

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	16-CV-00503 PSG (JEMx)	Date	November 20, 2017
Title	Tessa Koenig, et al v. Lime Crime, Inc.		

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Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

**Proceedings (In Chambers): The Court GRANTS the Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Class Notice**

Before the Court is Plaintiffs Tessa Koenig, Nila Cabistan, Jennie Holguin, Samantha Rex, Ana Sandez, Zena Pavia, Amirah Husbands, and Pearl Amaechi's ("Plaintiffs") renewed motion for preliminary approval of class settlement, certification of settlement class, and approval of class notice. Dkt. # 47. On July 13, 2017, the Court denied Plaintiffs' motion for preliminary approval, *see* Dkt # 46, and they now submit a new settlement proposal to address the Court's concerns. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the moving papers, the Court GRANTS the motion for preliminary approval of class settlement, certification, and notice.

I. Background

On January 21, 2016, Plaintiffs filed this class action lawsuit against Defendant Lime Crime, Inc. ("Lime Crime" or "Defendant"), alleging violations of consumer protection and data breach statutes, negligence, and breach of implied contract. *See generally* *Complaint*, Dkt. #1 ("Compl."). Plaintiffs were customers of LimeCrime.com, a website operated by Defendant that sells cosmetics products. *Id.* 8.

In February 2015, Lime Crime notified its customers that it discovered malicious software on a third-party computer server that hosted Lime Crime's website and stored personally identifiable information ("PII") of its customers. *Id.* 1. Lime Crime disclosed that between October 4, 2014 and February 2015, intruders may have accessed PII such as customer names, addresses, credit/debit card account numbers along with expiration dates, security codes, and user names and passwords to Lime Crime's website (the "Incident"). *Id.*; *see also* Ex. 2, Dkt. # 44, *Declaration of Jonathan D. Carameros* ¶ 8.

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After receiving notice of the Incident, Plaintiffs filed this action alleging that Lime Crime's failure to implement adequate security measures enabled intruders to intercept their PII and make unauthorized purchases on their credit and debit cards while putting other class members' PII at an ongoing risk of exposure and fraud. *Compl.* 1. Plaintiffs further allege that Lime Crime failed to disclose the extent of the breach or notify its customers in a timely manner. *Id.* 2.

After months of informal discovery, discussions, and negotiations, the parties mediated their dispute before the Honorable Judge David Brickner (Ret.), an experienced mediator, on August 10, 2016. *See* Dkt. # 44. As a result of these efforts, the parties reached a class-wide settlement and filed a motion for preliminary approval of the settlement. *See* Dkt. # 44, Ex. A ("Settlement Agreement"). The Court denied the motion, citing concerns with the *cy pres* recipients selected by Defendant and Lead Plaintiffs; the difficulties of the claims process for Eligible Claimants; and the benefits provided to the putative class by the injunctive relief. *See* Dkt. # 46.

Plaintiffs now move once more for preliminary approval of the proposed Settlement Agreement, conditional certification of the proposed settlement class, approval of the proposed notice to the class, and the scheduling of a hearing for final approval of the settlement and entry of judgment. *See generally Motion for Preliminary Approval of Class Settlement ("Mot.")*.

## II. Legal Standard

The approval of class action settlements is a two-step process under Federal Rule of Civil Procedure 23(e). Preliminary approval requires only that the terms of the proposed settlement fall within the "range of possible approval." *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010) ("At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members.") (internal quotation marks omitted). It amounts to a determination that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. *Manual for Complex Litigation* (Fourth) § 13.14 at 173. After notice to the class, preliminary approval is followed by a review of the fairness of the settlement at the Fairness Hearing, and, if appropriate, a finding that it is "fair, reasonable and adequate." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Because it is provisional, courts grant preliminary approval where the proposed settlement lacks "obvious deficiencies" raising doubts about the fairness of the settlement. *See, e.g., In re Vitamins Antitrust Litig.*, No. MISC 99-

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197(TFH), MDL 1285, 2001 WL 856292, at \*4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation* (Third) §30.41).

A court may approve a class action settlement “only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2). In determining whether a settlement is fair, reasonable, and adequate, the district court must “balance a number of factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026; *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is “by no means an exhaustive list of relevant considerations”).

