THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

DAVID HANSON, individually and on behalf of the settlement class,

*Plaintiff*,

*v.*

MGM RESORTS INTERNATIONAL, a Delaware corporation, and COSTCO WHOLESALE CORPORATION, a Delaware corporation,

*Defendants*.

Case No. 2:16-cv-01661 RAJ

**PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

NOTE ON MOTION CALENDAR: [November 9, 2018]

ORAL ARGUMENT REQUESTED



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## I. INTRODUCTION

Plaintiff David Hanson ("Plaintiff" or "Hanson") seeks final approval of a Settlement[1] resolving this class action against Defendants MGM Resorts International ("MGM") and Costco Wholesale Corporation ("Costco," and collectively, "Defendants") for their practice of charging consumers monthly inactivity fees on their MGM Gift Cards (the "Gift Card") much earlier than promised in violation of the Electronic Fund Transfers Act (the "EFTA"), 15 U.S.C. § 1693, *et seq.*, and other state laws.

If finally approved, the Settlement Class will receive nearly everything they could have hoped for as a result of this litigation. As the Court well knows by now, shortly after Hanson commenced this lawsuit, Defendants provided full refunds for any inactivity fees that were unlawfully charged on consumers' MGM Gift Cards. In addition, and in order to finally resolve the parties' dispute, Defendants have agreed to create a $150,000 Settlement Fund from which claiming Settlement Class Members will receive a *pro rata* cash payment after payment of settlement administration costs, attorneys' fees, and an incentive award to the Class Representative. This combined relief not only fully compensates Settlement Class Members for any monetary harm caused by the prematurely assessed inactivity fees, but also provides class members a significant portion of their available—yet wholly discretionary—statutory damages under the EFTA.

Given the strength of the overall class recovery, it should come as no surprise that, following implementation of the Court-approved notice plan, the reaction to the Settlement has been favorable: of the approximately 22,500 members of the Settlement Class, not a single one has objected to or requested to be excluded from the Settlement and over 7,000 individuals have filed potentially valid claims for payments.[2]

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[1] For the Court's convenience, Plaintiff again provides a copy of the Stipulation of Class Action Settlement (the "Settlement" or "Settlement Agreement"), which is attached hereto as Exhibit 1. Except as otherwise indicated, all defined terms used herein shall have the same meanings ascribed to them in the parties' proposed Settlement Agreement.

[2] As is standard practice, the Settlement Administrator, Heffler Claims Group, LLC, has and continues to review claims for duplication and/or fraud.



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In the end, as the Court found by permitting preliminary approval, this is a strong settlement and one that is deserving of approval. Accordingly, and for the reasons discussed below, Plaintiff Hanson respectfully requests that the Court enter an Order granting final approval of the parties proposed Settlement Agreement.

## II. BACKGROUND

The factual and procedural background of this case and the Settlement have been fully set forth in both (1) Plaintiff's Motion for Preliminary Approval of Class Action Settlement (Dkt. 34), and (2) Plaintiff's Motion for Award of Attorneys' Fees, Expenses, and Incentive Award. (Dkt. 40.) Nevertheless, for context and the Court's convenience, Plaintiff briefly reviews that background here.

### A. Nature of the Litigation.

This lawsuit stems from Defendants' practice of charging customers monthly inactivity fees on their MGM Gift Cards six months earlier than promised. (Dkt. 1 ("Compl.") ¶¶ 1–9.) Specifically, Plaintiff alleges that by charging customers a monthly $2.50 inactivity fee after only 12 months of nonuse despite the MGM Gift Cards stating that such fees would only be incurred after 18 months, Defendants violated the Electronic Fund Transfers Act—which requires the full disclosure of gift card inactivity fees to be made on gift cards and mandates that such terms cannot be modified or changed after a gift card is sold, *see* 15 U.S.C. § 1693l-1; 12 C.F.R. § 205.20—and other state laws. (*See* Compl.)

Plaintiff Hanson is one such consumer who purchased MGM Gift Cards from Defendants. (*Id.* ¶¶ 10, 36.) Like all the Gift Cards at issue, the front of each card Plaintiff purchased stated that a monthly inactivity fee would be charged "18 months from [a specified date] on cards showing no activity" (*id.* ¶¶ 38, 31 Fig. 2), and the reverse side of the card stated that a $2.50 monthly maintenance fee would be deducted from the card balance "after 18 months of no activity from [the] date printed on the front of the card." (*Id.* ¶¶ 38, 32 Fig. 3.) However, contrary to the cards' terms, Plaintiff claims he was charged a monthly $2.50 fee beginning only 12 months after his purchase. (*Id.* ¶ 40.) Plaintiff further alleges that this was not a one-off



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charge specific to him, but rather a common course of conduct that affected thousands of similarly situated consumers. (*Id.* ¶¶ 8–9, 44.)

