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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TRACFONE UNLIMITED SERVICE
PLAN LITIGATION

No. C-13-3440 EMC

**ORDER (1) GRANTING MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; AND (2) GRANTING
MOTION FOR AWARD OF
ATTORNEYS' FEES, COSTS, AND
REPRESENTATIVE SERVICE
AWARDS**

(Docket Nos. 121, 122)

I. INTRODUCTION

Class Plaintiffs filed four consolidated class actions against Defendant TracFone Wireless, alleging that TracFone sold “unlimited” data plans that were not, in fact, unlimited. Rather, when TracFone’s customers exceeded certain data usage caps, TracFone would throttle¹ or suspend those customers’ data service altogether, or even terminate their phone services entirely. Plaintiffs claim this behavior violated numerous laws, including California’s Unfair Competition Law (UCL), its Consumer Legal Remedies Act (CLRA), Florida’s Deceptive and Unfair Trade Practices Act (FDUTPA), as well as numerous common-law proscriptions. The Federal Trade Commission (FTC) also alleges that TracFone’s advertising of its “unlimited” data plans was deceptive, and filed a separate enforcement action that has been related to this case. *See Federal Trade Commission v. TracFone Wireless, Inc.*, Case No. 15-cv-00392-EMC. TracFone has settled the FTC enforcement

¹ Throttling is the slowing of a customer’s data service speed.

1 action as part of a global resolution of these class actions.

2 The parties to the consumer cases now seek final approval of a nationwide settlement of all
3 claims stemming from TracFone's allegedly deceptive marketing practices. Class counsel also
4 move for an award of attorneys' fees and costs, and for service awards for the named plaintiffs.
5 Pursuant to the terms of the proposed settlement, TracFone has paid \$40 million to the FTC that the
6 FTC will disburse to class members in accordance with an agreed upon payment formula.
7 Depending on the precise injury a class member experienced (*i.e.*, whether their service was
8 throttled, suspended, or terminated) and when that injury occurred, class members who made a claim
9 will receive between roughly \$15 and \$65 per affected phone line. TracFone further agreed to the
10 entry of injunctive relief regarding its advertising and disclosure practices with respect to its
11 "unlimited" data plans.

12 1.8 to 1.9 million customers for whom TracFone has up-to-date address information will
13 automatically receive a payment under the settlement without filing a claim. All other class
14 members are required to submit a simple claims form to recover under the settlement. The deadline
15 to file claims passed on June 19, 2015. The deadline for opt-outs and objections passed on May 20,
16 2015. The settlement administrator reports that 803,671 claim forms were submitted as of June 22.
17 Docket No. 139 (Second Supp. Decl. Simmons) at ¶ 8. By contrast, 142 putative class members
18 opted out, and five objected to the settlement. Docket No. 134-1 (Supp. Decl. Simmons) at ¶¶ 22,
19 23. Of those five objectors only two, Objectors Birner and Johnson, filed substantive objections.
20 And of those, only Birner appeared at the fairness hearing, is represented by counsel, and filed a
21 formal objection to the settlement complete with legal citations. However, as discussed more fully
22 below, the Court concludes that Birner lacks standing to object because he is not a class member. In
23 any event, the Court determines that his objection is without merit.

24 For the reasons explained in this Order and stated on the record at the final approval hearing,
25 the Court determines that the parties' proposed settlement is fair, reasonable, and adequate. It is
26 therefore approved. Similarly, the Court determines that class counsels' fees request is eminently
27 reasonable in light of the sizeable relief obtained for the class. Accordingly, class counsel will be
28 awarded the full \$5 million sought in fees, plus the full amount of their requested costs (\$63,644.75).

1 Finally, the Court approves the payment of \$2,500 service awards to the representative plaintiffs.

2 **II. DISCUSSION**

3 A. Motion for Final Approval of Class Action Settlement

4 1. Legal Standard for Final Approval

5 Federal Rule of Civil Procedure 23(e) “requires the district court to determine whether a
6 proposed settlement is fundamentally fair, adequate and reasonable.” *Hanlon v. Chrysler Corp.*, 150
7 F.3d 1011, 1026 (9th Cir. 1998). “It is the settlement taken as a whole, rather than the individual
8 component parts, that must be examined for overall fairness.” *Id.* (citing *Officers for Justice v. Civil*
9 *Serv. Comm’n of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982)).

10 While the factors this court may consider in making its fairness assessment will naturally
11 vary from case to case, typically the court should consider:

12 (1) the strength of the plaintiff’s case; (2) the risk, expense,
13 complexity, and likely duration of further litigation; (3) the risk of
14 maintaining class action status throughout the trial; (4) the amount
15 offered in settlement; (5) the extent of discovery completed and the
16 stage of the proceedings; (6) the experience and views of counsel; (7)
17 the presence of a governmental participant; and (8) the reaction of the
18 class members of the proposed settlement.

19 *In re Bluetooth Headset Prods. Liab. Litig. (In re Bluetooth)*, 654 F.3d 935, 943 (9th Cir. 2011)
20 (citing *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F. 3d 566, 575 (9th Cir. 2004)).

21 Moreover, “where, as here, a settlement is negotiated *prior* to formal class certification,
22 consideration of the[] eight *Churchill* factors alone is not enough to survive appellate review.” *In re*
23 *Bluetooth*, 654 F.3d at 946 (emphasis in original). Rather, a reviewing court must also be on the
24 lookout for “subtle signs that class counsel have allowed pursuit of their own self-interests and that
25 of certain class members to infect the negotiations.” *Id.* According to the Ninth Circuit in
26 *Bluetooth*, such “warning signs” include: (1) where “counsel receive a disproportionate distribution
27 of the settlement, or when the class receives no monetary distribution;” (2) where the “parties
28 negotiate a ‘clear sailing’ agreement providing for the payment of attorneys’ fees separate and apart
from class funds;” and (3) where “the parties arrange for fees not awarded to revert to defendants
rather than to be added to the class fund.” *Id.* (citations omitted).