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 (“It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.”). The Court may not delete, modify, or rewrite particular provisions of the settlement. *Id.* The district court is cognizant that the settlement “is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.” *Id.*

Furthermore, “[e]specially in the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton*, 327 F.3d. at 952. The Ninth Circuit has held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness. *See Hanlon*, 150 F.3d at 1026 (“The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court-designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e).”).

### III. Class Certification for Settlement Purposes Only

#### A. Legal Standard

Parties seeking certification of a settlement-only class must still satisfy the familiar Federal Rule of Civil Procedure 23 standards. *Hanlon*, 150 F.3d at 1019–24. To proceed as a class action under Rule 23, a plaintiff must satisfy the four prerequisites of Rule 23(a) and demonstrate that the action is maintainable under Rule 23(b)(1), (2), or (3). *See Amchem Prods.*,

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*Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997). The four prerequisites of Rule 23(a) are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Plaintiffs seek certification under Rule 23(b)(3), *see Mot.* 16, which requires 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.” Fed R. Civ. P. 23(b)(3).

Plaintiff seeks to certify a class for settlement purposes only, defined as “All persons or entities who were sent an Incident Notice.” *Mot.* 16. The Incident Notice is defined as Lime Crime’s notification of the Incident, made in writing in February 2015. *Id.* 17.

B. Discussioni. *Numerosity*

To satisfy the first prerequisite to maintain a class action under Rule 23(a), a proposed class must be “so numerous that joinder of all members would be impracticable.” Fed. R. Civ. P. 23(a)(1). Courts generally presume numerosity when there are at least forty members in the proposed class. *See Charlebois v. Angels Baseball, LP*, No. CV 10-0853 DOC (ANx), 2011 WL 2610122, at \*4 (C.D. Cal. June 30, 2011) (citations omitted); *see also Jordan v. Cty. of L.A.*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).

Here, the proposed class consists of more than 100,000 people whose personal identifiable information (“PII”) was potentially compromised. *Mot.* 17. A class of this size is sufficiently numerous to make individual joinder impracticable. Numerosity is therefore satisfied.

ii. *Commonality*

To satisfy the commonality requirement of Rule 23(a)(2), Plaintiff must establish questions of law or fact common to the class as a whole. *See Fed. R. Civ. P. 23(a)(2)*. The class claims must depend on a common contention that “is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). “What matters to class certification . . . is not the raising of common ‘questions’ – even in droves – but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.” *Id.* (internal quotation omitted). For the purposes of Rule 23(a)(2), “even a single common question” satisfies the requirement. *See id.* at 2556 (internal

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quotation omitted); *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (citing *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)).

The claims asserted here are capable of class-wide resolution. They raise common questions of law and fact, including: (1) whether Lime Crime took reasonable steps to avoid the Incident; (2) whether any potential exposure of Class Members' PII was the result of Lime Crime's failure to protect it; (3) whether Lime Crime provided sufficient and timely notice to Class Members whose PII was potentially exposed; (4) whether Lime Crime violated state consumer protection laws resulting in the Incident and/or in the timeliness with which it notified Class members; and (5) the extent of damages, if any, and the appropriate measure of damages. *Mot.* 18. The core allegation of all Class Members is that Lime Crime did not reasonably protect their PII and failed to notify them in a timely manner. *Id.* Commonality is therefore satisfied.

*iii. Typicality*

Typicality requires a showing that the named plaintiffs are members of the class they represent and that their claims are "reasonably coextensive with those of absent class members," but not necessarily "substantially identical." Fed. R. Civ. P. 23(a)(3); *Hanlon*, 150 F.3d at 1020. 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." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). The typicality and commonality requirements somewhat overlap. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Here, Lead Plaintiff's claims are typical of all other class members. Lead Plaintiffs were customers of Lime Crime and their PII was potentially exposed during the Incident; their claims derive from the same set of facts and legal theories as all Class Members. *Mot.* 19. As such, the typicality requirement is met here.

*iv. Adequacy*

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit has indicated that "[t]he proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

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In this case, there is no apparent conflict of interest between Plaintiffs and the class members. Plaintiffs and the proposed class members seek relief under identical facts and legal theories, and their interests are the same as those of other class members. *Mot.* 20. Additionally, Plaintiffs are represented by Federman & Sherwood, counsel with extensive experience in consumer class action litigation, including data breach cases like this one. *Id.* Plaintiffs have already spent a year helping Class Counsel to litigate this case on behalf of themselves and the putative class, and there is no reason to think they will not continue to vigorously assert the rights of the Class Members, which are identical to their own. *Id.* Accordingly, the adequacy requirement is satisfied.