**B. Procedural History.**

As a result of Defendants' alleged misconduct, Hanson filed a putative class-action complaint in this Court just over two years ago on October 24, 2016. (*Id.*) Just weeks later, and undoubtedly in response to the litigation, Defendants fully refunded every MGM Gift Card that had an inactivity fee assessed prior to 18 months of no activity from the date printed on the card. (Dkt. 16 at 2 n.4.) Around that same time, the parties attempted to discuss the potential for early resolution, but given their views as to the strengths of their respective arguments, those discussions were unsuccessful. (*See* Declaration of Eve-Lynn J. Rapp (the "Rapp Decl.") attached as Exhibit 2, ¶ 4.) Unable to reach a resolution, Defendants moved to dismiss Plaintiff's state law claims as well as to strike the class allegations. (Dkt. 16.)[3] After full briefing (Dkts. 22, 23), the Court granted Defendants' motion as to Plaintiff's single Nevada-based claim, but otherwise denied Defendants' motion in its entirety. (Dkt. 28.)

Following the Court's ruling, the parties revisited the prospects of settlement. (Rapp Decl. ¶ 5.) In doing so, and to better understand the pertinent issues in the case, the parties engaged in significant informal discovery related to, among other things, the scope of Defendants' gift card sales, the size of the putative class, the amount of monetary harm caused by the allegedly unlawful inactivity fees, and the refunds exercised by Defendants to date. (*Id.* ¶ 6.) Thereafter—and only following months of continuous communications and arm's-length negotiations, as well as careful consideration and analysis by counsel—the parties reached the Settlement Agreement now before the Court. (*Id.* ¶¶ 7–8.) Plaintiff then promptly filed a motion for preliminary approval of the proposed class action settlement on February 9, 2018, which the Court granted on July 31, 2018. (Dkts. 34, 37.) Most recently, in accordance with the Court's

[3] Defendants did not move to dismiss Plaintiff's EFTA claim. (Dkt. 16.)



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minute order (Dkt. 38), Plaintiff filed his motion for award of attorneys' fees, expenses, and incentive award on October 1, 2018. (Dkt. 40.)

## III. TERMS OF THE SETTLEMENT

The Settlement's key terms can be summarized as follows:

**A. Class Definition:** The Settlement Class includes all individuals in the United States who, from October 24, 2010 to July 31, 2018 (i.e. the date the Court preliminarily approved the Settlement), purchased an MGM Gift Card and were assessed an inactivity fee that was deducted from the balance of funds remaining on the Gift Card. (Settlement Agreement § 1.26.) The Settlement Class contains the usual exclusions of the Court, the Defendants, anyone who timely opts-out of the Settlement, and counsel for all parties. (*Id.*) Defendants have confirmed that approximately 22,500 individuals fall within the Settlement Class definition. (Rapp Decl. ¶ 9.)

**B. Monetary Relief:** In addition to the inactivity fee refunds already provided to Settlement Class Members, if the Settlement is finally approved, Defendants will create a non-reversionary Settlement Fund of $150,000 for the class's benefit. (Settlement Agreement § 1.28.) Every Settlement Class Member submitting a valid claim will be paid a *pro rata* portion of the fund (less Settlement Administration Expenses, and any attorneys' fee and incentive awards that may be approved by the Court). (*Id.* § 2.1.) As of the filing of this motion, 7,165 individuals have submitted potentially valid claims for payment. (Declaration of Michael Hamer (the "Hamer Decl."), attached as Exhibit 3, ¶ 15.) Given this response rate, each claiming Settlement Class Member can expect to receive a cash payment of approximately $9.00 (Rapp Decl. ¶ 10.)

**C. Payment of Attorneys' Fees and Expenses and Compensation for Class Representative:** Defendants have agreed to pay Class Counsel reasonable attorneys' fees and expenses in an amount determined by the Court. (Settlement § 8.1.) While Class Counsel has agreed to limit their request for attorneys' fees to no more than 33.3% of the Settlement Fund—and have voluntarily reduced their fee request to 25% of the Settlement Fund (*see* Dkt. 40)—Defendants are free to object to that amount. (Settlement § 8.1.) Should the Court award less

than the requested amount, the difference between the amount requested by Class Counsel and the amount actually awarded would be redistributed to Settlement Class Members who have submitted valid claims under the Settlement. (*Id.*) Given Hanson's significant efforts on behalf of the Settlement Class, the parties have likewise agreed he is entitled to a reasonable case contribution award, in an amount to be determined by the Court, to be paid from the Settlement Fund. (*Id.* § 8.2.) Plaintiff has separately moved for payment of attorneys' fees, expenses, and an incentive award. (*See* Dkt. 40.)

**D. Payment of Notice and Administrative Costs:** The Settlement Administrator, Heffler Claims Group, LLC (the "Settlement Administrator" or "Heffler"), shall be paid out of the Settlement Fund for its work in disseminating the Court-approved direct notice, publishing the targeted Facebook advertisements, maintaining the Settlement Website, and otherwise administering the Settlement, including processing Claim Forms and distributing payment to Settlement Class Members with valid claims. (Settlement §§ 1.25, 2.1.)

