UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-01649 SVW	Date	9/23/2019
Title	*Mary Amador, et al., v. Sheriff Leroy D. Baca, etc., et al.,*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz		N/A
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
N/A		N/A

Proceedings: ORDER DENYING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [387]

"[A] court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible." *Newberg on Class Actions*, § 12:26 (5th ed.). Because this settlement agreement fails to achieve that primary goal, the Court is forced to DENY preliminary approval.

I. Introduction and Factual Background

Lead Plaintiffs Mary Amador et al. represent a class of female inmates of the Los Angeles County Sheriff's Department ("LASD") who contend that highly invasive body cavity inspections conducted during the relevant class period (March 5, 2008 to January 1, 2015) violated their Fourth Amendment rights. Dkt. 387 pg. 1. After certification of several classes and sub-classes, Dkt. 327, this Court granted Plaintiff's Motion for Summary Judgment on June 7, 2017. Dkt. 361. Following a prolonged period of negotiation and mediation, the parties made this Motion for Preliminary Approval of Class Action Settlement. Dkt. 387.

The full Settlement Agreement requires LASD to pay a total of $53 million dollars into a Class Fund over a period of three years. Dkt. 387-2, pg. 3 ("the Settlement Agreement"). The proposed distribution of funds includes:

- Incentive awards to nine named plaintiffs of $10,000 each.

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- Up to $3 million in Class Funds to finance contracts between the County of Los Angeles and several private nonprofit and for-profit entities (the Moss Group and the Center for Gender and Justice) that seek to "develop a strengthened model of gender-responsive policy and operational practice at all LASD facilities that house female inmates."
- Third-party class settlement administration costs by the chosen administrator, JND Legal Administration, estimated at up to $464,000 (dependent on the total claims rate within the class).
- A provision giving Plaintiff's counsel the right to apply for attorney's fees of up to one-third of the Class Fund as well as litigation costs, with final approval over any award of attorney's fees at the Court's discretion.
- The remainder of the Class Fund to be distributed to class members under a points-based allocation formula.

Because the Class includes an estimated 93,000 to 94,000 individuals, Plaintiff's counsel anticipates that only 20% of the potential class will submit claims. Dkt. 387, pg. 12-13. Notice will be provided through text messages, email, social networking accounts, first-class mail, notices in Prison Legal News, and various other methods. Dkt. 387-2, pg. 21-22. The average claim, given Plaintiff's predicted claims rate, would be roughly $1500 per class member. Dkt. 387, pg. 13.

The Class Fund is non-reversionary but includes a remainder *cy pres* mechanism, allegedly intended to prevent accrual of "windfall" payments to class members. *Id.* at 6. This *cy pres* mechanism utilizes a secondary damages formula, applied solely for determination of a whether a *cy pres* payment to a non-profit organization should be made. *Id.* It uses a sliding scale that calculates a maximum damages pool allotted to the class as a whole based on the actual claims rate after notice is mailed out to potential class members. *Id.* Defendants also have the right to withdraw from the settlement if more than 250 class members choose to opt out of the class. *Id.*

II. Legal Standard

A district court holds a unique role in the approval of a class action settlement, serving as a fiduciary to the absent class members. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 968 (9th Cir. 2009); *see also Newberg*, at § 13:40, fn. 4. Judicial approval of a joint, unopposed class settlement

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occurs in the absence of the traditional adversarial process, and thus requires the court to "adopt the role of a skeptical client" in scrutinizing the settlement terms. *Manual for Complex Litigation, Fourth,* § 21.61. A district court "may not simply rubber stamp stipulated settlements", even at the preliminary approval stage. *Kakani v. Oracle Corp.*, 2007 WL 1793774, at *1 (N.D. Cal. June 19, 2007); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 603 (3rd Cir. 2010).

