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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CONSUMER PRIVACY CASES,	A120591, A120145 & A120151 (San Francisco City & County Super. Ct. No. JCCP 4211)

INTRODUCTION

Appellants in this action are objectors to a class action settlement. They maintain that class members were not given adequate notice of the settlement, that the settlement was not fair, reasonable and adequate, and that the court erred in approving attorneys' fees to class counsel. We conclude the court did not abuse its discretion, and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

This case originated in 1999 as a suit against Bank of America, N.A. and related entities (Bank) by the Utility Consumers' Action Network, (UCAN) acting on behalf of its affiliate the Privacy Rights Clearinghouse. The case was coordinated with two similar actions against Bank, *Slayton v. Bank of America NT& SA*, and *Asatryan v. Bank of America NT & SA.*, and assigned to the Honorable Richard Kramer as the coordination trial judge. A consolidated class action complaint was filed on April 30, 2003, pursuant to court order, with named plaintiffs Donovan Collier, Juan Duron, Terry Wolbert, Ki Won Rhee, Do Young Cho and Frank Cho.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts A through D of the Discussion.

The complaint alleged causes of action for unlawful and fraudulent business practices, false or misleading advertising, invasion of privacy in violation of the common law and the California Constitution, and unjust enrichment. Plaintiffs alleged that Bank, despite representations to the contrary, disclosed personal and confidential information to third party telemarketers and direct mail marketers for a fee, to enable them to market services to plaintiffs. They alleged the confidential information disclosed included account numbers, account balances, credit limits, social security numbers and other "sensitive" information.

The parties first attempted settlement in 2004, when they engaged in three mediation sessions with former U.S. Magistrate Judge Edward Infante. The court tentatively certified a California class on March 9, 2005, but deferred ruling on a nationwide class to allow further discovery. The parties continued settlement negotiations over the years, and finally reached a settlement agreement in early 2007.

The settlement agreement provided that Bank would provide the following to class members: (1) waiver of deposited item return fees; (2) waiver of fees for telephone calls to its Voice Response Unit; (3) vouchers for a $200 discount on loan fees for class members who take out a new residential first mortgage or refinance an existing residential mortgage; and (4) for class members who had a Bank-branded consumer credit card, either 12 free months of the Card Registry Service, with a retail value of $30 or 90 days of the Privacy Assist Identity Theft Protection service, with a retail value of $17.85. The Bank guaranteed it would continue to provide these benefits to class members until the aggregate benefit reached $10.75 million. The Bank also agreed to provide a "Privacy Toolkit"; an informational package with instructions on protecting financial privacy, to every class member who requested one. The value of the Privacy Toolkit would not count toward the aggregate benefit of $10.75 million. Additionally, the settlement agreement provided that Bank would pay a total of $3.25 million to a privacy-related *cy près* fund.

The parties agreed that Bank would not oppose class counsel's application for an award of attorneys' fees and expenses to be determined by the court, but not to exceed

$4 million. They also agreed that Bank would not oppose the request for an award of $5,000 to each of the six named class representatives, to be paid from "any award of attorneys' fees and costs."

Following hearings to consider objections, the court entered an order approving the settlement. Pursuant to the parties' settlement agreement, the court awarded $1.75 million to the "Rose Foundation for *cy près* distribution to one or more non-profit entities that specialize in privacy-related research," education, or policy development. The court also awarded a total of $1.5 million to the following entities: Center for Democracy and Technology ($253,000); Samuelson Law, Technology, & Public Policy Clinic, University of California Berkeley School of Law ($300,000); World Privacy Forum ($275,000); American Civil Liberties Union of Northern California ($300,000); Electronic Privacy Information Center ($150,000); and Consumer Action ($222,000).

The court also certified for the purposes of settlement a "Settlement Class," as follows: "Any person who, at any time between September 9, 1995 and May 31, 2007, was a U.S. resident and '(1) Had a Bank of America non-business checking or savings account; (2) Was a borrower on a non-business loan issued by (or acquired by) Bank of America secured by residential real estate within the United States; or (3) Had a Bank of America branded consumer credit card and a California mailing address for purposes of communicating with Bank of America. . . .' "[1]

The court entered a judgment of dismissal on October 4, 2007. Following further hearings, and after ordering supplemental submissions by the parties, the court entered a separate order awarding attorneys' fees and expenses. The court awarded class counsel $2,907,982 in attorneys' fees (based on a lodestar sum of $1,6671,704, with a 1.75 multiplier) and $110,373 in expenses. The fees were awarded alternatively under the common fund doctrine, and under the "private attorney general" provisions of Code of

[1] The court "[e]xcluded from the Settlement Class . . . Bank of America, any parent, subsidiary, affiliate or sister company of Bank of America, and all officers or directors who are, or who have been, employed by Bank of America or any parent, subsidiary, affiliate or sister company at any time during the Class Period."