**E. Release:** In exchange for the monetary relief described above, Settlement Class Members, upon final approval of the Settlement, shall be deemed to have fully released Defendants from any and all liability relating to the collection of inactivity fees from the Settlement Class Members' MGM Gift Cards. (*Id.* §§ 1.21–1.23, 3.)

## IV. THE COURT-APPROVED NOTICE WAS EFFECTIVE AND COMPORTS WITH DUE PROCESS

Before granting final approval to the Settlement, the Court must determine whether the notice provided to the class was "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice "must clearly and concisely state in plain, easily understood language," information regarding the nature of the action, the class definition, and the class members' right to exclude themselves from the class. *Id*. While Rule 23 requires that reasonable efforts be made to reach all class members, it does not require that each individual actually receive notice. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994); *Stewart v. Applied Materials,*

*Inc.*, No. 15-CV-02632-JST, 2017 WL 3670711, at *4 (N.D. Cal. Aug. 25, 2017) (stating that notice need only be disseminated "in a manner that does not systematically leave any group without notice.") (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982)). When a settlement class contains persons with unknown addresses, courts routinely find that supplemental notice by publication is reasonable and satisfies the requirements of Rule 23. *See Weeks v. Kellogg Co.*, No. 09-cv-08102, 2013 WL 6531177, at *11 (C.D. Cal. Nov. 23, 2013); *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1129 (N.D. Cal. 2015) (approving settlement that provided notice via targeted banner ads online, a detailed settlement website, and a toll-free phone number), *aff'd*, 869 F.3d 737 (9th Cir. 2017).

At preliminary approval, the Court approved the parties' multi-part notice plan set forth in the Settlement to be administered by the Settlement Administrator. (Dkt. 37 at 12–13.) The plan called for (i) direct notice by electronic mail or First Class U.S. Mail to all members of the Settlement Class for whom an email or mailing address was available, (ii) the publication of a detailed Settlement Website where Settlement Class Members could access the Long Form Notice and other important court documents and deadlines, and (iii) targeted Facebook advertisements designed specifically to reach members of the Settlement Class and direct them to the Settlement Website. (*Id.*; Settlement § 4.1.) All of the Court-approved notices used simple, plain language while still thoroughly explaining the lawsuit, the Settlement, and its benefits. (Settlement § 4.1.)

Together with Heffler, Plaintiff has diligently implemented the notice plan. Pursuant to the Settlement (*id.* § 4.1(a)), Heffler compiled a Class List that contains the known email and mailing addresses of 7,331 members of the Settlement Class. (Hamer Decl. ¶ 9.) On August 30, 2018, Heffler sent a copy of the Court-approved notice via email to each of the 1,263 class members for whom an email address was available. (*Id.* ¶ 11.) For the 220 emails that were determined to be undeliverable, the Settlement Class Members associated with those email addresses were designated to receive a postcard notice. (*Id.* ¶ 12.) Heffler also mailed 3,444

postcards via First-Class U.S Mail to those class members that did not have an email address or to whom an email was undeliverable. (*Id.* ¶¶ 11–12.) Of those postcards, 2 were returned with a forwarding address and resent. (*Id.* ¶ 14.) Only 185 were identified as undeliverable as addressed. (*Id.*)

In addition to direct notice, Heffler also published a detailed Settlement Website, www.giftcardclassaction.com, which is accessible by clicking one of the targeted Facebook advertisements or by simply typing the URL in online. (*Id*. ¶¶ 10, 13.) To this day, the Settlement Website contains relevant information about the Settlement—including important dates and deadlines, and relevant case documents—and allows Settlement Class Members to submit Claim Forms online. (*Id*. ¶ 10.) Both the Internet and direct notice have been effective: the Settlement Website has been accessed 23,137 times and 7,165 potentially valid claims have been filed to date. (*Id*.) Heffler also established a dedicated toll-free telephone number that class members can call for information about the Settlement. (*Id*. ¶¶ 4, 8.)

Finally, the Class Action Fairness Act ("CAFA") requires that a Defendant send or cause to be sent notice of the settlement to the U.S. Attorney General and the Attorneys General of each of the 50 states and the District of Columbia. 28 U.S.C. § 1715. The required CAFA notice was sent on February 22, 2018. (*Id.* ¶ 5.)

Given that the parties and Heffler fully carried out the Court-approved notice procedures, this Court should find that the notice plan sufficiently apprised class members of the Settlement and their rights, and thus satisfied Rule 23's notice requirements and Due Process.