1 2. Analysis of the Churchill Village and In re Bluetooth Factors

2 a. Strength of the Plaintiffs' Case

3 TracFone admits it throttled or suspended its customers' data service, and occasionally even
4 terminated its customers' TracFone service altogether where those customers exceeded certain
5 monthly data caps. The gravamen of Plaintiffs' complaint is that these data caps were not
6 adequately disclosed to consumers when they signed up for the service. Rather, TracFone
7 advertised that the relevant phone plans offered "unlimited" data.

8 The strength of the Plaintiffs' case appears to hinge largely on the viability of three separate
9 defenses, two substantive and one procedural. TracFone's first substantive defense is that it
10 adequately disclosed the existence of the data cap in its Terms & Conditions, and thus no reasonable
11 consumer could have been materially misled by its "unlimited" advertisements. Indeed, this is the
12 same (and only) substantive point raised by Objector Johnson: According to Johnson, TracFone
13 should not have to pay *any* damages because consumers should have known they would be throttled,
14 suspended, or terminated if they exceeded the data caps. *See* Docket No. 134-1, Ex. D (Johnson
15 Objection). Ultimately, the Court believes this putative defense (and associated objection) is not
16 particularly strong – the typical consumer would likely rely on the veracity of the widely publicized
17 "unlimited" advertising claims, and thus have little motivation to root around in TracFone's lengthy
18 form contract to learn that TracFone's definition of "unlimited" data ran counter to the plain and
19 ordinary meaning of that term.

20 TracFone's other substantive defense, however, appears much stronger. TracFone first
21 argues that a substantial number of class members who were throttled likely did not know that their
22 data speed had been slowed, and thus suffered little, if any, cognizable injury even if they reasonably
23 relied on TracFone's allegedly misleading advertisements. Moreover, TracFone argues that those
24 consumers who *did* notice the throttling sustained only limited damages, particularly given the
25 month-to-month duration of TracFone's service plans.² Put simply, TracFone argues that if a
26 consumer became aware of the throttling, and nevertheless chose to sign additional monthly

27 _____
28 ² TracFone customers receive TracFone's services pursuant to monthly contracts that a
customer can choose to let lapse without paying a penalty.

1 contracts with TracFone, that consumer was no longer misled by the “unlimited” advertisements.
2 Rather, such a class member *knew* that the “unlimited” advertisements were false, and chose to
3 purchase TracFone’s product anyway.

4 Finally, TracFone argues that Plaintiffs’ claims were unlikely to succeed as a procedural
5 matter because they were likely to be compelled to individual arbitration pursuant to an arbitration
6 clause contained in the Plaintiffs’ service agreement with TracFone. This possibility is discussed in
7 the following section regarding the risks of this litigation.

8 As to the first *Churchill Village* factor, the Court concludes that while the Plaintiffs’ case
9 appears strong, TracFone is not without plausible defenses that could have ultimately left class
10 members with a reduced or non-existent recovery. Thus, the first factor favors approval of this
11 settlement.

12 b. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

13 The second *Churchill Village* factor also favors settlement. Specifically, the proposed
14 settlement offers class members prompt relief without the expense and hassle of what would be
15 protracted litigation if this case cannot be resolved amicably.

16 First, it cannot be denied that this litigation is complex. There are four separate consumer
17 lawsuits pending against TracFone, along with an FTC enforcement action, alleging violations of
18 various laws of at least three different jurisdictions. Moreover, the alleged wrongful conduct at
19 issue took place over a considerable period of years, during which time TracFone’s advertisements
20 and disclosures apparently materially changed at least once, thereby admitting further legal and
21 factual variation that could quickly ratchet up the complexity of this case.

22 As noted above, there are also some notable litigation risks that could threaten, reduce, or
23 even eliminate Plaintiffs’ recovery entirely. Most notably, TracFone filed motions to compel
24 arbitration in each of the consumer cases pursuant to a contractual arbitration clause in its Terms &
25 Conditions that contains a class action waiver. TracFone notes that various federal courts have
26 previously concluded that TracFone’s terms of service are binding on consumers, and those terms of
27 service include the arbitration provision asserted in these actions. *See, e.g., TracFone Wireless, Inc.*
28 *v. Anadisk LLC*, 685 F. Supp. 2d 1304, 1315 (S.D. Fla. 2010) (holding that TracFone shrinkwrap

1 agreement, with similar language to agreement at issue here, was enforceable contract against phone
2 purchasers); *TracFone Wireless, Inc. v. Bequator Corp, Ltd.*, No. 10-cv-21462 (WMH), 2011 WL
3 1427635, at *8 (S.D. Fla. Apr. 13, 2011) (same). Thus, TracFone contends that Plaintiffs would be
4 unlikely to recover damages at all if litigation continues and the motions to compel individual
5 arbitration are litigated to completion.

6 Plaintiffs concede that TracFone's successful invocation of the arbitration clauses is a
7 significant risk they face if they go forward in this litigation absent settlement, although they
8 contend that they have strong defenses to the enforceability of the arbitration clause. Objector
9 Birner, however, argues that even Plaintiffs have exaggerated the risks of arbitration; in his view the
10 arbitration clause is plainly unenforceable as a matter of California law because it is both
11 procedurally and substantively unconscionable. Objection at 17-21. Even if Birner had standing to
12 object, and he does not, this objection is without merit. First, it is not immediately apparent that
13 California law would govern the enforceability of the arbitration provision. While the relevant
14 contract's choice-of-law provision provides that the contract shall be construed under the laws of
15 Florida, the contract specifically exempts the arbitration provision from the choice-of-law clause,
16 and does not specify what law should apply to the arbitration clause. Docket No. 51-1, Ex. 1 to
17 Decl. Levine at ¶ 16. Thus, the Court would likely need to apply choice of law rules to determine
18 the relevant law to apply to the arbitration clause. And under California's choice of law rules, it is
19 likely that the arbitration clause would be governed by either the law of the place where the contract
20 was made, or the law of the place where the contract was performed. *See, e.g.*, Cal. Civ. Code §
21 1646 (West 2015). It is quite possible then, that determining arbitrability could require the separate
22 application of the laws of every state where a TracFone class member signed up for, or received,
23 TracFone service. At a minimum, this extra complexity further counsels in favor of settlement.

