

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

Rene C. Davidson Courthouse

<p>Judith Reimann et al Plaintiff/Petitioner(s) VS. Erica L. Brachfeld et al Defendant/Respondent(s)</p>	<p>No.       RG10529702</p> <p>Date:     06/14/2023 Time:     8:36 AM Dept:     21 Judge:    Evelio Grillo</p> <p>ORDER re: Ruling on Submitted Matter</p>
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The Motion for Final Approval of Settlement filed by Michael DaRonco, Judith Reimann on 05/11/2023 and Motion for Attorney Fees filed by Judith Reimann, Michael DaRonco on 05/11/2023 are Granted.

The Court, having taken the matter under submission on 06/13/2023, now rules as follows:

The motion of plaintiffs for final approval of class action settlement is GRANTED.

**ORDER ON APPROVAL OF SETTLEMENT**

The complaint alleges claims regarding debt collections procedures. There are approximately 90 persons who opted out of the Vassalle federal litigation and approximately 23,000 persons to who BLG sent letters on Midland’s behalf.

The court previously certified the class. (Order of 10/6/19.)

This settlement is in addition to the BLG settlement.

The case preliminarily settled for monetary relief of a total of approximately \$2,800,000. The settlement agreement states there will be attorneys' fees of up to \$840,000 (30%) and a service award of \$5,000 for each class representative, and \$65,000 in claims administration.

The proposed class notice form and procedure are adequate. There was one opt out and no objections. The court notes that no class member has appeared at this hearing to object to the final approval, or the proposed second distribution.

The proposed class is appropriate for class certification.

The motion makes an adequate analysis as required by Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116.

The scope of the release for the class claims is appropriate. The scope of the release for the

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

absent class members cannot include a Civil Code 1542 release or an equivalent release.

The scope of the class release must be limited to the claims arising out of the claims in the complaint. The release of claims by the class is limited by the "factual predicate rule." (Hesse v. Sprint Corp. (9th Cir. 2010) 598 F.3d 581, 590.) (See also Hendricks v. Starkist Co (N.D. Cal. 2016) 2016 WL 692739 at \* 2-4 [Denying motion for final approval of class settlement because scope of release overbroad].)

The Settlement states that the funds will be distributed "as set forth in the Plan of Allocation approved by the Court." (Agt para 5.1(a).) The court approves the Plan of Allocation. See discussion below on "Plan of Allocation"

The settlement states that the unclaimed funds will be paid to Housing and Economic Rights Advocates. Counsel has provided the information required by CCP 382.4 regarding the absence or presence of a relationship between counsel and the residual beneficiary.

## ORDER ON PLAN OF ALLOCATION

The proposed "Plan of Allocation" is that after a first distribution that there would be a second distribution before funds went to the cy pres beneficiary.

Defendant objects to the "Plan of Allocation" on the ground that it is not consistent with the settlement agreement at para 5.1. (Objection filed 5/31/23.) Defendant raised this before. (Order of 2/3/23.)

As a matter of standing, defendant has no interest in the allocation of funds among the members of the class. "[T]he allocation of the total sum of damages among the individual class members "is an internal accounting question that does not directly concern the defendant." (In re Cipro Cases I & II (2004) 121 Cal.App.4th 402, 417.)

As a matter of contract interpretation, Agreement 5.1 states that "each Class Member shall be mailed a check equivalent to his/her share of the class recovery as set forth in the plan of allocation approved by the court." The reference to "a check" suggests a single distribution. A "plan of allocation approved by the court" suggests that the court can approve a plan of allocation not in the settlement agreement. The Plan of allocation has been presented to the court and the court has approved it.

As a matter of substance, the best use of the settlement funds is do distribute the funds to the absent class members. The absent class members are the persons who were injured. A cy pres distribution is "the next best use." (In re Microsoft I-V Cases (2006) 135 Cal.App.4th 706, 716.) A cy pres distribution is appropriate when class members cannot be located or when the balance between the amount of the funds and the administrative cost of distributing those funds makes a cy pres distribution reasonable.

As a matter of substance, the court is not concerned about a hypothetical potential windfall to certain members of the class. The persons who receive a second check are generally not getting a windfall because settlements are discounted for litigation risk and other factors. If a class

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

member's initial share of a settlement funds is to recover 30% of the actual loss, then the class member would not be getting a windfall after a second distribution (total of 60% of actual loss) or even after a third distribution (total of 90% of actual loss). A second distribution does not take money away from other class members because the other class members cannot be located and would not be getting the money anyway. A second distribution takes money away from the cy pres beneficiary. The court reasons that sending more money to the actually injured people is a more focused and better use of the money than sending money to a cy pres (aka "next best use") beneficiary. (In re Microsoft I-V Cases (2006) 135 Cal.App.4th 706, 716.)

As a matter of substance, the plan for a second allocation is particularly appropriate in this case where the length of time between the filing of the case and the resolution of the

case means that it will be difficult to reach many class members. If many class members who do not get the first distribution, then it is better to try to allocate the residual to the class members who have been located before distributing the funds the cy pres beneficiary.

The court ORDERS that plaintiffs may make a notices motion for court approval of a second distribution to the plaintiff class members. Counsel for plaintiffs may seek reasonable fees from the residual money for filing any such motion.