## V. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

In addition to determining that notice was sufficient, the Court must hold a hearing and determine whether the Settlement overall is "fair, reasonable, and adequate" before giving it final approval. Fed. R. Civ. P. 23(e)(2); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015); *Ikuseghan v. Multicare Health Sys*., No. 14-cv-5539, 2016 WL 3976569, at *2 (W.D. Wash. July 25, 2016) (Settle, J.). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Online DVD-Rental*,

779 F.3d at 944 (citation omitted). The Ninth Circuit has recognized "the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see also* Newberg & Conte, 2 Newberg On Class Actions, §6.60 (4th ed. 2002) ("Unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."). To assess the fairness of a settlement, the Ninth Circuit directs courts to consider the eight so-called *Churchill* factors:

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

*Online DVD-Rental*, 779 F.3d at 944 (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). In addition, where—as here—the parties reached a settlement prior to formal class certification, the district court must address not only the *Churchill* factors, but also ensure "that the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (original brackets omitted).

Here, each of the *Churchill* factors weigh strongly in favor of final approval, and the Settlement was not the product of collusion between the parties. As such, the Court can appropriately find that the Settlement is fair, reasonable, and adequate, and deserving of final approval.

**A. The *Churchill* Factors All Weigh in Favor of Final Approval.**

**1. Ultimate success on the Settlement Class's claims was not guaranteed.**

The first *Churchill* factor—the strength of the case—weighs in favor of final approval because there is no guarantee that Hanson would have ultimately succeeded on the merits of his case if litigation were to continue. *See G.F. v. Contra Costa Cty.*, No. 13-cv-3667, 2015 WL



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7571789, at *8 (N.D. Cal. Nov. 25, 2015) ("Approval of a class settlement is appropriate when plaintiffs must overcome significant barriers to make their case."). In addressing the strength of a plaintiff's case, the Ninth Circuit has "never prescribed a particular formula by which that outcome must be tested." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Instead, the assessment "is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Id.* (internal quotations omitted).

Here, while Hanson was confident he would ultimately prevail on the merits, significant hurdles stood in his way. As the Court recognized at preliminary approval, "the lack of legal precedent related to EFTA, particularly with respect to gift card inactivity fees," made Plaintiff's likelihood of success far from certain. (Dkt. 37 at 8.) *See Rinky Dink, Inc. v. World Bus. Lenders, LLC*, No. C14-0268-JCC, 2016 WL 3087073, at *2 (W.D. Wash. May 31, 2016) (Coughenour, J.) (finding first *Churchill* factor met when plaintiff provided "specific reasons that settlement [was] wise in light of the risk of losing on the merits"); *see also Cody v. SoulCycle, Inc.*, No. CV 15-6457 MWF, 2017 WL 6550682, at *3 (C.D. Cal. Oct. 3, 2017) (finding settlement favorable to continued litigation in part because the "dearth of legal precedent related to the EFTA . . . makes the outcome of [plaintiff's] action less certain"). For instance, given that no court has interpreted the EFTA's disclosures requirements, it is unclear whether Defendants violated them, as the MGM Gift Cards technically disclosed (i) that an inactivity fee may be charged, (ii) the amount of such fee ($2.50), (iii) how often the fee would be assessed (monthly), and (iv) that such fee may be assessed for inactivity. (*See* Dkt. 1, ¶¶ 31 Fig. 2, 32 Fig. 3); 15 U.S.C.A. § 1693l-1(b)(3). Since these requirements were arguably met, Plaintiff would need to persuade the Court that although the cards stated that an inactivity fee would be assessed "monthly", Defendants misrepresented *how often* inactivity fees would be charged by stating that such fees would apply after 18 months of nonuse, not 12. Although Plaintiff is confident the Court would rule in his favor, he recognizes the risks in establishing Defendants' EFTA liability, especially in light of the utter lack of relevant case law.

Even assuming Plaintiff established Defendants' liability, Defendants' prompt inactivity

fee refunds may have precluded Plaintiff from recovering any actual damages, leaving him only able to pursue EFTA's limited, discretionary statutory damages. *See* 15 U.S.C. § 1693m. As they asserted in their motion to dismiss (*see* Dkts. 16, 28), Defendants were sure to argue that Plaintiff cannot establish any actual damages because he and each putative class member have already been refunded for any wrongfully charged inactivity fees. Although Plaintiff refutes this argument (*see* Dkt. 22 at p. 9–13), he nonetheless recognizes that statutory damages may be his only avenue to monetary relief. That is, Plaintiff's pursuit of the EFTA's statutory damages could end in no monetary relief for the class, because they are wholly discretionary based on factors such as the nature of Defendants' noncompliance with the statute and the extent to which their noncompliance was intentional. *See* 15 U.S.C. § 1693m. Put simply, there was a real risk that Plaintiff would have recovered nothing even if he had proved the merits of his case through litigation. *See Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-01663, 2015 WL 7454183, at *5 (N.D. Cal. Nov. 23, 2015) (finding that relative strength of the defendant's case favored settlement because plaintiff faced difficulties in establishing damages on a class-wide basis).