2018 amendments to the Federal Rules of Civil Procedure ("FRCP") have added specificity to the previously murky standard for preliminary judicial approval of a class settlement. *See Cotter v Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016). In particular, FRCP Rule 23(e)(1)(B) has been amended to clarify appropriate procedure for preliminary approval by a court, requiring a district court to permit notice to be given to the class (i.e. granting preliminary approval) only following a sufficient showing that the court "will likely be able to" (1) approve the proposal under Rule 23(e)(2), and (2) certify the class for the purposes of judgment.

Thus, proper analysis at the preliminary approval stage requires inquiry into the same factors relevant to a final approval of a class settlement— that the settlement is "fair, reasonable, and adequate" when considering the specific sub-factors provided in 23(e)(2). If it falls within the "range of reasonableness" relative to each of these factors (to integrate relevant pre-amendment Ninth Circuit caselaw into this analysis) the court should issue preliminary approval. *Cotter v. Lyft*, at 935. These sub-factors include (A) adequate representation by class representatives and class counsel, (B) a proposal that was negotiated at arm's length, (C) adequate relief provided to the class, and (D) that the proposal treats class members equitably relative to each other.

III. Analysis

This Court previously certified several classes and sub-classes for damages under Rule 23(c)(4) Dkt. 327. Therefore the second requirement of 23(e)(1)(b), that the Court will be likely to "certify the class for purposes of judgment on the proposal," has already been satisfied by the prior course of proceedings. Therefore, the only live issue for analysis here is whether the Court determines that given these proposed terms, it is also likely to approve the final class settlement under 23(e)(2).

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a. Adequate representation by class counsel and class representatives.

"Adequate representation" for purposes of Rule 23(e)(2)(A) generally focuses inquiry on the nature and amount of discovery, as well as the overall performance of counsel representing the class during the course of litigation. *Newberg*, at § 13:49.

Kaye, McLane, Bednarski & Litt, LLP ("Class Counsel") has represented this class since 2010 and litigated vigorously in the years since, winning class certification and a Motion for Summary Judgment in the process. Dkt. 327, Dkt. 261. Class Counsel has litigated public interest and civil rights cases since 1984 and has specialized in civil rights class actions, including several specifically tied to strip search constitutional violations. Dkt. 388, Declaration of Barrett Litt, ¶¶ 2-3, 13. Class Counsel has performed extensive discovery, deposed a variety of LASD personnel, and settlement discussions began in this case only after multiple rounds of certification and decertification with regard to injunctive and damages relief. *Id.* at ¶ 5. Class Counsel also devoted significant effort to contacting potential class members immediately prior to reaching settlement agreement with Defendants in order to ensure an adequate claims rate and to provide leverage for an alternative piecemeal litigation strategy if settlement talks break down. *Id.* at ¶ 16.

On this record and given the wider range of latitude afforded this analysis for preliminary approval, the Court finds no issue with adequate representation of either counsel or class representatives that would bar preliminary approval.

b. Proposed settlement negotiated at arm's length.

Rule 23(e)(2)(B) directs inquiry at the relationship between the parties in order to root out potentially collusive settlements that benefit the plaintiffs' lawyers at the class's expense. *Newberg*, at § 13:50. Ninth Circuit district courts (prior to the 2018 amendment to the rules) generally gave an "initial presumption of fairness" to settlements negotiated at arm's length. *Corson v. Toyota Motor Sales U.S.A., Inc.*, 2016 WL 1375838, at *7 (C.D. Cal. April 4, 2016); *Mora v. Cal West Ag Services, Inc.*, 2018 WL 3201764, at *8 (E.D. Cal. 2018).

The parties reached a settlement agreement here following three full days of in-person settlement

conferences before the Hon. George H. King (Ret.). *Id.* at 3. As discussed above, these settlement negotiations followed a lengthy litigation process prior to the Summary Judgment order by this Court that prompted settlement negotiations. Given Class Counsel's experience, use of an impartial mediator, and very substantial pre-settlement litigation, the Court views this element as sufficiently satisfied for purposes of preliminary approval.

c. Relief provided for the class is adequate

Rule 23(e)(2)(C)'s requirement of adequate relief directs a court to consider, (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). The Advisory Committee notes to Rule 23 recommend forecasting the likely range of class-wide recoveries and comparing these results to the settlement figure. FRCP 23(e)(2) n. 2018. The Ninth Circuit has directed inquiry on this factor towards whether "the settlement taken as a whole" demonstrates that the class's interests drove the ultimate outcome of negotiations. *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)).

