UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

VALERIE LEMBECK, ROBERT LANGE, and ANDREW MILLER, *on behalf of themselves and all others similarly situated,*

Plaintiff,

v.

ARVEST CENTRAL MORTGAGE CO.,

Defendant.

Case No. 3:20-cv-03277-VC

[PROPOSED] ORDER GRANTING PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARDS

Date: August 12, 2021
Time: 10:00 a.m.
Courtroom:
Judge: Vince Chhabria

Date Filed: May 14, 2020
Trial Date: None set

Plaintiffs Valerie Lembeck, Andrew Miller, and Robert Lange, individually and on behalf of the proposed Settlement Class,[1] seek an award of $491,388 in attorneys' fees and costs, as well as $5,000 for each of the three Plaintiffs for their service as Class Representatives in connection with the Settlement of claims against defendant Arvest Central Mortgage Company ("Arvest"). *See* Dkt. 70. For the reasons set forth herein and the accompanying order on the motion for final approval ("Final Approval Order"), the Court GRANTS the motion.

As discussed in more detail in the Final Approval Order, the fee request is made in connection with the Settlement that consolidated three separate actions in California, Florida, and Texas, each of which alleged that Arvest improperly charged and collected millions of dollars in $5 and $10 Pay-to-Pay Fees from homeowners. To settle the claims, Arvest agreed to pay $1,474,314 into a common fund, which represents 49.7% of the fees collected from Class Members. Arvest further agreed to stop charging the fees in California, Florida, and Texas for three years. Based on the average amount collected during the four year class period, Class counsel estimates that Class Members will save approximately $2.5 million over the next three years. Class counsel requests an award of $475,239.55 in attorney's fees and $16,148.45 in costs (or one-third of the common fund), to be paid from the common fund.

When approving a class settlement, courts in the Ninth Circuit must assess whether the settlement is adequate for class members by weighing the proposed attorney's fees against the relief provided to the class. *Briseno v. Henderson,* 998 F.3d 1014, 1023-24 (9th Cir. 2001)(quoting Fed. R. Civ. P. 23(e)(2)(c)(iii)). For the reasons set forth in the Final Approval Order, the settlement as a whole is fair and adequate. Further, with respect to the request for fees, costs, and service awards, I find the requests fair for the reasons set forth below.

A. Attorneys' Fees and Costs

Rule 23(h) of the Federal Rules of Civil Procedure provides: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fee provisions included in proposed class-action settlements must be "fundamentally fair,

[1] Unless otherwise specifically defined herein, all capitalized terms have the same meanings as those set forth in the parties' Settlement Agreement, attached as Exhibit 1 to the Declaration of Hassan A. Zavareei ("Zavareei Decl.").

adequate and reasonable." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The court is not bound by the parties' settlement agreement as to the amount of attorneys' fees. *Id.* at 943. The Ninth Circuit has instructed district courts to review class fee awards with special rigor:

> Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fiduciary for the class plaintiffs. Accordingly, fee applications must be closely scrutinized. Rubber-stamp approval, even in the absence of objections, is improper.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1052 (9th Cir. 2002) (quotation omitted).

In the Ninth Circuit, the benchmark for an attorney's-fee award is 25% of the total settlement value. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The requested fees and cost here are 33.3% of the total common fund, independent of any value provided to Class Members via injunctive relief.

In common-fund cases, the Ninth Circuit requires district courts to assess proposed fee awards under either the "lodestar" method or the "percentage of the fund" method. *Fischel v. Equitable Life Ass. Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002); *Hanlon*, 150 F.3d at 1029. This court finds that the fee request here is reasonable under both approaches.

Where the settlement involves a common fund, courts typically award attorney's fees based on a percentage of the total settlement. The Ninth Circuit has established a "benchmark" that fees should equal 25% of the settlement, although courts diverge from the benchmark based on a variety of factors, including "the results obtained, risk undertaken by counsel, complexity of the issues, length of the professional relationship, the market rate, and awards in similar cases." *Morales v. Stevco, Inc.*, 2013 WL 1222058, at *2 (E.D. Cal. Mar. 25, 2013); *see also Six Mexican Workers*, 904 F.2d at 1311; *State of Fla. v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990); *In re Pac. Enters. Secs. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award of 33% of the recovery); *Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming 33% fee award).

When determining the value of a settlement, courts consider both the monetary and non-monetary benefits that the settlement confers. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 972-74 (9th Cir. 2003; *Hartless v. Clorox Co.,* 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x 716 (9th Cir. 2012); *Pokorny*

v. Quixtar, Inc., 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013), *appeal dismissed* (Sept. 13, 2013) ("The court may properly consider the value of injunctive relief obtained as a result of settlement in determining the appropriate fee."); *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *7 (N.D. Cal. Mar. 18, 2013) (settlement value "includes the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief"), *appeal dismissed* (Dec. 19, 2013).

Finally, Ninth Circuit precedent requires courts to award class counsel fees based on the total benefits being made available to class members rather than the actual amount that is ultimately claimed. *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269, *23 (N.D. Cal. Mar. 28, 2007 (citing *Williams v. MGM-Pathe Commc'ns Co.,* 129 F.3d 1026 (9th Cir. 1997) ("district court abused its discretion in basing attorney fee award on actual distribution to class" instead of amount being made available)).

