UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:18-cv-09490-SVW-PJW	Date	7/14/2020
Title	*Federico Galavis et al v. Bank of America, N.A., et al*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE
Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS [63]

I. Introduction

Lead Plaintiffs Frederico Galavis and Zak Kiriakos ("Plaintiffs") filed this motion seeking attorney's fees and costs on January 31, 2020 on behalf of Class Counsel Finkelstein & Krinsk LLP ("Class Counsel").[1] Dkt. 63. Defendants Bank of America, N.A. and VISA, Inc. (collectively "Defendants" individually "Bank of America" and "VISA") have not opposed this motion, nor has any class member filed an objection to the settlement or this motion. For the reasons articulated below, the Court GRANTS Plaintiff's motion in part, awarding Class Counsel a fee award equivalent to 25% of the total constructive common fund provided by Defendants pursuant to the Settlement Agreement.

II. Factual and Procedural Background

Plaintiffs initially filed this class action lawsuit in this Court on November 8, 2018. Dkt. 1. Following a hearing on Defendant VISA's motion to dismiss, the Court denied the motion and instructed the parties to file cross-motions for summary judgment by July 8, 2019. Dkt. 40. Following the hearing, the parties engaged in substantial discovery efforts, filed third-party subpoenas, and prepared for

[1] Plaintiff's motion also seeks incentive award payments for the two Lead Plaintiffs of $5,000 each. Dkt. 63-1 at 16-17. These awards are discussed and authorized in this Court's companion Order granting final approval to the settlement as a whole.

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depositions. Dkt. 64 at 2-3. In advance of a full-day mediation session on May 6, 2019, the parties prepared mediation briefs presenting their legal theories, and ultimately participated in a mediation session before former Magistrate Judge Jay Gandhi. Dkt. 64 at 3-4. With the assistance of the mediator, they reached a tentative settlement agreement at the mediation, and notified the Court that a settlement had been reached. Dkt. 47. On Oct. 22, 2019, Plaintiff filed a motion for preliminary approval of the class-action settlement. Dkt. 52. On Dec. 17, 2019, the Court granted preliminary approval. Dkt. 62. After notice to the class and an appropriate claims period, this settlement is now before the Court for final approval (discussed in a companion Order) and this motion for attorney's fees on behalf of Class Counsel. Dkt. 63; Dkt. 66.

Substantively, Plaintiffs' claims arise from allegations that certain Cash Advance charges were improperly incurred by class member credit card holders who used their Bank of America credit cards to purchase cryptocurrencies between 2016 and 2018. Dkt. 63-1 at 1. The parties dispute whether those cryptocurrency purchases were properly deemed "Cash Equivalents" subject to "Cash Advance" charges within the meaning of Bank of America's cardholder agreements, and whether VISA tortiously interfered with Bank of America's cardholder agreements by recoding cryptocurrency transactions on the VISA credit card network. *Id.*

The settlement agreement reached between Plaintiffs and the Defendants calls for a $415,000 Cash Settlement to the class members in exchange for a full release of all claims arising from the lawsuit. Dkt. 53-1 at 5. The Settlement Agreement also requires Defendants to pay all settlement administration costs, estimated at $70,000. *Id.* at 6. The Settlement Agreement also entitles Class Counsel to *apply* for reimbursement of costs and a fee award in an aggregate amount of $285,000. *Id.* at 11. In the event the Court approves a fee and costs award below $285,000, the different will not revert to Defendants, but will be added to the settlement fund account used to distribute proceeds to class members. *Id.*

III. Legal Standard

In awarding attorneys' fees under Federal Rule of Civil Procedure 23(h), "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 941. In the Ninth Circuit, there are two primary methods to

calculate attorney's fees: the lodestar method and the percentage-of-recovery method. *Id.* at 941–42. Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in the Ninth Circuit, the benchmark percentage is 25%. *Id.* at 942. The lodestar method requires "multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* at 941.

A district court has discretion in calculating fees, or approving a fee request, but it "abuses that discretion when it uses a mechanical or formulaic approach that results in an unreasonable reward." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir.2010) (internal quotation marks omitted). One way that a court may demonstrate that its use of a particular method or the amount awarded is reasonable is by conducting a cross-check using the other method. For example, a crosscheck using the lodestar method "can 'confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 945 (quoting *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 n. 40 (3d Cir.1995)).

Because the relationship between class counsel and class members turns adversarial at the fee-setting stage, district courts assume a fiduciary role that requires close scrutiny of class counsel's requests for fees and expenses from the common fund. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002); *see also In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) ("As a fiduciary for the class, the district court must 'act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is.' " (internal quotation marks omitted) (quoting *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994))); 4 William B. Rubenstein, Newberg on Class Actions § 13:40 (5th ed. 2012).

