UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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RONALD C. EVANS, JOAN M. EVANS, DENNIS TREADAWAY, and all other similarly situated,

Plaintiffs,

v.

ZIONS BANCORPORATION, N.A., dba California Bank and Trust,

Defendant.

ZIONS BANCORPORATION, N.A.,

Third-Party Plaintiff,

v.

JTS, LARRY CARTER, JACK SWEIGART AND BRISTOL INSURANCE,

Third-Party Defendants.

No. 2:17-cv-01123 WBS DB

MEMORANDUM AND ORDER RE: MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR ATTORNEYS' FEES, COSTS, AND REPRESENTATIVE SERVICE PAYMENT

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Plaintiffs Ronald Evans, Joan Evans, and Dennis Treadaway brought this putative class action against

defendant Zions Bancorporation, d/b/a California Bank and Trust ("CB&T"), asserting claims based on CB&T's alleged acquiescence in and provision of support for a fraud scheme perpetrated by one of its clients against putative class members. On August 1, 2022, the court granted plaintiffs' unopposed motion for preliminary approval of class action settlement. (See Order Granting Preliminary Approval (Docket No. 101).) Plaintiffs now move unopposed for final approval of the parties' class action settlement and attorneys' fees, costs, and a class representative service payment. (See Docket No. 102.) The court held a hearing on November 7, 2022. No class members appeared at the hearing to object to or to opt out of the settlement

I. Discussion[1]

The Ninth Circuit has declared a strong judicial policy favoring settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992); see also Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution[.]") (citation omitted). Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e).

"Approval under 23(e) involves a two-step process in

[1] The court previously recited the factual and procedural background in its order granting plaintiff's unopposed motion for preliminary approval of the class action settlement. (See Order Granting Preliminary Approval at 2-3.) Accordingly, the court will refrain from doing so again.

which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing Manual for Complex Litig. (Third), § 30.41 (1995)). This court satisfied step one by granting plaintiff's unopposed motion for preliminary approval of class action settlement on July 29, 2022. (Docket No. 101.) Now, following notice to the class members, the court will consider whether final approval is merited by evaluating: (1) the treatment of this litigation as a class action and (2) the terms of the settlement. See Diaz v. Tr. Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989).

A. Class Certification

A class action will be certified only if it meets Rule 23(a)'s four prerequisites and fits within one of Rule 23(b)'s three subdivisions. Fed. R. Civ. P. 23(a)-(b). Although a district court has discretion in determining whether the moving party has satisfied each Rule 23 requirement, the court must conduct a rigorous inquiry before certifying a class. See Califano v. Yamasaki, 442 U.S. 682, 701 (1979); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982).

1. Rule 23(a)

> Rule 23(a) restricts class actions to cases where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and

adequately protect the interests of the class. Fed. R. Civ. P. 23(a). These requirements are commonly referred to as numerosity, commonality, typicality, and adequacy of representation. In the court's order granting preliminary approval of the settlement, the court found that the putative class satisfied the Rule 23(a) requirements. (See Order Granting Preliminary Approval at 5-10.) The court is unaware of any changes that would affect its conclusion that the putative class satisfies the Rule 23(a) requirements, and the parties have not indicated that they are aware of any such developments. (See Mot. for Final Approval at 9.) The court therefore finds that the class definition proposed by plaintiffs meets the requirements of Rule 23(a).

2. Rule 23(b)

An action that meets all the prerequisites of Rule 23(a) may be certified as a class action only if it also satisfies the requirements of one of the three subdivisions of Rule 23(b). Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013). In its order granting preliminary approval of the settlement, the court found that both the predominance and superiority prerequisites of Rule 23(b)(3) were satisfied. (See Order Granting Preliminary Approval at 10-12.) The court is unaware of any changes that would affect its conclusion that Rule 23(b)(3) is satisfied. Because the settlement class satisfies both Rule 23(a) and 23(b)(3), the court will grant final class certification of this action.