Civil Procedure section 1021.5.[2] The court denied $951,450 in claimed attorneys' fees and $40,000 in claimed costs, finding that certain law firms had failed to meet their burden of proving the amount of fees sought. From the award of attorneys' fees, the court ordered that $5,000 be paid to each of the six individual class representatives.

Four objectors in the trial court filed appeals. Michael and Elizabeth Savage filed a timely appeal from the order approving settlement and the judgment of dismissal. Renee Garvin filed a timely appeal from the order approving settlement, the judgment of dismissal, and the order awarding attorneys' fees and expenses. Elaine Savage filed a timely appeal from the order awarding attorneys' fees and expenses and the "Order allowing filing of Order Approving Class Action Settlement Nunc Pro Tunc entered on December 4, 2007." We consider the three appeals, raising related issues, together, and issue a single opinion.[3]

DISCUSSION

A. Standard of Review

In a class action, the trial court has "broad discretion" to determine "whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper. . . ." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235.) "Our review is therefore limited to a determination whether the record shows 'a clear abuse of discretion.' " (*Id*. at p. 235, quoting *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th

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[2] "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." (Code Civ. Proc., § 1021.5.)

[3] (See *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128; Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 5:212, pp. 5-69 to 5-70.)

1794, 1802 (*Dunk*); see also *In re Microsoft I–V Cases* (2006) 135 Cal.App.4th 706, 723.)

In reviewing the fairness of a class action settlement, " '[d]ue regard' . . . 'should be given to what is otherwise a private consensual agreement between the parties. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." ' " (*7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1145, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801.)

In considering whether a settlement is reasonable, the trial court should consider relevant factors, which may include, but are not limited to " 'the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.' " (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 128 (*Kullar*), quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801; see also *In re Microsoft I-V Cases*, *supra*, 135 Cal.App.4th at p. 723.) A " 'presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.' " (*Kullar*, *supra*, 168 Cal.App.4th at p. 128, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1802; *Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 52-53.)

B. Notice to Class

Objectors Michael and Elizabeth Savage (the Savages) argue that the notice to the class of the proposed settlement was inadequate, both in its content and method of providing notice. They maintain the description of the nature of the action in the notice

to class members was "vague at best," and that notice to class members who are former customers of Bank of America by publication rather than mailing was insufficient.

The California Rules of Court[4] specify the content of the notice to class members and the factors the court must consider in determining the manner of notice. Rule 3.766 provides in pertinent part: "The content of the class notice is subject to court approval. If class members are to be given the right to request exclusion from the class, the notice must include the following: (1) A brief explanation of the case, including the basic contentions or denials of the parties; (2) A statement that the court will exclude the member from the class if the member so requests by a specified date; (3) A procedure for the member to follow in requesting exclusion from the class; (4) A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel." (Rule 3.766(d).)

The published notice to class members described the case as follows: "A settlement has been proposed in a class action lawsuit challenging Bank of America's disclosure of information about its customers to third-party marketers and Bank of America's communications to customers about its privacy policies. . . . [¶] This lawsuit was filed on September 9, 1999. Plaintiffs allege that Bank of America improperly disclosed its customers' confidential information to third parties, and misrepresented the scope and nature of its customer privacy policy. Bank of America denies these allegations and contends that it fully complied with the law and its privacy policy and cardholder agreements. The settlement is not an admission of wrongdoing or an indication that any law was violated."

The Savages claim the description of the nature of the action was too vague because it "bears no resemblance to the description of the nature of the case . . . in [the] [c]omplaint" and "did not put absent class members on notice that the lawsuit sought damages. . . ." They have cited no requirement that it do so. Rule 3.766(d) requires only

[4] All further rule references are to the California Rules of Court unless otherwise indicated.

a "brief explanation of the case," not a restatement of the complaint. Moreover, the Savages quote only a portion of the explanation of the case in the published notice to class members, omitting the entire paragraph titled "What's This Case About." The notice additionally referred class members to a Web site "[f]or more details." The description of the action in the published notice was an adequate "brief description" of the lawsuit.

The Savages also maintain that published notice to class members who were no longer customers of Bank of America in the newspaper USA Today "did not satisfy the requirements of due process." They claim there "is nothing in the record justifying constructive notice."

In determining the manner of notice to class members, "the court must consider: (1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Rule 3.766(e).) Furthermore, the rule specifically contemplates notice by publication or via the Internet. "If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action—for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet. . . ." (Rule 3.766(f).) "The standard is whether the notice has 'a reasonable chance of reaching a substantial percentage of the class members.' " (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 251, quoting *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 974.) "[A] large body of case law reflect[s] the view that 'the whole concept of a large class-action might easily be stultified by insistence upon perfection in actual notice to class-members. . . .' " (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527, 1540, quoting *Philadelphia Electric Co. v. Anaconda American Brass Co.* (E.D.Pa. 1968) 43 F.R.D.

452, 459.)[5] The trial court " 'has virtually complete discretion as to the manner of giving notice to class members.' " (*7-Eleven Owners for Fair Franchising v. Southland Corp.*, *supra*, 85 Cal.App.4th at p. 1164, quoting *Handschu v. Special Services Div*. (2d Cir. 1986) 787 F.2d 828, 833.)