*v. Rule 23(b)(3)*

Having concluded that Plaintiffs satisfy the Rule 23(a) factors, the Court now turns to Rule 23(b)(3). Rule 23(b)(3) provides that a class may be certified where common questions of law or fact predominate over individual questions and a class action is the superior method for adjudicating the controversy as a whole. *See* Fed. R. Civ. P. 23(b)(3). The predominance aspect specifically “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521 U.S. at 623. “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022.

Here, Plaintiffs argue that Defendant subjected every member of the class to potential exposure of their PII, and their damages, if any, flow from that Incident. *Mot.* 21. Therefore, the question of whether Lime Crime exposed Class Members’ PII and failed to timely notify them is common to the entire class, and predominates over individual issues. The Court therefore finds the Rule 23(b)(3) predominance and superiority requirements satisfied.

C. Conclusion

Plaintiff has met the requirements for class certification under Rule 23. Therefore, the Court CERTIFIES for settlement purposes only “all persons or entities who were sent an Incident Notice.”

IV. Preliminary Approval of the Proposed Class Action Settlement

The next step is to determine whether the settlement reached is “fair, reasonable, and adequate” under Rule 23(e). *See* Fed. R. Civ. P. 23(e)(2).

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A. Legal Standard

The approval of a class action settlement is a two-step process under Rule 23(e) where the court first determines whether a proposed class action settlement deserves preliminary approval. *In re Am. Apparel, Inc. S'holder Litig.*, No. CV 10-6352 MMM (CGx), 2014 WL 10212865, at \*5 (C.D. Cal. July 28, 2014). “At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members.” *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. *Manual for Complex Litigation* (Fourth) § 13.14, at 173. Preliminary approval is appropriate if “the proposed settlement appears to be the product of serious, informed, non-collusive 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.” *Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 WL 360196, at \*4 (C.D. Cal. Jan. 31, 2014); *Eddings v. Health Net, Inc.*, No. CV 10-1744 JST (RZx), 2013 WL 169895, at \*2 (C.D. Cal. Jan. 16, 2013).

After notice is given to the class, preliminary approval is followed by a review of the fairness of the settlement at a final fairness hearing, and, if appropriate, a finding that it is “fair, reasonable and adequate.” Fed R. Civ. P. 23(e)(2); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1027. In making this determination, the district court must “balance a number of factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026; *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm’n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is “by no means an exhaustive list”).

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 (“It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.”). The Court may not delete, modify, or rewrite particular provisions of the settlement. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1026. The district court is cognizant that the settlement “is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.” *Hanlon*, 150 F.3d at 1027. Because it is provisional, courts grant preliminary approval of a class action settlement

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where the proposed settlement does not disclose grounds to doubt its fairness and lacks “obvious deficiencies.” *In re Vitamins Antitrust Litig.*, No. MISC 99-0197(TFH), 2001 WL 856292, at \*4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation* (Third) § 30.41).

B. Overview of the Settlement Agreement

First, the Settlement Agreement provides for a gross settlement amount of \$110,000 (“Settlement Fund”) to be paid in consideration for the settlement and the release of any related claims as described in the Settlement Agreement. *Mot.* 3. Approximately 104,500 individuals had their website username and password potentially exposed during the Incident. *Id.* Each Eligible Claimant who submits a valid and timely claim will receive an amount up to Forty-Four Dollars (\$44). *Id.* If the aggregate value of the valid and timely claims exceeds the Settlement Fund amount, the cash payment to each Eligible Claimant will be reduced on a pro rata basis. *Id.* After all Eligible Claimants who have submitted a claim are paid, any remaining Settlement Funds will be used to pay any remaining Notice and Administration costs. *Id.* Any remaining funds will be paid to Eligible Claimants who did not submit a valid and timely claim, on a pro rata basis, so long as the cost of sending such payments does not exceed the amount to be paid to each Eligible Claimant. *Id.*

Thereafter, any remainder of the Settlement Fund will be distributed to the UC Berkeley School of Information, Center for Long-Term Cybersecurity. *Id.* 4. Its purpose is to foster research programs, technologies, and recommendations to develop a deeper understanding of technology security, and to help individuals, including Class members, avoid the impact of events such as the Incident at the heart of this litigation. *Id.*

