terms and conditions of the settlement as set forth in the Class Action Settlement Agreement and Release, (2) for settlement purposes only, provisionally certifying a Settlement Class and provisionally appointing Ray E. Gallo and Gallo LLP and Alexander Darr and Darr Law LLC as Settlement Class Counsel and Plaintiff as the Settlement Class Representative, (3) approving the form and method of notice to the Settlement Class and directing that notice to be provided to the Settlement Class, and (4) scheduling a hearing to consider final approval of the settlement.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities in support thereof, the Declaration of Dominic Valerian filed concurrently herewith, any additional briefing on this subject, and on any such further argument as may be presented to the Court at or before the hearing on this matter.

DATED: November 22, 2019

RESPECTFULLY SUBMITTED,

GALLO LLP
DARR LAW LLC

By: /s/ *Dominic Valerian*
Dominic Valerian
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Plaintiff Jeffrey Chen requests preliminary approval of the class action settlement he has reached with Defendant Chase Bank USA, N.A. now known as JPMorgan Chase Bank, N.A. ("Chase") to resolve this lawsuit (the "Settlement"). Plaintiff presents this proposed Settlement on behalf of himself and all other persons to whom Chase sent a letter giving either "previous unsatisfactory relationship with this bank" or "previous unsatisfactory relationship with us or one of our affiliates" as the only reason for taking an adverse action in connection with a credit card account from January 28, 2014 through November 22, 2019. Plaintiff alleges that Chase failed to provide these individuals with the specific reasons why it took an adverse action on their credit card accounts in violation of the notice requirement of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq.* and seeks punitive damages, injunctive relief, and attorneys' fees under 15 U.S.C. § 1691e. The Settlement provides for Chase to: (1) pay $244,659 for (a) non-reversionary payments to Settlement Class Members, (b) notice and administration costs (estimated at $50,102), and (c) an incentive award to Plaintiff of up to $5,000; (2) stop the challenged practices for five years; and (3) pay court-approved attorneys' fees and expenses of up to $185,000. Plaintiff submits that the Settlement is fair, reasonable and adequate and that the standards for certification of a settlement class are satisfied.

2. Background

A. Procedural History

In September 2018, Chase denied Plaintiff Jeffrey Chen's credit card application and sent him a letter citing "previous unsatisfactory relationship with this bank" as the sole reason for that adverse action. (Dkt. No. 1-1 ¶¶ 12-13; 18-19; Exh. A.) On January 28, 2019, Mr. Chen filed this class action lawsuit in Alameda County Superior Court alleging that Chase violated ECOA's notice provision, 15 U.S.C. § 1691(d), because its adverse action notice did not include the specific reason(s) for the adverse action taken or disclose the right to a statement of those reasons. (*Id*. ¶¶ 12-17, 35.) The Complaint sought certification of a nationwide class of persons to whom Chase sent a letter giving "previous unsatisfactory relationship with this bank" as the only reason

for denying a credit application between January 28, 2014 and the date of class certification, punitive damages of up to $500,000 (the statutory cap), injunctive relief, and attorneys' fees and costs. (*Id.* ¶ 23; Prayer for Relief ¶¶ 1-3.)

Chase removed the case to the Northern District of California, it was assigned to this Court, and the parties consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 9, 16.) On March 6, 2019, Chase moved to dismiss the Complaint on the grounds that: (1) its reason for denying Mr. Chen's application was sufficiently specific, and (2) Mr. Chen lacked statutory standing because he did not allege discrimination or confusion. (Dkt. No. 8.) The Court denied Chase's motion dismiss on May 6, 2019. (Dkt. No. 23.)

The parties exchanged initial disclosures on May 23, 2019 and each side served written discovery requests shortly thereafter. Valerian Decl. ¶ 5. Chase answered the Complaint on May 28, 2019. (Dkt. No 28.) An initial case management conference was held on May 30, 2019, at which the Court scheduled an early motion for summary judgment based on Chase's contention that Mr. Chen lacked statutory standing and received a sufficiently specific adverse action notice because he allegedly knew why his credit application was denied. Valerian Decl. ¶ 5.

On June 18, 2019, the parties scheduled a full day of mediation with Hon. Wayne D. Brazil (Ret.) for July 17, 2019 at JAMS in San Francisco. Valerian Decl. ¶ 6. To facilitate the mediation and conserve resources, the parties agreed to stay formal discovery and informally exchange information. *Id.* As part of this exchange, Chase produced records pertaining to its relationship with Mr. Chen and provided the size of the class and the number of at-issue letters it sent during the class period. *Id.* A week before the mediation, the parties submitted and exchanged detailed mediation statements, which thoroughly analyzed the relevant law, facts, and the litigation risks both sides face. *Id.*

On July 17, the parties spent a full day in mediation with Judge Brazil. *Id.* ¶ 7. The parties did not reach an agreement that day but made substantial progress and continued to negotiate over the following weeks. *Id.* The parties reached a settlement in principle on August 9, 2019. *Id.* Chase prepared the first draft of the settlement agreement and sent it to Plaintiff's counsel on

September 18, 2019. *Id.* ¶ 8. Two months of extensive negotiations concerning the final terms of the Settlement followed. *Id.* On November 22, 2019, the parties executed a comprehensive Class Action Settlement Agreement and Release (the "Agreement"), a copy of which is attached as Exhibit 1 to the concurrently filed Valerian Declaration. *Id.* At all times, the negotiation of the Settlement was in good faith and at arm's-length. *Id.*

B. The Proposed Settlement

(1) *Settlement Class*

The Agreement provides for certification of the following "Settlement Class" for settlement purposes only:

> [A]ll natural persons to whom Chase sent a letter giving either "previous unsatisfactory relationship with this bank" or "previous unsatisfactory relationship with us or one of our affiliates" as the only reason for taking an adverse action in connection with a credit card account during the period beginning January 28, 2014 and ending on November 22, 2019.