3. Rule 23(c)(2) Notice Requirements

If the court certifies a class under Rule 23(b)(3), it

"must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D. 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172–77 (1974)). Although that notice must be "reasonably certain to inform the absent members of the plaintiff class," actual notice is not required. Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (citation omitted).

The parties selected The Beverly Group, Inc. ("TBG") to serve as the Settlement Administrator. (Denver Decl. ¶ 3 (Docket No. 102-1).) The potential class members in this matter were also the overwhelming majority of unsecured creditors in the related IMG bankruptcy matter in which TBG's founder was serving at the Chapter 11 Trustee. (Id.) Defendants timely provided TBG with the class list, utilizing the bankruptcy proceeding database of claimants, derived from the Court-approved claims of the Trustee, and addresses. (Id.) From the combined settlement class member information from the estate's own records of court approved distribution and claims, list of potential class action members from class action counsel, and TBG's efforts to locate additional claimants, 56 settlement class members and 34 potential net-losers were identified. (Id.) When TBG sent out the Court-approved notice packets, the notice form was personalized for each recipient and set forth the recipient's net loss amount as reviewed by TBG. (Id. ¶¶ 4-5.) In total, TBG sent out 90 notice packets. (Id. ¶ 6.) TBG also ran the Court-

approved publication notice in the Sacramento Bee. (Id. ¶ 7.)

Ten notices were returned to TBG by the U.S. Post Office as undeliverable. (Id. ¶ 9.) TBG was able to email 4 class notices. (Id.) TBG has received zero responses from class members presenting written or oral requests for exclusion. (Id. ¶ 10.) TBG has received zero responses from class members presenting written or oral objections to the settlement. (Id. ¶ 11.) TBG received 5 responses from notice recipients questioning their respective net loss amounts. (Id. ¶ 12.) TBG has resolved 4 of the 5 claim disputes. (Id.) The remaining notice recipient did not provide documents to support a different calculation and has not provided any information to support a different calculation of a net loss other than $0. (Id.)

"Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) (quoting Mendoza v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352 (9th Cir. 1980)). The notice identifies the parties, explains the nature of the proceedings, defines the class, provides the terms of the settlement, and explains the procedure for objecting or opting out of the class. (Id. ¶ 8.) The notice also explains how class members' individual settlement awards will be calculated and the amount that class members can expect to receive. (Id.) Accordingly, the notice complies with Rule 23(c)(2)(B)'s requirements.

B. Rule 23(e): Fairness, Adequacy, and Reasonableness of Proposed Settlement

Having determined that class treatment is warranted, the court must now address whether the terms of the parties' settlement appear fair, adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2). To determine the fairness, adequacy, and reasonableness of the agreement, Rule 23(e) requires the court to consider four factors: "(1) the class representatives and class counsel have adequately represented the class; (2) the proposal was negotiated at arm's length; (3) the relief provided for the class is adequate; and (4) the proposal treats class members equitably relative to each other." Id. The Ninth Circuit has also identified eight additional factors the court may consider, many of which overlap substantially with Rule 23(e)'s four factors:

> The strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the 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.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998).

Because this settlement was reached prior to class certification, it will be subject to heightened scrutiny for purposes of final approval. See In re Apple Inc. Device Performance Litig., 50 F.4th 769, 2022 WL 4492078, at *8 (9th Cir. 2022). The recommendations of plaintiff's counsel will not be given a presumption of reasonableness, but rather will be subject to close review. See id. at *9. The court will particularly scrutinize "any subtle signs that class counsel have allowed pursuit of their own self-interests to infect the

negotiations." See id. (quoting Roes, 1-2 v. SFBSC Mgmt., LLC, 944 F.3d 1035, 1043 (9th Cir. 2019)).