Further, the Settlement Agreement provides that each Class Member will receive a one-time 15% discount coupon for a one-time purchase on Lime Crime’s website. *Mot.* 6. The coupon will be valid for one year. *Id.*

As for injunctive relief, the Settlement Agreement provides that Lime Crime has agreed to implement security measures to bring its systems into compliance with the Payment Card Industry Data Security Standard (“PCIDSS”), thereby creating an additional level of protection for card issuers and customers. *Id.* In addition, Lime Crime has agreed to (1) appoint a Chief Information Security Officer to coordinate security of class members’ PII; (2) perform a risk assessment to identify internal and external risks to the security of the class members’ PII for its website; (3) adjust how the class members’ payment card information is stored in light of the testing and monitoring performed as part of the new security protocols; and (4) develop and use reasonable steps to select and retain service providers capable of maintaining security practices for class members’ payment card information. *Mot.* 4–6. The estimated value of the injunctive

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relief is between \$141,200 and \$237,000, based upon rates of data security providers. *See id.* 6; Dkt. # 44-2, *Declaration of Joshua Quinn* (“Quinn Decl.”) ¶ 12. Class Counsel represents that the total recovery, then, is conservatively valued at \$366,000. *Mot.* 9.

The revised terms of the Settlement contain a streamlined and convenient method for Lime Crime customers to determine whether they are Eligible Claimants. Claimants must only state whether they received an Incident Notice; if they did, they are eligible to apply for their share of the Settlement Fund. *Id.* 3.

Finally, Lime Crime will pay attorneys’ fees, costs, expenses, and incentive awards separate from and in addition to the Settlement Fund. *Mot.* 7. The Settlement Agreement provides that Plaintiffs’ counsel shall apply for an award of attorneys’ fees, costs and expenses not to exceed \$140,000 and for incentive awards for the named Plaintiffs of up to \$1,000 each. *Id.* Administration fees will cost no more than \$31,000, and will be paid for by Lime Crime separate from the Settlement Fund. *Id.* 22.

C. Scrutiny of Settlement Agreement

i. *Fair and Honest Negotiations*

The parties indicate that the Settlement Agreement is the result of “extensive, hard-fought, arms’ length negotiations conducted by experienced counsel and aided by an experienced mediator.” *Mot.* 15. According to the motion, this process “involved face-to-face negotiations, numerous telephone meetings, and the exchange of several proposals and counter-proposals.” *Id.* The parties also mediated the case with the Honorable Judge David Brickner (Ret.), an experienced mediator. *Id.* 14. Although formal discovery had not commenced, Plaintiffs conducted informal discovery concerning the size of the potential settlement class and the nature of the Incident itself. *Settlement Agreement 5; see Glass v. UBS Fin. Servs., Inc.*, CV 06-4068 MMC, 2007 WL 221862, at \*5 (N.D. Cal. Jan. 26, 2007), *aff’d* 331 F. App’x 452 (9th Cir. 2009) (reasoning that the parties’ having undertaken informal discovery prior to settling supports approving the class action settlement) (citing *In re Mego*, 213 F.3d at 459). Lime Crime continues to deny all of the material allegations asserted in the action. *Settlement Agreement 5.*

Some courts generally presume that a Settlement Agreement is fair and reasonable if it is the result of good faith, arms’ length negotiations. *See Ross v. Trex Co., Inc.*, No. 09-cv-00670-JSW, 2013 WL 6622919, at \*3 (N.D. Cal. Dec. 16, 2013); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, at \*4 (C.D. Cal. July 21, 2008); *see also Rodriguez v. West Publishing Corp.*, 563 F. 3d 948, 965 (9th Cir. 2009) (“We put a good

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deal of stock in the product of an arms-length, non-collusive, negotiated resolution[.]). However, the Court believes that such a presumption is inconsistent with *Hanlon*'s emphasis on a probing inquiry. See *Aarons v. BMW of N. Am., LLC*, No. CV 11-7667 PSG CWX, 2014 WL 4090564, at \*10 (C.D. Cal. Apr. 29, 2014); see also *Hanlon*, 150 F.3d at 1026 ("The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court-designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e)."). Here, both parties allege that they have "fought hard for the interests of their respective clients," and there is no evidence of collusion. *Mot.* 15.