IV. Analysis

As is customary in large-figure class action settlements, the Court acts within its discretion to first analyze the fee request under the common fund approach, and then cross-check this analysis with reference to the provided lodestar figures submitted by Class Counsel, to ensure the award is reasonable. *See Acosta v. Frito-Lay, Inc.*, 2018 WL 2088278, at *11-12 (N.D. Cal. May 4, 2018); *Smith v. Am. Greetings Corp.*, 2016 WL 362395, at *8-9 (N.D. Cal. Jan. 29, 2016).

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The Court notes before beginning its analysis that Plaintiff's motion solely analyzes the reasonableness of the requested fee award under the lodestar approach and emphasizes the "separately negotiated" nature of that agreement. Dkt. 63-1 at 5-10. But the Court cannot ignore the fact that regardless of how Plaintiffs have chosen to structure this settlement, this is functionally a common fund settlement— Defendants have agreed to pay a fixed total of $770,000 between settlement administration costs ($70,000), attorney's fee award ($285,000), and a cash settlement fund ($415,000), in exchange for release of all relevant claims held by class members. *See* Dkt. 53-1 (settlement agreement); *see also In re Bluetooth*, 654 F.3d at 943 (describing "constructive common fund" approach); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996) ("in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal"); *In re Galena Biopharma, Inc. Sec. Litig.*, 2016 WL 3457165, at *7 (D. Or. June 24, 2016) (applying common fund approach to ensure reasonableness of "separately negotiated" fee award).

Moreover, it is precisely the non-reversionary character of the funds contributed by Defendants to the settlement that previously convinced the Court to grant preliminary approval to this settlement, because it persuaded the Court that the settlement appeared to be sufficiently non-collusive, despite the fact that this settlement was reached before the Court granted class certification. *See Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). Without the settlement provision providing that any portion of the proposed fee award not granted by the Court would be added to the Cash Settlement fund for distribution to class members, the fact that this settlement includes a "clear sailing" provision (preventing Defendants from objecting to Plaintiff's motion for attorney's fees unless they exceed $285,000) and authorizes a payment to Class Counsel equivalent to almost 40% of the total settlement and nearly 70% of the direct benefit to class members, the Court would not have approved this settlement. *See, e.g. In re Bluetooth*, 654 F.3d 935, 947 (9th Cir. 2011) (noting that a disproportionate benefit to class counsel, a "clear sailing" arrangement, and funds reverting to defendants may constitute substantial evidence that "class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations").

The Court also notes that even if it chose to primarily analyze this fee award via Plaintiff's preferred lodestar approach, the Court would then crosscheck that figure's reasonableness by utilizing the common fund approach and reach the same conclusion regarding the proposed fee award's

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reasonableness. *See Johnson v. MGM Holdings, Inc*, 943 F.3d 1239, 1242 (9th Cir. 2019) ("We encourage district courts to cross-check their attorneys' fee awards using a second method of fee calculation.")

a. *Common Fund*

Plaintiff's motion for attorney's fees seeks a total of $285,000 in costs and fees, an amount equivalent to approximately 37% of the total settlement payment made by Defendants. Dkt. 63-1 at 2. In the Ninth Circuit, the "benchmark" figure for fee award analysis under the percentage of a common fund approach is 25%. *See In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *see also In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 570 (9th Cir. 2019).

The Ninth Circuit has indicated that factors relevant for consideration of an upwards percentage fee adjustment include (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; (6) and the duration during which the case was handled on a contingency basis.[2] *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *see also In re Optical Disk Drive Products Antitrust Litigation*, 2020 WL 2507359, at *6 (9th Cir. May 15, 2020).

The Court concludes given the record before it that none of these factors justify an upwards adjustment to the 25% benchmark in the Ninth Circuit. Plaintiffs assert that the Cash Settlement amount of $415,000 recovers approximately 50% of the Cash Advance fees that were actually imposed on class members, and that this reflects a favorable result given the legal hurdles to liability created by the Defendant's vigorous opposition and the likelihood that Defendants' arguments that class member cryptocurrency purchases were accurately categorized under the relevant cardholder agreements would have prevailed at summary judgment or trial. *See* Dkt. 66-1 at 1-2, 12-13. The Court agrees and finds

[2] In *Vizcaino*, the Ninth Circuit does no more than state that the district court's conclusion that a 28% fee award was below the market rate for similar contingency fee cases was "d[id] not constitute an abuse of the court's discretion." 290 F.3d at 1049. Subsequent cases have emphasized that this factor should entail inquiry into how long Plaintiff's counsel litigated the action on contingency. *See In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 955 n.14 (9th Cir. 2015).

that while this settlement represents a good litigation outcome, within the range of reasonableness necessary for final approval, it is not an extraordinary result that justifies an upwards adjustment to the Ninth Circuit benchmark. *See Taylor v. TIC - The Indus. Co.*, 2018 WL 6131198, at *7 (C.D. Cal. Aug. 1, 2018) (declining to conclude that an early settlement for a substantial fraction of potential liability necessarily constituted an "extraordinary" result); *Graham v. Capital One Bank (USA), N.A.*, 2014 WL 12579806, at *5 (C.D. Cal. Dec. 8, 2014) (concluding that a settlement that recovered 100% of fees charged to the class of credit card holders constituted an "exceptional result" for class members).