Here, the court ordered three methods of notice. Members of the class who were current customers of Bank of America, a group of approximately 35 million individuals, were mailed written notice with their statements. In order to give notice to class members who were no longer customers of Bank of America, the court ordered notice to be published in USA Today newspaper on June 21, 2007, and posted on a settlement Web site, <http://www.bankprivacycase.com> (as of June 29, 2009). As the court acknowledged, giving notice to former customers who were class members "was a problem, the people may no longer be living or may have moved away." "[O]ne–time publication in the publication that we selected was adequate and reasonable. Two times might have given more of a chance, but the whole thing was hit and miss, and the job of this Court is to just do what seems reasonable and to balance off costs of giving notice." "We can't assure actual notice to everybody."

Mailing notice to 35 million class members, combined with providing notice by publication in a national newspaper and via a Web site, certainly provided a "reasonable chance of reaching a substantial percentage of the class members." (*Wershba v. Apple Computer, Inc, supra,* 91 Cal.App.4th at p. 251.) The Savages have demonstrated no abuse of discretion in this regard.[6]

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[5] " 'California courts may look to federal authority for guidance on matters involving class action procedures.' " (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4, quoting *Caro v. Procter & Gamble Co*. (1993) 18 Cal.App.4th 644, 656, fn. 7.) "[W]hen there is no relevant California precedent on point [regarding attorneys' fees in class actions] federal precedent should be consulted." (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 38 (*Lealao*).)

[6] We note that the court also ordered that Bank identify and pay for the notice ordered. "Ordinarily it is the plaintiff's responsibility to provide notice and bear the expense of doing so." (*Hypertouch, Inc. v. Superior Court, supra*, 128 Cal.App.4th at p. 1551.)

C. Adequacy of Representation

The Savages assert that class counsel and the class representatives did not provide adequate representation of the class, warranting reversal of the order approving the final settlement. They claim this was due to "numerous conflicts between the Class Representatives and the national class."

The Savages first allege that the class representatives had a conflict of interest with all other class members because the settlement agreement included a $5,000 payment to each of them. They claim that the $5,000 was not a "service award," but "was, in fact, an incentive payment to keep the named plaintiffs from objecting to the settlement." In seeking court approval of the settlement agreement, plaintiffs' counsel sought $5,000 "service awards" for each named class representative. In a declaration, counsel stated that the class representatives "fil[ed] suit on behalf of members of the Class, respond[ed] to discovery requests, and [sat] for depositions[,] . . . devot[ing] a significant amount of time and energy." .

While there has been scholarly debate about the propriety of individual awards to named plaintiffs, "[i]ncentive *awards* are fairly typical in class action cases. (See 4 William B. Rubenstein et al., Newberg on Class Actions § 11:38(4th ed. 2008); [Eisenberg & Miller], *Incentive Awards to Class Action Plaintiffs: An Empirical Study* (2006) 53 U.C.L.A. L.Rev. 1303 [finding 28 percent of settled class actions between 1993 and 2002 included an incentive award to class representatives])." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958.) These 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." (*Id.* at pp. 958-959, citing *In re Mego Financial Corp. Securities Litigation* (9th Cir. 2000) 213 F.3d 454, 463.) "A 'service fee' to the class representatives has been upheld in at least one California case. (*Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 726 . . . [affirming without discussion order for 'service payments to the five named plaintiffs compensating them for their efforts in bringing the suit'])."

(Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) ¶ 14:146.10, p. 14-88.)

Federal courts have established criteria "courts may consider in determining whether to make an incentive award [which] include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation." (*Van Vranken v. Atlantic Richfield Co*. (N.D. Cal. 1995) 901 F.Supp. 294, 299.) These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit. (See *Dornberger v. Metropolitan Life Ins. Co*. (S.D.N.Y. 2001) 203 F.R.D. 118, 124-125.)

The Savages have pointed to nothing in the record suggesting that the $5,000 awards to the class representatives were sought by counsel to induce them not to object to the settlement, or were out of proportion to the effort and time they expended in the litigation. Each class representative submitted a declaration detailing the efforts made on behalf of the class. Given the evidence before the court that each representative had, over the course of the lengthy litigation, responded to discovery requests, been deposed, assisted with investigation, and reviewed documents and pleadings, we find no abuse of discretion in these awards.

The Savages also assert that there was a conflict between the class representatives and the class members because the class representatives are all from California. They claim that this resulted in preferential treatment of California residents, noting that "[o]nly those class members who have California mailing addresses will be entitled to receive the Credit Card Services." The Savages neglect to mention that Bank credit card customers who had mailing addresses outside of California were not part of the class. Accordingly, the fact that these out-of-state credit card customers received no "credit card services" under the settlement agreement was not due to any conflict of interest on the part of the class representatives. Similarly, the Savages claim that the fact "almost all

of the recipients of the privacy-related *cy près* fund are California entities primarily serving California residents," demonstrates unfairness.[7] The Savages' argument, however, concedes that not all of the *cy près* fund entities are based in California. Given this concession, and their failure to demonstrate any unfairness, we fail to see how this portion of the settlement agreement provides for preferential treatment.

