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20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 SAN FRANCISCO DIVISION

23 JEFFREY CHEN,

24 Plaintiff,

25 v.

26 CHASE BANK USA, N.A., and DOES 1-  
27 100,

28 Defendants.

Case No. 3:19-cv-01082-JSC

**PLAINTIFF’S MOTION FOR FINAL  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

Date: June 25, 2020

Time: 9:00 AM

Judge: Hon. Jacqueline Scott Corley

Courtroom: E-15th Floor

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on June 25, 2020, at 9:00 AM, before the Hon. Jacqueline Scott Corley, in Courtroom E, 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 will and hereby does move the pursuant to Federal Rule of Civil Procedure 23(e) for an order: (1) granting final approval of the Settlement, (2) granting final certification of the Settlement Class for settlement purposes only, (3) entering final judgment, and (4) granting any other and further relief that the Court deems just and proper.

This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the Joint Declaration of Plaintiff’s Counsel and the Declaration of Jeanne Chernila (of KCC Class Action Services, LLC, Settlement Administrator) filed herewith, the record in this case, and any additional argument or evidence the Court may consider.

DATED: May 21, 2020

**RESPECTFULLY SUBMITTED,**

**GALLO LLP  
DARR LAW LLC  
VALERIAN LAW, P.C.**

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**1. Introduction**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Jeffrey Chen requests final approval of the Settlement he has reached with Defendant Chase Bank USA, N.A. now known as JPMorgan Chase Bank, N.A. (“Chase”) to resolve this lawsuit.<sup>1</sup> On January 16, 2020, the Court granted preliminarily approval of the proposed Settlement, provisionally certified the Settlement Class for settlement purposes, directed notice to the class, and scheduled a final approval hearing for June 25, 2020. (Dkt. No. 52.) Since then, the notice plan approved by the Court has been fully implemented by Kurtzman Carson Consultants LLC (“KCC”), the Settlement Administrator. The proposed Settlement has been well received by the Settlement Class. To date, out of 18,173 Settlement Class Members, 2,963 (16.3%) submitted valid claims, only ten requested exclusion, and none filed objections. As demonstrated herein, the Settlement is fair, reasonable, and adequate and merits final approval by the Court.

**2. Background<sup>2</sup>**

Plaintiff filed his Motion for Preliminary Approval on November 22, 2019 and the Court heard the matter on December 12, 2019. (Dkt. Nos. 43, 45.) At the preliminary approval hearing, the Court requested several revisions to the settlement agreement and expressed concern with the cost of settlement administration. Joint Decl. of Pl.’s Counsel in Supp. Pl.’s Mot. for Final Approval (“Joint Decl. re Final Approval”) ¶ 8. On January 13, 2020, based on the Court’s guidance at the preliminary approval hearing, Plaintiff submitted a revised Class Action Settlement Agreement and Release (the “Agreement”) (Dkt. No. 51, Exh. 1), a revised Notice (*id.* at 49), and a summary of an updated administration bid from KCC (Dkt. No. 51 ¶ 9). On January 16, 2020, having considered Plaintiff’s supplemental submission, the Court granted preliminary

<sup>1</sup> Unless otherwise noted, capitalized terms have the meaning ascribed to them in the Class Action Settlement Agreement and Release (Dkt. No. 51, Exh. 1).

<sup>2</sup> The prior background of this action and the Settlement is detailed in the Preliminary Approval Motion (Dkt. No. 43) and Motion for an Award of Attorneys’ Fees and Costs and Class Representative Incentive Award. (Dkt. No. 53) so it is not repeated here. *See* Northern District’s Guidelines (“If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions.”).

1 approval of the Settlement and scheduled the final approval hearing. (Dkt. No. 52.) On March 24,  
2 2020, Plaintiff filed his Motion for an Award of Attorneys' Fees and Costs and Class  
3 Representative Incentive Award seeking attorneys' fees of \$176,473.93, costs of \$8,526.07, and a  
4 \$5,000 Class Representative Incentive Award. (Dkt. No. 53.) That motion is noticed for the same  
5 date as the final approval hearing. (*Id.*)

### 6 **3. Class Notice and Claims Administration**

#### 7 **A. CAFA Notice**

8 Pursuant to requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715,  
9 on November 26, 2019, four days after the Preliminary Approval Motion was filed, KCC caused  
10 notices of the proposed settlement containing the materials required by §1715(b) to be mailed to  
11 the U.S. Attorney General, the Attorneys General of each of the 50 States and the District of  
12 Columbia, the Attorneys General of the 5 recognized U.S. Territories, the Office of the  
13 Comptroller of the Currency for the United States, and the Consumer Finance Protection Bureau.  
14 Decl. of Jeanne Chernila re: Settlement Administration ("Chernila Decl.") ¶¶ 2-3, Exhs. A, B. On  
15 January 17, 2020, soon after the revised Class Action Settlement Agreement and Release was  
16 filed, KCC caused amended notices of the proposed Settlement to be mailed to the  
17 aforementioned officials. Chernila Decl. ¶¶ 4-5, Exhs. B, C.

