FILED
DEC 13 2022

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

DATE: December 13, 2022
JUDGE: Edward G. Weil

DEPARTMENT: 39
CLERK: Denese Johnson
UNREPORTED

ANTHONY SERVICE, et al.,
Plaintiff(s),
vs.

Case No.: MSC22-01841

VOLKSWAGEN GROUP OF AMERICA, INC., et al.,
Defendant(s).

ORDER AFTER HEARING
RE: PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

John Hajny, Ricardo Villalobos, Anthony Service, and Jeremy Adams move for preliminary approval of their settlement with Volkswagen Group of America, Audi of America, LLC, and Sanctus, LLC d/b/a Shift Digital, of their putative class action. The action arises out of a data breach. (Complaint at ¶ 2.) The Court issued a tentative ruling on November 30, 2022, and held a hearing on December 1, 2022. At the hearing, the Court requested a supplemental submission by December 9, 2022, after which the matter was deemed submitted. The Court has reviewed the supplemental submission and now rules as follows.

A. Litigation Background

This particular case arises out of a nationwide class action complaint originally filed in the United States District Court for the District of New Jersey, titled *Villalobos v. Volkswagen Group of America, Inc.*, No. 2:21-cv-13049-JMV-JBC (D.N.J.) on June 28, 2021, by Plaintiff Ricardo Villalobos. (Byrd Decl. at ¶ 7.) On August 9, 2021, Plaintiff Villalobos filed a First Amended Class Action Complaint, adding Plaintiff Jeremy Adams. (Id.) On July 8, 2021, Plaintiff John Hajny filed his Class Action Complaint in the same court, titled *Hajny v. Volkswagen Group of America*, Inc., No. 2:21-cv-13442-JMV-JBC (D.N.J.). (*Id.*) On September 14, 2021, the court consolidated the Villalobos and Hajny actions, and the plaintiffs in those actions filed a Consolidated Class Action Complaint on October 14, 2021, which added a fourth Plaintiff, Anthony Service, under the consolidated caption, "In re: Volkswagen Group of America, Inc. Data Breach Litigation" (the "Consolidated Action"). (*Id.*)

On November 29, 2021, upon the Parties' stipulation, the *In Re: Volkswagen* Action was transferred to the Northern District of California, so that it could be consolidated with an earlier filed case, *Wynne v. Audi of America* (N.D. Cal.) No. 4:21-cv-08518-DMR. (Simpson Decl. at ¶ 4, Ex. 1.) Before the consolidation could occur, however, Wynne moved to remand, which was ultimately denied. (Byrd Decl. at ¶ 10.)

The Hon. Wayne R. Andersen (Ret.) presided over the settlement negotiations between Class Plaintiffs, Defendants, and proposed intervenor Wynne. (Andersen Decl. at ¶ 1.) Counsel for Class Plaintiffs, Defendants, and Wynne attended and participated in settlement discussions at an in-person mediation session on May 16, 2022, in Chicago, IL. (*Id.* at ¶ 9.) Wynne's counsel chose to depart this session in the early evening, while settlement discussions were still ongoing. (*Id.* at ¶ 11.) Counsel for proposed intervenor recalls these settlement discussions differently, but does not dispute that he was present at the mediation. (Righetti Decl. at ¶ 8.)

On August 10, 2022, Plaintiffs and Defendants informed Judge Ryu that they had signed a term sheet and, to avoid potential unnecessary disputes, planned to seek judicial approval of the settlement in state court. (Simpson Decl. at ¶ 6.) The instant class action complaint (the *Service* action) was filed on August 30, 2022, in this Court.

On September 15, Plaintiffs moved for preliminary approval of the Settlement Agreement, and the Court set a preliminary approval hearing for October 20. On October 13, one week before the preliminary approval hearing, Wynne filed an *ex parte* application for leave to intervene in this action. Although the *ex parte* application was denied, the Court permitted Wynne to file her motion to intervene, set it for hearing on November 17, 2022, and continued the hearing on the preliminary approval motion to December 1, 2022. On November 17, the motion to intervene was denied.