24 Additionally, Birner appears overly optimistic that the arbitration provision would be held
25 unenforceable under California law, at least in the most relevant respect. Birner has not argued, and
26 indeed may be foreclosed from arguing that the class action waiver is not enforceable in light of the
27 Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011). In
28 order to avoid the class action waiver, Plaintiffs would need to show that the entire arbitration

1 agreement was “permeated” with substantive unconscionability on grounds not preempted by the
2 FAA. *See Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 122 (2000); *see also*
3 *Mohamed v. Uber Techs., Inc.*, -- F. Supp. 3d --, 2015 WL 3749716, at *31 (N.D. Cal. 2015). The
4 only two putatively substantively unconscionable terms Birner identifies in the contract, however, a
5 unilateral modification clause and punitive damages waiver, could arguably be severed from the
6 agreement, leaving the class action waiver intact. *See Armendariz*, 24 Cal. 4th at 121-23 (holding
7 that California law favors “severing or restricting illegal terms rather than voiding the entire
8 contract”); *see also Mohamed*, 2015 WL 3749716, at *25 (summarizing relevant principles of
9 California law with respect to the severance of substantively unconscionable terms in arbitration
10 provisions). Put simply, there is substantial risk of lengthy and complicated litigation if this case is
11 not settled, and a sizeable risk that such litigation could not be maintained as a class action and
12 would instead be compelled to individual arbitrations. Thus, the second *Churchill Village* factor
13 strongly favors settlement.

14 c. The Risk of Maintaining Class Action Status Throughout the Trial

15 Plaintiffs would have the burden to show that a class action could be certified, and that
16 certification could be maintained through trial. The parties correctly argue that there are real risks
17 that Plaintiffs could not meet that burden here. Thus, the third *Churchill Village* factor weights in
18 favor of settlement approval.

19 TracFone does not concede that a nationwide class could be certified here. Indeed, TracFone
20 argues that the laws of all fifty states necessarily would apply to Plaintiffs’ claims, thus eviscerating
21 predominance and manageability. This is not a frivolous argument. *See Zinser v. Accufix Research*
22 *Inst. Inc.*, 253 F.3d 1180, 1190, *amended by and rehearing denied*, 273 F.3d 1266 (9th Cir. 2001)
23 (recognizing that legal variation among the laws of the fifty states may provide a basis for denying
24 class certification); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (same);
25 *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741–43 and n. 15 (5th Cir.1996) (same); *In re*
26 *Rhone–Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300–01 (7th Cir.1995) (same).

27

28

1 Moreover, and even assuming that the law of only a few states might apply to Plaintiffs'
2 claims, TracFone pointedly notes another significant obstacle to class certification – quantification
3 of class members' damages. As TracFone notes, the Supreme Court has recently held that a plaintiff
4 seeking class certification must typically present an adequate model for determining damages on a
5 classwide basis in order to satisfy Rule 23's predominance requirement. *See Comcast Corp. v.*
6 *Behrend*, 133 S.Ct. 1426, 1432 (2013); *see also Newton v. Am. Debt Servs.*, No. C-11-3228 EMC,
7 2015 WL 3614197, at *8 (N.D. Cal. Jun. 9, 2015) (discussing *Comcast* and class certification
8 requirements). Here, however, TracFone argues that no common damages model could be fashioned
9 because a class member's damages, if any, will depend on a number of individualized assessments.
10 For example, TracFone argues that the injury suffered by any class member could differ based on
11 individualized variables such as: (1) the period over which the customer was throttled (*i.e.*, did
12 throttling begin early in the month, mid-way through the month, or on the last day of the month?);
13 (2) the customer's desired amount of data use (*i.e.*, did the user want to stream movies or music, or
14 simply check emails or stock quotes?); and (3) throttling's ultimate impact on the user's
15 functionality (*i.e.*, was the user's functionality only slightly impaired because their email use did not
16 require particularly high data speeds, or was the class member's streaming video capability rendered
17 essentially useless because the throttling speed limit was too low to permit streaming?). Put simply,
18 TracFone argues that an individual who only infrequently used data intensive features and was
19 throttled towards the end of the month probably suffered substantially less damage from its
20 throttling than did a data-hungry individual who wanted to stream movies or music via his TracFone
21 device, but was prevented from doing so for a substantial portion of the month. While these
22 arguments might not ultimately foreclose class certification, they present real challenges that
23 Plaintiffs would have to overcome were this Court to deny final approval. Accordingly, this factor
24 favors final approval.

25 d. The Amount Offered in Settlement

26 As this Court recently explained in its opinion in *Bayat v. Bank of the West*, the most
27 important variable in assessing a class settlement is the amount of relief obtained for the class.
28 *Bayat v. Bank of the W.*, No. C-13-2376 EMC, 2015 WL 1744342, at *4 (N.D. Cal. Apr. 15, 2015).

1 Here, the settlement provides both monetary and injunctive relief to class members. As described
2 below, both forms of relief are valuable and substantial. Thus, the most important *Churchill Village*
3 factor weighs strongly in favor of final approval.

4 i. Monetary Relief

5 TracFone largely sold its “unlimited” service plans for \$45 a month during the class period.
6 *See* Docket No. 121 at 16. As the parties explained at the final approval hearing, TracFone’s
7 unlimited plan included not just “unlimited” data, but also unlimited voice calls and text messages.
8 *See* Docket No. 151. During the class period, TracFone also sold a more limited service plan for
9 roughly \$30 a month. *See* Docket No. 134 at 4. As explained at the hearing, this cheaper plan did
10 not include unlimited voice calls, text messages, or data service. Thus, it is reasonable to assume
11 that the monetary value of the “unlimited” data service sold to consumers is equal to some portion
12 (but not all) of the \$15 monthly premium that class members paid to obtain unlimited talk, text, and
13 data service.