In the end, while Hanson believes he would ultimately prevail on his EFTA claims, success was far from guaranteed. In contrast, the Settlement ensures that Hanson and claiming Settlement Class Members will obtain monetary relief on top of the full refunds they have already received for any wrongfully charged inactivity fees. Because the Settlement affords Hanson and the Settlement Class valuable relief while completely avoiding the hurdles (and potential pitfalls) associated with continuing litigation, this factor supports final approval. *See In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) ("[B]ecause ultimate success at trial is far from certain, this factor weighs strongly in favor of the settlement.").

**2. The Settlement is preferable to the risk, expense, complexity, and duration of continued litigation.**

The second *Churchill* factor—the risk, expense, complexity, and likely duration of further litigation—is closely related to the first and also weighs in favor of finally approving the Settlement. "Generally, unless the [S]ettlement is clearly inadequate, its acceptance and approval

are preferable to lengthy and expensive litigation with uncertain results." *Ching v. Siemens Indus., Inc.*, No. 11-4838, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) (internal quotations omitted). Here, continued litigation would be costly in terms of both the additional time and money required to proceed, while the outcome of Hanson's claims would remain uncertain. *See Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 542 (W.D. Wash. 2009) (Coughenour, J.) (finding "the inherent risks of trying the case," "the delayed the distribution of any benefits," and the likelihood "incur[ing] far more expenses" in the absence of settlement warranted final approval).

From the outset of this case, Defendants have vigorously defended themselves and have made clear they would continue to do so in the face of ongoing litigation, resulting in the expenditure by both sides of significant resources and the increased chance that Hanson's case falters. *See Rinky Dink*, 2016 WL 3087073, at *3 (noting that "[a]dditional depositions, expert work, and motion work would have been necessary before trial in this case, including summary judgment motions," and finding these considerations weighed in favor of approving settlement). Without the Settlement, "[m]otion practice would likely also have been extensive and protracted." *Burnett v. W. Customer Mgmt. Grp., LLC*, No. CV-10-0056-JLQ, 2011 WL 13290339, at *5 (E.D. Wash. Feb. 22, 2011) (Quackenbush, J). For example, Plaintiff was prepared to move for—and Defendants were sure to oppose—formal class certification had the parties been unable to resolve the case. And, as discussed, Hanson would also need to prevail at summary judgment and trial to secure any relief for the Settlement Class beyond their inactivity fee refunds. In addition, the losing party would almost certainly appeal, further increasing the costs of the litigation and level of attendant uncertainty. *See Bayat v. Bank of the W.*, No. 13-02376, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015) ("[R]egardless of who prevails on the merits . . . the losing party would likely appeal, thus significantly prolonging this litigation and increasing its expense and complexity."); *Arthur v. Sallie Mae, Inc.*, No. 10-CV-00198-JLR, 2012 WL 4075238, at *1 (W.D. Wash. Sept. 17, 2012) ("Continued litigation undoubtedly would have involved additional discovery and motions practice, trial, the related expenses for all

parties, and an appeal on the part of [defendant] if it lost at trial.").

In contrast, the Settlement provides immediate and valuable relief to Settlement Class Members. And avoiding unnecessary litigation resources benefits not just the Settlement Class, but Defendants and this Court as well. *See Larsen v. Trader Joe's Co.*, No. 11-5188, 2014 WL 3404531, at *4 (N.D. Cal. July 11, 2014) ("Avoiding such unnecessary and unwarranted expenditure of resources and time would benefit all parties, as well as conserve judicial resources."); *Ching*, 2014 WL 2926210, at *4 (same). In light of the not insignificant risks in obtaining recovery for the class through litigation, this *Churchill* factor weighs strongly in favor of final settlement approval as well. *See LaGarde v. Support.com, Inc.*, No. 12-0609, 2013 WL 1283325, at *4 (N.D. Cal. Mar. 26, 2013) ("In light of the risks and costs of continued litigation, the immediate rewards to class members are preferable.").

**3. The risk of maintaining class status favors final approval.**

The third *Churchill* factor—the risk of maintaining class action status throughout trial—likewise weighs in favor of approving the Settlement. While the Court conditionally certified the Settlement Class for settlement purposes (Dkt. 37), absent settlement, class certification would certainly have been adversarial. Indeed, as the Court acknowledged in its preliminary approval order, Defendants would likely argue that Plaintiff could not establish Rule 23's commonality, typicality, and predominance requirements because the EFTA's actual damages provision requires individual proof of detrimental reliance. (Dkt. 37 at 8.) *See* 15 U.S.C. § 1693m(a)(1) (providing relief for "any actual damage sustained by [the] consumer *as a result*" of noncompliance with the EFTA) (emphasis added). In other words, Defendants would likely assert that this case could not proceed as a class action because, in their view, each putative class member must individually prove that they relied on the inactivity fee disclosures stated on the MGM Gift Cards to recover actual damages. *See Voeks v. Pilot Travel Ctrs.*, 560 F. Supp.2d 718, 725 (E.D. Wis. 2008) ("To show actual damages under § 1693m(a)(1) a plaintiff must plead and prove detrimental reliance"); *but see Friedman v. 24 Hour Fitness USA, Inc.*, No. 06-cv-06282,



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2009 WL 2711956, at *10–11 (C.D. Cal. Aug. 25, 2009) (finding that plaintiffs need not show individual proof of reliance to recover EFTA's actual damages and certifying the class).