Agreement §§ 1.29, 3.1(a). Excluded from the Settlement Class are "officers and directors of Chase and its parents, subsidiaries, affiliates, and any entity in which Defendant has a controlling interest; and all judges assigned to hear any aspect of this litigation, as well as their immediate family members." *Id.* § 1.29. Chase represents that, to the best of its knowledge, there are approximately 18,183 persons in the Settlement Class. *Id.* § 4.11.

The Settlement Class is broader than the class defined in the Complaint[1] because it includes: (1) persons given only the reason "previous unsatisfactory relationship with us or one of our affiliates" (instead of just "previous unsatisfactory relationship with this bank"), and (2) persons sent a qualifying reason in connection with any adverse action on a credit card account (rather than only persons sent a qualifying reason in connection with the denial of a credit application). These differences are reasonable because Settlement Class Members' claims are substantially similar to the claims alleged in the Complaint.

[1] The Complaint defines the class as: "All natural persons to whom Defendant sent a letter giving "Previous unsatisfactory relationship with this bank" as the only reason for denying a credit application in the period beginning [beginning January 28, 2014] and ending on the day of class certification." (Dkt No. 1-1 ¶ 23.)

(2) *Settlement Consideration*

The Agreement provides for Chase to pay non-reversionary "Settlement Class Consideration" of $244,659 for: (1) payments to the Settlement Class, (2) a Class Representative Incentive Award of up to $5,000, and (3) Notice and Settlement Administration Costs. Agreement §§ 2.3, 3.2, 3.3, 4.8, 4.10(f).

Assuming a $5,000 Class Representative Incentive Award and Notice and Settlement Administration Costs of $50,102 (as estimated by the Settlement Administrator (Valerian Decl. ¶ 10)), $189,557 will be paid to the Settlement Class (the "Net Settlement Class Consideration"). This amounts to an average recovery of $10.42 per Settlement Class Member. The Net Settlement Class Consideration will be divided between Settlement Class Members who submit a valid Claim Form on a *pro rata* basis in proportion to the total number of Settlement Class Members who submit valid Claim Forms. Agreement § 4.10(b).

At least 35 days before the Claims Submission Deadline, Plaintiff will move for a Class Representative Incentive Award of up to $5,000, which Chase does not presently intend to oppose. Agreement § 3.3. That motion will be posted on the Settlement Website within one day of its filing. *Id.* If the Court approves a Class Representative Incentive Award of less than $5,000 or no Class Representative Incentive Award, the unapproved amount shall remain part of the Settlement Class Consideration. *Id.* § 3.3(e).

Class Representative Jefferey Chen estimates that he has spent more than 40 hours on this case, including, researching and consulting with prospective counsel, gathering documents and information, providing factual information to counsel, monitoring case developments, and participating in settlement discussions. Valerian Decl. ¶ 12. Mr. Chen also ran the risk of paying Chase's costs if he lost and gave up significant financial privacy for the benefit of the class. *Id.* Class representative incentive awards of $5,000 are standard in this district. *See Deaver v. Compass Bank*, No. 13-00222 JSC, 2015 WL 4999953, at *9 (N.D. Cal. Aug. 21, 2015); *Harris v. Vector Mktg. Corp.*, Case No. 08-cv-5198-EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012).

The Agreement provides for the Court to enjoin Chase, for a period of five years

beginning on the date of Final Approval, from using the phrases "previous unsatisfactory relationship with this bank" and "previous unsatisfactory relationship with us or one of our affiliates" in adverse action notices as the sole reason for denying credit card applications or otherwise taking an adverse action in connection with a Chase credit card account. Agreement § 3.5.

At least 35 days before the Claims Submission Deadline, Plaintiff's counsel will move for attorneys' fees and costs of up to $185,000, to be paid by Chase in addition to the Settlement Class Consideration. Agreement § 3.4(a). That motion will be posted on the Settlement Website within one day of its filing. *Id.* Chase does not presently intend to oppose a motion that does not seek more than $185,000. *Id.* § 3.4(a). The Settlement's enforceability is not contingent on the amount of attorneys' fees and costs awarded. *Id.* § 3.4(b).

(3) *Release of Claims*

Plaintiff and Settlement Class Members who do not opt out will release the "Released Parties" from the "Released Claims." Agreement §§ 3.6(a).

> "Released Claims" means any and all Claims which the Settlement Class Representative or any member of the Settlement Class ever had, now have, or may have in the future arising out of or relating to: (a) Chase's use of the language "previous unsatisfactory relationship with this bank" or "previous unsatisfactory relationship with us or one of our affiliates" in an adverse action notice sent pursuant to the ECOA in connection with a credit card account on or before November 22, 2019; or (b) the acts and omissions alleged in the Complaint occurring on or before November 22, 2019.

