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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALICIA HARRIS,

No. C-08-5198 EMC

Plaintiff,

v.

**ORDER GRANTING PLAINTIFF'S
RENEWED MOTION FOR FINAL
APPROVAL**

VECTOR MARKETING CORPORATION,

(Docket No. 505)

Defendant.

Previously, the Court denied Ms. Harris's motion for final approval of the class action settlement. The parties thereafter participated in a settlement conference with Judge Spero and reached a new settlement agreement, one which modified the terms of the prior settlement agreement. Ms. Harris now asks the Court to give final approval to the new, or modified, settlement agreement.

I. FACTUAL & PROCEDURAL BACKGROUND

A. Prior Settlement Agreement

Under the old settlement agreement, the parties agreed to settle the case for a maximum payment by Vector of \$13 million. *See* Docket No. 450 (Saltzman Decl., Ex. A) (Joint Stip. ¶¶ 2.H, 4.A). Anything not claimed would revert back to Vector. *See* Docket No. 450 (Saltzman Decl., Ex. A) (Joint Stip. ¶ 4.A).

Out of the \$13 million, the net settlement amount available for the class would be approximately \$7.76 million. *See* Docket No. 450 (Saltzman Decl., Ex. A) (Joint Stip. ¶¶ 2.I, 4.F-

1 G). Other monies would go to attorney's fees and costs (\$4.19 million and \$1 million respectively),¹
 2 the PAGA payment (\$25,000),² and an incentive award to Ms. Harris (\$25,000). (\$25,000 PAGA
 3 payment).³

4 Out of the \$7.76 million available to the class, half would be set aside for the training
 5 subclass and half set aside for the sample kit subclass. *See* Docket No. 450 (Saltzman Decl., Ex. A)
 6 (Joint Stip. ¶ 4.F-G). Each member of the training subclass would get a net payment of
 7 approximately \$57 (a gross payment of approximately \$94). *See* Docket No. 450 (Saltzman Decl.,
 8 Ex. A) (Joint Stip. ¶ 4.G.1). Each member of the sample kit subclass would get a net payment of
 9 approximately \$75 (a gross payment of approximately \$125). *See* Docket No. 450 (Saltzman Decl.,
 10 Ex. A) (Joint Stip. ¶ 4.G.2). The class notice that was ultimately issued reflected these same
 11 amounts. *See* Docket No. 450 (Saltzman Decl., Ex. 1A) (Class Notice at 1, 3) (specifying net and
 12 gross amounts).

13 B. Response to Class Notice

14 On May 9, 2011, the claims administrator sent out 68,345 notices. *See* Docket No. 476
 15 (Braun-Wronowski Decl. ¶ 6). Out of these notices, 7,092 were undeliverable. *See* Docket No. 476
 16 (Braun-Wronowski Decl. ¶ 9). In other words, 61,253 notices were deliverable. An additional 142
 17 notices were sent out on July 8, 2011. *See* Docket No. 476 (Braun-Wronowski Decl. ¶ 7). It is not
 18 clear from the record how many of the additional notices were not deliverable. *See* Docket No. 488
 19 (Ex. A) (updated claims report).

20 As of July 8, 2011, there were four requests for exclusion from the settlement. *See* Docket
 21 No. 476 (Braun-Wronowski Decl. ¶ 16); Docket No. 488 (Ex. A) (updated claims report). Also,
 22 there were approximately two to four objections. *Compare* Docket No. 476 (Braun-Wronowski
 23 Decl. ¶ 15) (stating that there were four objections), *with* Docket No. 488 (Ex. A) (updated claims
 24 report) (indicating that there were two timely objections).

26 ¹ *See* Docket No. 450 (Saltzman Decl., Ex. A) (Joint Stip. ¶ 4.C.1-2).

27 ² *See* Docket No. 450 (Saltzman Decl., Ex. A) (Joint Stip. ¶¶ 2.K, 4.B).

28 ³ *See* Docket No. 450 (Saltzman Decl., Ex. A) (Joint Stip. ¶ 4.D).