To support their request for fees, Plaintiffs have proffered that the value of the injunctive relief alone to the Settlement Class is $2,500,000. This is based on the annual average of $820,000 of Pay-to-Pay fees collected by Arvest from Class Members. Considering the $1,474,314 cash payment and the value of the injunctive relief, the requested fee is about 12% of the total settlement value, almost 13 percentage points below the Ninth Circuit benchmark. The court finds that the requested fee is appropriate even if it is slightly more than the 25% benchmark. If the value of the changed practices is only half of what Counsel estimates, for instance, the requested fee represents 18% of the total settlement value-still below the Ninth Circuit benchmark. Even if the court considers only the monetary relief of $1,474,314, the requested fee reflects 33.3% of that benefit; this remains consistent with awards that have been approved in similar cases. *See McWhorter, et al v. Ocwen Loan Servicing LLC, et al,* 2:15-cv-1831 (N.D. Ala.) (awarding one third of the settlement fund plus expenses in a common fund case with no reversion); *Montesi et al v. Seturus, Inc.,* 2015CA010910 (Fla. Cir. Ct) (awarding one third of the settlement fund and up to $150,000 in expenses in a common fund case with no reversion).

Finally, after applying the percentage method, courts typically roughly calculate the lodestar as a "cross-check to assess the reasonableness of the percentage award." *E.g., Weeks v. Kellogg Co.,* 2013 WL 6531177, *25 (C.D. Cal. Nov. 23, 2013); *see also Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977) *Melnyk v. Robledo*, 64 Cal. App. 3d 618, 624-25 (1976); *Clejan v. Reisman*, 5 Cal. App. 3d 224, 241 (1970); *Fed-Mart*

Corp. v. Pell Enterprises, 111 Cal. App. 3d 215 (1980). "The lodestar . . . is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate." *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000). Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained and the contingent risk presented." *Id.*

Based on the detailed declarations submitted by Counsel, the court finds that the lodestar at the time Plaintiffs' Motion for Fees, Costs, and Service Awards was filed was approximately $444,404.80. *See* Dkt. 70 at 1. Plaintiffs' attorneys have detailed their efforts to date extensively, and the court is familiar with the hard-fought nature of this litigation. *See* June 15, 2021 Declaration of Kristen G. Simplicio ("Simplicio Decl.") ¶¶ 3-22; June 15, 2021 Declaration of James L. Kauffman, ("Kauffman Decl.") ¶¶ 11-20. Counsel represents that at the completion of the case, their lodestar is almost certain to exceed the requested fee award of $475,239.55, due in large part to work in supervising the distribution of funds and overseeing the Post-Distribution Accounting. *See* Simplicio Decl. ¶ 28 (indicating Plaintiffs' Counsel lodestar will likely incur an additional $50,000 following their Motion for Fees, Costs, and Service Awards).

The rates they have used are the Adjusted Laffey Matrix rates which are Class Counsel's customary rates and which provide appropriate market rates for attorneys working in the Washington, D.C. area. *See e.g. Kumar v. Salov North America Corp.,* No. 14-CV-2411-YGR, 2017 WL 2902898 (N.D. Cal. July 7, 2017)(awarding attorneys in this matter Adjusted Laffey Matrix rates). Further by representing Plaintiffs on a contingency, Class Counsel has taken a delay in payments in this matter and this Court has discretion to approve an award for this delay. *See In re Washington Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1305 (9th Cir. 1994) ("The district court has discretion to compensate delay in payment in one of two ways: (1) by applying the attorneys' current rates to all hours billed during the course of litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement.").

Were it in question, the court notes that other factors here, "including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk

presented" would likely support awarding a multiplier. *Lealao*, 82 Cal. App. at 26; *see also Walsh v. Kindred Healthcare*, 2013 WL 6623224, *3 (N.D. Cal. Dec. 16, 2013) (citing *Lealao* method with approval). The risk inherent in this litigation is illustrated by the fact that district courts are split on the merits of the underlying claims, and shortly after this settlement was reached, several plaintiffs filed an appeal with the Ninth Circuit over a district court's decision to dismiss these claims in full. *See Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No. 220CV07301ODWEX, 2021 WL 1253578 (C.D. Cal. Apr. 5, 2021) (granting motion to dismiss), *appeal filed*, Case No. 21-55459 (9th Cir.). Thus, the court finds the fee request reasonable under both the "percentage of the fund" approach and the lodestar cross-check.

Class Counsel are entitled to reimbursement of reasonable out-of-pocket expenses. Fed. R. Civ. P. 23(h); *see Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (holding that attorneys may recover reasonable expenses that would typically be billed to paying clients in non-contingency matters.); *Van Vranken*, 901 F. Supp. at 299 (approving reasonable costs in class action settlement). Costs compensable under Rule 23(h) include "nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

Here, class counsel seeks reimbursement of $16,148.45 in litigation expenses, which includes the cost of a private mediator. They have provided records that document their claim. *See* Simplicio Decl. ¶ 29; Kauffman Decl. ¶ 29. The costs will be paid from the common fund and will not reduce the amounts paid to class members who made valid claims. The court therefore finds that these submissions support an award of $16,148.45 in costs.

B. Class Representative Payments

The district court must evaluate named plaintiffs' payments individually, using relevant factors including "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, . . . [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). "Such awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). The Ninth Circuit recently emphasized that district courts must "scrutiniz[e]

all incentive awards to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Solutions,* 715 F.3d 1157, 1163 (9th Cir. 2013). Here, the Plaintiffs came forward to represent the interests of thousands of others, with very little personally to gain, as their individual alleged damages were very small. Before and during litigation, Plaintiffs had their highly sensitive financial information regarding their mortgage agreements inspected. Plaintiffs participated in the litigation by reviewing the complaint and other filings and making themselves available to assist with discovery. And Plaintiffs all worked with counsel to initiate separate cases in their home states, taking the substantial risk they might, at a minimum, lose their case and pay the other side's costs. Thus, the Court approves a $5,000 award each for Ms. Lembeck, Mr. Lange, and Mr. Miller.

IT IS SO ORDERED.

Dated: _____

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Hon. Vince Chhabria

United States District Judge