IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIMOTHY NELLIS, JANEL DRANES, LUCY SOUSA, DAVID CASTILLO and EDWARD CAMARENA, on behalf of themselves and all other similarly situated,	)	Case No. 20-cv-2486
Plaintiffs,	)	Judge Robert M. Dow Jr.
v.	)	
VIVID SEATS LLC, a Delaware Corporation,	)	
Defendant.	)	

ORDER

For the reasons stated on the record in open court at the motion hearing held on October 27, 2021, as well as those stated in the order granting final approval filed on the docket today and those stated below, Plaintiffs' motion for attorneys' fees [62], Plaintiffs' motion for final approval [78], and Plaintiffs' motion to seal documents [88] are all granted. The objections filed on the docket [64, 65, 71, 74] and tendered by counsel [see 83-1] are overruled for the reasons stated below and on the record. Final judgment is entered in a separate order granting final approval of the class action settlement. Civil case terminated.

STATEMENT

As noted above, many of the reasons for the Court's approval of the final settlement in this class action have been stated on the record in open court and/or incorporated into the final approval order filed on the docket today. In this order, the Court will set out additional explanation for overruling the objections submitted by a few class members.

The docket reveals four objections on the docket: Ms. McGrath [64], Mr. Dudley [65], Ms. Burton [71], and Mr. Mendez [74]. In addition, counsel have called to the Court's attention two additional objections and submitted the substance of those objections in their recent filings in support of the motion for final approval [see 83-1]. Those objections are from Ms. Spencer and Mr. Philip. Counsel confirmed on the record at the October 27 hearing that no other objections have been received and no additional objectors attended the hearing.

To begin, the Court appreciates the value that objectors can bring to judges considering whether a settlement satisfies the criteria for approval in Rule 23. The Seventh Circuit has on many occasions recognized this value, and the rules incorporate a procedure for objectors to follow when seeking to call to the Court's attention their perceptions that the settlement falls short of the

mark in certain respects. Here, as explained below, the Court concludes that none of the objections provides any reason to reject either the settlement or the attorneys' fees claimed.

To begin, as stated on the record, the Court finds this to be a good settlement for the Plaintiff Class. It either gets them close to a full refund or a full credit for the value of their tickets depending on whether the event has been cancelled or merely postponed or rescheduled. Relief varies slightly based on whether the event was cancelled or merely postponed or rescheduled, but within each category each class member is treated equally. Many class members have already received refunds and/or used their credits. Others have until the end of next year in which to access their relief. California class members get an extra measure of relief, which appropriately reflects the strength of their claims under the appropriate (and unique) California consumer protection laws. See *Eubank v. Pella Corp.*, 2019 WL 1227832, at *5 (N.D. Ill. Mar. 15, 2019) (noting that different treatment of class members may "reflect[] a necessary balancing between the strength of conflicting damages claims").

Class members have been given clear notice of the provisions of the settlement and a small handful have opted out. Both the take and opt out rates are acceptable for the size of the class and the nature of the claims and relief. The settlement was reached with the assistance of a retired federal judge who now specializes in mediation and was negotiated at arms-length by experienced counsel. As counsel noted on the record, and as they amplified in their briefs, Defendants could have mounted plausible, and as to some issues strong, legal defenses to liability.

It appears that some objectors misapprehend the relief that has been obtained on their behalf. Ms. Spencer, for example, asserts that the settlement amount leaves "very little" for class members. While the relief does not quite make every claimant entirely whole, it comes close. Only in a rare case, where liability is overwhelming, will class plaintiffs obtain a full and complete recovery, for "the essence of settlement is compromise." *In re AT&T Mobility*, 270 F.R.D. 330, 347 (N.D. Ill. 2010). Notwithstanding that recognized proposition, it appears that Ms. Burton did receive a full refund long before the settlement was approved. It also is important to bear in mind that many of the cancellations and postponements referenced by the objectors took place during the pandemic. Vivid Seats, as a secondary market ticket broker, did not control these cancellations. Indeed, in most instances the performers themselves did not either—rather, public health restrictions on the size of gathering during the pandemic required all involved to stay home and, at the least, to avoid clustering in large, mostly indoor venues. Nor would Vivid Seats have any control over whether and when these events would be rescheduled or if they would simply be cancelled. It therefore is hard to place fault, as Ms. McGrath does, on Vivid for its inability to notify customers about the ultimate fate of a postponed concert when so much remains up in the air due to the ongoing pandemic.

