UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE

GOOGLE ADWORDS LITIGATION

Case No. 5:08-cv-03369-EJD

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS FEES, REIMBURSEMENT OF COSTS AND EXPENSES AND SERVICE AWARDS

Re: Dkt. Nos. 375, 381

After stints in both the Ninth Circuit Court of Appeals and the United States Supreme Court, this class action concerning the misplacement of internet advertisements has resulted in a settlement between Representative Plaintiffs JIT Packaging, Inc., RK West, Inc. and Richard Oesterling (collectively, "Plaintiffs") and Defendant Google, Inc. ("Google"). The court preliminary approved the settlement in an order filed on March 9, 2017. Dkt. No. 369. Having now noticed the members of the class, Plaintiffs return for final approval and for a determination of attorneys fees, costs, and service awards. Dkt. Nos. 375, 381.

Having carefully considered the relevant pleadings, this matter's extensive litigation history and the statements of counsel from the hearing on July 27, 2017, the court has determined that final approval of the settlement is warranted. Additionally, the court will award reasonable amounts for attorneys fees, costs, expenses and service awards.

I. BACKGROUND

Google maintains AdWords, an auction-based program for which Google serves as an intermediary between website hosts and advertisers. Through AdWords, internet advertisers

provide advertisements to Google and its third party website-owner partners. Participating advertisers enter variables defined by Google into the AdWords interface on Google's website, including the maximum price per ad they are willing to pay and their overall budget. They also select which Google-defined categories of websites should display their ad. AdWords then utilizes an auction-based algorithm to determine the online placement and price of the ad. Under this process, advertisers during the class period did not know in advance exactly where their ads would appear.

Advertisers paid Google each time an internet user "clicked" on their displayed ad. The price of a particular click depended on several factors, including: the maximum bids of other AdWords customers for clicks based on the same search term, a "quality score" of the advertisement, and a "Smart Pricing" discount applied to the website where the ad had been placed. Google created and instituted Smart Pricing, an internally-calculated price adjustment, to adjust the advertiser's bids to the same levels that a "rational advertiser" would bid if the rational advertiser had sufficient data about the performance of ads on each website. Smart Pricing is a ratio calculated by dividing the conversion rate for the lower-quality website by the conversion rate for the same ad on google.com.

During the class period, an advertiser using AdWords could request that its ads appear on "Search Feed" sites (such as search result pages), "Content Network" sites (such as well-known news providers), or both. However, other categories of websites did not appear in the AdWords registration process: "parked domains" (generic pages without actual content) and error pages (pages that appear when an internet user inputs information other than a legitimate web address into a browser). Even though Google did not disclose these ostensibly lower-quality websites during the AdWords registration process, Plaintiffs allege that AdWords ads appeared on both parked domains and error pages.

Plaintiffs filed a Third Amended Complaint on November 29, 2010 (Dkt. No. 166), which became the operative pleading when the court denied Google's motion to dismiss. Dkt. No. 235.

Plaintiffs allege that Google misled advertisers in violation of California's Unfair Competition Law ("UCL"), Business and Professions Code § 17200 et seq., and the False Advertising Law ("FAL"), Business and Professions Code § 17500 et seq., by failing to disclose the placement of AdWords ads on parked domains and error pages. The proposed class is defined as:

> All persons or entities located within the United States who, from July 11, 2004 through March 31, 2008, had an AdWords account with Google and were charged for clicks on advertisements appearing on parked domains and/or error pages.

The court denied Plaintiffs' motion for class certification (Dkt. No. 315), which decision the Ninth Circuit reversed. Dkt. No. 343. The Ninth Circuit also denied Google's ensuing motion for panel rehearing and rehearing en banc. Dkt. No. 346. Google then filed a petition for writ of certiorari in the Supreme Court, which was denied. Dkt. No. 350. The Ninth Circuit's mandate followed on June 8, 2016. Id. The parties notified the court of the settlement on December 12, 2016. Dkt. No. 357. The court held a preliminary approval hearing on March 9, 2017, and granted the motion that same day. Dkt. Nos. 369, 370. These motions followed.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action 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 v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).

"Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage, the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Having already completed a preliminary examination of the agreement, the court reviews it again, mindful that the law favors

the compromise and settlement of class action suits. See, e.g., Churchill Village, LLC. v. Gen. Elec., 361 F.3d 566, 576 (9th Cir. 2004); Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he [or she] is exposed to the litigants and their strategies, positions, and proof." Hanlon, 150 F.3d at 1026.

III. DISCUSSION

A. Class Certification

The Federal Rules of Civil Procedure describe four preliminary requirements for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. See Fed. R. Civ. P. 23(a)(1)-(4). If these are satisfied, the court must then examine whether the requirements of Rule 23(b)(1), (b)(2), or (b)(3) are similarly satisfied. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345-46 (2011).

The Rule 23 requirements are more than "a mere pleading standard." Id. The class representations are subjected to a "rigorous analysis" which compels the moving party to "affirmatively demonstrate . . . compliance with the rule - that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id.

The court previously found the proposed class satisfied Rule 23(a), and developments since preliminary approval support this finding. The numerosity requirement is easily satisfied because the class has 1.14 million members. See Int'l Molders' & Allied Workers' Local 164 v. Nelson, 102 F.R.D. 457, 461 (N.D. Cal. 1983) ("[W]here the number of class members exceeds forty, and particularly where class members number in excess of one hundred, the numerosity requirement will generally be found to be met."). The commonality requirement is satisfied because the resolution of the following question "will resolve an issue that is central to the validity of each one of the claims in one stroke": whether Google's alleged omissions were misleading to a reasonable AdWords customer? Wal-Mart, 564 U.S. at 350. The typicality requirement is

satisfied because Plaintiffs' claims arise out of the same conduct as those of the class; specifically, Google's alleged failure to disclose the placement of advertisements on parked domains and other less desirable websites. See Hanlon, 150 F.3d at 1020 (explaining that "representative claims are typical if they are reasonably co-extensive with those absent class members; they need not be substantially identical"). The adequate representation requirement is satisfied because there is no evidence of a conflict of interest between Plaintiffs or Plaintiffs' counsel and the class, and Plaintiffs' counsel has adequately demonstrated a motivation to prosecute this case vigorously. See id.

Nor has anything changed with respect to Rule 23(b)(3) since, in the court's view, the Ninth Circuit determined the predominance requirement was satisfied for this case. See Pulaski & Middleman v. Google, Inc., 802 F.3d 979, 990 (9th Cir. 2015).

Since a sufficient showing has been made as to all of the Rule 23 requirements, conditional class certification will continue for final approval.

B. Notice Plan and Settlement Administration

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." As to the content of notices, it must explain in easily understood language the nature of the action, definition of the class, class claims, issues and defenses, ability to appear through individual counsel, procedure to request exclusion, and the binding nature of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

Here, the court approved a notice plan comprised by the following: (1) direct email notice to settlement class members, (2) postcard notices to settlement class members whose emails were returned or not opened, (3) a press release announcing the settlement, and (4) a dedicated website and informational toll free number. The court also approved Analytics Consulting, LLC as the settlement administrator. To effectuate the plan, Google provided a list of class members used by the Settlement Administrator to send an initial round of email notices. The Settlement

Administrator then sent a second round of emails (830,294) to class members it determined had not opened the original message. A third round of emails (642,312) were sent to class members who had not filed claims before the deadline.

Postcard notices (209,761) were sent to class members whose emails were returned. The parties also authorized the Settlement Administrator to send postcard notices to class members who had not opened the original email, though such notice was not specifically authorized by the preliminary approval order. In sum, 725,464 postcard notices were mailed.

Additionally, the Settlement Administrator sent individualized letters (1,434) to class members whose AdWords profiles were associated with over five accounts. As a result of the plan, the Settlement Administrator estimates that 89% of class members received some form of direct notice.

All of the notices referred class members to the website maintained by the Settlement Administrator. A press release was also provided to PR Newswire and distributed to 12,000 traditional media and 2,500 online media outlets.

The court reaffirms the notice plan satisfies Rule 23(c)(2)(B) and finds the Settlement Administrator has fully and properly implemented the notice plan.