*ii. Settlement Amount*

After reviewing the first proposed Settlement Agreement the parties filed, the Court had several concerns; specifically, that the value of the coupon settlement, estimated to be worth \$996,781.50, was vastly overstated and was not actually a value to class members at all, but rather only to Lime Crime. See Dkt. # 46. The Court expressed further concern with the *cy pres* distributions proposed in the original motion. *Id.* The parties have revised their Settlement Agreement to address the Court's concerns.

Class Counsel now estimates the total recovery of the Settlement to be valued at \$366,000. *Mot.* 9. That figure includes a Settlement Fund of \$110,000, which will provide each Eligible Claimant an amount up to \$44. *Id.* The estimated value of the injunctive relief is between \$141,200 and \$237,000, and the coupon is now estimated to be worth \$25,000. See generally *Mot.* Class Counsel expects a 3% claim rate on the coupon—the percentage of Lime Crime customers who responded to its complimentary offer of Experian's ProtectMyID, and the claim rate in comparable data breach cases. *Id.* 12.

When evaluating a coupon settlement, the Court discerns whether "the value of a specific coupon settlement is reasonable in relation to the value of the claims surrendered." *True v. Am. Honda Motor Co.*, 749 F.Supp.2d 1052 (C.D. Cal. Feb. 26, 2010). In *True*, the court denied the Plaintiffs' motion for final approval of settlement when a purchaser of a hybrid car settled a lawsuit on behalf of a putative class of approximately 176,990 hybrid purchasers and lessees. *Id.* at 1058, 1063. The primary relief offered by the settlement was a \$500 or \$1000 rebate towards a purchase of a new vehicle in the future, in addition to a small cash payment of \$100 to class members who could show they made a documented complaint regarding their vehicles. *Id.* at 1061. The court noted that the general disapproval of coupon settlements is due to three problems: "they often do not provide meaningful compensation to class members; they often fail to disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation." *Id.* at 1069. In evaluating

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the settlement, the court reasoned that courts “have generally rejected the idea that the face value of coupons or rebates should be used for settlement valuation purposes” because “where a coupon or rebate is not freely transferable on the open market, as is the case here, it has even less value.” *Id.* at 1075. Further, the court acknowledged that it is incorrect to assume that class members are as likely as any other Honda owner to purchase another Honda because the class includes customers who were misled about the car or were disappointed in the car they bought. *Id.* at 1074.

Here, the Court is satisfied that Class Counsel has addressed the Court’s prior concerns about probable coupon usage rates. The parties have revised their estimated potential value of the coupon discount from \$996,781.50 to \$25,000. *Mot.* 12. The new figure contemplates a 3% claim rate, a figure the Court finds much more realistic than the 100% claim rate previously submitted. *Id.* Further, the 90-day limit on usage for the coupon has been replaced with a one-year limit, which the Court finds acceptable.

The Court is also persuaded that the revised *cy pres* distribution is adequate and has addressed the Court’s primary prior concerns. The Settlement Agreement now provides that, in the event that the Settlement Fund is not exhausted after all valid claims are paid, the remaining funds will be distributed to the UC Berkeley School of Information, Center for Long-Term Cybersecurity. *Settlement Agreement* 12. The Ninth Circuit requires *cy pres* distributions to “account for the nature of the plaintiffs’ lawsuit, the objectives of the underlying statutes, and the interests of the silent class members.” *Naschin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011). The new distribution will be made to the UC Berkeley School of Information, Center for Long-Term Cybersecurity, whose objectives directly address the type of data breach at issue in this case. *Mot.* 4. In contrast to the an organization promoting women in business, *see* Dkt. # 46, this distribution relates to the nature of Plaintiffs’ lawsuit, dealing in the very data protection statutes at issue in Plaintiffs’ case; further, the Center develops solutions and protections for individuals whose data has been compromised in the way that Plaintiffs allege theirs has. *Id.* Class Counsel has not, however, provided the Court with any information detailing how it selected this entity as its *cy pres* distribution recipient, nor establish that there is no potential conflict of interest in regard to either the named Plaintiffs or Class Counsel. The Court is satisfied that the *cy pres* distributions now meet the Ninth Circuit standards, and preliminarily approves the distribution subject to an assessment of the information regarding selection and conflict of interest.

*iii. Attorneys’ Fees and Costs*

Class Counsel will submit a motion for attorneys’ fees, costs, and expenses at least fourteen (14) days before the Objection deadline. *Id.* 30. Attorneys’ fees, costs, and expenses

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will not exceed \$140,000. *Id.* The Court will render a decision on approval of these fees and costs upon formal motion by Class Counsel, prior to the Final Fairness Hearing.