The Savages also assert that the settlement benefits are allocated unfairly because "a husband and wife are precluded . . . from having the same recoveries." The settlement agreement provides that joint owners of accounts, such as a husband and wife, "may collectively claim the same benefit(s) with respect to such account(s) that a single owner of such account(s) could claim." Accordingly, the settlement benefits are rationally based on each account, regardless of the number of owners. There is no disparate treatment based on the status of being a husband and wife.

D. Adequacy of Court's Review of Settlement Agreement

Finally, the Savages argue that the court erred in approving the settlement agreement because it "did not and could not have properly conducted [the] necessary analysis." They aver that the court provided "no explanation of how the strengths and weaknesses of the settlement were evaluated or upon what grounds the Superior Court concluded the settlement was fair." They further claim that the court had "no evidence" of the "best case scenario" regarding potential damages and the plaintiffs' chance of success, and failed to consider the actual cost of the settlement to Bank.

The Savages' claim ignores both the standard of review and the factors the trial court may consider. "[T]he settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits" of the plaintiffs' claims. (*7-Eleven Owners for Fair Franchising v. Southland Corp., supra,* 85 Cal.App.4th at p. 1145.) "Our task is limited to a review of the record to determine whether it discloses a clear abuse of discretion

[7] The Savages also maintain, without citation to any authority or fact in the record, that UCAN "has an apparent conflict of interest, [because it] . . . [p]resumably . . . relies . . . on public and private funding," and is not precluded from applying for a grant from the Rose Foundation. This speculative claim of unfairness is insufficient to establish an abuse of discretion on the part of the trial court.

when the trial court's determination of fairness is challenged on appeal. We do not substitute our notions of fairness for those of the trial court or the parties to the agreement. [Citation.] 'To merit reversal, both an abuse of discretion by the trial court must be "clear" and the demonstration of it on appeal "strong." ' " (*In re Microsoft I-V Cases, supra,* 135 Cal.App.4th at p. 723, quoting *7-Eleven Owners for Fair Franchising, supra,* at p. 1146.)

The settlement agreement here met the four *Kullar* requirements entitling it to a "presumption of fairness." (*Kullar, supra,* 168 Cal.App.4th at p. 128, citing *Dunk, supra,* 48 Cal.App.4th at p. 1802.) Experienced counsel negotiated the settlement after seven years of litigation, including extensive investigation and discovery. The court found that the settlement was "the product of arm's-length negotiations," and only a very low percentage, approximately .000454 percent, of the over 35 million class members objected.

The court, moreover, contrary to the Savages' claim, conducted an extended analysis of the fairness of the settlement. First, the court considered the strength of the plaintiffs' case, including the unsettled state of the law on "what privacy rights exist," the difficulty in quantifying damages, and the evidentiary problems in determining causation. The court explained, "we always recognized that whatever decision might be made regarding the nature of the privacy right would probably go to the State Supreme Court for final determination, a very time-consuming and very expensive proposition. [¶] None of that would have anything to do with the monetary value of such rights, only what the rights might be, because some of the information that was given away was, I think everybody would concede, available from other sources. Anybody who's listed in the phone book would have their name and number [available to telemarketers]. True, it's harder to get it out of a phone book than from a bank list. But there were questions as to what is the nature of any privacy right that might exist here, a very difficult problem for this case." The court also considered the difficulties in proving causation and damages, noting "assuming that being telephoned by a telemarketer, which is where all this went, was also an element of wrong that resulted from an alleged wrongful distribution of

information, how do you quantify that? [I]f somebody bought something from a telemarketer, did that person get damaged at all? Maybe they were benefitted." The court also explained that a consumer receiving a telemarketing call "had no way of knowing whether that call resulted from the sale of . . . information by Bank of America, or by Wells Fargo, or by American Express, or by Sears, or by many of the other defendants that I had in a whole batch of cases. From a legal perspective, that comes down to causation."

The Savages also urge that there was no evidence before the court regarding the cost of the settlement to Bank. They claim that "a reasonable inference may be drawn that the settlement is not costing [Bank] anything other than legal fees and the cost of noticing the settlement." First, the Savages ignore the portion of the settlement agreement requiring $3.25 million to be paid by Bank to the *cy près* fund. Second, they have cited no authority for their claim that the cost to a settling defendant, rather than " 'the amount offered in settlement' " (*Kullar, supra*, 168 Cal.App.4th at p. 128), must be considered. As the court explained, "I don't believe that [cost to Bank] is an appropriate measure. [¶] . . . I recognize it will certainly cost the bank less than the face value, but that's how most cases get settled; it's called creating value. If defendant can give something that costs X to a plaintiff that's worth two times X to the plaintiff, that is an economically rational way of, quote, creating money and justifying a settlement. [¶] . . . Whether, indeed, that costs the bank $10 million doesn't matter. It's good value. It's fair, adequate, and reasonable, which is the standard here."

"Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' [Citation.]" (*Dunk, supra*, 48 Cal.App.4th at p.1801.) The Savages have demonstrated no abuse of discretion in approval of the class settlement terms.

E. *The Attorneys' Fees Award*

Appellants Renee Garvin (Garvin) and Elaine Savage[8] attack the court's award of attorneys' fees to class counsel. We first note that neither Garvin nor Savage challenge the total amount of the fee award in this matter, nor do they contend here that the award was excessive in light of the recovery to the class membership. Rather, they contend that any settlement process that purports, as here, to separately provide for fees is a legal fiction which is pernicious and unethical, and inherently unfair to class members. Garvin also contends that the difference between the amount awarded by the trial court in this instance ($3,018,355 inclusive of expenses) and the maximum amount of $4 million allowed by the settlement agreement was a surplus which "under law belonged to th[e class]." We disagree as to both contentions, and will affirm the award.

The provisions Garvin finds so inherently objectionable are contained in paragraph 7(d) and paragraph 10 of the settlement agreement. They provide that class counsel would seek court approval for payment, by Bank of America, of not more than $4 million dollars for attorneys' fees and costs, and that Bank of America would not oppose such an application. Bank of America reserved the right to seek to withdraw from the settlement if the court awarded a greater amount, but the settlement was not otherwise contingent on the fee determination. An attorneys' fee agreement of this type is sometimes referred to as a "clear sailing agreement." (See *Lealao, supra,* 82 Cal.App.4th at p. 32; *Weinberger v. Great Northern Nekoosa Corp*. (1st Cir.1991) 925 F.2d 518, 520, fn. 1.)

Garvin claims that the " 'separate' payment scheme is a breach of class counsel's fiduciary responsibility to the class because it puts class counsel's interests in maximizing their fee ahead of class counsel's responsibility to maximize the class's recovery" and

[8] Respondents urge that because Elaine Savage's sole legal argument is regarding the "structure of the settlement agreement itself," though she did not appeal from the October 4, 2007, settlement approval order, her appeal should be dismissed. Given that we are addressing Garvin's similar argument in relation to the settlement agreement, we also consider Elaine Savage's argument, though in relation to the attorneys' fee order from which she appealed, and hold she has likewise failed to demonstrate any reason why that order should not be affirmed.

insists that this position "has been enshrined into class action law at both the federal and State of California level." While it is true that the propriety of "clear sailing" attorneys' fee agreements has been debated in scholarly circles, (see Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements* (2003) 77 Tul.L.Rev. 813, 815-816; Herr, Manual for Complex Litigation (4th ed. 2008) §§ 21.662, 21.71, pp. 522-524, 533-534) commentators have also noted that class action "settlement agreement[s] typically include a 'clear sailing' clause." (Alexander, *Rethinking Damages in Securities Class Actions* (1996) 48 Stan.L.Rev. 1487, 1534.) In fact, commentators have agreed that such an agreement is proper. "[A]n agreement by the defendant to pay such sum of reasonable fees as may be awarded by the court, and agreeing also not to object to a fee award up to a certain sum, is probably still a proper and ethical practice. This practice serves to facilitate settlements and avoids a conflict, and yet it gives the defendant a predictable measure of exposure of total monetary liability for the judgment and fees in a case. To the extent it facilitates completion of settlements, this practice should not be discouraged." (4 Newberg et al., on Class Actions, *supra*, § 15:34, p. 112, fn. omitted.)[9]

Garvin acknowledges the absence of any evidence here of misconduct by class counsel, or of any collusion between counsel and defendant Bank of America in negotiation of the fees. Garvin nevertheless maintains that this court "must set up a structural mechanism that protects against the dangers of class counsel's and defendant's manipulation of the settlement process," asserting that "[t]his is an issue about procedural

[9] Garvin includes in her appellant's appendix a critique of the practice of direct negotiation of attorneys' fees with settling defendants, contained in a letter dated September 17, 2007, addressed to the Chair of the Standing Committee on Ethics and Professional Responsibility of the American Bar Association. The letter, which was not presented to the trial court, was authored by a number of academics and resulted primarily from objections to surreptitious separate fee arrangements in tobacco litigation undisclosed to class members. The authors urged, as Garvin does here, that the practice should be deemed *per se* unethical. The ABA has not accepted that recommendation, nor is there any such prohibition in the California Rules of Professional Conduct. The factors used in determining whether a fee is proper under California ethical standards are enumerated in Rules Prof. Conduct, rule 4-200(B)(1).

temptation and fiduciary responsibility, not about evidence of misconduct in a given settlement negotiation. [¶] . . .[¶] . . . the *potential* for abuse is the issue." (Italics added.)