C. Fairness Determination

The court now reexamines the fairness of the proposed settlement, this time with the benefit of notice to the class.

The details of a class action settlement are scrutinized to ensure they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The burden to demonstrate fairness falls upon the proponents of the settlement. Staton, 327 F.3d at 959; Officers for Justice, 688 F.2d at 625. To assess the fairness of the proposed settlement, the court considers eight factors derived from Churchill Village, LLC v. General Electric, 361 F.3d 566, 575 (9th Cir. 2004), also known as the "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.

In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 944 (9th Cir. 2015).

When settlement occurs before formal class certification, settlement approval requires a higher standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. Lane v. Facebook, Inc., 696 F.3d 811, 819 (9th Cir. 2012).

Here, the parties proposed a settlement with the following components:

- Google will pay the total amount of $22.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) settlement payments to class members, (2) attorney fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the Claims Administrator.
- According to the Settlement Agreement, the entire net settlement fund will be distributed to class members who submit valid claims. If the total amount of valid claims amounts to less than the net settlement fund, claimants will receive 100% of the amounts of the their claims. If the total amount of valid claims is more than the net settlement fund, payments will be reduced on a pro rata basis. No settlement payment will be made, however, if the total amount of the payments is less than $1.00.
- If, after distributions, there remains a residual amount of $100,000 or more in the fund, it will be distributed as an account credit "to Settlement Class members who did not submit Claims and have an Active Account, on a pro rata basis in accordance with the total amount they spent on Google AdWords ads that were placed on parked domains and error pages during the Settlement Class Period." However, no payment will be made that is less than $5.00.

- If the residual amount in the fund is less than $100,000, it will be distributed to the cy pres recipients. Plaintiffs propose the Public Justice Foundation and Public Counsel as the cy pres recipients.
- As to particular payments, Plaintiffs intended to request incentive awards for the representative plaintiffs of $5,000 each, subject to court approval. Plaintiffs also estimated that administrative costs would be $280,000.
- Plaintiffs' counsel intended to request attorneys fees and costs not to exceed $6.5 million and $700,000, respectively.

The court previously weighed the relevant factors and found the proposed settlement to be fair, reasonable and adequate. Doing so again, the court finds that, on balance, the factors still weigh in favor of the settlement.

First, the settlement was reached after extensive motion practice and discovery, as well as subsequent to an appellate proceeding that ended only when the United States Supreme Court denied certiorari.

Second, the parties engaged the services of an experienced private mediator to assist them in their efforts to resolve this action at arms-length, a fact which undermines the possibility of collusion between Plaintiffs' counsel and Google.

Third, Plaintiffs' counsel, which consists of experienced class action litigators, support the settlement.

Fourth, it is apparent the parties thoughtfully considered the risk, expense and complexity of further litigation in reaching a compromise. Indeed, as Plaintiffs point out, Google indicated it would seek decertification of the class and would likely appeal any result in Plaintiffs' favor. Thus, settlement saves the parties the burden of funding what could have been protracted litigation in the trial and appellate courts for many more years. In addition, the amount of the settlement and the manner of its distribution are adequate in light of the claims and the strong potential for additional proceedings.

The reaction of class members, however, is not necessarily positive as a matter of numbers. Though the small amount of opt-outs and objections in relation to the number of class members is noted, the submission of only 81,479 timely claims and 71 late claims (which the parties agree should be honored) out of a class of 1,147,404 members amounts to a participation rate of only 7%. This is below the customary participation rate for consumer class actions, as recently observed by the Ninth Circuit. See Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1130 (9th Cir. 2017) ("It is not unusual for only 10 or 15% of the class members to bother filing claims.").

However, the 7% participation rate is not fatal to the settlement. As indicated by Plaintiffs' counsel and the court at the final approval hearing, several factors could explain a low rate, including the fact this action refers to conduct that occurred between nine and thirteen years ago. Importantly, the pleadings do not disclose any reason to find the participation rate was affected by a failure of notice, given the successful implementation of the notice plan and the percentage of class members exposed to the information. Moreover, the low number of claims is outweighed by the other Churchill factors, which taken together show this settlement falls within a reasonable range of possible settlements, after giving "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. Hanlon, 150 F.3d at 1027; see In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

Because the settlement remains fair adequate and reasonable, the court grants final approval.