Class Counsel incurred approximately $7,000 in total litigation costs and litigated this case for approximately 7 months prior to settlement. Dkt. 1; Dkt. 49. While Plaintiff argues that they investigated this case for two years prior to filing this lawsuit, Dkt. 63-1 at 10, Class Counsel's declaration indicates that they were first contacted by Lead Plaintiffs in April 2018 (7 months before this lawsuit was filed), and that they spent approximately 12 hours on pre-lawsuit investigation into the relevant factual and legal issues. Dkt. 64 at 1, 7. Class Counsel's litigation efforts, while substantial and involving application of novel facts (cryptocurrency purchases) to class action litigation, were not exceptionally risky, and did not place a substantial burden on Class Counsel in representing this class. *See* Dkt. 64 at 3-4 (detailing efforts by Class Counsel during litigation). The market rate for litigation in this area (class action lawsuits) remains 25% of the common fund in the Ninth Circuit, as discussed above. Accordingly, analysis of the relevant factors leads the Court to conclude that a fee award of 25% of the total constructive common fund is reasonable in this context. The Court calculates this amount to be $192,500.[3]

b. *Lodestar Cross-check*

As is customary, the Court checks this fee award against the lodestar, "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). The declaration submitted by Class Counsel sufficiently documents and justifies their hourly billing rates and show a combined hourly

[3] To reach this result, the Court excludes the costs incurred by Class Counsel, and uses as the common fund the total payment made by Defendants pursuant to the Settlement agreement, which includes $415,000 in cash settlement funds, the proposed fee award of $285,000, and the settlement administration costs, which Plaintiffs assert to be approximately $70,000. Dkt. 66-1 at 12-13.

billing total of 415.4 hours incurred in the course of this litigation. *See* Dkt. 64 at 6-10. This is a reasonable number of hours billed in a case with substantial discovery and significant motion practice. At the appropriately justified hourly rates for each of the attorneys employed by Class Counsel, this resulted in a total lodestar figure of $212,049. *Id.* at 10. When compared to the common fund fee award this Court has calculated above, this results in a lodestar multiplier of 0.91. The resulting "negative multiplier suggests that the percentage-based amount of the fee award the Court finds reasonable is appropriate here. *See Taylor v. TIC*, 2018 WL 6131198, at *10 (C.D. Cal. Aug. 1, 2018) (approving fee award equivalent to 25% of common fund with a negative multiplier of 0.5); *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (approving negative multiplier of 0.74);

The Ninth Circuit has stated that in certain contexts, it is an abuse of discretion for a district court judge to fail to apply a risk enhancement when "when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky." *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) (citations and quotations omitted); *see also Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016). But these cases involved circumstances where the fees sought by Class Counsel amounted to 25% and 20% of the total settlement amount respectively, figures at or below the 25% benchmark in the Ninth Circuit. *Stanger*, 812 F.3d at 737; *Stetson*, 821 F.3d at 1162. In this context, where a constructive common fund exists given an easily calculable total settlement payment made by Defendants, such a risk enhancement would be inappropriate when compared to the ultimate benefit to the class, because it would result in a fee award equivalent to 37% of the total settlement amount, substantially above the Ninth Circuit benchmark. *See Brooks v. Life Care Centers*, 2015 WL 13298569, at *5 (C.D. Cal. Oct. 19, 2015) (finding that a "negative multiplier" is not a compelling reason to depart from the Ninth Circuit's benchmark for fee awards); *Contreras v. Worldwide Flight Servs., Inc.*, 2020 WL 2083017, at *8 (C.D. Cal. Apr. 1, 2020) (same); *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, at *18 (C.D. Cal. Feb. 16, 2017) (same); *see also Johnson v. MGM*, 943 F.3d at 1242 (affirming district court's decision to grant lodestar with no risk multiplier when that lodestar award exceeded the 25% benchmark for common fund cases).

c. *Costs*

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An attorney is entitled to "recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (citation omitted). To support an expense award, Plaintiffs should file an itemized list of their expenses by category and the total amount advanced for each category, allowing the Court to assess whether the expenses are reasonable. *Smith v. Am. Greetings Corp.*, 2016 WL 362395, at *9 (N.D. Cal. Jan. 29, 2016) (citations omitted).

Plaintiff has submitted evidence adequately documenting litigation costs of $6,727.69 incurred during conduct of this litigation. *See* Dkt. 64 at 10. These expenses are properly categorized and reasonable in light of the course of litigation overall. The Court awards $6,727.69 in costs to Class Counsel.

V. Conclusion

The Court GRANTS IN PART Plaintiffs' motion for attorney's fees. Class Counsel are awarded $192,500 in attorney's fees and $6,727.69 in costs. Final approval of the settlement and incentive payments to Lead Plaintiffs Galavis and Kiriakos are addressed in a companion Order filed shortly after this Order.

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