#### 18 **B. Implementation of the Notice Plan**

19 KCC has fully implemented the notice plan approved by the Court.

20 On January 24, 2020, Chase provided KCC with a Class List of 18,183 persons containing  
21 names, addresses, and email addresses. Chernila Decl. ¶ 7. KCC removed duplicate records and  
22 processed the names and addresses through the National Change of Address Database resulting in  
23 2,903 updated addresses and a list of 18,173 unique individuals. *Id.*

24 On February 28, 2020, KCC caused the Notice to be emailed to the 17,926 Settlement  
25 Class Members for whom Chase provided an email address. Chernila Decl. ¶ 8. A copy of the e-  
26 mail Notice sent to the Class is attached as Exhibit D to the Chernila Declaration. *Id.* The same  
27 day, KCC caused the Notice and Claim Form (the "Notice Packet") to be mailed to the 247  
28 Settlement Class Members without an email address. Chernila Decl. ¶ 9. A copy of the Notice

1 Packet is attached as Exhibit E to the Chernila Declaration. *Id.*

2 1,557 Settlement Class Members' email notifications were deemed undeliverable or  
3 "bounced." Chernila Decl. ¶ 10. KCC caused the Notice Packet to be mailed to these Settlement  
4 Class Members on March 6, 2020. *Id.* 13,557 e-mail notifications were deemed delivered but not  
5 opened by Settlement Class Members within 7 days of receipt. *Id.* ¶ 11. On March 10, 2020, KCC  
6 caused the Notice Packet to be mailed to the 13,557 Settlement Class Members who did not open  
7 their e-mail notifications within 7 days. *Id.*

8 KCC received 191 Notice Packets returned by the USPS with complete forwarding  
9 addresses and promptly caused them to be re-mailed to the forwarding address. Chernila Decl.  
10 ¶ 12. KCC received 1,832 Notice Packets returned by the USPS with undeliverable addresses. *Id.*  
11 ¶ 13. KCC found updated addresses for 479 of the Settlement Class Members associated with the  
12 undeliverable addresses by searching credit bureau and/or other public source databases and  
13 promptly re-mailed Notice Packets to these Settlement Class Members. *Id.* 14 Settlement Class  
14 Members were not searched because they had previously contacted KCC and updated their  
15 addresses. *Id.*

16 On or about February 27, 2020, KCC established a website—www.ECOASettlement.com  
17 —dedicated to this matter to provide information to the Settlement Class Members and to answer  
18 frequently asked questions. Chernila Decl. ¶ 14. Visitors of the website could download copies of  
19 the Notice, Claim Form, and other case-related documents. *Id.* Plaintiff's Motion for an Award of  
20 Attorneys' Fees and Costs and Class Representative Incentive Award was posted to the website  
21 on March 24, 2020, the day it was filed. *Id.* Visitors could also submit claims online. *Id.* As of  
22 May 6, 2020, the website had received 9,216 visits. *Id.* KCC also established a toll-free telephone  
23 number and a dedicated email address for potential Settlement Class Members to obtain  
24 information about the Settlement. *Id.* ¶¶ 15-16. KCC received 129 calls to the telephone hotline  
25 (88 of which were handled by a live operator) and 37 emails to the dedicated email address (all of  
26 which have received replies). *Id.*

27 **C. Claims and Requests for Exclusion**

28 The postmark deadline to submit claims, request exclusion, or file an objection was April



1 28, 2020. Chernila Decl. ¶¶ 17, 21, 22. Ten Settlement Class Members requested exclusion from  
2 the Settlement and no objections have been filed. *Id.* ¶¶ 21, 22. A list of the Settlement Class  
3 Members who requested exclusion is attached as Exhibit F to the Chernila Declaration. *Id.* ¶ 21.

4 To receive a payment, Settlement Class Members were required to “submit a valid Claim  
5 Form electronically through the Settlement Website or by mail to the Settlement Administrator”  
6 within 60 days after the Notice Date. (Agreement §§ 1.5, 4.3(a), 4.10(b).) The Claim Form was  
7 made available on the Settlement Website and included with mailed Notices. Chernila Decl. ¶¶ 9,  
8 14, Exh. E. To date, KCC has received 4,634 timely filed Claim Forms and 21 late Claim Forms.  
9 *Id.* ¶ 17. After excluding duplicate Claim Forms and claims submitted by persons who were not  
10 on the Class List, KCC determined that there are 2,945 valid timely claims and 18 otherwise valid  
11 late claims. *Id.* ¶¶ 18, 19. Pursuant to Section 4.3(d) of the Agreement, which authorizes the  
12 parties to determine the validity and timeliness of claims deemed invalid or untimely by the  
13 Settlement Administrator, the parties have agreed to accept the 18 otherwise valid late claims. *Id.*  
14 ¶ 19. Accordingly, out of 18,173 Settlement Class Members, 2,963 have submitted valid claims to  
15 date, which amounts to a 16.3% claims rate.