14 The settlement provides that class members who were throttled before TracFone made
15 certain disclosure changes will receive a *minimum* payment of \$6.50, while customers who were
16 throttled after TracFone allegedly made more fulsome disclosures will receive a *minimum* payment
17 between \$2.15-\$2.50. Docket No. 121 at 7. For class members whose data service was suspended,
18 the minimum payment is \$10. *Id.* Plaintiffs whose service was terminated entirely will receive a
19 guaranteed \$65 payment. *Id.* Critically, these minimum payment amounts assume a 100% claims
20 rate. If, as has turned out to be the case, the actual claims rate is below 100%, the per claimant
21 payout rises according to a *pro rata* formula in the settlement agreement. The parties contend that
22 based on the estimated final claims rate of nearly 30%, individuals who were throttled will receive
23 roughly \$16 per claim, while claimants whose service was suspended will receive roughly \$25. *See*
24 Docket No. 134 at 1.

25 Contrary to Objector Birner’s arguments that the monetary relief obtained in this settlement
26 is too low, the \$40 million settlement represents a good monetary result for class members. As
27 noted above, the most reasonable approximate measure of the damages class members sustained is
28 the additional amount of money customers paid for TracFone’s “unlimited” data plan – an amount

1 roughly equal to some unspecified portion of the \$15 monthly premium class members were charged
2 for unlimited data, voice and text services. Assuming for a moment that this entire \$15 premium
3 could be attributed solely to TracFone's unlimited data service, the Court finds that a realistic
4 theoretical verdict value in this case would be roughly \$120 million, which represents a \$15 refund
5 for each of the approximately eight million class members for the first month their service was
6 throttled without forewarning or adequate disclosure.³ The \$40 million settlement fund recovers
7 one-third of the theoretical verdict amount for class members – a very reasonable compromise in this
8 Court's experience. More realistically, only a portion of the \$15 premium is attributable to
9 unlimited data, and even then because the throttling occurred only when the ceiling on data usage
10 was reached, many users would not encounter throttling until the last days of the month. This fact
11 suggests that assuming a full month's damage at the full \$15 premium rate may well be a generous
12 assumption.

13 Birner's specific arguments regarding the alleged inadequacy of the monetary relief in this
14 settlement are all predicated on untenable assumptions, and must be rejected. For instance, Birner
15 suggests that customers who were throttled should be refunded the full \$45 monthly service fee they
16 paid TracFone for *every* month they subscribed to the unlimited data plan and were throttled, not just
17 for one (or at most two) months of service. However, TracFone correctly points out that class
18 members who learned they had been throttled could have discontinued their service plans with no
19 penalty – TracFone users subscribe to the company's service on a month-to-month basis with no
20 obligation to renew. Those individuals, like Birner himself, who kept renewing their TracFone
21 service month after month likely either (1) were not throttled or did not know they were throttled,
22 and thus likely suffered little or no legally cognizable injury, or (2) knew they were throttled and
23 continued to sign up for TracFone's service anyway. TracFone makes a strong argument that when
24 such members willingly renewed their plans knowing that they were subject to throttling, they could
25 no longer claim that TracFone's marketing was materially misleading, deceptive, or injurious.

26
27 ³ The Court assumes without deciding that class members would likely only recover
28 damages for the first month they were throttled. If a consumer continued to sign up for TracFone's
service in subsequent months after learning of TracFone's throttling, such a consumer likely was not
affirmatively misled by TracFone's allegedly deceptive advertisements.

1 Objector Birner’s next argument, that payments between \$2.15 and \$6.50 to throttled class
2 claimants are “minimal, arbitrary, or *de minimus*,” is equally off-point. Birner fails to recognize that
3 these figures represent the *minimum* payments due under the settlement, assuming a 100% claims
4 rate. Because the claims rate does not approach 100%, Birner’s objection is largely irrelevant. In
5 any event, and in light of the nearly 30% claims rate reported by the parties in their final approval
6 papers, the actual payments to throttled class members are expected to be approximately \$16 each –
7 at least \$1 *more* than a reasonable estimate of their actual damages (*i.e.*, the full \$15 paid for
8 unlimited talk, text, and data). *See* Docket Nos. 134 at 1, 139 at 1. Clearly, this is a very good result
9 for class claimants.

10 Birner also wrongly argues that the \$40 million settlement amount is too low because class
11 members would be entitled to a substantial restitution remedy if this case is not settled. Essentially,
12 Birner argues that TracFone would be obligated to disgorge the entirety of the revenues it
13 wrongfully earned by allegedly misrepresenting the central feature of its unlimited data plan. Birner
14 alleges that “simple math establishes that TracFone would be unjustly enriched or enjoy revenue,
15 based upon the \$15.00 difference [in price between] the plans, between \$14.6 billion to \$18.3
16 billion.” Objection at 4. There are a number of serious flaws in this calculation, including the fact
17 that Birner’s “simple math” presumes that the entire class (and millions of non-class members, as
18 well) would be entitled to a full refund of \$15 for every month during the years-long class period.
19 But even more fundamentally, Birner’s unjust enrichment theory wrongly assumes that the entire
20 \$15 payment TracFone received from class members would be subject to disgorgement to injured
21 class members, even though the actual benefit TracFone arguably received as a result of its
22 misrepresentations is likely only a portion of the \$15 charge. *See Day v. AT&T Corp.*, 63 Cal. App.
23 4th 325, 340 (1998) (explaining that a restitution award under the UCL has two predicates; “the
24 offending party must have obtained something to which it was not entitled *and* the victim must have
25 given up something which he or she was entitled to keep”) (emphasis in original); *see also* Dan B.
26 Dobbs, *Law of Remedies: Damages-Equity-Restitution*, at § 4.1(4) (West 1993) (explaining how
27 restitution is typically calculated, and noting that restitution in an amount exceeding a plaintiff’s
28 actual monetary losses is rarely awarded); Douglas Laycock, *The Scope and Significance of*

1 *Restitution*, 67 Tex. L. Rev. 1277, 1289 (1989) (noting that courts typically only award restitution in
2 an amount exceeding plaintiff's losses in cases where the defendant's conduct was particularly
3 egregious, and further noting that even an award disgorging a defendant's profits is relatively rare).
4 Allowing class members to recover the full \$15 paid for each month they subscribed to TracFone's
5 service would represent a significant windfall for class members; not a just measure of damages.
6 Birner has simply not established that class members would obtain a significantly larger recovery
7 under a restitution or unjust enrichment theory than they are receiving under the proposed
8 settlement.