At this preliminary stage, the Court is not yet required to rule on any proposed award of attorney's fees and no "side agreements" under Rule 23(e)(3) have been identified within the full Settlement Agreement provided to the Court. Dkt. 387-2. Thus elements (iii) and (iv) are not relevant here to the Court's analysis at the preliminary approval stage.

The settlement agreement calls for a $53 million settlement split between nearly 100,000 potential class members (after costs and attorney's fees). Dkt. 387. Class Counsel cites in its declarations to a variety of class action settlement with roughly comparable facts and class sizes, which resulted in settlements ranging from $55 million to $33 million, although actual payout rates were far lower in some cases. Dkt. 388, Litt Declaration, pg. 5. Class Counsel also contends that the estimated dollar figure per-claim, $1500, would be at the "high end" of strip search class recoveries. *Id.* at 4.

Class Counsel acknowledges that while individual members of the class might possibly win five

or even six figure judgments in individual actions, this Court's prior ruling certifying the subclasses under Rule 23(c)(4) precluded class-wide damages calculations, meaning recovery would otherwise be largely limited by class member's ability and willingness to mount individualized trials on damages. Dkt. 327, pg. 8. Additionally, the "opt-out" provision described above and detailed in the full settlement order would permit individual members with strong claims to pursue greater compensation through individual jury trials on damages. Dkt. 387-2, pg. 7. Finally, Supreme Court precedent during the course of this litigation has pared back constitutional claims regarding jail strip searches generally, restricting the range of continued litigation in this area. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 341, (2012).

Given the size of the class here, the average recovery, and the ability of up to 250 class members with more substantial claims to opt-out of the settlement, the Court would generally be inclined to approve the broad terms of the settlement. However, the proposal to earmark up to $3 million of the settlement to contracts between private parties and Los Angeles County, thereby reducing the recovery of each member of the class, creates grave concerns for this Court which prevent it from granting preliminary approval of the settlement.

i. If the $3 million payment is *cy pres*, it is an unprecedent use of such a mechanism.

Cy pres is a medieval equitable doctrine that has evolved in the modern era into the primary method for disposing of **unclaimed** class action funds, on logic that this constitutes a "next best" use of funds through an indirect benefit realized by charitable action. *Newberg*, at § 12:32. In more controversial cases, courts have approved "full" *cy pres* charitable distributions (without any distribution directly to class members) in contexts where the classes are vast and injuries comparatively small, such that attempted distribution be cost-prohibitive.[1] *Newberg*, at § 12:26 fn. 16 (collecting cases). In justifying use of *cy pres*, courts have emphasized the advantage of indirect benefit conferred by charitable action enabled by funds as an alternative to making additional "windfall" payments to class

[1] Classically considered appropriate in contexts where the postage required to mail a settlement check would exceed the per-member recovery. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011). *Cf. Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting the parties' contention that "each member would receive an amount smaller than the cost of postage").

members whose claims have already been fully settled. *Newberg*, at § 12:32; *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 676 (7th Cir. 2013).'

Alternatives to *cy pres* exist, primarily *pro rata* distribution of unclaimed funds to existing class members who submitted claims. The American Law Institute (ALI) issued a 2010 report taking the position that class settlement should "presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair." *Newberg*, at § 12:30 (quoting American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07, cmt. b (2010)).

The Ninth Circuit has approved of *cy pres* for both unclaimed funds and full *cy pres* distribution to charities. *In re Easysaver Rewards Litigation*, 906 F.3d 747, 760 (9th Cir. 2018); *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990); *Lane v. Facebook Inc.*, 696 F.3d 811, 819-20 (9th Cir. 2012). Review of a *cy pres* remedy included in a class action requires that the remedy "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members...." *Nachsin*, at 1036. But endorsement of traditional *cy pres* in the Ninth Circuit has generally focused on class settlements where the harm to class members was generally fully reimbursed for any claimants, and thus additional recovery could plausibly be considered a "windfall" to participating members. *Easysaver*, at 761.