1 Excluding the late claims, the final number of claims made for the training time subclass was
 2 16,834. *See* Docket No. 488 (Ex. A) (updated claims report). If the nondeliverables are not
 3 counted, then the claims rate is 27.4 percent (*i.e.*, $16,834 \div (61,253 + 142)$).⁴

4 Out of the total class, there are 52,232 class members who are also eligible for benefits by
 5 returning their sample knife kit. *See* Docket No. 487 (Ex. A) (updated claims report). The final
 6 number of claims made for the sample kit subclass was 528. *See* Docket No. 488 (Ex. A) (updated
 7 claims report). This is a claims rate of 1 percent (*i.e.*, $528 \div 52,232$).⁵

8 C. New, or Modified, Settlement Agreement

9 The new, or modified, settlement agreement basically has the same terms as the old
 10 settlement agreement with the following exceptions.

11 1. *Attorney's fees.* Instead of asking for \$4.19 million in attorney's fees, Ms. Harris is
 12 now limiting her request to \$2.8 million. *See* Docket No. 505 (Am. to Joint Stip. ¶ 1). This
 13 essentially frees up \$1.39 million, which Vector has essentially agreed will not revert back to it but
 14 rather will be distributed to the original claimants and a cy pres account.⁶ If the Court awards less
 15 than \$2.8 million, then half of the remaining amount reverts to Vector and half is distributed to the
 16 cy pres. *See* Docket No. 505 (Am. to Joint Stip. ¶ 1).

17 2. *Original claimants.* The class members who submitted claims under the old
 18 settlement agreement will get their claims enhanced by 20% – *i.e.*, \$69 (instead of \$57) for the
 19 training subclass and \$90 (instead of \$75) for the sample kit subclass. *See* Docket No. 505 (Am. to
 20 Joint Stip. ¶ 2) (differences of \$12 and \$15 respectively).

21 With 16,834 claimants for the training time claim, this means that Vector will pay an
 22 additional \$202,008 (*i.e.*, $16,834 \times \$12$). With 528 claimants for the sample kit claim, this means

23
 24 ⁴ This assumes that the 142 additional notices that were sent out on July 8, 2011, were all
 25 deliverable. Although it is likely that some were not deliverable, in all likelihood the number was
 small given that only 7,092 notices were not deliverable out the 68,345 original notices (*i.e.*,
 approximately 10 percent).

26 ⁵ The record does not reflect how many notices out of the sample kit subclass were not
 27 deliverable. For purposes of this order, the Court assumes that all notices issued were deliverable.

28 ⁶ Vector will actually end up paying a little more than \$1.39 million – approximately \$20,000
 more.

1 that Vector will pay an additional \$7,920 (528 x \$15). In short, out of the \$1.39 million that was
2 freed up, the class receives approximately \$210,000. Given that the class was going to get about \$1
3 million under the old settlement, this means that the class will now get about \$1.2 million (net).

4 3. *Cy pres.* Out of the \$1.39 million enhancement under the new settlement, \$1.2
5 million will go to a cy pres account. The cy pres account will be distributed to eight different public
6 interest organizations, each of which is related to employment. *See* Docket No. 505 (Am. to Joint
7 Stip. ¶ 3.).

8 4. *Incentive award.* Ms. Harris continues to seek an incentive award of \$25,000. The
9 parties now expressly agree that anything not awarded will revert to Vector. *See* Docket No. 505
10 (Am. to Joint Stip. ¶ 4).

11 Under the new terms of the settlement agreement, the net payment to the class (\$1.2 million)
12 and the cy pres (\$1.2 million) taken together are about 15.7% of the total maximum verdict value.
13 (The training claim has a maximum verdict value of \$7,648,650,⁷ and the sample kit claim a
14 maximum verdict value of approximately \$7,573,640 (*i.e.*, 52,232 x \$145).⁸)

15 **II. DISCUSSION**

16 A. Motion for Final Approval

17 As a preliminary matter, the Court notes that it previously certified both an FLSA class and a
18 Rule 23(b)(3) class. *See* Docket No. 375 (order, filed on 11/5/2010). Thus, the Court need not
19 analyze whether the requirements for certification have been met⁹ and may focus instead on whether
20 the proposed settlement is fair, adequate, and reasonable.

21 _____
22 ⁷ *See* Docket No. 466 (Order at 15 & n.6) (noting that the parties calculated the maximum
23 verdict value by “multipl[ying] the number of Training Time class members (69,000) by the unpaid
average wage for the training time (\$110.85)”).