D. Attorneys Fees, Costs, Expenses and Service Awards

i. Attorneys Fees

When attorneys fees and costs are requested by counsel for the class, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). "In a diversity action such as this, federal courts apply state law both to determining the right to fees and the method of calculating them." Emmons v. Quest Diagnostics

Clinical Labs, Inc., No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018, at *7, 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. Feb. 27, 2017) (citing Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002); Mangold v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1478 (9th Cir. 1995)).

The California Supreme Court has clarified that "when an attorney fee is awarded out of a common fund preserved or recovered by means of litigation, the award is not per se unreasonable merely because it is calculated as a percentage of the common fund." Laffitte v. Robert Half Int'l Inc., 1 Cal. 5th 480, 486 (2016). In doing so, the Court joined "the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." Id. at 503. The Court also suggested considerations of the risks and potential value of the litigation, the contingency, novelty, and difficulty of the case, the skill shown by counsel, and a lodestar cross-check were all appropriate means of discerning an appropriate percentage award in a common fund case. Id. at 504, 506. Notably, however, the Court did not adopt a generally applicable "benchmark" percentage for common fund fee awards, though it cited other courts that do. Id. at 495 (observing benchmark fees percentages used in the Ninth and Eleventh Circuits).

The Ninth Circuit has recognized that "courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." In re Bluetooth, 654 F.3d at 941. The Ninth Circuit also recognizes factors similar to those of the California Supreme Court for determining the appropriateness of a fee award: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." Tarlecki v. bebe Stores, Inc., No. C 05-1777 MHP, 2009 WL 3720872, at *4, 2009 U.S. Dist. LEXIS 102531 (N.D. Cal. Nov. 3, 2009).

"Though courts have discretion to choose which calculation method they use, their

discretion must be exercised so as to achieve a reasonable result." In re Bluetooth, 654 F.3d at 941. Because the California Supreme Court has recently approved the percentage calculation for common fund cases like this one, the court will utilize that method along with a lodestar cross-check to calculate the appropriate amount of attorneys fees.

a. Percentage of the Fund

Plaintiffs' counsel seeks a fee award of $6.5 million, which amounts to 28.8% of the settlement fund. Several of the factors weigh in counsel's favor. Counsel undertook substantial risk by agreeing to litigate the claims on a purely contingent basis knowing that Google would put up a strong and serious defense. To that end, counsel has carried the financial burden of this case for the past eight years without compensation.

Additionally, this case required notable legal acumen given the complex class certification issues, a Ninth Circuit appeal resulting in a published opinion, and a certiorari petition to the United States Supreme Court. Additionally, class counsel points out the amount requested is consistent with that awarded in other similar cases decided under federal and California law.

But there is one potentially negative factor. Though the amount of the settlement fund is significant, the 7% participation rate is not. As already stated, there are several possible explanations for the low rate, most of which do not reflect unfavorably on counsel's performance. But another possibility, however unlikely, is that class members were not motivated to participate by the settlement result itself.

Applying the relevant factors provided by the California Supreme Court and the Ninth Circuit to the settlement achieved in this case, the court deems it fair, reasonable and adequate to award counsel an amount representing 27% of the settlement fund, or $6,075,000. The court finds this amount properly accounts for the risk involved, the significant amount of work done, and the lower-than-typical participation rate.

b. Lodestar Cross-Check

Both the Ninth Circuit and the California Supreme Court encourage trial courts "to guard

against an unreasonable result" by cross-checking attorneys fees calculations against a second method. In re Bluetooth, 654 F.3d at 944; accord Laffitte, 1 Cal. 5th at 504. Since a percentage award might be reasonable in some cases but arbitrary in cases involving an extremely large settlement fund, the purpose of the comparison is to ensure counsel is not overcompensated. See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 109 F.3d 602, 607 (9th Cir. 1997); see also Laffitte, 1 Cal. 5th at 504 ("If a comparison between the percentage and lodestar calculations produces an imputed multiplier far outside the normal range, indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage.").