1. Adequate Representation

The court must first consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This analysis is "redundant of the requirements of Rule 23(a)(4) . . . " Hudson v. Libre Tech., Inc., No. 3:18-cv-1371-GPC-KSC, 2020 WL 2467060, at *5 (S.D. Cal. May 13, 2020) (quoting Rubenstein, 4 Newberg on Class Actions § 13:48 (5th ed.)) See also In re GSE Bonds Antitr. Litig., 414 F. Supp. 3d 686, 701 (S.D.N.Y. 2019) (noting similarity of inquiry under Rule 23(a)(4) and Rule 23(e)(2)(A)).

Because the Court has found that the proposed class satisfies Rule 23(a)(4) for purposes of class certification, the adequacy factor under Rule 23(e)(2)(A) is also met. See Hudson, 2020 WL 2467060, at *5.

2. Negotiation of the Settlement Agreement

Counsel for both sides appear to have diligently pursued settlement after thoughtfully considering the strength of their arguments and potential defenses. The parties participated in an arms-length mediation before two experienced litigation mediators. In August of 2020, the parties participated in a mediation before retired Judge Richard L. Gilbert, but the case did not settle. (Denver Decl. ¶ 16.) The parties continued with additional discovery and trial preparation, including taking over 50 depositions with thousands of exhibits. (Id.) In March of 2022, the parties participated in a mediation before retired Judge Ronald Sabraw from JAMS, who has expertise in Ponzi scheme

litigation. (Id.) After the first day of this second mediation, March 17, 2022, the case did not settle. (Id.) The parties agreed to consider a mediator's proposal as a possible method that might move the discussions forward. (Id.) On March 25, 2022, Judge Sabraw recommended that the Bank pay the class $14,000,000 to settle approximately $55,000,000 in unrepaid loans. (Id.) On April 1, 2022, the parties were informed by the Judge that both sides had accepted the mediator's proposal. (Id.) On June 17, 2022, the parties drafted and executed a long-form settlement agreement. (Id.)

Given the sophistication and experience of plaintiff's counsel, the parties' representation that the settlement reached was the product of arms-length bargaining over two mediations, and the five-year litigation history, the court finds the proposed settlement is non-collusive and is in the best interest of the class.

3. Adequate Relief

In determining whether a settlement agreement provides adequate relief for the class, the court must "take into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any [other] agreement[s]" made in connection with the proposal. See Fed. R. Civ. P. 23(e)(2)(C); Baker v. SeaWorld Entm't, Inc., No. 14-cv-02129-MMA-AGS, 2020 WL 4260712, at *6-8 (S.D. Cal. Jul. 24, 2020).

The court notes that, in evaluating whether the

settlement provides adequate relief, it must consider several of the same factors as outlined in Hanlon, including the strength of the plaintiff's case, the risk, expense, complexity, and likely duration of further litigation, the risk of maintaining class action status throughout the trial, and the amount offered in settlement. See Hanlon, 150 F.3d at 1026.

In determining whether a settlement agreement is substantively fair to class members, the court must balance the value of expected recovery against the value of the settlement offer. See In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). Here, plaintiffs' counsel estimates that defendant's potential exposure could be approximately $55,000,000 (Denver Decl. ¶ 19.) The case settled for $14,000,000--approximately 25% of the potential damages. (Id.) Given that 100% success in litigation is uncommon, and based on defendants' contentions that (1) there is no definitive proof of actual knowledge; (2) the circumstantial evidence offered by plaintiffs to support an inference of actual knowledge is inconclusive and subject to alternate interpretation; (3) it is unrealistic for class members to expect they are due a full return of their funds considering that investments in legitimate companies often result in losses; and (4) the class members themselves were arguably reckless in passing money to IMG without first doing anything to confirm the company was legitimate, which it was not. (Id. ¶ 20.) The Settlement Agreement will result in an average payment of approximately 17% of each class member's net loss after the proposed deductions for attorneys' fees, costs of litigation, notice expenses, and an enhancement aware for the

plaintiffs. (Id. ¶ 22.)