24 ⁸ *See* Docket No. 466 (Order at 21) (noting that, according to Ms. Harris, members of the
sample kit subclass “each paid approximately \$145.00 (\$135 plus sales tax) for the sample kits).

25 ⁹ *See, e.g., Denny v. Deutsche Bank, A.G.*, 443 F.3d 253, 270 (2d Cir. 2006) (stating that,
26 “[b]efore certification is proper for any purpose – settlement, litigation, or otherwise – a court must
27 ensure that the requirements of Rule 23(a) and (b) have been met” and that “[t]hese requirements
28 should not be watered down by virtue of the fact that the settlement is fair or equitable”); *Okudan v.*
Volkswagen Credit, Inc., No. 09-CV-2293-H (JMA), 2011 U.S. Dist. LEXIS 84567, at *6 (S.D. Cal.
Aug. 1, 2011) (noting that a proposed settlement class still must meet the criteria of Rule 23(a) and
(b)).

1 In determining whether a settlement agreement is fair, adequate, and reasonable to all
2 concerned, a district court may consider some or all of the following factors:

3 the strength of plaintiffs' case; the risk, expense, complexity, and
4 likely duration of further litigation; the risk of maintaining class action
5 status throughout the trial; the amount offered in settlement; the extent
6 of discovery completed, and the stage of the proceedings; the
7 experience and views of counsel; the presence of a governmental
8 participant; and the reaction of the class members to the proposed
9 settlement.

10 *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003).

11 In its order granting preliminary approval, the Court provided an assessment of these factors,
12 *see* Docket No. 466 (Order at 22-24), and that assessment largely remains the same. The only
13 factors that are deserving of additional analysis are (1) the reaction of the class members to the
14 proposed settlement; (2) the strength of the plaintiffs' case; and (3) the amount offered in settlement.

15 With respect to the reaction of the class members, as indicated above, very few persons have
16 opted out or objected. The limited number of opt-outs and objections indicates that, as a whole, the
17 class does not find the proposed settlement problematic. As for the objections that have been made,
18 the Court has evaluated them and concludes that they do not establish that the settlement is unfair.
19 For example, one class member objected to the amount of attorney's fees requested, but the
20 settlement agreement does not guarantee that class counsel will in fact be awarded that sum.
21 Another class member objected on the basis that she is deserving of more money, at least \$7,000,
22 given her particular circumstances. Such a recovery is not realistic. Moreover, the objector was
23 entitled to opt out rather than remain in the class.

24 Turning to the remaining factors, *i.e.*, the strength of the plaintiffs' case and the amount
25 offered in settlement, the Court notes that these factors are related. For example, where the
26 plaintiffs' case is weak, then a fair settlement may not have great value. *See Yeagley v. Wells Fargo*
27 *& Co.*, No. C 05-03404 CRB, 2008 U.S. Dist. LEXIS 5040, at *8 (N.D. Cal. Jan. 18, 2008) (noting
28 that, "while the settlement offers little of value to the class, plaintiff's case is weak and the class
could not do better if the Court rejected the settlement"), *rev'd on other grounds*, 365 Fed. Appx.
886 (9th Cir. 2010). In contrast, the stronger the case, the more value the settlement should have in
order to be fair and adequate.

1 In the instant case, there was considerable risk if the class were to take the case to trial. Most
2 notably, if this Court or an appellate court were to find in Vector's favor on the fourth *Portland*
3 *Terminal* factor (*i.e.*, whether the employer derives an *immediate* advantage from the activities of the
4 trainees), then the class could lose on the training time claim. As for the sample kit claim, that claim
5 was weak from the outset because a Sales Representative could get his or her deposit back by
6 returning the sample kit. Finally, although this Court rejected Vector's argument that a Rule
7 23(b)(3) class should not have been certified because the FLSA collective action was a superior way
8 of proceeding, *see* Docket No. 375 (Order at 28-30), there was authority to support Vector's position
9 that a 23(b)(3) class for the state law claims was not proper in view of the FLSA opt-in class. *See*
10 *Leuthold v. Destination Am.*, 224 F.R.D. 462 (N.D. Cal. 2004). Thus, there was a risk to class
11 certification. The Court concludes that, in light of the above risks, the settlement reached by the
12 parties is sufficiently fair, adequate, and reasonable such that it should be approved.