And even if Hanson were to certify a class over Defendants' objections, the risk of decertification would still loom over the case. *See LinkedIn*, 309 F.R.D. at 587 ("[T]he notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement.") (citing *Rodriguez*, 563 F.3d at 966). Thus, despite the Court finding that the Settlement Class here satisfies all the requirements of Rule 23, this risk should still weigh in favor of final approval. *See Rodriguez*, 563 F.3d at 966 ("[T]he risk remained that the nationwide class might be decertified; it was not so minimal that this factor could not weigh in favor of the settlement.").

**4. The relief secured in the Settlement is significant given the circumstances of this case.**

The fourth *Churchill* factor—the relief offered in settlement—is generally considered the "most important" and similarly weighs in favor of final approval. *Bayat*, 2015 WL 1744342, at *4. Courts typically weigh the relief obtained in the settlement against the possible relief that could be obtained at trial. *See, e.g. Ikuseghan*, 2016 WL 3976569, at *4 (comparing value obtained in TCPA settlement against possible recovery at trial). That said, "[i]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D. Cal. 2015); *see Rinky Dink*, 2016 WL 4052588 at *5 (approving settlement when plaintiffs accepted "a smaller[,] certain award" than the uncertainty of continuing to litigate).

Here, the Settlement requires Defendants to create a $150,000 non-reversionary Settlement Fund for the benefit of the Settlement Class. *See Rodriguez*, 563 F.3d at 965 (upholding approval when the settlement "is in cash, not in kind, which is a good indicator of a beneficial settlement"). As explained above, and as the Court acknowledged at preliminary approval, Plaintiff's most likely source of monetary relief in this case was the EFTA's statutory

damages, which are limited to $500,000 in class cases and entirely discretionary. (*See* Dkt. 37 at 9 (at preliminary approval, recognizing "the potential difficulty in establishing actual damages in this case").) In contrast, the settlement amount presented for approval represents nearly one third of the maximum statutory damages allowed under the EFTA, a proportion that in line with—and in some cases exceeds—other common fund settlements that have been approved within the Ninth Circuit. *See Rodriguez*, 563 F.3d at 965 (finding "the negotiated amount [to be paid in settlement] is fair and reasonable no matter how you slice it" when the amount was 10% of the class's trebled damages estimate); *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (upholding settlement creating fund worth 16.7% of plaintiff's potential recovery); *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 456 (E.D. Cal. 2013) (approving settlement creating fund valued at 30% of plaintiffs' maximum damages).

Furthermore, the anticipated cash payments of approximately $9.00 per-class member compare favorably to the relief provided in other similar EFTA settlements, especially considering that, as a result of Hanson's lawsuit, all class members have already been reimbursed for any wrongfully charged fees. *See Farrell v. OpenTable, Inc.*, No. C 11-1785 SI, 2012 WL 1379661, at *1 (N.D. Cal. Jan. 30, 2012) (approving EFTA settlement that gave class members the option to extend their gift certificate expiration dates or request a refund, but did not afford any separate monetary relief); *Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 477–78 (S.D. Cal. 2013) (approving EFTA settlement where only certain subclass members received monetary relief in the form of a $15 credit and reimbursement for fees paid, less any partial refunds, up to a maximum of $36); *De La Torre v. CashCall, Inc.*, No. 08-cv-03174-MEJ, 2017 WL 5524718, at *8 (N.D. Cal. Nov. 17, 2017) (finally approving EFTA settlement in which the average payment was $14.84).

Consequently, this most important factor weighs heavily in favor of granting final approval as well.

**5. The parties had sufficient information to make an informed settlement decision.**

The fifth *Churchill* factor—the extent of discovery completed and the stage of the proceedings—evaluates whether the parties "had enough information to make an informed decision about the strength of their cases and the wisdom of settlement." *Rinky Dink*, 2016 WL 4052588, at *5. Here, there can be no question that Hanson and his counsel conducted a thorough investigation of the claims and defenses so that they possessed sufficient information to allow them to make the informed decision to enter into the Settlement on behalf of the Settlement Class.