#### 16 **D. Administration Costs**

17 At preliminary approval, KCC agreed to cap administration costs at \$52,000 contingent  
18 upon no significant changes to the scope of work, a class size of 18,183 members, 95% of the  
19 class receiving email notification, mailed notification being sent to approximately 7,000  
20 Settlement Class Members, and a claims filing rate of 10%. Joint Decl. re Final Approval ¶ 9.  
21 KCC now seeks final settlement administration costs (including taxes) of \$59,242.46. Chernila  
22 Decl. ¶ 23. Final administration costs exceed the \$52,000 in administration costs that were  
23 projected at preliminary approval primarily because the roughly 16% claims rate is substantially  
24 higher than projected, individuals who are not Settlement Class Members filed 1,357 invalid  
25 claims, and Notice Packets were mailed to more than twice as many Class Members as projected.  
26 *Id.* ¶ 24.

#### 27 **E. Payments**

28 Chase agreed to pay “Settlement Class Consideration” of \$244,659 for: (1) payments to

1 the Settlement Class, (2) a Class Representative Incentive Award of up to \$5,000, and (3) Notice  
 2 and Settlement Administration Costs. (Agreement §§ 2.3, 3.2, 3.3.) The funds remaining after  
 3 deducting the Class Representative Incentive Award and Notice and Settlement Administration  
 4 Costs from the Settlement Class Consideration (the “Net Settlement Class Consideration”) will be  
 5 divided in equal shares among the Settlement Class Members who submitted a valid Claim Form.  
 6 (*Id.* § 4.10(b).) Assuming a \$5,000 Class Representative Incentive Award and Notice and  
 7 Settlement Administration Costs of \$59,242.46, the Net Settlement Class Consideration will be  
 8 \$180,416.54, yielding a payment of approximately \$60.89 per claiming Settlement Class  
 9 Member. Joint Decl. re Final Approval ¶ 13.

10       Within 15 days of the Effective Date,<sup>3</sup> Chase will deposit the Settlement Class  
 11 Consideration into an account which will be maintained as the “Court-approved Qualified  
 12 Settlement Fund.” (Agreement §§ 3.2, 4.8.) The Settlement Administrator will mail payments to  
 13 eligible Settlement Class Members within 27 days of the Effective Date. (*Id.* § 4.10(c).)

14       The checks mailed to Settlement Class Members Eligible for Cash Payment shall be valid  
 15 for 180 days after issuance. (*Id.* § 4.10(d).) If any check is returned as undeliverable, the  
 16 Settlement Administrator will make “reasonable efforts to locate the proper address for any  
 17 intended recipient” and “will re-mail it once to the updated address.” (*Id.*) For checks left  
 18 uncashed after the 180 days, a second distribution will be made to the Settlement Class Members  
 19 who cashed their initial checks if “economically feasible.” (*Id.* § 4.10(e).) If second round  
 20 distribution is not feasible, or if there are funds remaining after the “stale check date for the  
 21 second distribution,” the remaining funds will then be distributed in a “mutually agreeable  
 22 manner, subject to the approval of the Court.” (*Id.*) In no event shall any unclaimed funds revert  
 23

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24 <sup>3</sup> “Effective Date” means the date on which all of the following events have occurred: (a) the  
 25 Court has entered both the Final Order and the Judgment, and (b) either: (i) the time to appeal  
 26 from the Judgment or any orders entered in connection with that Judgment has expired and no  
 27 appeal has been taken; or (ii) if a timely appeal of the Judgment or any orders entered in  
 28 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.)

1 to Chase. (*Id.* § 4.10(f).)

2 **F. Post-Distribution Accounting**

3 Within 21 days after the final distribution of the Settlement funds and payment of  
4 attorneys' fees, Plaintiff's counsel shall file a Post-Distribution Accounting in accordance with  
5 the Procedural Guidance for Class Action Settlements and post it to the Settlement Website.  
6 (Agreement § 4.12.)

7 **4. Argument**

8 **A. Legal Standard**

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

19 "At the [final] fairness hearing, presently before the Court, after notice is given to putative  
20 class members, the Court entertains any of their objections to (1) the treatment of the litigation as  
21 a class action and/or (2) the terms of the settlement." *Ontiveros v. Zamora*, 303 F.R.D. 356, 363  
22 (E.D. Cal. 2014) (citing *Diaz v. Trust Territory of Pac. Islands*, 876 F.2d 1401, 1408 (9th Cir.  
23 1989)). Following the final fairness hearing, the Court must reach a final determination as to  
24 whether the parties should be allowed to settle the class action pursuant to their agreed upon  
25 terms. *See id.*; *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal.  
26 2004).