Here, the settlement agreement does not expressly label the $2-$3 million in planned contracts the Moss Group and the Center for Gender and Justice as *cy pres*, unlike the proposed remainder *cy pres* provision that mandates payments to an unnamed nonprofit in the event of a low claims rate. Dkt. 387-2, pp. 3, 18. However it does label this payment as "indirect compensation to absent class members", language evocative of the purpose behind a *cy pres* mechanism in most cases. *Id.* at 3. In addition, these contractual payments are intended "to help develop a strengthened model of gender-responsive policy and operational practice at all LASD facilities that house female inmates (including CRDF and Twin Towers), while enhancing the culture of safety and respect for both staff and the inmate population." *Id.* Under the Ninth Circuit standard, this would appear to suggest intent to have the payments treated as *cy pres*, given the nature of plaintiff's lawsuit and the goal of encouraging respectful, safe practices by

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LASD.

But as discussed above, *cy pres* primarily exists as a method of distributing **unclaimed** funds. Here, the contractual payments would be set aside in advance of claim filing by class members and excluded from the Class Fund to be distributed according to the points-based formula provided. Dkt. 387-2 pp. 6-7. This represents a substantial extension of the traditional use of the *cy pres* mechanism, one that the Court does not feel is justified in these circumstances.

Moreover, this Court believes that the Ninth Circuit's approval of *cy pres* in "windfall" cases is clearly distinguishable from the facts of this settlement. Every member of this class has had their constitutional rights violated on at least one occasion, and it is unclear that any dollar amount, much less an additional $3 million split between thousands of class members, could plausibly constitute a "windfall." More concretely, cases like *In re Easysaver* involved consumer classes, where damages could be readily calculated and participating class members had truly been fully compensated. *Id.* at 761. Similarly, full charitable *cy pres* in scenarios with small settlement figures and enormous classes are a far cry from this proposed settlement, which has a minimum recovery of $200, easily justifying the expense of full distribution. Dkt. 387-2, pg. 13.

To the extent that these payments are considered *cy pres*, the Court finds reduction of the Class Fund in advance of any distribution to claiming class members to be unfair to members of the class, and accordingly it cannot constitute "adequate relief" for purposes of preliminary approval under Rule 23(e)(1)(B) and (e)(2). Thus, preliminary approval on the basis that this Court is "likely" to issue final approval on these terms is impossible.

ii. If the $3 million is not *cy pres*, it represents a reduction in recovery to the class members to combat issues that both sides claim have already been abated.

At an earlier time in this case's history, the Plaintiffs included a claim for injunctive relief to improve the conditions in which the strip searches were conducted. Dkt. 387, fn. 2. In 2015, LASD added privacy curtains and body scanners to the search area, and Plaintiffs dropped their claim for injunctive relief. *Id.* If both Parties feel that additional resources are necessary to continue to promote

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changes in gender-responsive policing by LASD, they have other avenues available to them. Plaintiffs can bring an additional suit regarding current policies implemented by LASD. LASD itself can seek additional funds from the Los Angeles County Board of Supervisors, perhaps as part of their recent initiative addressing "Building a Gender-Responsive Criminal Justice System." Dkt. 387, pg. 4. Either of those solutions could be accomplished without shortchanging recovery of this class for constitutional violations in order to enact these future policy changes.

The Parties might argue that these payments do not constitute *cy pres*, but instead are a nonmonetary form of compensation made to all class members. Indeed, at the August 19, 2019 motion hearing regarding preliminary approval, the Parties indicate that these payments were primarily intended to benefit absent class members who were not able to participate in the recovery and are statistically more likely than the population as a whole to enter LASD custody in the future. The Court is unconvinced that such benefits stemming from improvements in future LASD policing conduct are sufficiently connected to this class collectively to justify reducing the overall Class Fund by almost 10% (given the calculations described in the Settlement Agreement) after attorney's fees and costs are deducted. Dkt. 387-2, pp. 7-8.