9 Birner's argument that class members could obtain punitive damages if they pursued this
10 case through trial is similarly off-base. As Plaintiffs point out, punitive damages are only available
11 under one of the various statutes they sued under. *See Clark v. Superior Court*, 50 Cal. 4th 605, 610
12 (2010) (holding that punitive damages are not available under California's Unfair Competition
13 Law); *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. Ct. App. 1984) (holding that punitive
14 damages are not available under Florida's Deceptive and Unfair Trade Practices Act); *Crogan v.*
15 *Metz*, 47 Cal. 2d 398, 405 (1956) (holding punitive damages are not available for breach of contract
16 under California law); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1536 (11th Cir. 1985)
17 (explaining that punitive damages are not available for breach of contract under Florida law). And
18 while punitive damages can theoretically be awarded under the CLRA, Birner has not cited any
19 CLRA case where such damages were actually awarded, nor has Birner sufficiently demonstrated
20 that TracFone's conduct here would warrant a punitive damages award under the CLRA.

21 Equally without merit is Birner's argument that the settlement does not adequately
22 compensate those few class members whose service was entirely terminated. Objection at 15. As
23 Birner explains, until late 2013 TracFone subscribers were required to purchase either locked
24 handsets that worked only on TracFone's network, or locked SIM cards that would not work on
25 other networks. *Id.* Consequently, the phones or SIM cards purchased by later-terminated class
26 members could not be used with other wireless carriers, rendering those products useless. Birner
27 alleges that the settlement does not adequately account for these class members' sunk costs.

28 TracFone notes that first-time customers could purchase a new TracFone-branded handset

1 for as little as \$5, or could purchase a locked SIM card for less than \$16. Docket No. 135 at 5.
2 Birner has not contradicted this point. Importantly, claimants whose service was terminated receive
3 a guaranteed \$65 payment under the settlement. This payment is intended to provide compensation
4 both for the value of any data service that was lost, and for at least some portion of the cost of any
5 handset or SIM card that was purchased and then rendered worthless by TracFone’s decision to
6 terminate service. Birner’s objection that claimants whose service was terminated do not receive
7 adequate compensation for their sunk equipment costs is not well taken.

8 Finally, Birner argues that the \$40 million settlement amount is too low because TracFone
9 has the financial wherewithal to withstand a greater verdict. However, “the fact that [the defendant]
10 could afford to pay more does not mean that it is obligated to pay any more than what the [plaintiffs]
11 are entitled to under the theories of liability that existed at the time the settlement was reached.” *In*
12 *re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004). More generally, it is not this
13 Court’s role in reviewing a settlement to ensure the settlement is perfect, extracting every cent
14 possible from the defendant under the circumstances. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819
15 (9th Cir. 2012). Rather, this Court’s job is simply to ensure the settlement is “fundamentally fair
16 within the meaning of Rule 23(e).” *Id.* For the reasons described above, the monetary portion of
17 this settlement is very fair to class members by any measure and thus Birner’s objection to the
18 monetary relief is without merit.

19 ii. Injunctive Relief

20 In addition to the significant monetary relief available under the settlement, TracFone has
21 also agreed to make numerous conduct changes, including:

- 22 ● TracFone will not advertise its mobile service plans as providing “unlimited” data
23 unless it also makes clear in adjacent disclosures any applicable throttle limits or
24 caps, as well as the actual speeds to which customer data will be slowed.
- 25 ● TracFone’s terms and conditions will be updated to describe the impact throttling can
26 have on the functionality of services.
- 27 ● TracFone will ensure that customers contacting TracFone customer service receive
28 accurate information about TracFone’s throttling, suspension, and service termination

1 policies, and about the impact throttling can have on the functionality of services.

- 2 ● TracFone will implement a system to advise customers by SMS text message when
3 their data speed has been throttled upon reaching specified data usage caps.

4 *See* Settlement Agreement at § IV.C.

5 The Court finds that the injunctive relief will have significant value for both class members
6 and the general public. Most importantly, the injunctive relief is designed to make it clear to
7 customers exactly what TracFone is selling when it advertises its “unlimited” data plans by forcing
8 TracFone to better inform customers of its throttling, suspension, and service termination policies.

9 Further, TracFone customers will receive a text message when they are actually throttled.
10 Customers who receive such a text message and dislike TracFone’s throttling policy can choose not
11 to renew their TracFone service the following month.

12 Birner argues that the conduct changes in the Settlement Agreement are “unenforceable
13 window dressing” because the settlement does not provide for liquidated damages or the automatic
14 imposition of specified monetary sanctions in the event that TracFone does not comply with the
15 terms of the settlement. Objection at 24. Like many of Birner’s other arguments, this objection is
16 predicated on a fundamental misunderstanding of the facts or law. As TracFone correctly point out,
17 this Court retains jurisdiction over the Settlement Agreement and FTC Stipulated Order—if
18 TracFone does not comply with the terms of the settlement, the Court can take appropriate remedial
19 action. There is absolutely no reason to suspect that the injunctive relief agreed to is merely
20 “unenforceable window dressing.”

21 In conclusion, the value of both the monetary and injunctive relief on offer in this settlement
22 is very good, and well within the reasonable range of approvable outcomes when compared to the
23 theoretical verdict value of these claims. Thus the fourth *Churchill Village* factor tips strongly in
24 favor of settlement approval.