Id. § 1.24.

> "Released Parties" means JPMorgan Chase Bank, N.A., together with its predecessors, successors (including, without limitation, acquirers of all or substantially all of its assets, stock or other ownership interests) and assigns; the past, present, and future, direct and indirect, parents (including, but not limited to holding companies and JPMorgan Chase & Co.), subsidiaries and affiliates of any of the above (including Chase Bank USA, N.A.); and the past, present and future principals, trustees, partners (including, without limitation, affinity, agent bank, and private label and co-brand partners), officers, directors, employees, agents, attorneys, shareholders, advisors, predecessors, successors (including, without limitation, acquirers of all or substantially all of their assets, stock, or other ownership interests), assigns, representatives, heirs, executors, and administrators of any of the above.

Id. § 1.25.

> "Claims" means any and all actual or potential claims, actions, causes of action, suits, counterclaims, cross claims, third party claims, contentions, allegations, and assertions of wrongdoing, and any demands for any and all debts, obligations, liabilities, damages (whether actual, compensatory, treble, punitive, exemplary, statutory, or otherwise), attorneys' fees, costs, expenses, restitution, disgorgement, injunctive relief, any other type of equitable, legal or statutory relief, any other benefits, or any penalties of any type whatever, whether known or unknown, suspected or unsuspected, contingent or non-contingent, or discovered or undiscovered, whether asserted in federal court, state court, arbitration or otherwise, whether asserted in an individual action, a class action, a *parens patriae* action, or a representative action, and whether triable before a judge or jury or otherwise.

Id. § 1.5. As to the Released Claims only, Plaintiff and Settlement Class Members expressly waive any and all rights under Section 1542 of the California Civil Code, which excludes from release any claims which the creditor does not know or suspect to exist at the time of executing the release, and any comparable provisions. *Id.* § 3.6(d).

The claims to be released are broader than the claims in the Complaint in that: (1) the release extends to claims arising out of or related to Chase's use of the language "previous unsatisfactory relationship with us or one of our affiliates" whereas the Complaint only asserted claims based on the language "previous unsatisfactory relationship with this bank"; and (2) the release is not limited to the claims alleged in the Complaint but extends to claims "arising out of or related to" (i) Chase's use of the at-issue language, and (ii) the facts alleged in the Complaint. *Id.* § 1.24. The first difference is appropriate because it tracks the scope of the Settlement Class, which is broader than the class alleged in the Complaint as discussed above. The second difference is appropriate in that the release generally tracks the claims asserted in the lawsuit and is consistent with other releases approved by courts in this district.[2]

[2] *See, e.g., In re Anthem, Inc. Data Breach Litigation*, 327 F.R.D. 299, 327 (N.D. Cal., 2018) (approving a release of claims "related to or arising from any facts alleged in any of the Actions"); *Custom LED, LLC v. eBay, Inc.*, No. 12-CV-00350-JST, 2013 WL 6114379, at *4 (N.D. Cal. Nov. 20, 2013) (approving release of claims "arising out of or relating in any way to any of the legal, factual, or other allegations made in the Action, or any legal theories that could have been raised based on the allegations of the Action"); *Chavez v. PVH Corp.*, No. 13-CV-01797-LHK, 2015 WL 581382, at *5 (N.D. Cal. Feb. 11, 2015) (indicating a willingness to approve a release of claims "arising from, or related to the facts occurring during the Settlement

(4) *Settlement Administration*

The Agreement provides for Kurtzman Carson Consultants LLC ("KCC") to serve as the Settlement Administrator. Agreement § 1.28. Because this case and the Settlement involve confidential customer financial information, Chase insisted upon using one of a limited number of settlement administrators that have completed its screening process to ensure that they can adequately protect the security and confidentiality of confidential customer information. Valerian Decl. ¶ 10. Chase's outside counsel reached out to one such administrator, KCC, and invited them to submit a bid. *Id.* KCC prepared bids to administer the Settlement with and without a claims process, with one email campaign and with three email campaigns, and with and without the claim form included with the class notice. *Id*. The parties selected the approach that they determined provided the best value to the Settlement Class. *Id*. KCC has estimated Notice and Settlement Administration Costs will come to $50,102. *Id.* Notice and Settlement Administration Costs will be paid out of the Settlement Class Consideration. Agreement §§ 2.3, 3.2. KCC has not had any engagements with Plaintiff's counsel in the past two years. Valerian Decl. ¶ 10.

(5) *Notice*

Within 10 days after entry of the Preliminary Approval Order, Chase will provide the Settlement Class Member List to the Settlement Administrator and Settlement Class Counsel. Agreement § 4.2. Within 45 days of Preliminary Approval, the Settlement Administrator will provide the Settlement Class with notice of the proposed Settlement by:

> (a) Establishing a Settlement Website, which shall contain the Notice and enable Settlement Class Members to submit a Claim Form electronically. The Settlement Website shall remain active until at least 45 days after the Post-Distribution Accounting;
>
> (b) Emailing the Notice to all Settlement Class Members who have an email address on file with Chase; and,
>
> (c) For all Settlement Class Members who do not have a current and valid email address on file with Chase (including as evidenced by any undeliverable messages or bounce-backs resulting from (b) immediately above), by sending the Notice to Settlement Class Members via U.S. Mail using the postal mailing address on file with Chase as

Class Period as alleged in the Second Amended Complaint").