As above, even if these payments do not constitute *cy pres*, the Court concludes that the settlement agreement as presented does not give "adequate relief" to class members, and thus cannot give preliminary approval to the settlement as proposed.

iii. The proposed remainder *cy pres* mechanism is unlikely to be utilized but may present a future challenge to final approval.

As referenced above, the settlement agreement has an additional *cy pres* mechanism that only takes effect if the claims rate by class members is very low. Dkt. 387-2, pp. 17-18. These calculations are dependent on the distribution of claimants with regard to the number of searches they experienced while in LASD custody during the Class Period. *Id.* The table appears below:

CY PRES FORMULA	
# SEARCHES	**AMOUNT**
1-3	$5,000
4-6	$10,000
7-10	$15,000
11+	$20,000

Under the remainder calculation, each claim submitted will be allotted a $5k-$20k figure based on the total number of searches endured by each class member. *Id.* Then, the final Class Fund will have the total dollar figure of all actual claims submitted under this calculation formula deducted from it, and any remainder will be donated to a nonprofit to be specified in the future. *Id.* The stated purpose of this additional *cy pres* mechanism is to ensure Class Members "do not receive a windfall" in the event of an unusually low claims rate.[2]

Because the formula incorporates a relatively high claim maximum for even single searches, a remainder *cy pres* distribution to charity is unlikely unless the claims rate is much lower than predicted. To borrow an example from the Settlement Agreement, if only 4,000 class members submit claims (a claims rate of less than 5%) and the average claim is given a value of $9,000 (meaning that the majority of claims are by class members with 1-3 or 4-6 claimed searches), the Class total under the formula would equal $36 million and no *cy pres* payment would be made. *Id.* at 18.

Class Counsel stated in their declaration that they anticipate a claims rate of approximately 20% based on their experience in prior strip search class action settlements. Litt Declaration, ¶ 9. Given Class Counsel's substantial experience in this area, and their declaration under penalty of perjury to this effect, the Court takes the view that the actual claims rate will be at least reasonably close to their estimate. To

[2] It should be noted however that although the *cy pres* formula operates as a "cap" to the extent that it governs how much of the Class Fund is actually distributed to Class Members as a whole, it does not actually govern individual claim values. Instead, the more complicated points-based formula based on the dates of LASD searches (intended to correspond to the invasiveness of the searches at different points in time) would be used to allocate pro rata shares of the final Class Fund. Dkt. 387-2, pg. 12.

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illustrate how low the claims rate would have to be for the *cy pres* remainder formula to take effect, if Class Counsel was off by 50% (i.e. a claims rate of 10% rather than 20%) and each claimant fell into the lowest possible category (1-3 searches), the formula would still result in no additional *cy pres* distribution because the class would total ~$47 million in claims. Class Counsel's estimate would have to be off very substantially (below 6-7% rather than 20%), and all claims would need to be in the lowest possible category to present the possibility of a substantial *cy pres* distribution to a future nonprofit.

On similar logic to the analysis above in parts (i) and (ii), this Court is inclined to think that any *cy pres* distribution intended to prevent windfall payments is wholly inappropriate in the context of a class consisting of individuals who have suffered constitutional violations. It is not clear to the Court that a payment of even $5000 to an individual who has suffered an invasive body cavity search in public view could rightly be considered a "windfall". Thus, if the effect of this provision was to deprive the class members of a substantial portion of the Class Fund because the claims rate was unexpectedly quite low, the Court would be unlikely to approve such a settlement.