Plaintiffs' counsel represents that, absent settlement, further litigation would be costly, time consuming, and uncertain in outcome. (See id. at ¶ 71.) Defendants would likely appeal any favorable judgment for plaintiff, resulting in further expense and jeopardy for class members. (Id.) Given the strength of plaintiff's claims and defendants' potential exposure, as well as the risk, expense, and complexity involved in further litigation, the court is satisfied that the settlement and resulting distribution provides a strong result for the class and is fair to class members.

The Settlement Agreement further provides for plaintiffs' counsel to seek attorney's fees totaling 30% of the net amount remaining on the $14,000,000 after deductions incurred for litigation costs not to exceed $200,000, claims administration expenses not to exceed $150,000, and an enhancement award of $5,000 for both plaintiff Ronald Evans and plaintiff Joan Evans, for a total of $10,000. (Id. ¶ 23.)

If a negotiated class action settlement includes an award of attorney's fees, then the court "ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). As discussed in greater detail below, the attorneys' fees requested are reasonable. In light of all of these considerations, the court finds that Rule 23(e)'s third factor is satisfied. See Fed. R. Civ. P. 23(e)(C).

4. Equitable Treatment of Class Members

Finally, the court must consider whether the Settlement Agreement "treats class members equitably relative to each other." See Fed. R. Civ. P. 23(e)(2)(D). In doing so, the Court determines whether the settlement "improperly grant[s] preferential treatment to class representatives or segments of the class." Hudson, 2020 WL 2467060, at *9 (quoting Tableware, 484 F. Supp. at 1079).

Here, the Settlement Agreement does not improperly discriminate between any segments of the class--all class members are entitled to pro rata monetary relief based on their respective net loss. (See Mot. for Final Approval at 21.) While the Settlement Agreement allowed plaintiffs to seek an incentive enhancement award of $5,000 for both plaintiff Ronald Evans and plaintiff Joan Evans, for a total of $10,000,[2] (Denver Decl. ¶ 23), plaintiff has submitted additional evidence documenting their time and effort spent on this case, which, as discussed further below, in Section E, has satisfied the court that their additional compensation above other class members is justified. See Hudson, 2020 WL 2467060, at *9. The court therefore finds that the Settlement Agreement treats class members equitably. See Fed. R. Civ. P. 23(e)(D).

5. Remaining Hanlon Factors

In addition to the Hanlon factors already considered as part of the court's analysis under Rule 23(e)(A)-(D), the court must also take into account "the extent of the discovery

[2] Plaintiff Treadway has elected to forego the request for the enhancement award so that the $5,000 is added to the general distribution amount. (Denver Decl. ¶ 23, fn. 3.)

completed . . . the presence of government participation, and the reaction of class members to the proposed settlement." Hanlon, 150 F.3d at 1026.

Through formal and informal discovery, defendants provided a substantial amount of information that appears to have allowed the parties to adequately assess the value of plaintiff's and the class's claims. (Denver Decl. ¶ 29.) For example, over 50 depositions were taken with thousands of exhibits discussed during the depositions. (Id.) This factor weighs in favor of final approval of the settlement.

The seventh Hanlon factor, pertaining to government participation, also weighs in favor of approval. Hanlon, 150 F.3d at 1026. Under the Class Action Fairness Act ("CAFA"), the proposed settlement must be submitted to the Office of the Comptroller of the Currency ("OCC") within 10 days of filing the Settlement Agreement with the court. Here, Bank has confirmed that the Bank provided a copy of the proposed Settlement Agreement to the OCC before June 27, 2022. Bank has also confirmed that the OCC has not sought to intervene or otherwise objected to the settlement. This factor therefore weighs in favor of final approval of the settlement.

The eighth Hanlon factor, the reaction of the class members to the proposed settlement, also weighs in favor of final approval. See Hanlon, 150 F.3d at 1026. No class members have objected to or sought to opt out of the settlement. See id.