27 **B. Final Class Certification**

28 Final approval of a class action settlement requires, as a threshold, an assessment of

1 whether the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b).  
2 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019, 1022 (9th Cir. 1998).

3 (1) **Rule 23(a) Requirements**

4 Rule 23(a) requires that:

5 (1) the class is so numerous that joinder of all members is  
6 impracticable; (2) there are questions of law or fact common to the  
7 class; (3) the claims or defenses of the representative parties are  
8 typical of the claims or defenses of the class; and (4) the  
9 representative parties will fairly and adequately protect the interests  
10 of the class.

11 Fed. R. Civ. P. 23(a). In the Court’s Order granting preliminary approval of the Settlement, the  
12 Court found that the putative class satisfied the numerosity, commonality, typicality, and  
13 adequacy of representation requirements of Rule 23(a). (Dkt. No. 52 at 7-8.) There have been no  
14 developments that would alter that analysis, so the Court should find that all four of Rule 23(a)’s  
15 requirements have been met.

16 (2) **Rule 23(b) Requirements**

17 In addition to meeting the requirements of Rule 23(a), a potential class must also meet one  
18 of the conditions outlined in Rule 23(b)—of relevance here, the condition that “the court finds  
19 that the questions of law or fact common to class members predominate over any questions  
20 affecting only individual members, and that a class action is superior to other available methods  
21 for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In evaluating the  
22 proposed class, “pertinent” matters include:

23 (A) the class members' interests in individually controlling the  
24 prosecution or defense of separate actions;

25 (B) the extent and nature of any litigation concerning the  
26 controversy already begun by or against class members;

27 (C) the desirability or undesirability of concentrating the litigation  
28 of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). In its Order granting preliminary approval of the Settlement, the Court  
found that both prerequisites of Rule 23(b)(3) were satisfied. (Dkt. No. 52 at 8-10.) There have  
been no developments that would alter that analysis, so the Court should find that both of Rule

1 23(b)(3)'s requirements have been met.

2 (3) **Rule 23(c)(2) Notice Requirements**

3 Finally, if the Court certifies a class under Rule 23(b)(3), it “must direct to class members  
4 the best notice that is practicable under the circumstances, including individual notice to all  
5 members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). Rule  
6 23(c)(2) governs both the form and content of a proposed notice. *See Ravens v. Iftikar*, 174  
7 F.R.D. 651, 658 (N.D. Cal. 1997). The notice must be “reasonably certain to inform the absent  
8 members of the plaintiff class,” but Rule 23 does not require actual notice. *Silber v. Mabon*, 18  
9 F.3d 1449, 1454 (9th Cir. 1994).

10 In its Order granting preliminary approval of the Settlement, the Court found that the  
11 content of the Notice, as revised, met the requirements of Rule 23(c)(2)(B). (Dkt. No. 52 at 14-  
12 15.) The Notice was sent to Settlement Class Members in the form approved by the Court (with  
13 placeholders filled in, typographical errors corrected, and minor formatting changes). *Compare*  
14 *Chernila Decl. Exhs. D and E with Dkt. No. 51 at 49*. Accordingly, the content of the Notice  
15 satisfies the requirements of Rule 23(c)(2)(B) for the reasons set forth in the preliminary approval  
16 Order.

17 The Court also previously approved the notice plan. (Dkt. No. 52 at 15.) As discussed  
18 above, KCC has fully implemented the notice plan approved by the Court, including:  
19 (1) establishing a Settlement Website containing the Notice and Claim Form, (2) emailing the  
20 Notice to all Settlement Class Members who have an email address on file with Chase, and  
21 (3) sending the Notice and Claim Form via U.S. mail to all Settlement Class Members without a  
22 current or valid email address on file and to those who did not open their email Notice within  
23 seven days. *Chernila Decl.* ¶¶ 8-11, 14. The Claim Form was made available on the Settlement  
24 Website and mailed along with the Notices sent by mail. *Id.* ¶¶ 9-14. Settlement Class Members  
25 were given 60 days from the date Notice was first sent on February 28, 2020 (*i.e.* until April 28,  
26 2020) to submit a claim, request to be excluded, or file an objection. *Id.* ¶¶ 8, 17, 21-22. Further,  
27 Plaintiff’s Motion for Attorney’s fees was filed and posted to the Settlement Website on March  
28 24, 2020—35 days before the deadline to object or opt-out of the Settlement. *Id.* ¶ 14.



1 satisfies both the *Churchill* and *Bluetooth* factors.