25 e. The Extent of Discovery Completed and the Stage of the Proceedings

26 The fifth *Churchill Village* factor favors approval of this settlement. Declarations from class
27 counsel reveal that they spent significant time litigating this matter before a settlement was reached.
28 For instance, class counsel aver that they spent roughly 778 hours on pre-filing case investigation,

1 440 hours preparing for and taking depositions, and roughly 663 hours on other discovery. *See*
2 Docket Nos. 143-46. Plaintiffs counsel have represented to the Court that they obtained sufficient
3 information throughout the litigation process to make an informed decision about the settlement.
4 *See id.* There is no reason to question counsels' assertion. Thus this factor weighs in favor of
5 approval.

6 f. The Experience and Views of Counsel

7 Class counsel have submitted declarations that indicate that all of the attorneys here have
8 significant experience litigating and settling consumer class actions. *See, e.g.*, Docket Nos. 122-1
9 and 122-2. For instance, lead class counsel from the firm of Lieff, Cabraser, Heimann & Bernstein,
10 LLP, are known to this Court to be skilled and experienced class action litigators. All counsel
11 involved in this matter support the settlement. This factor weighs in favor of final approval.

12 g. The Presence of a Governmental Participants

13 The FTC participated heavily in reaching this settlement, and supports the settlement.
14 Indeed, the FTC will be responsible for the disbursement of the \$40M settlement fund to class
15 claimants. No government entity has raised any objections to the proposed settlement. This factor
16 weighs in favor of final approval.

17 Birner argues that the FTC's presence in the settlement counsels *against* approval because, in
18 Birner's view, the settlement was solely the work of the FTC. Essentially, Birner argues that the
19 consumer actions added nothing to the settlement, and the \$40 million paid to the FTC for the
20 purpose of consumer redress should be viewed solely as consideration to settle the FTC enforcement
21 action. According to Birner, consumers received nothing but "past consideration" in exchange for
22 the release of their claims. Objection at 13.

23 Birner's argument is without merit. The consumer and FTC settlements were reached at the
24 same time as part of a *global* settlement. TracFone has stated that it only agreed to pay \$40 million
25 to the FTC because those funds will be used to pay class members in the consumer cases, thereby
26 resolving all of the pending lawsuits against it. Docket 113 at 2. Counsel for the FTC confirmed
27 this point at the final approval hearing, as did Plaintiffs' counsel. The FTC's endorsement of the
28 settlement counsels in favor of granting final approval.

1 h. The Reaction of the Class Members of the Proposed Settlement

2 As previously indicated, the parties estimate that there are approximately eight million
3 members in the settlement class. Over 800,000 of these individuals submitted claims, while only
4 142 opted out, and five objected to the settlement. Docket Nos. 134-1; 139. Additionally, the
5 settlement provides that an additional 1.8 to 1.9 million customers for whom TracFone has address
6 information will automatically receive a check, even if they did not affirmatively file a claim. Taken
7 together, and depending on the extent of the overlap between the those class members who will
8 automatically receive a payment and those who filed claims, the total claims rate is estimated to be
9 approximately 25-30%. This is an excellent result that counsels in favor of settlement approval.
10 *See, e.g., Bayat*, 2015 WL 1744342 at *5-6 (approving class action settlement with 2% claims rate);
11 *Evans v. Linden Research, Inc.*, No. C-11-1078 DMR, 2014 WL 1724891, at *4 (N.D. Cal. Apr. 29,
12 2014) (approving class action settlement with 4.3% claims rate).

13 i. *In re Bluetooth* Factors

14 When a settlement agreement is negotiated prior to formal class certification, the district
15 court must evaluate the settlement for three additional signs of collusion between class counsel and
16 the defendant:

- 17 (1) do counsel receive a disproportionate distribution of the settlement,
18 or does the class receive no monetary distribution while class counsel
19 are amply rewarded;
20 (2) is there a “clear sailing” arrangement providing for the payment of
21 attorneys’ fees separate and apart from class funds . . . ; and
22 (3) do any attorneys’ fees not awarded to class counsel revert to
23 defendants instead of being added to the class fund.

24 *See In re Bluetooth*, 654 F.3d at 946-47 (citations omitted).

25 Here, two of the three *Bluetooth* signs weigh against settlement approval.⁴ Specifically, the
26 settlement has a “clear sailing” agreement whereby fees will be paid separate and apart from class

27 ⁴ The first *Bluetooth* factor is not met. As described below, the \$5 million fees request does
28 not represent a disproportionate portion of the settlement. Rather, the fees awarded represent 11%
(\$5M/\$45M) of total settlement amount. This figure is particularly reasonable in light of the 25%
benchmark for fees awards in the Ninth Circuit. *See Hanlon*, 150 F.3d at 1029. The requested fee is
even more reasonable in light of the positive value of the injunctive relief obtained on behalf of class
members.

1 funds, and TracFone has agreed not to challenge class counsels' fees request up to \$5 million. *See*
2 Settlement Agreement § IX.A (“Defendants agreed not to oppose . . . (a) \$5 million attorneys’ fees;
3 and (b) \$100,000 litigation expense.”). Moreover, any fees not awarded to class counsel will revert
4 to TracFone rather than being added to the \$40 million settlement fund. The presence of these
5 factors is in no way dispositive, however. As the *Bluetooth* opinion itself makes clear, the *Bluetooth*
6 factors are merely “warning signs” that indicate the *potential* for collusion. *See In re Bluetooth*, 654
7 F.3d at 947. When faced with such “indicia of possible implicit collusion,” the Court need not reject
8 the settlement outright. *Id.* Rather, the Court is merely obligated to “assure itself that the fees
9 awarded in the agreement were not unreasonably high” in light of the results obtained for class
10 members. *Id.*

11 In the case at bar, the requisite “hard look” at the settlement indicates that the requested fees
12 award is not “unreasonably high” in light of the significant relief obtained for the class. Indeed, as
13 noted above, every single *Churchill Village* factor weighs in favor of final approval, and the most
14 important factor – the amount received in settlement – is undoubtedly favorable. Moreover, it is
15 worth noting that the particular settlement structure present here was mandated by the FTC, which
16 prohibited the use of any settlement funds to pay attorney fees, litigation expenses, court costs, or
17 incentive payments to class representatives. Stipulated Order § III.A. Thus, the settlement displays
18 the second *Bluetooth* “warning sign” because the FTC required the payment of attorneys’ fees
19 “separate and apart from class funds.” *In re Bluetooth*, 654 F.3d at 947. Significantly, the \$40
20 million settlement fund is not subject to reversion to the Defendant; all of it will be distributed to
21 class members. Thus, the Court will grant final approval to this settlement despite the presence of
22 two of *Bluetooth*’s three warning signs.