The court therefore finds that the remaining Hanlon factors weigh in favor of preliminary approval of the Settlement Agreement. See Ramirez, 2017 WL 3670794, at *3.

In sum, the four factors that the court must evaluate under Rule 23(e) and the eight Hanlon factors, taken as a whole, appear to weigh in favor of the settlement. The court will therefore grant final approval of the Settlement Agreement.

C. Attorneys' Fees

Federal Rule of Civil Procedure 23(h) provides, "[i]n 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." Fed. R. Civ. P. 23(h). If a negotiated class action settlement includes an award of attorneys' fees, that fee award must be evaluated in the overall context of the settlement. Knisley v. Network Assocs., 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 455 (E.D. Cal. 2013) (England, J.). The court "ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." Bluetooth Headset, 654 F.3d at 941.

"Under the 'common fund' doctrine, 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable [attorneys'] fee from the fund as a whole.'" Staton v. Boeing Co., 327 F.3d 938, 969 (9th Cir. 2003) (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)). In common fund cases, the district court has discretion to determine the amount of attorneys' fees to be drawn from the fund by employing either the percentage method or the lodestar method. Id. The court may also use one method as a "cross-check[ ]" upon the other method.

See Bluetooth Headset, 654 F.3d at 944.

As part of the settlement, the parties agreed that plaintiffs' counsel would seek attorney's fees totaling 30% of the net amount remaining from the $14,000,000 payment after the reduction of the following: (1) litigation expenses not to exceed $200,000; (2) settlement administration expenses not to exceed $150,000; (3) a combined $15,000 enhancement award for the Evans plaintiffs ($5,000 each). (Id. ¶ 36.) As such, the requested attorney's fees will amount to $4,105,905. (Id.) The remaining $9,580,445 will be available to be distributed to members of the settlement class, which is approximately 17% of each class member's respective net loss. (Id.)

Like other class actions, this case presented both counsel and the class with a risk of no recovery at all. (Id. ¶ 37.) Plaintiffs' counsel represents that, because the firm works on contingency, it sometimes recovers very little to nothing at all, even for cases that may be meritorious, and that the potential costs that must be expended in such cases are often substantial. (See id.) Where counsel do succeed in vindicating rights on behalf of a class, they depend on recovering a reasonable percentage-of-the-fund fee award to enable them to take on similar risks in future cases. (See id.) Plaintiffs' counsel argues that, in light of the strong result and substantial risk taken in this case, a 30% fee, as requested here, is reasonable.

A "lodestar-multiplier" cross-check confirms the reasonableness of the requested award. Plaintiffs' counsel has

calculated a lodestar figure in this case of $5,579,002.[3] (See Denver Decl. ¶ 44.) According to contemporaneous billing logs kept by plaintiffs' counsel, attorneys at the two firms have, over the span of five years, dedicated 6,724 hours of work to this case. (Id. at ¶¶ 41-43.)

Based on plaintiffs' counsel's calculated lodestar figure, plaintiff seeks a lodestar multiplier of approximately 0.74--in other words, plaintiffs' counsel seeks less than the lodestar cross-check would indicate she and her firm are entitled to. In class actions, "[m]ultipliers can range from 2 to 4 or even higher." Wershba v. Apple Computer, Inc., 91 Cal. App. 4th 224, 255 (2001).[4] "Indeed, 'courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.'" Vizcaino, 290 F.3d at 1051 (approving fee award where lodestar cross-check resulted in multiplier of 3.65); see also id. at 1052 n.6, appx. (collecting cases and finding that risk multiplier fell between 1.0 and 4.0 in 83% of cases); In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding 3.97 multiplier and observing that "[i]n recent years multipliers of between 3 and 4.5 have become more common").

Factors considered in determining the appropriate lodestar multiplier generally include: (1) the risks presented by

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[3] The court expresses no opinion as to the proper lodestar amount in this case.