2 (1) ***The Settlement satisfies the Churchill factors.***

3 (a) *Strength of Plaintiff's Case and the Risk, Expense, Complexity, and Likely Duration of*  
4 *Further Litigation*

5 Courts first consider “the strength of [Plaintiff’s] case on the merits balanced against the  
6 amount offered in the settlement.” See *DIRECTV, Inc.*, 221 F.R.D. at 526 (internal quotation  
7 marks and citation omitted). There is no “particular formula by which th[e] outcome must be  
8 tested.” *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Rather, the court’s  
9 assessment of the likelihood of success is “nothing more than an amalgam of delicate balancing,  
10 gross approximations and rough justice.” *Id.* (internal quotation marks and citation omitted). “In  
11 reality, parties, counsel, mediators, and district judges naturally arrive at a reasonable range for  
12 settlement by considering the likelihood of a plaintiffs' or defense verdict, the potential recovery,  
13 and the chances of obtaining it, discounted to a present value.” *Id.* “In most situations, unless the  
14 settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and  
15 expensive litigation with uncertain results.” *DIRECTV, Inc.*, 221 F.R.D. at 526 (quotation marks  
16 and citation omitted).

17 Here, the Complaint alleges that Chase violated the violated ECOA’s notice provision, 15  
18 U.S.C. § 1691(d), by sending class members adverse action notices that did not include the  
19 specific reason(s) for the adverse action taken or disclose the right to a statement of those reasons.  
20 (Dkt. No. 1-1 ¶¶ 12-17, 35.) The Complaint seeks punitive damages of up to \$500,000 (the  
21 statutory cap), injunctive relief, and attorneys’ fees and costs. (*Id.* at Prayer for Relief ¶¶1-3.)  
22 While Plaintiff believes his claims are meritorious and warranted imposition of the maximum  
23 punitive damage award, continued litigation presents substantial risks and costs.

24 First, any punitive damages recovery likely requires a finding that Chase acted recklessly.  
25 See *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982) (holding that a punitive  
26 damages award under § 1691e(b) requires that the creditor “wantonly, maliciously or  
27 oppressively discriminates” or acts in “reckless disregard of the requirements of the law”). While  
28 Plaintiff contends ECOA’s text and implementing regulations unambiguously foreclose Chase’s

1 contention that “previous unsatisfactory relationship with this bank” constitutes a specific reason,  
2 ECOA’s specificity requirement is not “black and white” and is the subject of little caselaw, so a  
3 court or jury might be reluctant to find recklessness. *See, e.g., Safeco Ins. Co. of Am. v. Burr*, 551  
4 U.S. 47, 69-70 (2007) (holding that defendant’s interpretation of the Fair Credit Reporting Act  
5 was incorrect, but not objectively unreasonable, and thus fell “well short of raising the  
6 ‘unjustifiably high risk’ of violating the statute necessary for reckless liability.”) Absent a  
7 punitive damage award, the class would not obtain a monetary recovery.

8 Second, Chase contends that whether an applicant is “aggrieved” under 15 U.S.C. §  
9 1691e(a) and whether a statement of reasons is “specific” under 15 U.S.C. § 1691(d) should be  
10 determined based on the applicant’s unique knowledge or other individualized circumstances.  
11 There is little precedent on whether an objective or subjective standard governs these inquiries  
12 under ECOA. Were Chase’s view to prevail, it could preclude Plaintiff and other class members  
13 from demonstrating statutory or Article III standing<sup>4</sup> or raise individualized issues that could  
14 preclude class certification.

15 Third, litigating the case through trial would entail significant discovery and motion  
16 practice, including summary judgment and class certification motions, such that both sides’ fees  
17 and costs could exceed the \$500,000 cap on punitive damages.

18 Given the challenges Plaintiff would face should this case move forward instead of  
19 resolving, the first two factors weigh in favor of approving the Settlement.

20 (b) *Risks of Maintaining Class Action Status Throughout Trial*

21 In considering the third factor, courts look to the risk of maintaining class certification  
22 if the litigation were to proceed. Were litigation to proceed, Chase would likely argue that  
23 whether an applicant is “aggrieved” under 15 U.S.C. § 1691e(a), whether each class member has  
24 Article III standing, and whether a statement of reasons is “specific” under 15 U.S.C. § 1691(d),  
25 each present individualized questions that preclude class certification. While Plaintiff believes

26 \_\_\_\_\_  
27 <sup>4</sup> *See Ramirez v. Transunion LLC*, 951 F.3d 1008, 1017 (9th Cir. Feb. 27, 2020) (“every member  
28 of a class certified under Rule 23 must satisfy the basic requirements of Article III standing at the  
final stage of a money damages suit when class members are to be awarded individual monetary  
damage”).



1 that each of these issues present common questions, the risk a court could find otherwise supports  
2 approval of the Settlement.