Aside from the question of whether this is an argument better addressed to the Legislature, we find no federal or California authority that has adopted Garvin's argument, and Garvin cites none. Her assertion that the practice has been "condemned" in the federal Manual for Complex Litigation is simply incorrect. The section cited by Garvin, in context, provides that "*If an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses*, both amounts must be disclosed to the class. Moreover, the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class, with the agreed-on fee amount constituting the upper limit on the fees that can be awarded to counsel. *The total fund could be used to measure whether the portion allocated to the class and to attorney fees is reasonable.*" (Manual for Complex Litigation, *supra*, § 21.71, p. 525, italics added.)[10] Far from condemning the practice of separate agreement on fees, the Manual acknowledges such provisions, and merely requires that the total settlement amount, including fees, be used as a yardstick to measure the reasonableness of the fees. Similar fee agreements have been implicitly approved in *Dunk*, *supra,*48 Cal.App.4th 1794 [Defendant agreed to pay attorneys' fees and costs not to exceed $1.5 million; remanded to trial court only to determine the amount of fees using a lodestar analysis]; *Lealao*, *supra*, 82 Cal.App.4th at p. 24 [Defendant agreed to pay "reasonable attorney fees as determined by the court"; remanded for consideration of additional factors in determining the amount to be awarded]; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615 ["fee shifting" agreement for separate fees to be paid by defendant]; and *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123 [Defendant agreed to pay $14,125,000 to the extent approved by the court]; see also *Zucker v. Occidental Petroleum Corp*. (9th Cir. 1999) 192 F.3d 1323, 1325 [Defendants

[10] Garvin cites to section 30.4 in the Third edition of the Manual for Complex Litigation, which contains identical language.

would not oppose request for fees and reimbursements not to exceed $2,975,000].[11] It is further difficult to envision how the specter of attorney malfeasance that she invokes would be laid to rest were the prophylactic rule she advocates actually adopted. The Manual for Complex Litigation offers a caveat on negotiation of a lump sum settlement covering both class claims and attorney fees, observing that "[a]lthough there is no bar to such arrangements, the simultaneous negotiation of . . . attorney fees creates a potential conflict." (Manual for Complex Litigation, *supra*, § 21.71, p. 525, fn. omitted.) If fees were not negotiated simultaneously, but instead were to be subsequently determined by the court as a portion of a lump sum, as Garvin appears to suggest, any argument by counsel to enhance his or her fees from a "common fund" beyond a base lodestar amount would of necessity diminish the recovery of the class, again engendering the same conflict of interest she claims occurs here.

Our courts have always been cognizant of the inherent tension between the interests of class membership and counsel in settlement of class action litigation. " '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.' " (*Apple Computer, Inc. v. Superior Court*, *supra*, 126 Cal.App.4th at p. 1265.) For this reason the majority of courts have found, for example, that it is impermissible to have a class representative too closely associated with the class attorney. (*Id*. at p. 1264, citing *Susman v. Lincoln American Corp*. (7th Cir. 1977) 561 F.2d 86, 90-91.) It has also been recognized that once an agreement to settle is reached, the interests of class counsel and defendant are no longer necessarily adverse. (See *In re General Motors Corp. Pick-Up Truck Fuel Tank* (3rd Cir. 1995) 55 F.3d 768, 819-820 [" 'a defendant is interested only in disposing of the total claim asserted against it; . . . the allocation between the class payment and the attorneys' fees is of little or no

[11] The trial court, as an alternative ground, awarded fees pursuant to Code of Civil Procedure section 1021.5 which contains an expressly declared legislative policy *against* payment of attorneys' fees out of the recovery in such circumstances. (Code Civ. Proc., § 1021.5, subd. (c); *Graham v. DamilerChrysler Corp*. (2004) 34 Cal.4th 553, 565.)

interest to the defense.' . . . [T]he divergence in financial incentives [between the class and counsel] creates the 'danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.' "].)

Because of the potential for fraud, collusion or unfairness thorough 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. (*Dunk, supra,* 48 Cal.App.4th at pp. 1808-1809.) Although presenting no evidence of any abuse here, Garvin nevertheless claims that "trial court discretion is not an adequate protection against the settling parties' ability to sacrifice class-member interests to benefit themselves." Garvin further asserts that "[b]ecause of trial courts' proclivity to approve class action settlements based upon the parties' representations, this Court cannot rely on individual trial court judges to weed out self-interested behavior by the settling parties."

We are unwilling to make any such assumptions. Instead, we presume that our trial judges are well aware of their responsibilities as a "fiduciary" for the protection of absent class members (*7-Eleven Owners for Fair Franchising v. Southland Corp., supra,* 85 Cal.App.4th at p. 1151) " 'whose rights may not have been given due regard by the negotiating parties' " (*Dunk, supra,* 48 Cal.App.4th at p. 1801, quoting *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624.) The court has a duty, independent of any objection, to assure that the amount and mode of payment of attorneys' fees are fair and proper, and may not simply act as a rubber stamp for the parties' agreement. (See *Garabedian v. Los Angeles Cellular Telephone Co., supra,* 118 Cal.App.4th at pp. 128-129.) " '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 the class and determining and setting a reasonable attorney's fee . . . .' " (*Zucker v. Occidental Petroleum Corp., supra,* 192 F.3d at pp. 1328–1329 & fn. 20.) Garvin fails to convince us that California trial

judges are incapable of performing, or unwilling to perform, these obligations, or that the trial judge here failed to do so.