Mr. Dudley appears to believe that the incentive award to the named Plaintiffs for their work with counsel in advancing the litigation is a class-wide award. It is not, and the Seventh Circuit has consistently upheld modest incentive awards for named Plaintiffs. Ms. McGrath's contention that the relief is illusory as to her also appears to be misplaced. The Rolling Stones concert to which she held tickets did in fact take place in Minneapolis last week. https://www.startribune.com/minnesota-fans-finally-spend-the-night-together-with-rolling-stones-at-u-s-bank-stadium/600109687/. However, had the concert been cancelled, she would

have had a right to request a cash refund. Mr. Mendez filed a document that the parties and the Court have agreed triggered his opt-out rights and therefore extinguished his objector rights. See *Agretti v. ANR Freight Sys.*, 982 F.2d 242, 246 (7th Cir. 1992) ("The general rule, of course, is that a non-settling party does not have standing to object to a settlement between other parties"). In any event, his objection was based on a criminal statute, which he claims is implicated in this case. Nothing in the settlement of this civil case could extinguish criminal liability should a prosecutor agree with Mr. Mendez's assessment. Finally, it appears that Mr. Philip has misread the settlement's provisions regarding holders of tickets from rescheduled or postponed events. In the event that such events ultimately are cancelled, class members have at least 21 days to claim a refund and have until the end of 2022 to use a credit.

In regard to the motion for attorneys' fees, the Court has carefully scrutinized the claim. "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." *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1030 (N.D. Ill. 2011) (quoting Fed. R. Civ. P. 23(h)). The Seventh Circuit directs that when fees are to be awarded from a common fund, "the district court must try to assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635-36 (7th Cir. 2011) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001)). "The court must base the award on relevant market rates and the *ex ante* risk of nonpayment."' *Id*. That risk, of course, can be realized in contingent fee cases when the Defendant prevails on the merits.

In determining the appropriate fee under the Seventh Circuit's guidance in *Synthroid*, this Court has recognized that "[t]he…method—which has emerged as the favored method for calculating fees in common fund cases in this district—sets the fee award as a percentage of the recovered settlement fund, plus expenses and interest." *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015). While the Court retains discretion to apply the competing lodestar method, "[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class." *In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 2011 U.S. Dist. LEXIS 157910, at *9 (N.D. Ill. Nov. 30, 2011) (citation omitted). In recent years, "courts in this district have generally used the net value of a settlement as a reference for awarding fees, not counting administrative costs and incentive awards." *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 200 (N.D. Ill. 2018).

As an initial matter, the starting point for counsels' request is the contractual rate approved by the lead Plaintiffs of one-third of the total relief. As counsel point out, this is a relatively standard rate for contingent fee work, even in class actions. As the Court has noted, when the recovery in a case grows extremely large—sometimes in the hundreds of millions or billions of dollars—courts are reluctant to approve such a large percentage going to counsel. But counsel have cited larger funds from which other courts have awarded a third (or more) to counsel. Each case must be judged on its own merits in regard to the appropriate compensation for counsel.

Here, the class obtained an almost full recovery on claims that were not without risk from a legal perspective. Perhaps the class is fortunate that Defendant did not resist more vigorously, but counsel on both sides promptly sought the assistance of a mediator and worked quickly to form the basis of a resolution. To be sure, the exact contours of the settlement evolved over time, but

the basic framework emerged expeditiously, thereby cutting down time and expense on both sides of the case. Plaintiffs' counsel bore the expense of researching the claim, filing the complaint, and shepherding the case to resolution. Given the legal defenses set out in the briefs, counsel also bore the risk of no recovery at all had Defendants chosen to litigate and prevailed on their defenses. As the Court noted during the hearing, while it is not obligated to perform a lodestar crosscheck, it has done so with the information provided by counsel. That lodestar reflects a very substantial premium for counsel over their ordinary hourly rates—too large a premium in the eyes of some of the objectors, including Ms. Burton. The Court has considered whether the lodestar is in fact too much, but has concluded in the end that (a) the near total relief obtained for the class, (b) the rate at which class members already have received and will continue to receive that relief, (c) the risk borne by counsel given the substantial potential defenses to liability, and (d) the efficiency with which the settlement was reached through arms-length negotiations, all point in the direction of giving class counsel the benefit of their contractual arrangement.

Dated: November 1, 2021

Robert M. Dow, Jr.
United States District Judge