3 (c) *The Settlement Amount*

4 The fourth fairness factor, the amount of recovery offered, also favors final approval of  
5 the Settlement Agreement. This factor “is generally considered the most important, because the  
6 critical component of any settlement is the amount of relief obtained by the class.” *Bayat v. Bank*  
7 *of the W.*, No. C-13-2376 EMC, 2015 WL 1744342, at \*4 (N.D. Cal. Apr. 15, 2015) (citation  
8 omitted). When considering the fairness and adequacy of the amount offered in settlement, “it is  
9 the complete package taken as a whole, rather than the individual component parts, that must be  
10 examined for overall fairness.” *DIRECTV, Inc.*, 221 F.R.D. at 527 (citation omitted). “[I]t is well-  
11 settled law that a proposed settlement may be acceptable even though it amounts to only a  
12 fraction of the potential recovery that might be available to the class members at trial.” *Id.*  
13 (collecting cases).

14 Under 15 U.S.C. § 1691e(b), Chase’s potential liability on class members’ punitive  
15 damages claims is capped at \$500,000. At preliminary approval, Plaintiff’s counsel projected Net  
16 Settlement Class Consideration of \$187,659, which amounts to approximately 38% of Settlement  
17 Class Members potential recovery.<sup>5</sup> (Dkt. No. 52 at 13.) Due to the higher than anticipated  
18 administration costs, Net Settlement Class Consideration is now projected at \$180,416.54,  
19 representing approximately 36% of Settlement Class Members’ potential recovery. Joint Decl. re  
20 Final Approval ¶ 13. Although less than previously estimated, the projected Net Settlement Class  
21 Consideration remains fair, reasonable, and adequate in light of Chase’s maximum damages  
22 exposure and the litigation risks. *See Rodriguez*, 563 F.3d at 964 (antitrust settlement providing  
23 30% of estimated damages was fair and reasonable in antitrust action); *In re Anthem, Inc. Data*  
24 *Breach Litig.*, 327 F.R.D. 299, 319 (N.D. Cal. 2018) (data breach settlement providing  
25 approximately 14.5% of the class’s projected recovery was fair and reasonable); *see also Linney*

26 \_\_\_\_\_  
27 <sup>5</sup> Net Settlement Class Consideration was projected at \$189,557 in the Motion for Preliminary  
28 Approval but projected Net Settlement Class Consideration had decreased to \$187,659 by the  
time of preliminary approval because projected administration costs increased from \$50,102 to  
\$52,000.

1 v. *Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (noting that a settlement may be  
2 adequate even if it “amount[s] to a fraction of the potential recovery”).

3 Further, in addition to the monetary component, the Settlement provides for meaningful  
4 injunctive relief that should put an end to the challenged conduct for at least five years and help  
5 effectuate ECOA’s purposes. (Agreement § 3.5.)

6 (d) *Extent of Discovery*

7 In the context of class action settlements, as long as the parties have sufficient information  
8 to make an informed decision about settlement, “formal discovery is not a necessary ticket to the  
9 bargaining table.” *Linney*, 151 F.3d at 1239. Rather, the court’s focus is on whether “the parties  
10 carefully investigated the claims before reaching a resolution.” *Ontiveros*, 303 F.R.D. at 371  
11 (citation omitted).

12 In preparation for the July 17 mediation before Hon. Wayne D. Brazil (Ret.), Chase  
13 informally produced records pertaining to its relationship with Mr. Chen and provided the size of  
14 the class and the number of at-issue letters it sent during the class period. Joint Decl. re Final  
15 Approval ¶ 6. This case turns primarily on the content of identical form letters, so knowing the  
16 content of the letters and number of letter recipients enabled the parties to reasonably assess its  
17 strengths and value. *Id.* The parties subsequently exchanged detailed mediation statements and  
18 participated in a full day of mediation. *Id.* Under these circumstances, the extent of discovery  
19 favors approval of the Settlement.

20 (e) *Experience and Views of Counsel*

21 The experience and views of counsel also weigh in favor of approving the Settlement.  
22 Together Plaintiff’s Counsel Ray Gallo, Dominic Valerian, and Alexander Darr, have substantial  
23 experience in litigating class actions and ECOA cases on behalf of consumers. (Dkt. No. 53-1 ¶¶  
24 33-36.) Mr. Gallo graduated from UCLA Law School in 1991, has been litigating in consumer  
25 class actions since 2004, and has been appointed as class counsel multiple times. (*Id.* ¶¶ 33-34.)  
26 Mr. Valerian graduated from USC Law School in 2005, spent four years defending complex  
27 cases, including consumer class actions, and since 2009, has focused primarily on prosecuting  
28 consumer and employment class and mass actions, including three cases where he was appointed