We also start from the proposition that the " 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' " (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; *Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 579.) For this reason "[o]ur review of the amount of attorney fees awarded is deferential." (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1051-1052; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) We apply an abuse of discretion standard. (*Lealao*, *supra*, 82 Cal.App.4th at p. 25.) Fees approved by the trial court are presumed to be reasonable, and the objectors must show error in the award. (*Dunk*, *supra*, 48 Cal.App.4th at p. 1809.)

Turning to the fee determination made in this case, we find no error in the award. Garvin makes no specific objection here to the amount of the award, and in fact argued in the trial court that there was no "common fund" justifying a percentage recovery, and that a "lodestar" approach should be used in calculating fees. Garvin argued below that the supporting evidence for the fee rates and amounts was inadequate. Considering these objections, and expressing its own concern that support was lacking for some claims, the court conducted two subsequent hearings to obtain and review the declarations and documentary support for the requests. The trial court then used a lodestar analysis to determine the base fee, and applied a multiplier to calculate the final award. " ' "[T]he primary method for establishing the amount of 'reasonable' attorney fees is the lodestar method. The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. 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." [Citation.] "The purpose of such adjustment is to fix a fee at

the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." [Citation.] Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis. [Citation.]' [Citation.]" (*In re Vitamin Cases*, *supra*, 110 Cal.App.4th at p. 1052.) This approach "anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) " ' "Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts." ' [Citation.]" (*In re Vitamin Cases*, *supra*, at p. 1058.)[12] The trial court properly used the lodestar approach here, requiring the plaintiff's law firms to submit detailed support for their fee claims, and denying those claims he found unsupported.

It may be appropriate in some cases, assuming the class benefit can be monetized with a reasonable degree of certainty, to "cross-check" or adjust the lodestar in comparison to a percentage of the common fund to ensure that the fee awarded is reasonable and within the range of fees freely negotiated in the legal marketplace in comparable litigation.[13] (*Lealao*, *supra*, 82 Cal.App.4th at pp. 49–50; see also *Wing v.*

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[12] We acknowledge that some federal circuits take a contrary view. See *Report of Third Circuit Task Force, Court Awarded Attorney Fees* (1985) 108 F.R.D. 237, 246-249, concluding that the lodestar method is deficient and subject to abuse when applied in cases resulting in the creation of a fund, and that the lodestar technique is a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar." (*Id.* at p. 258.) Justice Kline presents a detailed comparison of California and federal and jurisprudence on this question in *Lealao*, *supra*, 82 Cal.App.4th 19.

[13] We note again that Garvin urged before the trial court that there was no quantifiable common fund justifying a percentage fee award. Assuming that the class settlement here could be fully monetized at the face amount of $14 million ($10.75 million plus $3.25 million), the fee and cost award of $3,108,355 is approximately 21.4 percent of this amount, and approximately 17.6 percent of the aggregate amount.

Asarco, Inc. (9th Cir. 1997) 114 F.3d 986, 990.) While the court has discretion to do so where appropriate, it is not required. (*Lealao*, at pp. 49-50; *Ramos v. Countrywide Home Loans, Inc.*, *supra*, 82 Cal.App.4th at p. 628.) Further, a fee award may not be justified solely as a percentage of the recovery when that award will not come from the settlement fund. (*In re Vitamin Cases*, *supra*, 110 Cal.App.4th at p. 1060.) Regardless of whether attorneys' fees are determined using the lodestar method or awarded based on a "percentage-of-the-benefit" analysis under the common fund doctrine, " '[t]he ultimate goal . . . is the award of a "reasonable" fee to compensate counsel for their efforts, irrespective of the method of calculation.' [Citations.]" (*Apple Computer, Inc. v. Superior Court*, *supra*, 126 Cal.App.4th at p. 1270.) It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace. (*Chavez v. Netflix, Inc*., *supra*, 162 Cal.App.4th at pp. 65-66.)

As Justice Kline observed in *Lealao*, what constitutes a reasonable fee in a representative action is a complex question to which there are no easy answers. (*Lealao, supra*, 82 Cal.App.4th at p. 53.) The methodology used by the trial court was consistent with applicable law, and no abuse of discretion is shown.