> updated by the Settlement Class Administrator using reasonable and customary procedures for address updating using public records.

Id. § 4.2. The proposed class notice (the "Notice") is attached as Exhibit D to the Agreement. *Id.* § 1.15. All email notices shall be sent with a tracking pixel. *Id.* § 4.2. Any Settlement Class Member who, as of the seventh day following the email notice, has not opened their email notice (as reported via the tracking pixel) shall be sent notice by mail per (c) above. *Id.*

(6) *Claims Process and Payment*

To receive a payment, Settlement Class Members must submit a valid Claim Form electronically through the Settlement Website or by mail to the Settlement Administrator. Agreement §§ 1.5, 4.3(a), 4.10(b). The Claim Form for submission by mail is attached as Exhibit E to the Agreement. The Settlement Administrator will mail the Claim Form to any Settlement Class Member upon request and make it available on the Settlement Website. *Id.* § 4.3(a). The Claim Form requires the Settlement Class Member to provide: (a) the Settlement Class Member's name and mailing address, (b) a certification that, to the best of the Settlement Class Member's knowledge, Chase sent him or her a notice containing either "previous unsatisfactory relationship with this bank" or "previous unsatisfactory relationship with us or one of our affiliates" as the only reason why Chase took an adverse credit action against the Settlement Class Member. *Id.* § 1.6, Exh. E. Claim Forms must be submitted online or postmarked no later than 60 days after the Notice Date (the "Claims Submission Deadline"). *Id.* § 4.3(b).

Plaintiff's counsel estimates the percentage of Settlement Class Members who are expected to submit a Claim Form at 7% based on an average claims rate of 7.37% in four similar cases involving consumer finance claims that KCC identified. Valerian Decl. ¶ 11. A table KCC prepared showing information relevant to the claims rate in these four cases is attached as Exhibit 2 to the Valerian Declaration. *Id.* Based on the approximate class size of 18,183 persons, the projected 7% claims rate, and assuming Net Settlement Class Consideration of $189,557 (as discussed above), each of the 1,273 Settlement Class Members projected to submit a valid Claim Form is projected to receive a Cash Payment of approximately $149.

Within 15 days of the Effective Date, Chase will pay the Settlement Class Consideration

into an account selected by the Settlement Administrator (the "Settlement Class Consideration Account"), which shall be maintained as a Court-approved Qualified Settlement Fund.[3] Agreement §§ 3.2, 4.8. Within 27 days of the Effective Date, each Settlement Class Member Eligible for Cash Payment shall be mailed the Cash Payment drawn from the Settlement Class Consideration Account. *Id.* § 4.10(c). The checks mailed to Settlement Class Members Eligible for Cash Payment shall be valid for 180 days after issuance. The Settlement Administrator will make reasonable efforts to locate the proper address for any intended recipient of a Cash Payment whose check is returned by the Postal Service as undeliverable, and will re-mail it once to the updated address. *Id.* § 4.10(d). For any checks remaining uncashed more than 180 days, a second distribution shall be made to Settlement Class Members that cashed their initial checks if economically feasible. *Id.* § 4.10(e). If Settlement Class Counsel and the Settlement Administrator deem a second distribution economically infeasible or if there are funds remaining in the Settlement Class Consideration Account after the stale check date for the second distribution, then the remaining funds shall be distributed in a mutually agreeable manner, subject to the approval of the Court. *Id.*

(7) *Opt-Outs*

Settlement Class Members may exclude themselves from the Settlement Class by submitting a request for exclusion to the Settlement Administrator by mail that is postmarked no later than 60 days after the Notice Date (the "Exclusion/Objection Deadline"). Agreement § 4.4. To be effective, the request for exclusion must include (a) the Settlement Class Member's full name, telephone number, and mailing address; (b) a clear and unequivocal statement that the Settlement Class Member wishes to be excluded from the Settlement Class; (c) the case name and

[3] "Effective Date" means the date on which all of the following events have occurred: (a) the Court has entered both the Final Order and the Judgment, and (b) either: (i) the time to appeal from the Judgment or any orders entered in connection with that Judgment has expired and no appeal has been taken; or (ii) if a timely appeal of the Judgment or any orders entered in connection with that Judgment is taken, the date on which the Judgment or any orders entered in connection with that Judgment is no longer subject to further direct appellate review if the Judgment or any orders entered in connection with that Judgment have not been reversed in any way. Agreement § 1.10.

number; and (d) the Settlement Class Member's signature or digital signature or affirmation, or the like signature or affirmation of an individual authorized to act on the Settlement Class Member's behalf. *Id*. If more than 25 Settlement Class Members submit valid and timely requests for exclusion, Chase may terminate the Settlement within 10 days after receiving notice. Agreement § 4.6.