1 co-counsel with Mr. Gallo. (*Id.* ¶ 35.) Mr. Darr graduated from Ohio State University Law School  
2 in 2010 and after clerking and working briefly at a law firm, he founded Darr Law LLC where he  
3 prosecutes consumer protection actions. (*Id.* ¶ 36.) Mr. Darr “has pursued more than 100  
4 consumer arbitrations, many alleging claims under the Equal Credit Opportunity Act.” (*Id.*)

5 Based on their experience, their familiarity with the factual and legal issues in this case,  
6 the novelty of multiple legal questions in this case, the risk, delay, and uncertainty of continued  
7 litigation, the maximum potential monetary recovery, and the significant relief obtained,  
8 Plaintiff’s Counsel believe the Settlement is fair, reasonable, and adequate. Joint Decl. re Final  
9 Approval ¶ 16. Given counsel’s experience in this field, their assertion that the Settlement is fair,  
10 adequate, and reasonable supports final approval of the Settlement. *See Hanlon*, 150 F.3d at 1026;  
11 *see also DIRECTV, Inc.*, 221 F.R.D. at 528 (“Great weight is accorded to the recommendation of  
12 counsel, who are most closely acquainted with the facts of the underlying litigation.”) (internal  
13 quotation marks and citation omitted).

14 (f) *Presence of a Government Participant*

15 Although no government entity is a party to this action, because this action was brought  
16 under the Class Action Fairness Act, 28 U.S.C. § 1715, Chase was required to provide notice to  
17 the relevant state and federal officials under 28 U.S.C. § 1715(b). As set forth above, KCC  
18 provided notice of the revised Settlement to the relevant authorities in accordance with Section  
19 1715(b) on January 17, 2020. Chernila Decl. ¶¶ 4-5, Exhs. B, C. Final approval of the Settlement  
20 would thus follow service of the CAFA notice by more than 90 days as required by Section  
21 1715(d). None of the officials sent the CAFA notice have objected to the Settlement. Chernila  
22 Decl. ¶ 6.

23 (g) *Reaction of Settlement Class Members*

24 The positive reaction from Settlement Class Members weighs in favor of approval. At the  
25 time of preliminary approval, Plaintiff’s Counsel estimated a 7% claims rate based on an average  
26 claims rate of 7.37% in four similar cases involving consumer finance claims that KCC identified.  
27 (Dkt. 43 at 13.) The claims rate, however, has proven substantially higher with 2,963 valid  
28 claims, representing a robust 16.3% claims rate. *See, e.g., Messineo v. Ocwen Loan Servicing*,

1 *LLC*, No. 15-cv-02076-BLF, 2017 WL 733219, at \*7 (N.D. Cal. Feb. 24, 2017) (noting that a  
 2 9.26% claims rate is higher than average for consumer class settlements and favors final  
 3 approval); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) (noting that  
 4 “higher than average claims rate of 7.7%” in TCPA settlement favored final approval); Federal  
 5 Trade Commission Staff Report, Consumers and Class Actions (Sept. 2019) at 11 (finding  
 6 median claims rate of 9% and weighted mean claims rate (*i.e.*, cases weighted by the number of  
 7 notice recipients) of 4% for direct notice recipients). In addition, there have been no objections  
 8 and only ten opt-outs. Chernila Decl. ¶¶ 21-22. “Courts have repeatedly recognized that the  
 9 absence of a large number of objections to a proposed class action settlement raises a strong  
 10 presumption that the terms of a proposed class settlement action are favorable to the class  
 11 members.” *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL  
 12 1687832, at \*14 (N.D. Cal. Apr. 22, 2010). In light of the 16.3% claims rate, the small number of  
 13 opt outs, and zero objections, this factor strongly favors approval.

14 (2) ***The Settlement satisfies the Bluetooth factors.***

15 The first *Bluetooth* factor—whether class counsel receives a disproportionate distribution  
 16 of the settlement, or the class receives no monetary distribution but counsel is amply rewarded—  
 17 is absent or minimal here. *Bluetooth*, 654 F.3d at 947. Between the Settlement Class  
 18 Consideration (\$244,659) and the maximum potential award of attorneys’ fees and costs  
 19 (\$185,000), Chase has agreed to pay a total of up to \$429,659 to settle this case. The maximum  
 20 potential award of attorneys’ fees and costs (\$185,000) represents 43.1% of this amount and the  
 21 requested attorneys’ fees (\$176,473.93) represents 41.1% of this amount.<sup>6</sup> While 41.1% exceeds  
 22 the Ninth Circuit’s 25% benchmark, it is much lower than the 83.2% at issue in *Bluetooth*. *See*  
 23 *Shvager v. ViaSat, Inc.*, No. 12-10180 MMM (PJWx), 2014 WL 12585790, at \*13 (C.D. Cal.  
 24 Mar. 10, 2014) (request for attorneys’ fees and costs amounting to 41.1% of common fund was  
 25 significantly lower than the 83.2% at issue in *Bluetooth* and did not suggest collusion). Moreover,  
 26 the five-year prohibition on Chase engaging in the challenged conduct constitutes a central

27 \_\_\_\_\_  
 28 <sup>6</sup> Plaintiff seeks attorneys’ fees and costs of \$185,000, including fees of \$176,473.93 and costs of \$8,526.07. (Dkt. No. 53.)