## REFERENCE TO MEDIATION COMMUNICATIONS

Plaintiff's opening papers reference settlement offers made during the first mediation. (Motion at p. 8; Birkhaeuser Decl. para 10.) Defendant argues that plaintiff's counsel inappropriately disclosed mediation information. (Evid Code 1119.)

Plaintiff's counsel should not have disclosed mediation communications. That noted, there is no harm on the facts of this case. The relevant information was disclosed in the briefing on the earlier BLG settlement in 2021 and has been in the public record for over a year. The remedy is that the court will not consider the disclosed mediation communications as evidence on this motion.

The court STRIKES all references to offers made in mediation from the settlement agreement.

## APPROVAL OF FEES, COSTS, AND SERVICE AWARD

"Because absent class members are not directly involved in the proceedings, oversight to ensure settlements are fair and untainted by conflict is the responsibility of both the class representative and the court." (Mark v. Spencer (2008) 166 Cal.App.4th 219, 227.)

"In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. ... [T]horough judicial review of fee applications is required in all class action settlements and the fairness of the fees must be assessed independently of determining the fairness of the substantive settlement terms.' ... " 'The evil feared in some settlements-unscrupulous attorneys negotiating large attorney's fees at the expense of an inadequate settlement for the client-can best be met by a careful ... judge, sensitive to the problem, properly evaluating the adequacy of the settlement for

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

the class and determining and setting a reasonable attorney's fee....' " (Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 555-556.)

The court starts with its benchmark, then cross-checks with the lodestar, and makes adjustments if the benchmark is significantly different from the lodestar. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 505 ["If the multiplier calculated by

means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted"].)

The Ninth Circuit's benchmark is 25%. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 495.)

When using the percentage of recovery approach, this court's benchmark for fees is 30% of a total fund. Courts have benchmarks ranging from 25% to 33%. *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 495; *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167, 1175; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557 fn 13; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 fn 11; *Schulz v. Jeppesen Sanderson, Inc.* (2018) 27 Cal.App.5th 1167, 1175.) The court's benchmark of 30% suggests fees of \$813,969.30.

When cross-checking with the lodestar/multiplier, the court will evaluate the lodestar based on reasonable fees that would have been charged at hourly rates and then apply a multiplier. The multiplier includes contingent fee risk and other factors.

Counsel at assert they spent 2,500 hours on the case. The court finds that this is reasonable. This is efficient given that multiple years spent on this case and the amount of law and motion practice.

The court finds that a blended rate of \$550 is appropriate for the case. The court considers the evidence presented on the motion and the multiple factors the court recently identified in *Harris v. Southern New Hampshire University* (2023) 2023 WL 3605289. The court will use a blended rate of \$550 per hour.

This results in a lodestar of \$1,375,000.

The court applies a 1.2 multiplier for risk. When considering risk, the court considers there is less risk in a case with fee shifting statutes because counsel's potential fees are not limited by and coupled to the monetary recovery. With a fee shifting statute, counsel has the risk of proving liability but if counsel proves liability, then the fees shift to the defendant with little to no consideration of the amount of the client's monetary recovery. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1174.) For example, a nominal damage recovery will result in counsel recovering "reasonable attorneys' fees" that could far exceed the award of damages. (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 419 [jury awarded plaintiff \$30,300, counsel recovered \$1,113,905.40 in fee-shifted fees]; *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1006-1007 [client recovered \$1, counsel recovered \$87,525 in fee-shifted fees].) There was a fee shifting provision. This results in a multiplier adjusted lodestar of \$1,650,000.

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Considering the percentage analysis fees of \$813,969 and the multiplier adjusted lodestar fees of \$1,650,000, the court will award fees of \$813,969. The court awards fees at its benchmark. The award of fees is appropriate to compensate counsel in this case, to incentivize the prosecution of meritorious cases, and does not result in an unreasonable windfall to counsel at the expense of their clients.

The court approves costs of \$ 86,769.41.

The court approves actual settlement administration costs of up to \$34,818. This might be increased if there is a second distribution of funds.

The court approves a service award of \$10,000 to each plaintiff. Each plaintiff provided evidence regarding the nature of participation in the action, including a description of specific actions and the amount of time committed to the prosecution of the case. (Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807.)

The Court ORDERS that 10% of any fee award to be kept in the administrator's trust fund until the completion of the distribution process and Court approval of a final accounting.

The Court will set a compliance hearing after the completion of the distribution process and the expiration of the time to cash checks for counsel for plaintiff and the Administrator to comply with CCP 384(b) and to submit a summary accounting how the funds have been distributed to the class members and the status of any unresolved issues. If the distribution is completed, the Court will at that time release any hold-back of attorney fees.

Plaintiff may submit a proposed order if necessary. The court will sign any proposed order, which is modified by this order.

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated: 06/14/2023



Evelio Grillo / Judge

<b>SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA</b>	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	<b>FILED</b> Superior Court of California County of Alameda 06/14/2023
PLAINTIFF/PETITIONER: Judith Reimann et al	Chad Finke, Executive Officer / Clerk of the Court By: <u><i>Nicole Hall</i></u> Deputy N. Hall
DEFENDANT/RESPONDENT: Erica L. Brachfeld et al	
<b>CERTIFICATE OF MAILING</b>	CASE NUMBER: RG10529702

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the attached document upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

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Dated: 06/14/2023

By:

*Nicole Hall*

N. Hall, Deputy Clerk

**CERTIFICATE OF MAILING**