(8) *Objections*

Settlement Class Members may object to the proposed Settlement by filing or sending the Court a written objection that is postmarked or filed no later than 60 days after the Notice Date (the "Exclusion/Objection Deadline"). Agreement § 4.7. To be effective, an objection must: (a) include the case name and case number; (b) contain the full name, mailing address, and telephone number of the Settlement Class Member objecting to the Settlement (the "Objector"); (c) include the Objector's signature or the signature of an individual authorized to act on his or her behalf; (d) state with specificity the grounds for the objection; (e) state whether the objection applies only to the Objector, to a specific subset of the class, or to the entire class; (f) contain the name, address, bar number and telephone number of counsel for the Objector, if represented or counseled in any degree by an attorney in connection with the objection; and (g) state whether the Objector intends to appear at the Final Approval Hearing, either in person or through counsel. *Id.* If the Objector or his or her attorney intends to call witnesses or present evidence at the Final Approval Hearing, the objection must also contain: (a) a list identifying all witnesses whom the Objector may call at the Final Approval Hearing and providing all known addresses and phone number for each witness, together with a reasonably detailed report of the testimony the witness will offer at the hearing; and (b) a detailed description of all other evidence the Objector will offer at the Final Approval Hearing, including copies of any and all exhibits which the Objector may introduce at the Final Approval Hearing. *Id.*

(9) *Post-Distribution Accounting*

Within 21 days after the final distribution of the settlement funds and payment of attorneys' fees, Plaintiff's counsel shall file a Post-Distribution Accounting in accordance with

the Procedural Guidance for Class Action Settlements and post it to the Settlement Website. Agreement § 4.12.

(10) *Class Action Fairness Act*

CAFA notice is required under 28 U.S.C. § 1715 and will be provided by the Settlement Administrator within 10 days of the filing of the motion for preliminary approval. Agreement § 2.2(a).

(11) *Past Distributions*

Plaintiff's counsel's most similar prior class action settlement is *Bottoni v. Sallie Mae*, No. C 10-03602 LB, 2013 WL 12312794 (N.D. Cal. 2013), which also included consumer claims for statutory damages against a creditor. Valerian Decl. ¶ 19. In *Bottoni*, class members received $1,026,594 cash and an estimated $76 million in debt reduction, notice was sent to all 40,416 class members, notice was sent by email with a copy by U.S. mail to each class member that did not have an email address or had an email returned as undeliverable, claim forms were not required, the average class member received approximately $25 cash and an estimated $1,880 in debt relief, $292,226.37 was distributed to the *cy pres* recipient Operation HOPE, administrative costs were $72,149.03, attorneys fees were $1,200,000, and costs were $28,959. *Id*.

3. Argument

"A class action settlement must be fair, adequate, and reasonable." *Uschold v. NSMG Shared Services, LLC*, No. CV 18-01039 JSC, 2019 WL 4963261, at *5 (N.D. Cal. Oct. 8, 2019) (citing Fed. R. Civ. P. 23(e)(2)). "Where, as here, parties reach an agreement before class certification, 'courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.'" *Id.* (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003)). "If the court preliminarily certifies the class and finds the settlement appropriate after 'a preliminary fairness evaluation,' then the class will be notified, and a final fairness hearing scheduled to determine if the settlement is fair, adequate, and reasonable pursuant to Rule 23." *Id*. (quoting *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *5 (N.D. Cal. Nov. 21, 2012)).

A. The proposed Settlement Class satisfies the requirements for certification.

Class actions must meet the following requirements for certification:

> (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. P. 23(a). "In addition to meeting the requirements of Rule 23(a), a putative class action must also meet one of the conditions outlined in Rule 23(b)—as relevant here, the condition that '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.'" *Uschold*, 2019 WL 4963261, at *5 (quoting Fed. R. Civ. P. 23(b)(3)). "Prior to certifying the class, the Court must determine that Plaintiff[] ha[s] satisfied [his] burden of demonstrating that the proposed class satisfies each element of Rule 23." *Id.*

(1) *Rule 23(a)'s requirements are satisfied.*

The Rule 23(a) factors are satisfied. First, the putative class size is estimated at 18,183 persons, which satisfies the numerosity requirement. Agreement § 4.11.

Second, the commonality requirement is satisfied because this action presents common questions of law and fact, including, *inter alia*: (1) whether Chase's explanation for its adverse actions constitutes a "specific" reason under ECOA's notice provision; (2) whether punitive damages should be awarded under ECOA; (3) whether class members are "applicants" under ECOA; (4) whether Chase is a creditor under ECOA; and (5) whether Chase's credit denials and terminations constitute "adverse actions" under ECOA.

Third, the typicality requirement is similarly satisfied because Chase treated Plaintiff and all class members in the same way, and thus, Plaintiff and all class members suffered the same or similar injury. *Uschold*, 2019 WL 4963261, at *5 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("The test of typicality is 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."))

Fourth, Plaintiff Jeffrey Chen and class counsel are adequate representatives of the class. Mr. Chen is a Settlement Class Member and was injured by the same course of conduct common to all Settlement Class Members, thus his interest in this litigation is aligned with that of the class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594-95 (1997) ("Representatives must be part of the class and possess the same interest and suffer the same injury as the class they seek to represent."). Counsel for Plaintiff are competent and experienced in class action litigation and consumer protection litigation. Valerian Dec. ¶¶ 13-18.

(2) *Rule 23(b)(3)'s requirements are satisfied.*

As previously discussed, "[t]o qualify for certification under Rule 23(b)(3), a class must satisfy two conditions in addition to the Rule 23(a) prerequisites: common questions must 'predominate over any questions affecting only individual members,' and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 537 (N.D. Cal. 2012) (quoting Fed. R. Civ. P. 23(b)(3)). There are no predominance or superiority concerns because the challenged policies are common to all Settlement Class Members.