1 component of the relief obtained, which cannot be easily monetized, so focusing only on  
2 monetary consideration would substantially undervalue the results achieved. *See, e.g., Bluetooth*,  
3 654 F.3d at 941 (“The ‘lodestar method’ is appropriate in class actions brought under fee-shifting  
4 statutes ... where the relief sought – and obtained – is often primarily injunctive in nature and thus  
5 not easily monetized.”); *Relente v. Viator, Inc.*, No. 12-cv-05868-JD, 2015 WL 3613713, at \*3  
6 (N.D. Cal. June 9, 2015) (rejecting percentage-of-recovery method where plaintiff achieved  
7 injunctive relief halting defendant’s wrongful conduct in a consumer class action because it  
8 ignores the value of the injunction). Further, given the ECOA’s \$500,000 cap on punitive  
9 damages, attorneys’ fees will exceed the 25% benchmark in virtually every contested ECOA  
10 punitive damages class action.

11 The second sign of collusion is where the parties’ agreement contains a “clear sailing”  
12 agreement, which “is one where the party paying the fee agrees not to contest the amount to be  
13 awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling.”  
14 *Schuchardt v. Law Office of Rory W. Clark*, 2016 U.S. Dist. LEXIS 6741, at \*28 (N.D. Cal. Jan.  
15 20, 2016) (quoting *In re Toys R Us-Del., Inc.—Fair & Accurate Credit Transactions Act*  
16 *(FACTA) Litig.*, 295 F.R.D. 438, 458 (C.D. Cal. 2014)). The Agreement provides for Chase to pay  
17 attorneys’ fees and costs in an amount awarded by the Court of up to \$185,000. (Agreement §  
18 3.4(a).) It further provides for Chase to pay attorneys’ fees and costs “in addition to the  
19 Settlement Class Consideration” and states that “Chase has no present intention to oppose”  
20 Plaintiff’s motion for attorneys’ fees. *Id.* This is not a clear sailing provision as described above  
21 because Chase did not relinquish its right to contest a fee award of \$185,000 or less. But even if  
22 the Court finds a clear sailing provision present, there was no collusion as the attorneys’ fees  
23 Chase agreed to pay are reasonable and the Settlement is fair to the class.

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

28 Notwithstanding the presence of one or more *Bluetooth* factors, the Settlement did not

1 result from collusion. The Settlement provides fair compensation to Settlement Class Members  
 2 given the value of their claims and the fees and costs Plaintiff's Counsel have applied for are  
 3 reasonable. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 895  
 4 F.3d 597, 611 (9th Cir. 2018) (“[f]or all these factors, considerations, ‘subtle signs,’ and red flags,  
 5 ... the underlying question remains this: Is the settlement fair?”). Moreover, the Settlement is the  
 6 outcome of arms-length negotiations conducted with the help of an experienced mediator. Joint  
 7 Decl. re Final Approval ¶¶ 6-7; *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL  
 8 1114010, at \*4 (N.D. Cal. Apr. 13, 2007) (“The assistance of an experienced mediator in the  
 9 settlement process confirms that the settlement is non-collusive.”). Accordingly, the Court should  
 10 find that final approval is warranted under the *Bluetooth* factors.<sup>7</sup>

## 11 5. Conclusion

12 For the foregoing reasons, Plaintiff respectfully requests that the Court grant final  
 13 approval of the Settlement and enter Judgment.

14 DATED: May 21, 2020

**RESPECTFULLY SUBMITTED,**

**GALLO LLP  
 DARR LAW LLC  
 VALERIAN LAW, P.C.**

18 By: /s/ Dominic Valerian  
 19 Dominic Valerian  
 Attorneys for Plaintiff

23 <sup>7</sup> See, e.g., *Bluetooth*, 654 F.3d at 950 (noting that the district court may find the settlement  
 24 reasonable notwithstanding the presence of all three *Bluetooth* factors); *Dashnaw v. New Balance*  
 25 *Athletics, Inc.*, No. 17cv159-L(JLB) 2019 WL 3413444, at \*6 (S.D. Cal. Jul. 29, 2019) (granting  
 26 final approval of consumer class action settlement where defendant agreed to pay up to \$650,000  
 27 in attorneys' fees and costs on a \$1.4 million settlement and three *Bluetooth* factors applied);  
 28 *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).