As to the substance of the matter, Volkswagen collects personal information from customers and potential customers. "Personal Information" (PI) includes names, addresses, phone numbers and information about vehicles purchased. For customers who applied for loans through Volkswagen, "*Sensitive* Personal Information" (SPI) was collected, which includes driver's license numbers, Social Security numbers, and other bank account, credit card, and tax numbers. PI was collected for about 3.1 million people. SPI was collected from about 90,000. Volkswagen kept the data, and shared it with third parties, including Shift Digital. Plaintiffs claim that Shift Digital "left that unredacted data exposed for nearly two years." Allegedly, some of the data was stolen and some posted for sale on the web, which can result in it being used for a variety of fraudulent purposes. In March of 2021, Volkswagen learned of the problem, and began notifying consumers and law enforcement officials. The above-referenced litigation ensued.

B. Terms of the settlement

The settlement would approve a settlement class, which would consist of "[A]ll persons residing in the United States to whom VWGoA and/or Audi sent notice that their SPI and/or PI may have been exposed as a result of the Incident." Within the class,

there would be three subclasses: Tier 1 (California Residents whose sensitive personal information was exposed and who would receive $350); Tier 2 (non-California residents whose sensitive personal information was exposed and who would receive $80); and Tier 3 (nationwide class members whose personal information [not "sensitive" personal information] was exposed and who would receive $20). Tier 1 and 2 members who document actual losses greater than the payment amount will receive the higher amount (up to $5,000). These cash payment amounts are not guaranteed, however. If the amount of valid claims within any Tier exceeds the amount available, the payments will be reduced pro rata. Money from the Tier 3 fund can be used to pay Tier 1 and 2 members if their funds would otherwise be reduced. The class has about 3,177,240 members; Tier 1 has about 19,593 members, Tier 2 has about 70,591 members, and Tier 3 has about 3,087,056 members.

Class members will release all claims arising from the incident, which occurred between August 17, 2019 and June 15, 2021. Thus, there is no "class period."

A settlement fund of $3,500,000 would be created, which would provide for cash payments or (for Tier 1 and tier 2 members) reimbursement of out-of-pocket losses for class members who submit valid claims. $500,000 would be allocated to notice and administrative costs; $20,000 to representative incentive awards for the four plaintiffs ($5,000 each); $1,050,000 in attorney's fees (30% of the gross settlement amount), and up to $50,000 in litigation costs. The funds would be paid to the administrator within thirty days after order directing notice to the class. The gross settlement amount would be divided among the three subclasses: Tier 1 California SPI subclass ($2,000,000), Tier 2 Nationwide SPI subclass ($800,000), and Tier 3 Nationwide PI subclass ($700,000). The net funding available is $1,880,000, just over half of the gross amount. The amount available to each tier is less: Tier 1: $1,074,285, Tier 2: $429,714, and Tier 3: $376,000.

Detailed criteria are provided concerning the nature of the reimbursable out-of-pocket expenses and the necessary documentation.

Defendant Shift Digital also would make various improvements to its existing security systems and practices, for three years.

C. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction ... to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

D. Attorney fees, costs, representative payments, and administrative costs

Plaintiff seeks one-third of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id.*, at 505.) Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

The requested representative payment of $5,000 for plaintiffs will be reviewed at time of final approval. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

Similarly, litigation costs and settlement administrative costs will be considered at final approval.

E. Discussion and Conclusion

Plaintiffs have adequately discussed the strengths and weaknesses of the case, including both the merits and whether a class would be certified. California class members also have a claim under the California Consumer Privacy Act, which creates a statutory damages remedy, with specific minimum damages of $100. This statute, however, took effect on January 1, 2020, while the data in question was "exposed" from August 17, 2019 to June 15, 2021. As between defendants, Volkswagen might shift liability to Shift Digital (but since the settlement includes Shift Digital, that would not appear to be a significant problem). Counsel estimate the maximum damages available

to the Tier 1 subclass at about $14.6 million, simply by multiplying the $750 maximum statutory damages per subclass member. No estimate of potential actual damages is provided. Nor is an estimate provided of the likely value of the Tier 2 and Tier 3 subclasses. It stands to reason, however, that the Tier 2 subclass members, who do not have a claim under California law, and the Tier 3 subclass members, who did not have "sensitive" information disclosed have a less valuable claim than Tier 1 subclass members. Plaintiffs initially did not address whether any of the non-California class members have state law claims in their state of residence that have some value. In the supplemental submission, they explain that no other state has a statute similar to the California consumer Privacy Act.

In addition, the parties have submitted authority holding that "a foreign state may exercise jurisdiction over the claim of an absent class [member] even though [he or she] may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." (*Phillips Petroleum v. Shutts* (1985) 472 U.S. 797, 811.)