(a) *Common questions predominate over any questions affecting only individual class members.*

"The predominance inquiry focuses on the relationship between the common and individual issues and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (citation and quotation marks omitted). The core common questions in this case—whether Chase's explanation for its adverse actions constitutes a "specific" reason under ECOA's notice provision and whether punitive damages should be awarded—predominate over any differences between class members, so common questions of law and fact predominate.

(b) *A class action is the superior means to adjudicate this dispute.*

A class action is a superior means of adjudicating a dispute "[w]here classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino*, 97 F.3d

at 1234. In evaluating superiority, "courts consider the interests of the individual members in controlling their own litigation, the desirability of concentrating the litigation in the particular forum, and the manageability of the class action." *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 514 (N.D. Cal. 2007), modified, 2007 WL 2220972 (N.D. Cal. Aug. 1, 2007), aff'd sub nom., *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137 (9th Cir. 2009).

Members of the proposed Settlement Class do not have a strong interest in individual litigation given the relatively low value of their individual claims. *See Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (evaluating superiority under Rule 23(b)(3) and noting that "the class action is superior to maintaining individual claims for a small amount of damages"). Actual damages caused by Chase's failure to provide the specific reason(s) for its adverse actions would be difficult to prove. Punitive damages in individual actions are capped at $10,000 (15 U.S.C. § 1691e(b)) and require a showing of recklessness. *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982). Class Members' claims are also highly uniform so they can be resolved much more efficiently on a class basis than through thousands of individual actions.

B. The proposed Settlement satisfies the criteria for preliminary approval.

In determining whether a settlement agreement is fair, adequate, and reasonable to all concerned, courts generally consider the following factors:

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

In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). However, when "a settlement agreement is negotiated prior to formal class certification, consideration of these eight ... factors alone is" insufficient. *Id.* In such cases, courts must not only consider the above factors, but also ensure that the settlement did not result from collusion among the parties. *Id.* at 947. Because

collusion "may not always be evident on the face of a settlement, ...[courts] must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* In *Bluetooth*, the court identified three such signs:

> (1) when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded;
>
> (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class; and
>
> (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.

Id. (internal quotation marks and citations omitted).

The Court cannot, however, fully assess such factors until after the final approval hearing; thus, "a full fairness analysis is unnecessary at this stage." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008) (internal quotation marks and citation omitted). At the preliminary approval stage, "the settlement need only be potentially fair." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. May 31, 2007). Preliminary approval is thus appropriate if "the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and citation omitted).

(1) ***The fairness factors support preliminary approval of the Settlement.***

(a) *The Settlement was the product of serious, informed, noncollusive negotiations.*

The first factor concerns "the means by which the parties arrived at settlement." *Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011). To approve a proposed settlement, a court must be satisfied that the parties "have engaged in

sufficient investigation of the facts to enable the court to intelligently make...an appraisal of the settlement." *Acosta*, 243 F.R.D. at 396. Courts thus have "an obligation to evaluate the scope and effectiveness of the investigation plaintiffs' counsel conducted prior to reaching an agreement." *Id*. The use of a mediator and the presence of discovery "support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement." *Villegas*, 2012 WL 5878390, at *6.

The Settlement was reached following arm's-length negotiations presided over by an experienced mediator and retired magistrate judge Wayne D. Brazil. Likewise, the parties were "armed with sufficient information about the case to have been able to reasonably assess its strengths and value." *Acosta*, 243 F.R.D. at 396. This case turns primarily on the content of identical form letters, so knowing the number of letter recipients, which Chase provided, enabled the parties to reasonably assess its strengths and value. Valerian Dec. ¶ 6. Further, the parties were represented by experienced counsel during the course of settlement negotiations, which supports the fairness of the settlement. *See Hanlon*, 150 F.3d at 1026.

(b) *The Settlement has no obvious deficiencies*

"The Court next considers 'whether there are obvious deficiencies in the Settlement Agreement.'" *Schuchardt v. Law Office of Rory W. Clark*, No. 15-cv-01329-JSC, 2016 WL 232435, at *9 (N.D. Cal. Jan. 20, 2016).

The first *Bluetooth* factor—whether class counsel receives a disproportionate distribution of the settlement, or the class receives no monetary distribution but counsel is amply rewarded—is absent or minimal here. *Bluetooth*, 654 F.3d at 947. Chase has agreed to pay a total of up to $429,659 to settle this case, which is the sum of the Settlement Class Consideration and the maximum potential award of attorneys' fees and costs. The amount of attorneys' fees and costs Chase agreed not to contest—$185,000—represents 43.1% of this amount with attorneys' fees representing approximately 41% of this amount.[4] While 41% exceeds the Ninth Circuit's 25% benchmark, it is much lower than the 83.2% at issue in *Bluetooth*. *See Shvager v. ViaSat, Inc.*, No. 12-10180 MMM (PJWx), 2014 WL 12585790, at *13 (C.D. Cal., 2014) (request for

[4] Plaintiff's counsel's costs are presently at $7,685, so an award of $185,000 in attorneys' fees and costs would amount to a fee award of $177,315. Valerian Decl. ¶ 21.

attorneys' fees and costs amounting to 41.1% of common fund was significantly lower than the 83.2% at issue in *Bluetooth* and did not suggest collusion). Moreover, the five-year prohibition on Chase engaging in the challenged conduct constitutes a central component of the relief obtained, which cannot be easily monetized, so focusing only on monetary consideration would substantially undervalue the results achieved. *See, e.g., Bluetooth*, 654 F.3d at 941 ("The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes ... where the relief sought – and obtained – is often primarily injunctive in nature and thus not easily monetized."); *Relente v. Viator, Inc.*, 2015 WL 3613713, at *3 (N.D. Cal. 2015) (rejecting percentage-of-recovery method where plaintiff achieved injunctive relief halting defendant's wrongful conduct in a consumer class action because it ignores the value of the injunction).