As detailed in Hanson's motion for attorneys' fees, (Dkt. 40), Class Counsel spent considerable time and resources investigating and litigating this case. In particular, Class Counsel thoroughly investigated Defendants' practice of charging inactivity fees on customers' MGM Gift Cards well before this action was even filed. (Rapp Decl. ¶ 3.) As the case progressed, the parties' developed a keen understanding of the case's legal and factual issues by engaging in robust motion practice at the motion to dismiss stage and exchanging significant informal discovery related to, *inter alia*, the scope of Defendants' gift card sales, the size of the putative class, the monetary harm caused by the inactivity fees, and the refunds exercised by Defendants to date. (*Id.* ¶ 6.) *See Griffith v. Providence Health & Servs.*, No. C14-1720-JCC, 2017 WL 1064392, at *4 (W.D. Wash. Mar. 21, 2017) (Coughenour, J.) ("The absence of formal discovery in this case in no way undermines the integrity of the [s]ettlement given the extensive investigation that has occurred as a result of proceedings thus far."). With that information in hand, along with the knowledge acquired from litigating and settling similar consumer class actions, the parties and their respective counsel had all the information they needed to fully understand the pertinent issues of the case and reach an informed resolution. (Rapp Decl. ¶ 7.) *See Griffith*, 2017 WL 1064392, at *4 (finding that informal discovery "gave counsel the opportunity to adequately assess this case's strengths and weaknesses—and thus to structure the [s]ettlement in a way that adequately accounts for those strengths and weaknesses.").



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Given the information gathered by the parties and their thorough understanding of the case, this factor also supports final approval. *See Ikuseghan*, 2016 WL 3976569, at *3 (approving settlement reached "between experienced attorneys who are familiar . . . with the legal and factual issues of this case in particular").

**6. Class Counsel believes—based on their extensive experience litigating and settling consumer class actions—that the Settlement is in the best interests of the Settlement Class.**

The sixth *Churchill* factor—the experience and views of counsel—also weighs in favor of final approval. *Id.*, at *4 (considering that class counsel, "who are experienced and skilled in class action litigation, support the [s]ettlement as fair, reasonable, and adequate, and in the best interests of the [c]lass as a whole," and approving settlement). "[P]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967. "Consequently, the recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *LinkedIn*, 309 F.R.D. at 588 (internal quotations omitted); *see also Larsen*, 2014 WL 3404531, at *5 ("A district court is entitled to give consideration to the opinion of competent counsel that the settlement is fair, reasonable, and adequate.") (internal quotations omitted).

Here, Settlement Class Counsel has extensive experience prosecuting and settling class actions, especially in the consumer protection realm. (*See generally* Dkt. 40-1 (firm resume of Edelson PC).) Most importantly, Class Counsel have been litigating and otherwise overseeing this case for over two years. Thus, their "opinions . . . should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases." *Larsen*, 2014 WL 3404531, at *5. Based on their experience with consumer class actions and their involvement in this case, Settlement Class Counsel firmly believe that the Settlement is in the best interests of the Settlement Class in light of the relief it provides and the risks attendant to continued litigation. (Rapp Decl. ¶ 11.)

This factor thus supports final approval of the Settlement. *See LinkedIn*, 309 F.R.D. at 588 ("[C]lass counsel believes the settlement is in the best interests of the class, especially in



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light of the potential risks and rewards of continued litigation . . . Consequently, this factor favors approval of the settlement.").

**7. No governmental entity opposes the Settlement.**

The seventh *Churchill* factor looks to the presence of any governmental participant and their views on the Settlement, if any. "The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). Here, in accordance with the Class Action Fairness Act, 28 U.S.C. § 1715 *et seq.*, Defendants—through Heffler—caused notice of the proposed Settlement, along with relevant pleadings and other filings, to be provided to the attorney general of every state on February 22, 2018. (Hamer Decl. ¶ 5.) No governmental entity has raised any objection or concern regarding the Settlement, and this factor thus weighs in favor of final approval. *See LinkedIn*, 309 F.R.D. at 588–89 (finding lack of government opposition supports approval because "CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures.") (internal quotations omitted); *see also Rinky Dink*, 2016 WL 3087073, at *3 (finding factor weighed in favor of approval when notice was sent pursuant to CAFA and no government intervened).

**8. The Settlement Class's favorable reaction to the Settlement supports final approval.**

The eighth and final *Churchill* factor—the reaction of class members—likewise supports final approval. "Courts have repeatedly recognized that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of the proposed class action settlement are favorable to the class members." *Bellinghausen*, 306 F.R.D. at 258 (internal quotations omitted). Thus, the Court "may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it." *Id.* (internal quotations omitted); *see also LinkedIn*, 309 F.R.D. at 589 ("A low number of opt-outs and

objections in comparison to class size is typically a factor that supports settlement approval."). Conversely, a high claims rate suggests class member support for a settlement. *See Larsen*, 2014 WL 3404531, at *5 ("The participation rate . . . weighs in favor of finding that the settlement is favorable to the class members."); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) ("Upon considering the high rate of [c]lass [m]ember claims and the relatively low number of requests for exclusion, the [c]ourt finds the reaction of the [c]lass to the [s]ettlement favors approval of the [s]ettlement.").