The Court has made some effort to determine the amount likely to be available to claimants. Using the net funds available, and dividing by the number of class members, Tier 1 provides $54.83 per class member (1,074,285/19,593), Tier 2 provides $6.08 (429,714/70,597), and Tier 2 provides $0.12 (376,000/3,087,000). Of course, not all class members will apply. Plaintiffs estimate the claims rate by using figures from 9 other cases. (The Court has no idea how these cases were chosen, but for discussion purposes assumes they are representative.) In those cases, the rate averaged 2.54%, but ranged from 0.7% to 5.3%. Assuming 2.54% applied, this would allow each claimant of Tier 1 $2,158, Tier 2 $239.60, and Tier 3 $4.72. If 5% applied this would allow each member of Tier 1 $1,096.60, Tier 2 $121.72, and Tier 3 $2.40. While there is significant uncertainty here, the arithmetic suggests that if the claims rate is typical of the other cases used as an index, the funding would be more than enough for the Tier 1 members to get their $350 payment, more than enough for the Tier 2 members to get their $80 payment, but not enough for the Tier 3 members to get their $20 payment.

As to Tier 3, the Court initially questioned why is the settlement structured such that it appears likely that they will not receive the "minimum" $20 payment. In the supplemental submission, counsel explain that, based on expected claims rates, there will be excess funds from the Tier 1 and 2 pools, which will be used to pay Tier 3 claimants.

This, however, addresses only the class members seeking the flat payment. Initially, Plaintiffs did not provide any information (based on other settlements) indicating the number of reimbursement claims (or as plaintiffs call them, the "indemnity" claims), their amounts, and their success rate. In the supplemental

submission, plaintiffs document that indemnity claims are extraordinarily low: ranging from .000023% to .000054%. The upshot is that these claims will be minimal, and any sufficiently documented claims will be paid, with funds left over to be used to increase the flat damage claims.

There is no provision in the settlement for disbursement of unclaimed residue, if there is any. This is because the settlement provides that if this occurred, applicants would receive an additional payment distributed pro rata for expense claims or cash payments. While plaintiffs expect that all funds will be paid to the class, at the Court's request, in the event of a residue, they have selected a cy pres recipient, in compliance with Code of Civil Procedure sections 384 and 382.4. They have selected the Electronic Privacy Information Center as the recipient and attested that counsel have no relationship with the foundation that could create an appearance of impropriety.

The proposed administrator, Epiq systems, appears to be qualified. The cost estimate of $500,000 is much higher than a typical class action settlement, but the class size is large, and the claims processing here will be much more extensive. (Although relatively little of the extra expense will be based on processing indemnification claims, based on the information provided about indemnification claim rates.) Counsel obtained three bids. In response to the Court's inquiry concerning whether this is an estimate or a cap, counsel have clarified that it is a cap, subject to conditional reopening under specific circumstances. Given that the final amount is subject to approval by the Court, this is sufficient.

The Court finds that the settlement is sufficiently fair, reasonable, and adequate to justify preliminary approval.

Accordingly, the motion is granted.

Counsel are directed to prepare an order reflecting this entire ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court. If funds are paid to the proposed cy pres recipient, the parties will be required to provide an amended judgment setting forth the amount paid.

DATED: December 13, 2022

Hon. Edward G. Weil
Judge of the Superior Court

Superior Court of California, Contra Costa County

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K. Bieker
Court Executive Officer

CLERK'S CERTIFICATE OF MAILING

CASE NAME:	CASE NUMBER:
ANTHONY SERVICE VS. VOLKSWAGEN GROUP OF AMERICA, INC	C22-01841

THIS NOTICE/DOCUMENT HAS BEEN SENT TO THE FOLLOWING ATTORNEYS/PARTIES:

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SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY

I DECLARE UNDER PENALTY OF PERJURY THAT I AM NOT A PARTY TO THE WITHIN ACTION OR PROCEEDING; THAT ON THE DATE BELOW INDICATED, I SERVED A COPY OF THE ORDER AFTER HEARING RE PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BY DEPOSITING SAID COPY ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID IN THE UNITED STATES MAIL AT MARTINEZ, CA AS INDICATED ABOVE TO ALL ACTIVE AND DISPOSITIONED PARTIES.

DATE: 12/13/2022

BY: _____

D. JOHNSON, DEPUTY CLERK