"The second sign of collusion is whether the parties' agreement contains a 'clear sailing' agreement, which '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.'" *Schuchardt*, 2016 WL 232435, at *9 (N.D. Cal. 2016) (quoting *In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 458 (C.D. Cal. Jan. 17, 2014)). There is no such agreement between the parties, so this factor does not apply.

The third *Bluetooth* factor—whether "the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund" (*Bluetooth*, 654 F.3d at 948)—is present. The Settlement Class Consideration is not reversionary, but the award of attorneys' fees and costs will be paid separately from that fund. Agreement § 3.4(a).

Notwithstanding the presence of a *Bluetooth* factor, the Settlement did not result from collusion. As discussed below, the Settlement provides fair compensation to Settlement Class Members given the value of their claims and the fees and costs Plaintiff's counsel intend to apply for are reasonable. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 895 F.3d 597, 611 (9th Cir. 2018) ("[f]or all these factors, considerations, 'subtle signs,' and red flags, ... the underlying question remains this: Is the settlement fair?"). Moreover, the Settlement is the outcome an arms-length negotiation conducted with the help of

an experienced mediator. Valerian Decl. ¶¶ 6-9; *Satchell v. Fed. Exp. Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.") Accordingly, there are no obvious deficiencies supporting the denial of preliminary approval.[5]

(c) *The Settlement does not improperly grant preferential treatment to the Settlement Class Representative or segments of the Settlement Class.*

Under this factor, "the Court examines whether the Settlement [Agreement] provides preferential treatment to any class member." *Villegas*, 2012 WL 5878390, at *7. Here, each Settlement Class Member that submits a valid claim will receive a *pro rata* share of the Net Settlement Class Consideration, so each Settlement Class Member is treated equally. Agreement § 4.10(b). Plaintiff will seek a $5,000 incentive award, however, "the Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable." *Harris*, 2011 WL 1627973, at *9 (citing *Staton*, 327 F.3d at 977).

(d) *The Settlement falls within the range of possible approval.*

"In determining whether the Settlement Agreement 'falls within the range of possible approval,' the Court must focus on 'substantive fairness and adequacy' and 'consider [P]laintiffs' expected recovery balanced against the value of the settlement offer.'" *Uschold*, 2019 WL 4963261, at *5 (N.D. Cal. Oct. 8, 2019) (quoting *Tableware*, 484 F. Supp. 2d at 1080). "[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts only to a fraction of the potential recovery that might be available to class members at trial." *Nat'l Rural*

[5] *See, e.g.*, *Bluetooth*, 654 F.3d at 950 (noting that the district court may find the settlement reasonable notwithstanding the presence of all three *Bluetooth* factors); *Dashnaw v. New Balance Athletics, Inc.*, No. 17cv159-L(JLB) 2019 WL 3413444, at *6 (S.D. Cal., 2019) (granting final approval of consumer class action settlement where defendant agreed to pay up to $650,000 in attorneys' fees and costs on a $1.4 million settlement and three *Bluetooth* factors applied); *Shvager*, 2014 WL 12585790, at *13 (granting final approval of consumer class action settlement where defendant agreed to pay up to $150,000 in attorneys' fees and costs on a $365,000 settlement and two *Bluetooth* factors applied); *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 687 (N.D. Cal. 2016) (granting final approval of consumer class action settlement where two *Bluetooth* factors applied because the it adequately satisfied class members' claims

Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 527 (C.D. Cal. 2004).

Chase's potential liability on Settlement Class Members' punitive damages claims is capped at $500,000 under 15 U.S.C. § 1691e(b). The projected Net Settlement Class Consideration of $189,557 amounts to approximately 38% of this potential recovery. This represents a fair and adequate recovery in light of the risks and costs of continued litigation, including the following.

First, the Court or a jury could find that Chase did not act in reckless disregard of ECOA as required for an award of punitive damage. "Although the word 'shall' is used, § 1691e(b) does not require an award of punitive damages for every violation of the Act." *Anderson*, 666 F.2d at 1278. Instead, "punitive damages may be awarded pursuant to § 1691e(b) if (1) the creditor wantonly, maliciously or oppressively discriminates against an applicant, or (2) the creditor acts in 'reckless disregard of the requirements of the law', even though there was no specific intention to discriminate on unlawful grounds." *Id*. "This determination is to be made by considering all the relevant factors, particularly those listed in s 1691e(b) itself." *Id*. Discrimination is not at issue, so Plaintiff would likely need to prove Chase acted in reckless disregard of ECOA's specificity requirement to recover punitive damages.