13 In so holding, the Court acknowledges that the fairness of the settlement with respect to the
14 training claim – the stronger of the two claims – is a close call. In its order granting preliminary
15 approval, the Court had expressed concern that, with a claims procedure for the training time claim,
16 the actual pay-out to the class might be quite low. As it turns out, the claims rate – although not
17 robust – was not inordinately low. Given the claims rate, the training time claim ultimately settled
18 (on a net basis) for approximately 15.3 percent of the maximum verdict value.¹⁰ Although this is a
19 relatively small percentage, the Court cannot say that it renders the settlement unfair given the risks
20 identified above. *Cf. Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 U.S. Dist. LEXIS
21 8476, at *13 (N.D. Cal. Jan. 26, 2007) (stating that, given the uncertainties involved in the litigation,
22 it was reasonable for the parties to settle the case for approximately 25 to 35 percent of the amount
23 of damages plaintiff could have hoped to prove at trial).

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26 ¹⁰ The maximum verdict value for the training time claim was \$7.6 million. *See* Docket No.
27 466 (Order at 15 & n.6) (noting that the parties calculated the maximum verdict value by
28 “multip[lying] the number of Training Time class members (69,000) by the unpaid average wage for
the training time (\$110.85)”). The training time claim settled for approximately \$1.16 million (*i.e.*,
16,834 x \$69).

1 Furthermore, the Court notes that, in approving the settlement, which contains a cy pres
2 component, it has taken into account the Ninth Circuit's holding in *Nachshin v. AOL, LLC*, 663 F.3d
3 1034 (9th Cir. 2011). In *Nachshin*, the Ninth Circuit clarified that

4 the cy pres doctrine allows a court to distribute unclaimed or
5 non-distributable portions of a class action settlement fund to the "next
6 best" class of beneficiaries. Cy pres distributions must account for the
7 nature of the plaintiffs' lawsuit, the objectives of the underlying
8 statutes, and the interests of the silent class members, including their
9 geographic diversity.

10 *Id.* at ----.

11 In the instant case, Vector argues that the additional \$1.39 million that was freed up
12 constitutes an "unclaimed fund," and therefore a cy pres distribution is appropriate. While, as a
13 formal matter, the money cannot be characterized as an unclaimed fund (*e.g.*, it is more than likely
14 that those who did make claims under the original settlement would want more money if given the
15 opportunity to stake out an additional claim), the Court is satisfied that, as a practical matter, the
16 money may be so characterized. This is because, if the \$1.39 million were to be made available to
17 the entire class (more than 60,000 people), then each class member would get more money but not
18 that much more. Therefore, it is likely that the response of the class would not be materially
19 different – *i.e.*, the vast majority of class members would not make a claim. Thus, at the end of the
20 day, the original claimants would be getting only a bit more and the rest of the fund would be
21 unclaimed; that unclaimed amount would fairly be put into the cy pres, similar to the result under the
22 new settlement.

23 Furthermore, Vector has stated it would not participate in a settlement that would
24 significantly enhance the per class member award (*e.g.*, if the unclaimed funds were distributed to
25 those members who filed a claim resulting in an award close to full verdict value of their training
26 time claim). Vector states it believed the claims lacked merit and a full award per claimant would
27 constitute an unjust windfall. Thus, redistributing \$1.39 million directly to the class is not an
28 available option.

Under these circumstances, the Court is satisfied that the cy pres distribution here is
appropriate and consistent with *Nachshin*. The Court also notes that the cy pres beneficiaries

1 identified by the parties are all proper, taking into account “the nature of the plaintiffs’ lawsuit, the
2 objectives of the underlying statutes, and the interests of the silent class members, including their
3 geographic diversity.” *Id.*

4 Finally, the new settlement obviates the Court’s previously stated concern relating to
5 potential unfairness and collusion under *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d
6 935 (9th Cir. 2011). Unlike the initial settlement, the award to the class (directly and via cy pres)
7 under the new settlement is not substantially outstripped by a “clear sailing” attorney fee provision.
8 Furthermore, the new settlement provides that if the fee award is reduced from the requested
9 amount, there is no full reversion to Vector. Instead, half will go to the class.