F. *The Claimed "Surplus" from the Fee Award*

Despite Garvin's assertion in the trial court that there was no "common fund" on which to base attorney's fees, she nevertheless argues here that the attorneys' fees were a component of the class recovery, and that the difference between the fees and costs actually awarded ($3,018,355) and the maximum amount that Bank of America agreed to pay ($4 million) constitutes a "surplus" belonging to the class members. She contends

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" 'Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.' " (*Chavez v. Netflix, Inc.*, *supra*, 162 Cal.App.4th at p. 66, fn. 11, quoting *Shaw v. Toshiba America Information Systems, Inc.* (E.D.Tex. 2000) 91 F. Supp. 2d 942, 972.) A fee award of 25 percent " '[i]s the "benchmark" award that should be given in common fund cases.' " (*Lealao*, *supra*, 82 Cal.App.4th at p. 24, fn. 1, quoting *Six Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311.) The award here is well within what have been deemed to be reasonable ranges.

that "[t]he class had a right to what Defendant made available to settle the litigation" and that therefore there is a sum of $981,645 due to the class. (Emphasis omitted.)

She claims here, as she did in the trial court, that that the Manual for Complex Litigation supports this rather unique theory. It does not. As discussed above, Garvin's citation from the Manual that "the sum of the two amounts [class settlement and fees] ordinarily should be treated as a settlement fund for the benefit of the class" (Manual for Complex Litigation, *supra*, § 21.71, p. 525) is taken out of context and does not stand for the proposition she urges. As previously noted, the Manual goes on to explain that the two amounts are treated as a "settlement fund" so that the "total fund could be used to measure whether the portion allocated to the class and to attorney fees is reasonable." (*Ibid.*) As the trial court also observed, nothing in the Manual for Complex Litigation suggests that any reduction in the claimed attorneys' fees be awarded to the class. "The citation of the Complex Litigation Manual does not establish otherwise. [¶] . . . [¶] . . . It doesn't say what you say it says, period. It does not allow the Court to restructure the deal of the parties, so I'm not disregarding a thing."

Garvin's reliance on *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, is similarly misplaced. In *Staton*, an employment discrimination class action, the parties negotiated the amount of attorneys' fees as part of the settlement between the class and the defendant, and included as a term of the proposed decree the specific amount of attorneys' fees that class counsel would receive. (*Id.* at pp. 944-945.) Rejecting that approach, the court held that in a case which involved both a statutory fee-shifting provision and an actual or putative common fund it would be permissible to *either* negotiate and settle the amount of statutory fees along with the merits of the case (with judicial approval of fees consistent with the reasonableness standard), or alternatively to negotiate and agree to the value of a common fund (including an estimated hypothetical award of statutory fees) and then apply to the court for an award from the fund, using common fund fee principles. (*Id.* at p. 972.) In the latter circumstance, where there is a single "common fund," after the court determines the fee amount "all the remaining value of the fund belongs to the class rather than reverting to the defendant." (*Ibid.*) That is

not the situation presented here. Even those cases that have treated fees as part of a "constructive common fund" or a "package deal" have done so only for purposes of assessing the total value of a settlement, and to compare the allocation of benefits between counsel and the class. (See *In re General Motors Corp. Pick-Up Truck Fuel Tank, supra,* 55 F.3d at p. 820; *Apple Computer, Inc. v. Superior Court, supra,* 126 Cal.App.4th at p. 1269.) Simply put, there is a complete absence of any authority supporting Garvin's position.

Garvin's arguments that this creates a "windfall" for the defendant, and a disincentive for class members to raise objections to the fee again miss the mark. Under the terms of the agreement before us, the defendant merely established the outer limits of its liability for fees, and agreed not to oppose a fee application within the defined range, without conceding the propriety of any particular amount. A court must still determine the reasonableness of the fee, and must do so whether or not there is an objection presented from the class. (*Garabedian v. Los Angeles Cellular Telephone Co., supra,* 118 Cal.App.4th at p. 129.) For the reasons previously stated, we likewise reject Garvin's allegation that there is a "judicial predisposition to go along with the parties' 'deal' " and that the fee structure here is part of a strategy by the plaintiff's class action bar to "disincentivize judicial scrutiny of their fee request." As Garvin admits, the court here did reduce the fee request, and we do not presume that any other trial judge would take the cavalier and dismissive approach to this serious task that Garvin suggests.

G. Objectors' Claim for Attorneys' Fees and Costs on Appeal

Garvin seeks attorneys' fees and costs on appeal, claiming that a "class member/objector who has benefitted his or her class [or the class action mechanism generally] is entitled to an award of reasonable attorneys' fees and costs." "[T]here is no direct authority in California applying the substantial benefit doctrine to award attorney fees to an objector . . . [though] a number of federal courts have endorsed use of the doctrine to award attorney fees to an objector whose actions substantially benefit class members. . . . [¶] The leitmotiv of all these opinions is that the objector must establish

his or her efforts produced a concrete benefit for the class, allowing it to recover more (or otherwise be in an improved position) than it would have in the absence of the objectors' efforts." (*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets* (2005) 127 Cal.App.4th 387, 398.) Garvin has made no showing of benefit to the class in pursuing this appeal, and we therefore deny the request.

DISPOSITION

The judgment is affirmed.

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Bruiniers, J.*

We concur:

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Jones, P. J.

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Simons, J.

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial Court:	San Francisco Superior Court
Trial Judge:	Honorable Richard A. Kramer

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