23 j. Conclusion

24 All of the *Churchill Village* factors weigh in favor of final approval and a finding that the
25 proposed settlement is fair, reasonable, and adequate. And while two of the *Bluetooth* warning signs
26 are present, the settlement appears to present a good deal for class members when viewed as a
27 whole. Consequently, the Court **GRANTS** the motion for final approval.

28

1 B. Objector Birner Lacks Standing to Object to the Settlement

2 The Court has considered and rejected Birner's various objections to the proposed settlement
3 on the merits, as indicated above and in the Court's oral ruling at the final approval hearing. In any
4 event, the Court finds that Birner has no legal standing to object to the settlement because he has not
5 demonstrated that he is an aggrieved class member. *See In re First Capital Holdings Corp. Fin.*
6 *Prods. Sec. Litig. (In re First Capital)*, 33 F.3d 29, 30 (9th Cir. 1994) (holding that only "an
7 aggrieved class member" has standing to object to a proposed class settlement); *see also San*
8 *Francisco NAACP v. San Francisco Unified School Dist.*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal.
9 1999) (noting that "nonclass members have no standing to object to the settlement of a class action")
10 (citation omitted). The burden is on Birner to prove that he has standing to object (*i.e.*, that he is an
11 aggrieved class member). *See In re Apple Inc. Sec. Litig.*, No. 06-cv-5208-JF, 2011 WL 1877988, at
12 *3 n.4 (N.D. Cal. May 17, 2011); *In re Hydroxycut Mktg. and Sales Practices Litig.*, No. 09-cv-1088
13 BTM, 2013 WL 5275618, at *2 (S.D. Cal. Sep. 17, 2013) ("The party seeking to invoke the Court's
14 jurisdiction – in this case, the Objectors – has the burden of establishing standing.") (citing *Steel Co.*
15 *v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998)).

16 Birner has not met his burden to establish that he is an aggrieved class member. The closest
17 Birner has come is his unsupported assertion that he believes he was throttled because his data
18 service was often slow. *See* Docket No. 136-1 (Birner Depo.) at 34:8-35:12. But as the parties to
19 this litigation agree, a cell phone user's data speed can be affected and slowed by numerous factors
20 unrelated to deliberate throttling, such as poor cell reception or differing network speeds (*e.g.*, 3G
21 vs. 4G). *See* Docket No. 137-1 at ¶ 16.

22 In contrast to Birner's weak showing on standing, TracFone has submitted probative
23 evidence that Birner is *not* a class member. Specifically, a TracFone employee submitted a
24 declaration under penalty of perjury that states that (1) "TracFone keeps record of all accounts that
25 were throttled, suspended, or terminated at TracFone's direction"; and (2) those records establish
26 that Birner's account was never throttled, suspended, or terminated because he "never consumed
27 enough data in a single 30-day period to be subject to throttling, suspen[sion], or termination."
28 Docket No. 137-1 at ¶¶ 13-14. Birner has presented no evidence that seriously contradicts

1 TracFone’s assertion that he is not a class member. Thus, the Court finds that Birner lacks standing
 2 to object to the proposed settlement because he is not a class member, and certainly is not an
 3 aggrieved class member.⁵ See *In re First Capital*, 33 F.3d at 30 (“Simply being a member of a class
 4 is not enough to establish standing. One must be an aggrieved class member.”). Nonetheless, the
 5 Court has treated Birner as *amicus curiae* and given full consideration to his arguments.

6 C. Motion for Attorneys’ Fees and Class Representative Incentive Awards

7 1. Legal Standards for an Award of Attorneys’ Fees

8 The Ninth Circuit has held that in a class action “the district court must exercise its inherent
 9 authority to assure that the amount and mode of payment of attorneys’ fees are fair and proper.”
 10 *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999). The district court’s
 11 duty to “carefully assess the reasonableness of a fee amount spelled out in a class action settlement
 12 agreement,” *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003), exists “independently of any
 13 objection” to the fee amount requested. *Zucker*, 192 F.3d at 1328-29.

14 In common-fund cases like this one, “the district court has discretion to use either a
 15 percentage or lodestar method” when determining the appropriate amount of attorneys’ fees.
 16 *Hanlon*, 150 F.3d at 1029; see also *In re Bluetooth*, 654 F.3d at 942. If the court selects the
 17 percentage method, “[t]his circuit has established 25% of the common fund as a benchmark award
 18 for attorney fees.” *Hanlon*, 150 F.3d at 1029 (citation omitted). If the court selects the lodestar
 19 method, the court “begins with the multiplication of the number of hours reasonably expended by a
 20 reasonable hourly rate.” *Id.* (citation omitted). The lodestar figure may then be “adjusted upward or
 21 downward to account for several factors including the quality of the representation, the benefit
 22 obtained for the class, the complexity and novelty of the issues presented, and the risk of
 23 nonpayment.” *Id.* (citation omitted). Regardless of which method the court chooses, the Ninth
 24 Circuit has “encouraged courts to guard against an unreasonable result by cross-checking their

25
 26 ⁵ Birner filed a motion to continue the final approval hearing in this case so that he could
 27 review the discovery provided to him for the purpose of learning whether he is actually a class
 28 member. Docket No. 141. The Court denied Birner’s motion, finding that Birner had made an
 insufficient showing that it was likely that he would ever find evidence in the discovery provided to
 him that contradicts TracFone’s direct assertion that he was never throttled, even if the Court
 permitted Birner extra time to review or conduct such discovery.