10 Accordingly, the Court grants final approval to the new, or modified, settlement proposed by
11 the parties.

12 B. Motion for Attorney’s Fees and Costs

13 1. Attorney’s Fees

14 As indicated above, Ms. Harris is now seeking only \$2.8 million in attorney’s fees (instead
15 of \$4.19 million). The new fee request is approximately 21.5% of the total settlement (*i.e.*, \$13
16 million x 21.5% ≈ \$2.8 million). In the renewed motion, Ms. Harris notes (as this Court noted
17 above) that this puts fees on par with the money to the class and the cy pres combined (\$2.4 million
18 total). She also points out that the new amount requested is even less than the lodestar, which is
19 claimed to be \$3,046,763.75. *See* Docket No. 470 (Mot. at 8).

20 The Court concludes that the new fee request is fair. First, 25% is the benchmark if the
21 percentage method is used, *see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1407 (9th Cir. 2002),
22 and Ms. Harris is now asking for less than the benchmark. That discount from the benchmark is
23 warranted because, although the settlement for the class is adequate, it is far short of the total
24 settlement fund of \$13 million. As this Court previously noted, given the 1% response rate on the
25 sample kit claim, the final amount allocated to that claim (over \$3.8 million) was practically
26 illusory. Thus, were the 25% benchmark to apply to the full \$13 million, the fee award would be
27 unduly inflated. The discount here is warranted. Second, as Ms. Harris argues, fees are now on par
28 with the money to the class and the cy pres combined (roughly 1:1). The Court is not faced with a

1 situation where fees are disproportionate to the class award as in *Bluetooth*. Third, while the
2 claimed lodestar is arguably excessive (particularly in terms of hours), the Court takes into account
3 the fact that class counsel did spend additional time working on the case since the fee motion was
4 filed back in June 2011.

5 Accordingly, the Court grants the motion for attorney's fees in the amount of \$2.8 million.

6 2. Costs

7 Ms. Harris also asks that class counsel be reimbursed for their costs, totaling \$411,522.12,
8 and for the costs incurred or to be by the claims administrator (Epiq Systems, Inc.), not to exceed
9 \$250,000.

10 The Court notes that the amounts requested do not exceed the amounts agreed to in the
11 parties' settlement agreement (*i.e.*, \$1 million total). The Court further notes that counsel and the
12 claims administrator have provided evidence supporting their claims that costs in the above amounts
13 have been or will likely be incurred. *See* Docket No. 476 (Lee Decl. ¶ 3 & Ex. A) (\$144,241,44); *id.*
14 (Jung Decl. ¶ 3 & Ex. A) (\$40,481.25); Docket No. 478 (Saltzman Decl. ¶ 6 & Ex. A)
15 (\$226,799.43); Docket No. 476 (Braun-Wronowski Decl. ¶ 20) (noting that, for Epiq, costs in the
16 amount of \$68,111.71 were incurred from January 1, 2011, through March 31, 2011, for mailing the
17 notice of certification and that an additional \$180,386.42 has been incurred from April 1, 2011,
18 through June 30, 2011). Although the Court has questions about some costs (*e.g.*, the lump sum of
19 \$15,000 incurred by Ms. Jung for class administration) and, arguably, some costs may have been
20 unnecessary (*e.g.*, travel costs for multiple attorneys to attend certain hearings or conferences), these
21 costs, as a whole, appear reasonable and were incurred.

22 Accordingly, the Court grants the motion for costs, both as to costs incurred by counsel as
23 well as costs incurred or likely to be incurred by Epiq. Counsel is awarded costs in the amount of
24 \$411,522.12 and Epiq is awarded the costs incurred not to exceed \$250,000.