A defendant acts in reckless disregard of the law if its action "is not only a violation under a reasonable reading of the statute, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 69-70 (2007) (holding that defendant's interpretation of the Fair Credit Reporting Act was incorrect, but not objectively unreasonable, and thus fell "well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability.") While Plaintiff contends ECOA's text and implementing regulations unambiguously foreclose Chase's contention that "previous unsatisfactory relationship with this bank" constitutes a specific reason, there is a significant risk that the Court, an appellate court, or a jury could find that Chase's conduct was not reckless, which would likely preclude an award of punitive damages. Absent a punitive damage award, the class would not be entitled to any monetary relief.

Second, Chase contends that whether an ECOA adverse action notice is sufficiently specific and whether an applicant is aggrieved must be determined in light of the recipient's knowledge. Were Chase's view to prevail, it could preclude Plaintiff from demonstrating statutory standing, render Chase's adverse action notice adequate as to some class members, and raise individualized issues that could preclude class certification.

Third, resolving this case through trial would entail significant discovery and motion practice, including summary judgment and class certification motions. Given the $500,000 punitive damages cap, both sides' fees and costs could easily exceed the amount at stake. These considerations weigh in favor of settlement. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); *Curtis–Bauer v. Morgan Stanley & Co.*, 06–C–3903 TEH, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

Given these risks and potential costs, it is Plaintiff's counsels' informed opinion that settlement at this juncture is in the best interests of the Settlement Class. Valerian Decl. ¶ 9.

C. The proposed class notice is the best practicable.

For any class certified under Rule 23(b)(3), class members must be afforded "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Such notice must clearly state the following:

> (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).

Fed. R. Civ. P. 23(c)(2)(B). "Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill.*, 361 F.3d at 575 (internal quotations omitted).

The notice requirements under Rule 23(c)(2)(B) are met. The Notice describes the allegations and claims in plain language, defines a class member, includes contact information for Plaintiff's counsel and the Settlement Administrator, and summarizes the Settlement amounts and their distribution. Agreement Exh. D at 1-2, 5. The Notice further describes the options available to Class Members, including instructions for opting out of the Settlement and filing an objection. *Id.* at 2-3. It also informs Settlement Class Members that remaining in the Settlement will release certain claims against certain parties and describers the scope of the release. *Id.* at 3-4. The Notice informs class members that they may appear at the final fairness hearing in person or through an attorney. *Id.* at 2, 3, 5. Finally, it directs Settlement Class Members to the Settlement Website, Plaintiff's counsel, and the Settlement Administrator for additional information and to PACER or the Clerk's office as an alternative means to access case documents. *Id.* at 5.

The notice plan is also adequate. The Settlement Administrator will email the Notice to all Settlement Class Members who have an email address on file with Chase and mail the Notice (using reasonable and customary procedures for address updating using public records) to all Settlement Class Members who do not have a current and valid email address on file with Chase or do not open their email notice within seven days of receipt. Agreement § 4.2. Further, the Settlement Administrator will maintain a Settlement Website that contains the Notice and enables Settlement Class Members to submit a Claim Form. *Id.* § 4.2(a). Class Members shall have 60 days from the Notice Date to submit a claim form, opt out of the Settlement, or object to the Settlement. *Id.* §§ 4.3(b), 4.4, 4.7. At least 35 days before the Claims Submission Deadline, Plaintiff's counsel will file a motion for attorneys' fees and costs and a Class Representative Incentive Award, which will be posted to the Settlement Website within one day of its filing. *Id.* § 3.4(a).

D. The attorneys' fees and costs Plaintiff's counsel intend to request are reasonable.

Rule 23(h) provides for an award of attorneys' fees and costs in a certified class action where it is "authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). ECOA authorizes an award of attorneys' fees and costs in a successful action and the Agreement provides for Chase to pay an award of attorneys' fees and costs of up to $185,000. 15 U.S.C. § 1691e(d); Agreement § 3.4. However, "courts 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." *Bluetooth*, 654 F.3d at 941.

Plaintiff's counsel intends to seek an award of $185,000 in attorneys' fees and costs with fees requested under the lodestar method. As of November 18, 2019, Plaintiff's counsel's lodestar was $203,558 as shown in the following table.

Timekeeper	Firm	Position	Hourly Rate	Hours	Lodestar
Ray Gallo	Gallo LLP	Partner	$750	23.8	$17,850
Dominic Valerian	Gallo LLP	Partner	$550	203.8	$112,090
Alexander Darr	Darr Law	Partner	$475	142.1	$67,498
Marc van Anda	Gallo LLP	Paralegal	$225	27.2	$6,120
Total				**396.9**	**$203,558**

Valerian Decl. ¶ 20. Plaintiff's counsel's costs are presently at $7,685, so an award of $185,000 in attorneys' fees and costs would amount to a fee award of $177,315. *Id.* ¶ 21. Given Plaintiff's counsel's current lodestar, a fee award of $177,315 would represent a negative multiplier of .87. Fees and costs will increase through final approval, so the requested multiplier will be lower.

4. Conclusion

In light of the forgoing, Plaintiff respectfully requests that the Court grant the motion for preliminary approval of the class action settlement and certify the proposed class.

DATED: November 22, 2019

RESPECTFULLY SUBMITTED,

GALLO LLP
DARR LAW LLC

By: /s/ *Dominic Valerian*
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