Here, Plaintiffs' counsel calculates a total lodestar figure of $7,002,126 for 12,496.6 billing hours from 17 lawyers, paralegals and law clerks. The ranges for hourly rates are as follows: $600 to $900 for partners and "of counsel" attorneys, $350 to $520 for associates and "project attorneys," $350 for a law clerk, $190 to $220 for paralegals. Altogether, the average hourly rate for all work performed is $560.

Plaintiffs' counsel has provided sufficient support for its proposed lodestar calculation. The amount of hours and other costs attributed to this case are appropriate in light of the efforts required to litigate and ultimately engage in a lengthy appellate and then settlement process. In addition, the hourly rates fall within the higher range of those historically approved in this district. In re Magsafe Apple Power Adapter Litig., No. 5:09-cv-01911-EJD, 2015 WL 428105, at *12, 2015 U.S. Dist. LEXIS 11353 (N.D. Cal. Jan. 30, 2015). Accordingly, the lodestar cross-check confirms the reasonableness of the percentage-based calculation since it exceeds the latter amount.

ii. Costs

Plaintiffs' counsel seeks reimbursement of $700,000 for costs, which amount they disclosed in the application for preliminary approval. Since the amount of incurred costs is more than the request, the court finds that $700,000 is fair, adequate and reasonable.

iii. Administrative Expenses

Plaintiffs' counsel seeks approval of $484,000 in total projected expenses charged by the Settlement Administrator for implementing the notice plan and coordinating claims and payments. Notably, counsel originally estimated administrative costs of $280,000.

Though the request for expenses is well above the amount disclosed during preliminary approval proceedings, the court understands that counsel authorized additional, previously-unanticipated individualized notices to class members with multiple AdWords accounts. Because these notices can account for the increase, and because they were undertaken for the benefit of the class, the court will approve the request for $484,000 in administrative expenses.

iv. Incentive Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." Staton, 327 F.3d at 977. To determine the appropriateness of incentive awards a district court should use "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions ... the amount of time and effort the plaintiff expended in pursuing the litigation ... and reasonabl[e] fear[s of] workplace retaliation." Id. (internal quotation marks omitted).

Here, the Settlement Agreement provides that Plaintiffs may receive incentive awards of up to $5,000 each. In this district, that amount is presumptively reasonable. Jacobs v. Cal. State Auto. Ass'n Inter-Ins. Bureau, No. C 07-00362 MHP, 2009 WL 3562871, at *4-5, 2009 U.S. Dist. LEXIS 101586 (N.D. Cal. Oct. 27, 2009). Since Plaintiffs assumed the responsibilities and burdens of acting as representatives in this lawsuit, including providing documents, verifying allegations, and consulting with counsel, the court will approve the $5,000 incentive awards as reasonable.

IV. OBJECTION

The court received one written objection on behalf of John J Keady Transportation

Consulting. Generally, objectors to a class action settlement bear the burden of proving any assertions they raise in opposition to approval. United States v. Oregon, 913 F.2d 576, 581 (9th Cir. 1990).

Keady has not satisfied this burden. The objection primarily takes issue with information provided on the postcard notice, and seems to protest any obligation to investigate whether he was injured as a result of Google's conduct. But these sorts of questions could have been answered by following the instructions listed on the notice, visiting the dedicated website or contacting the Settlement Administrator. In short, this objection does not present a viable reason to reject the settlement and is overruled on that basis.

V. CONCLUSION AND ORDER

Based on the preceding discussion, the Motion for Final Approval of Class Action Settlement (Dkt. No. 381) is GRANTED.

The Motion for Attorneys Fees, Reimbursement of Costs and Expenses and Service Awards (Dkt. No. 375) is also GRANTED as follows:

1. The court approves attorneys fees of $6,075,000 to Plaintiffs' counsel.
2. The court approves costs of $700,000 to Plaintiffs' counsel.
3. The court approves administrative expenses of $484,000.
4. The court approves incentive awards of $5,000 for Plaintiffs.

IT IS SO ORDERED.

Dated: August 7, 2017

EDWARD J. DAVILA
United States District Judge