1 calculations against a second method.” *In re Bluetooth*, 654 F.3d at 944. Ultimately, “courts aim to
2 tether the value of an attorneys’ fees award to the value of the class recovery.” *In re HP Inkjet*
3 *Printer Litig.*, 716 F.3d at 1178 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). “The more
4 valuable the class recovery, the greater the fees award. And vice versa.” *Id.* at 1178-79 (citation
5 omitted); *see also Hensley*, 461 U.S. at 436 (instructing district courts to “award only that amount of
6 fees that is reasonable in relation to the results obtained”).

7 2. Merits of the Request for Attorneys’ Fees

8 Class counsel requests an attorneys’ fees award of \$5 million, which represents 11% (\$5
9 million/\$45 million) of the total settlement value. This is well below the 25% benchmark typically
10 awarded in common fund cases in the Ninth Circuit. *See Hanlon*, 150 F.3d at 1029. As discussed
11 above, class counsel obtained excellent relief for the class. They are therefore entitled to a
12 reasonable fee to compensate them for their successful efforts. *See Hensley*, 461 U.S. at 436. The
13 Court readily concludes that a contingency award is appropriate in this case, and further concludes
14 that an award of roughly 11% of the common fund amount is reasonable in light of the superb results
15 obtained by class counsel here.

16 Moreover, the \$5 million fees request is easily justified under the lodestar cross-check. Here,
17 class counsel spent more than 5,000 hours litigating this case, running up approximately \$3 million
18 in legal fees. The Court requested supplemental briefing from class counsel regarding their lodestar
19 billings, and the Court has reviewed class counsels’ supplemental filings. The Court is satisfied that
20 class counsels’ lodestar figure is justified in light of the complexity and duration of this litigation.

21 The \$5 million fees award sought represents a positive lodestar multiplier of about 1.7. As
22 noted, courts have discretion to apply a positive multiplier after considering factors such as: the
23 quality of representation, the benefit obtained for the class, the complexity and novelty of the issues
24 presented, and the risk of nonpayment. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298
25 (N.D. Cal. 1995) (providing that the district court may “enhance the lodestar with a ‘multiplier,’ if
26 necessary to arrive at a reasonable fee in light of all of the circumstances of the case”); *In re*
27 *Washington Public Power Supply Sys. Securities Litig.*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994)
28 (explaining that a positive lodestar multiplier is appropriate to compensate counsel for the risk of

1 non-payment in a contingency fee case). All of these factors warrant a positive multiplier here, and
2 the precise multiplier (1.7) is well within the range approved in the Ninth Circuit in other successful
3 class actions. *See, e.g. Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002) (approving
4 a 3.65 multiplier on Iodestar); *Van Vranken*, 901 F. Supp. at 298-99 (N.D. Cal. 1995) (multiplier of
5 3.6). Thus the Court **GRANTS** the motion for attorneys' fees, and awards class counsel the full
6 amount of fees sought, as well as the full amount of litigation costs requested.

7 3. Class Representative Service Awards

8 The \$2,500 incentive awards sought for the named plaintiffs are reasonable and approved. In
9 the Ninth Circuit, "named plaintiffs . . . are eligible for reasonable incentive payments." *Staton*, 327
10 F.3d at 977. Such awards are intended to "compensate class representatives for work done on behalf
11 of the class, to make up for financial or reputational risk undertaken in bringing the action, and,
12 sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West*
13 *Publ'g Corp.*, 563 F.3d 948, 958-959 (9th Cir. Cal. 2009).

14 According to the Plaintiffs' attorneys, in addition to lending their names to these cases, and
15 thus subjecting themselves to public attention, the named Plaintiffs here were actively engaged in
16 the prosecution and settlement of these actions. *See* Docket No. 122 at 20. Among other things,
17 they "provided information to Class Counsel, gathered documents, reviewed pleadings, stayed
18 updated about the litigation, reviewed and approved the proposed Settlement, and, in the case of one
19 plaintiff, had their deposition taken." *Id.* The \$2,500 awards requested are reasonable, especially in
20 light of other cases where similar or larger incentive awards have been awarded to named class
21 plaintiffs. *See, e.g., Nwabueze v. AT & T Inc.*, No. C 09-1529 SI, 2013 WL 6199596, at *12 (N.D.
22 Cal. Nov. 27, 2013) (awarding \$5,000 incentive payment for each of two named plaintiffs); *Hopson*
23 *v. Hanesbrands, Inc.*, No. CV-08-844 EDL, 2009 U.S. Dist. LEXIS 33900, at *27-28, 2009 WL
24 928133 (N.D. Cal. Apr. 3, 2009) (noting that "courts have found that \$5,000 incentive payments are
25 reasonable") (citations omitted).

26 **III. CONCLUSION**


27 For the reasons explained above and on the record at the final approval hearing, the Court
28 grants final approval to the proposed class action settlement. The Court also grants class counsel \$5

1 million in attorneys' fees, and \$63,644.75 in costs. Finally, the Court grants the request for \$2,500
2 incentive awards for the named plaintiffs. The Court overrules all objections on the merits, and
3 further concludes that Objector Birner lacked standing to object in the first instance.

4 This order disposes of Docket Nos. 121 and 122. The Clerk is directed to close the file in
5 this case, along with the file in the following cases: *Browning v. TracFone Wireless*, No. 14-cv-
6 1347-EMC; *Blaqmoor v. TracFone Wireless*, No. 13-cv-5295-EMC; *Gandhi v. TracFone Wireless*,
7 No. 13-cv-5296-EMC; and *Federal Trade Commission v. TracFone Wireless*, No. 15-cv-392-EMC.

8
9 IT IS SO ORDERED.

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11 Dated: July 2, 2015

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14 EDWARD M. CHEN
15 United States District Judge
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United States District Court
For the Northern District of California