25 C. Motion for Incentive Award

26 Finally, Ms. Harris asks to be awarded \$25,000 as an incentive payment.

27 It is well-established in this circuit that named plaintiffs in a
28 class action are eligible for reasonable incentive payments, also known
as service awards. In fact, the Ninth Circuit recently noted that

1 incentive payments to named plaintiffs have become “fairly typical” in
2 class actions. However, while incentive payments have become
3 increasingly common, there is no entitlement to an incentive payment.
4 Rather, “[s]uch awards are discretionary . . . and are intended to
5 compensate class representatives for work done on behalf of the class,
6 to make up for financial or reputational risk undertaken in bringing the
7 action, and, sometimes, to recognize their willingness to act as a
8 private attorney general.” When incentive payments are part of a
9 settlement, the court must carefully consider the disparity created by
10 incentive payments to named plaintiffs because “excessive payments
11 to named class members can be an indication that the agreement was
12 reached through fraud or collusion.” Particularly, the Ninth Circuit
13 has cautioned that, “if class representatives expect routinely to receive
14 special awards in addition to their share of the recovery, they may be
15 tempted to accept suboptimal settlements at the expense of the class
16 members whose interests they are appointed to guard.”

17 When considering a request for an incentive payment, the court
18 must evaluate each request individually, taking into account the
19 following factors: (1) the actions the plaintiff has taken to protect the
20 interests of the class; (2) the degree to which the class has benefitted
21 from those actions; (3) the duration of the litigation and the amount of
22 time and effort the plaintiff expended in pursuing it; and (4) the risks to
23 the plaintiff in commencing the litigation, including reasonable fears
24 of workplace retaliation, personal difficulties, and financial risks.
25 Additionally, to ensure that an incentive payment is not excessive, the
26 court must balance “the number of named plaintiffs receiving
27 incentive payments, the proportion of the payments relative to the
28 settlement amount, and the size of each payment.”

16 *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 U.S. Dist. LEXIS 38667, at *92-94
17 (N.D. Cal. Apr. 1, 2011). Several courts in this District have indicated that incentive payments of
18 \$10,000 or \$25,000 are quite high and/or that, as a general matter, \$5,000 is a reasonable amount.
19 *See, e.g., Thieriot v. Celtic Ins. Co.*, No. C 10-04462 LB, 2011 U.S. Dist. LEXIS 44852, at *21-22
20 (N.D. Cal. Apr. 21, 2011) (noting that incentive payment of \$25,000 is on the “high end,” although
21 ultimately awarding that amount); *Chu v. Wells Fargo Invs., LLC*, Nos. C 05-4526 MHP, C 06-7924
22 MHP, 2011 U.S. Dist. LEXIS 15821, at *14 (N.D. Cal. Feb. 16, 2011) (stating that \$10,000 is
23 “perhaps somewhat on the high end of the acceptable range for the size of the class [approximately
24 2,700 members] and the amount of the settlement [\$6.9 million]”); *Jacobs v. California State Auto.*
25 *Ass’n Inter-Ins. Bureau*, No. C 07-00362 MHP, 2009 U.S. Dist. LEXIS 101586, at *13-14 (N.D.
26 Cal. Oct. 27, 2009) (stating that “[a] \$ 25,000 incentive payment is quite high for this district, in
27 which a \$ 5,000 payment is presumptively reasonable”; rejecting \$25,000 request and awarding
28 \$7,500 instead); *Hopson v. Hanesbrands Inc.*, No. CV-08-0844 EDL, 2009 U.S. Dist. LEXIS 33900,

1 at *27-28 (N.D. Cal. Apr. 3, 2009) (stating that, “[i]n general, courts have found that \$ 5,000
2 incentive payments are reasonable”); *see also* Wren, 2011 U.S. Dist. LEXIS 38667, at *96 (noting
3 that “there is ample case law finding \$5,000 to be a reasonable amount for an incentive payment”).

4 Implicitly cognizant of the above case law, Ms. Harris defends the \$25,000 requested by
5 noting that (1) she spent more than 100 hours on this case (which included being deposed twice); (2)
6 her private information was disclosed (*e.g.*, telephone, school, and work records) and she had to
7 explain to family and friends why they were being subpoenaed; (3) her future employment is
8 threatened because she agreed to be a class action plaintiff; and (4) unlike the rest of the class, she is
9 giving Vector a release of all claims.

10 For the most part, the Court finds these arguments unpersuasive. First, that Ms. Harris has
11 spent more than 100 hours on this case is not particularly compelling, especially because some of the
12 time spent on the case was tied to issues with the merits of her individual claim. Second, her
13 suggestion that her future employment is threatened is entirely speculative. Courts typically have a
14 concern about retaliation where the plaintiff is still employed by the defendant; that is not the case
15 here. Finally, the fact that Ms. Harris is giving up all of her claims against Vector is not enough to
16 justify an award in the amount of \$25,000. When asked at the hearing what additional claims she
17 had against Vector, Ms. Harris indicated that she had incurred expenses post-training. But those
18 expenses were likely very minimal as even Ms. Harris has basically admitted during this litigation
19 that she did not work as a Sales Representative for a long period of time.