*iv. Incentive Award*

Class Counsel will seek Service Awards not to exceed \$1,000 per Class Representative. *Id.* 7. The payment of the Service Award and the attorneys' fees and costs will be through a wire deposit by Lime Crime to Federman & Sherwood's OIOLTA account. *Id.* 31. The Court will render a decision on approval of the incentive awards upon formal motion by Class Counsel, prior to the Final Fairness Hearing.

D. Notice to Class Members and Time Periods for Action

Before the final approval hearing, the Court requires adequate notice of the settlement be given to all class members. Federal Rule of Civil Procedure 23(c)(2)(B) provides:

For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

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., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)).

After preliminary approval of this Settlement Agreement and the class notices, Class Counsel will provide the Settlement Administrator with: (1) each class member's full name; (2) last known mailing address; and (3) email address. *Mot.* 20. With this information, the Settlement Administrator will then mail notice to the class. For any Notices that are returned as non-delivered, the Settlement Administrator will promptly attempt to determine the correct address through lawful skip-tracing or other appropriate means in order to maximize the probability that class members will receive the Notices. *Id.* 20.

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The Settlement Administrator will also establish the Settlement Website, at [www.lcsettlement.com](http://www.lcsettlement.com), that will inform Class Members of the terms of the Agreement, their rights, dates and deadlines, updates, linked access to the Agreement, the Long Form Notice and Summary Notice, the motion for final approval of the settlement, any motion seeking attorneys' fees, costs, expenses, and service awards, the Preliminary Approval Order, the Claim Form (which will be available for download), and the complaint. *Id.* The Settlement Website will remain operational until at least thirty days following the Effective Date. *Id.* After that date, the Settlement Administrator will transfer ownership of the URL to Lime Crime. *Id.*

The Notice Program consists of three components: email of the Summary Notice; dissemination of the Summary Notice by mail; and a Long Form Notice and Summary Notice on the Settlement Website. *Id.* 22. For any mailed notices returned as undeliverable, the Settlement Administrator will use reasonable efforts to identify updated mailing addresses and re-mailing the notices. *Id.* The URL address of the Settlement Website will be included in the Long Form Notice and Summary Notice. *Id.* 23. The Notice also includes procedures and deadlines for objecting to the Settlement or to Class Counsel's application for attorneys' fees, costs, and expenses, and for opting out of the Settlement. *Id.* 23-24. Any Class Member who wants to be excluded from the Settlement must provide a written statement requesting exclusion. *Id.* 7. Class Members have 45 days after the Settlement Administrator mails the Notice to request exclusion or to object to the Settlement Agreement. *Settlement Agreement* 24.

Lastly, Plaintiffs propose that a final approval hearing take place no earlier than ninety (90) days after the notices are mailed. *Id.* 26. Plaintiffs will file a motion for final approval of the Settlement and a motion for attorneys' fees, costs, and expenses, and for Service Awards, by no later than fourteen (14) days prior to the Objection Deadline. *Id.*

#### IV. Conclusion

The Court is satisfied that the parties have addressed the Court's prior concerns with the terms and procedures of the Settlement Agreement. For the foregoing reasons, the Court GRANTS Plaintiffs' motion for preliminary approval of the Settlement Agreement. The Court PRELIMINARILY APPROVES the Settlement Agreement and PRELIMINARILY APPROVES the Notice, subject to the conditions referenced in Section III.D of this Order. The final approval hearing is set for **February 26, 2017 at 1:30 PM.**

The Court ORDERS at least thirty days before the final approval hearing and in addition to the motion for final approval for class action settlement:

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- A memorandum justifying class counsel's award of attorneys' fees and costs that includes declarations supporting the reasonableness of each attorney's requested hourly rate, itemized billing statements showing hours worked, hourly rates, expenses incurred thus far, and expenses to be incurred in the future; and
- A memorandum justifying the incentive award for each named Plaintiff, including a detailed description of Plaintiffs' efforts in pursuit of this case, and supporting declarations.
- A memorandum explaining the process by which Class Counsel chose UC Berkeley School of Information, Long-Term Cybersecurity as its *cy pres* distribution, and supporting declarations that establish no conflict of interest with either names Plaintiffs or Class Counsel in such a choice.

**IT IS SO ORDERED.**