Here, and as noted above, out of the approximately 22,500 members of the Settlement Class, 7,165 submitted potentially valid claim forms for payment. (*See* Hamer Decl. ¶ 15.) This figure surpasses the participation rates in other consumer class actions, including those in EFTA cases. *See Zepeda v. PayPal, Inc.*, No. C 10-2500 SBA, 2017 WL 1113293, at *16 (N.D. Cal. Mar. 24, 2017) (finally approving EFTA settlement with a 2.8% claims rate and specifically finding the reaction of the class favored approval), *appeal dismissed*, No. 17-15780, 2017 WL 3138104 (9th Cir. July 11, 2017); *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL 4610764, at *8 (N.D. Cal. Aug. 28, 2013) (approving consumer class action settlement related to unauthorized monthly charges with a 3% claims rate); *Barani v. Wells Fargo Bank, N.A.*, No. 3:12-cv-02999-GPC-KSC, Dkt. 32 at 5–6 (S.D. Cal. Mar. 6, 2015) (approving TCPA settlement with a 1.17% claims rate).

In comparison to the thousands of individuals who submitted claim forms to participate in the Settlement, not a single one has objected to or requested to be excluded from the Settlement. (Hamer Decl. ¶ 16.) This complete lack of opposition to the Settlement overwhelmingly suggests that the Settlement Class Members approve of the Settlement. *See Shelby v. Two Jinns, Inc.*, No. CV 15–03794–AB, 2017 WL 6347090, at *7 (C.D. Cal. Aug. 2, 2017) (finally approving EFTA settlement where "[n]o [c]lass member has opted out or objected to the settlement"); *Cody*, 2017 WL 6550682, at *5 (approving EFTA gift card settlement where "[e]ight out of approximately 150,000 potential class members opted out and three class members have objected"); *Zepeda*, 2017 WL 1113293, at *15 (approving EFTA settlement

where "only eleven class members filed objections and 75 have opted out").

The overwhelmingly positive reaction of the class—as does every other *Churchill* factor—thus also weighs strongly in favor of granting final approval to the Settlement.

**B. The Settlement Is Not the Product of Collusion Between the Parties.**

Having established that the *Churchill* factors support finally approving the Settlement, the Court must also ensure that the Settlement is not the product of collusion. *See In re Bluetooth*, 654 F.3d at 946–47. There is "a presumption that a class settlement is fair and should be approved if it is the product of arm's-length negotiations conducted by capable counsel with extensive experience in complex class action litigation." *Ikuseghan*, 2016 WL 3976569, at *3. As discussed above, the Settlement reached here is the product of extensive arm's-length negotiations between counsel experienced in litigating complex consumer class actions. (Rapp Decl. ¶¶ 7–8.). *See Pelletz*, 255 F.R.D. at 542 (approving of settlement "reached after good faith, arms-length negotiations" where "[b]oth [p]laintiffs' counsel and [d]efendants' counsel represented . . . that the negotiations were in good faith"); *Rodriguez*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.").

In addition, none of the factors the Ninth Circuit has identified as potentially indicative of a collusive settlement are present here. First, Class Counsel is not receiving a disproportionate distribution of the Settlement's value while the class is left with nothing. *In re Bluetooth*, 654 F.3d at 947. To the contrary, Class Counsel is asking for the standard benchmark for fees in this Circuit—25% of the Settlement Fund (Dkt. 40)—an amount that is far below their documented lodestar. Second, the parties have not negotiated a "clear sailing" provision in the Settlement, *see In re Bluetooth*, 654 F.3d at 947—i.e. an agreement "where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." *In re Toys R Us-Del., Inc.—Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 458 (C.D. Cal. Jan. 17, 2014). Rather, Defendants, just as every other member of the Settlement Class, are free to object to Hanson's and Class Counsel's fee request. (*See* Settlement § 8.1.)

Third, the final *Bluetooth* factor—reversion of any un-awarded fees to the defendant rather than being added to the settlement fund—is also not present here. *In re Bluetooth*, 654 F.3d at 947. Instead, the Settlement Fund was specifically created to be non-reversionary, which includes any amounts requested, but not ultimately, awarded to Hanson or Class Counsel as attorneys' fee and incentive awards. (Settlement §§ 1.28, 8.1.)

## VI. CONCLUSION

For the foregoing reasons, Plaintiff David Hanson respectfully requests that the Court enter an Order granting final approval to the Settlement.

Respectfully submitted,

**DAVID HANSON,** individually and on behalf of the settlement class,

Dated: October 29, 2018

By: s/ Kevin A. Bay
One of Plaintiff's attorneys

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*Class Counsel*

**MEET AND CONFER ATTESTATION**

Per the Court's standing order, I met and conferred with counsel for Defendants MGM Resorts International and Costco Wholesale Corporation, regarding Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement (the "Motion"). Defendants do not oppose Plaintiff's request for final approval. Defendants, however, have not reviewed the instant Motion, and therefore reserve their rights to object to statements made in support of the Motion.

s/ Eve-Lynn J. Rapp



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**CERTIFICATE OF SERVICE**

I, Eve-Lynn J. Rapp, an attorney, hereby certify that on October 29, 2018, I served the above and foregoing to by causing a true and accurate copy of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Eve-Lynn J. Rapp



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