20 The only point raised by Ms. Harris that does give the Court some pause is the fact that
21 Vector pursued disclosure of her private information and subpoenaed her family and friends. The
22 Court notes that, on the one hand, Vector’s conduct was not completely unjustified. For example,
23 according to Vector, it never received from Ms. Harris a request for payment for qualified sales
24 presentations (“QSPs”). Therefore, it was not unreasonable for Vector to make inquiry as to
25 whether Ms. Harris actually made QSPs to the persons she subsequently identified. Also, it was
26 reasonable for Vector to seek Ms. Harris’s telephone records in order to evaluate her claim that was
27 in constant contact with her managers. But, on the other hand, Vector’s conduct in other ways
28

1 bordered on the being overly aggressive – in particular, Vector’s pursuit of Ms. Harris’s school and
2 employment records and its challenge to Ms. Vector’s competency.

3 Given the above, the Court shall award Ms. Harris more than the typical incentive award, but
4 not the \$25,000 requested. Notably, the case law on which Ms. Harris relies justifying such awards
5 are distinguishable. For example, in *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D.
6 Cal. 1995), and *Glass*, 2007 U.S. Dist. LEXIS 8476, the amounts obtained for the class were vastly
7 larger than the settlement amount obtained here (\$67 million and \$45 million), and, in *Van Vranken*,
8 there was actually a trial in which the class representative testified. In *Cook v. Niedert*, 142 F.3d
9 1004 (7th Cir. 1998), the class representative had spent “hundreds of hours” on the case and there
10 was a finding by a special master that he reasonably feared workplace retaliation. *Id.* at 1016.
11 Similarly, in *Brotherton v. Cleveland*, 141 F. Supp. 2d 907 (S.D. Ohio 2001), the class
12 representative spent approximately 800 hours working on the lawsuit. None of these extreme facts
13 exist here.

14 Taking into account the totality of the circumstances, the Court concludes that an incentive
15 award of \$12,500 is more than fair to compensate Ms. Harris for her time and efforts on the
16 litigation.

17 **III. CONCLUSION**

18 In sum, in accordance with the above, the Court grants the motion for final approval, grants
19 the motion for fees and costs, and grants the motion for an incentive award. With respect to fees, the
20 award is limited to \$2.8 million. With respect to costs, class counsel is awarded costs in the amount
21 of \$411,522.12 and Epiq is awarded the costs incurred not to exceed \$250,000. Finally, Ms. Harris
22 is awarded an incentive payment of \$12,500.

23 The case is dismissed with prejudice and without costs to any party, other than as specified in
24 the settlement agreement and this order.

25 Upon entry of this order, Ms. Harris and the settlement class members who have not opted
26 out of the settlement shall be deemed to have released the “Released Parties” of the “Released
27 Claims” (as defined in the settlement agreement).

28

1 Without affecting the finality of this judgment in any way, the Court retains jurisdiction over
2 (a) implementation of the settlement and the terms of the settlement agreement; (b) distribution of
3 the settlement proceeds; and (c) all other proceedings related to the implementation, administration,
4 consummation, and enforcement of the terms of the settlement agreement and/or settlement, as well
5 as the administration of claims. The time to appeal from this judgment shall commence upon its
6 entry.

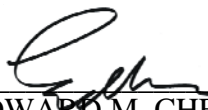
7 In the event that the “Settlement Effective Date” (as defined in the settlement agreement)
8 does not occur, this judgment shall be rendered null and void and shall be vacated, nunc pro tunc,
9 except insofar as expressly provided to the contrary in the settlement agreement, and without
10 prejudice to the status quo ante rights of Ms. Harris, the settlement class members, and Vector.

11 The Court instructs the Clerk of the Court to enter judgment in accordance with this opinion.

12 This order disposes of Docket No. 505.

13
14 IT IS SO ORDERED.

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16 Dated: February 6, 2012

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19 EDWARD M. CHEN
20 United States District Judge
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