However, it appears likely given Class Counsel's declaration and experience that the claims rate will not be so low, and the preliminary approval standard only requires the Court to determine that it is "likely to" grant final approval under Rule 23(e)(2). In addition, Class Counsel note that they have been in pre-settlement contact with hundreds of class members who experienced many unconstitutional strip searches, increasing the likelihood that a substantial portion of total claimants will fall into the highest ($20,000) bracket for remainder *cy pres* calculation purposes. Dkt. 388, pg. 6. Because the Court deems the claims rate likely to exceed that necessary to avoid a remainder *cy pres* distribution, it does not find it necessary to deny preliminary approval on this basis. However, it does reserve the right upon motion for final approval, to review the actual claims rate and the actual distribution of the Class Fund under the same "fair, reasonable, and adequate" standard.

d. Proposal treats class members equitably.

Analysis of the intra-class equity of a proposed class settlement under Rule 23(e)(2) requires inquiry into how class members are treated relative to differences in their claims, any incentive payments made to lead plaintiffs, and how the scope of release granted by the settlement affects different categories of class members. FRCP 23(e)(2), advisory committee's note to 2018 amendment.

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Courts in the Ninth Circuit have generally closely scrutinized settlement agreements that treat class members disparately. *Ferrington v. McAfee, Inc.*, 2012 WL 1156399, at *8 (N.D. Cal. 2012); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

Incentive payments of $10,000 to $25,000 for lead plaintiffs in multi-million dollar class settlements have been summarily approved in a variety of cases. *Glass v. UBS Fin. Servs., Inc.*, 2007 WL 221862, at *16 (N.D. Cal. Jan.26, 2007) (approving payments of $25,000 to each named plaintiff); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 153265, at *2–3 (N.D. Cal. Jan. 13, 2016) ($25,000 for each of ten class representatives in $127.45 million settlement); *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, *5 (N.D. Cal. Feb. 16, 2011) ($10,000 to two plaintiff representatives involved in case for five years and $4,000 to three representative plaintiffs participating in case for two years, from a $6.9 million settlement fund).

Here, the points-based distribution formula means that class members will have differing recoveries, but the formula will be applied neutrally and has a clear rationale. The distribution formula developed in the course of mediation by the Parties is based on the changing conditions and level of privacy across the multi-year class period. Dkt. 387-2, pg. 10. It gives increasing point totals for searches endured under worse conditions during earlier periods in the class. *Id.* at 11. Beyond the sliding scale for invasiveness of searches, class members also receive proportionate recoveries based on the total number of searches they have endured because their recovery is based on their proportionate share of the total points awarded to the class. *Id.* Given that this Court previously determined that each search during the period constituted a discrete constitutional violation, the Court finds it likely at this preliminary stage that the distribution formula constitutes a reasonable approximation of elative damages of for class members across the different periods available.

The settlement agreement calls for incentive payments of $10,000 to nine different lead plaintiffs, for a total of $90,000. These payments, individually and in total, are appropriate given the overall settlement of $53 million. As the Parties note, the need for lead plaintiffs in custody to request prior injunctive relief, to represent individual subclasses created by this Court, and the need for lead plaintiffs to disclose intimate details to support their claims all support the reasonableness of incentive payments and the total number of lead plaintiffs, which are not disproportionate given an expected average claim of $1500 for unnamed class members. Dkt. 387, pg. 11.

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The scope of the Settlement Agreement extends to all violations of law or constitutional rights arising from the class-wide factual allegations alleged in the Fourth Amended Complaint. *Id.* at 15-17. In the Ninth Circuit, courts give preclusive effect only to new claims arising from an "identical factual predicate" to the claims in the class settlement. *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010). Because the Class Period and factual allegations in the Fourth Amended Complaint are detailed and specific in this case, and the scope of the release directly references the underlying complaint, the Court finds the scope of release here appropriate under that standard. Dkt. 334. Additionally, the Opt-Out Clause discussed previously prevents application of the release to any class members who seek to be excluded. *Id.* at 25.

IV. Conclusion

The motion for preliminary approval is DENIED. If the parties wish to present another agreement for preliminary approval that is otherwise consistent with this opinion, the motion must be filed by no later than November 1, 2019.

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