[4] Federal courts incorporate California state law on deciding an appropriate multiplier when the claims are brought under California state law. Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002).

the contingent nature of the case; (2) the difficulty of the questions involved and the skill requisite to perform the legal service properly; (3) the nature of the opposition; (4) the preclusion of other employment by the attorney from accepting the case; and (5) the result obtained. Ketchum v. Moses, 24 Cal. 4th 1122, 1132 (Cal. 2001); Graham v. DaimlerChrysler Corp., 34 Cal. 4th 553, 582 (Cal. 2004); Serrano v. Priest, 20 Cal.3d 25, 48-49 (Cal. 1977). Given the risks undertaken by plaintiffs' counsel, the defenses likely to be raised by defendant, the strong result for the class, and the fact that courts routinely approve fee awards corresponding with a lodestar of well over 1.0, the court finds that a multiplier of 0.74 is justified this case. See Johnson v. Fujitsu Tech. & Bus. of Am., Inc., No. 16-cv-03698-NC, 2018 U.S. Dist. LEXIS 80219, at *20 (N.D. Cal. May 11, 2018) (finding multiplier of 4.37 to be reasonable); In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2017 U.S. Dist. LEXIS 201108, at *21 (N.D. Cal. Dec. 6, 2017) (finding multiplier of 3.66 to be "well within the range of awards in other cases.").

Accordingly, the court finds the requested fees to be reasonable and will approve counsel's motion for attorneys' fees.

D. Costs

"There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." In re Heritage Bond Litig., Civ. No. 02-1475, 2005 WL 1594403, at *23 (C.D. Cal. June 10, 2005). The appropriate analysis is whether the particular costs are of the type billed by attorneys to paying clients in the marketplace. Harris v. Marhoefer, 24

F.3d 16, 19 (9th Cir. 1994). "Thus, [reimbursement of] reasonable expenses, though greater than taxable costs, may be proper." Id. at 20.

Here, the parties agreed that plaintiffs' counsel shall be entitled to recover reasonable litigation costs, not to exceed $200,000. (Denver Decl. ¶ 47.) Counsel states that his firm has incurred expenses and costs to date in the amount of $69,538.33. (Denver Decl. ¶ 47.) Robert Brace expended $64,111.67. (Id. ¶ 47.) These expenses include filing fees, court fees, deposition fees, travel expenses, document and electronic file fees, mediation fees, legal research fees, and data analysis fees. (Id.) The court finds that these are reasonable litigation expenses, see Heritage, 2005 WL 1594403, at *23, and will therefore grant class counsel's request for costs up to the amount authorized by the Settlement Agreement, $200,000.

E. Representative Service Award

"Incentive awards are fairly typical in class action cases." Rodriguez, 563 F.3d at 958. "[They] 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 958-59.

Nevertheless, the Ninth Circuit has cautioned that "district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives . . ." Radcliffe v. Experian Info. Solutions, Inc., 715 F.3d 1157, 1164 (9th Cir. 2013). In

assessing the reasonableness of incentive payments, the court should consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions" and "the amount of time and effort the plaintiff expended in pursuing the litigation." Staton, 327 F.3d at 977 (citation omitted). The court must balance "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." Id.

In the Ninth Circuit, an incentive award of $5,000 is presumptively reasonable. Davis v. Brown Shoe Co., Inc., No. 1:13-01211 LJO BAM, 2015 WL 6697929, at *11 (E.D. Cal. Nov. 3, 2015) (citing Harris v. Vector Marketing Corp., No. C-08-5198 EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012)) (collecting cases). Two of the three named plaintiffs, Ronald Evans and Joan Evans, seek an incentive payment of $5,000 each. (Denver Decl. ¶ 48.) The Evans plaintiffs represent that they have devoted significant time and resources to the case over the past five years, including involvement in the appeal to the Ninth Circuit. (Decl. of Ronald and Joan Evans ("Evans Decl.") ¶ 5 (Docket No. 98-3); Denver Decl. ¶ 48.) The Evans plaintiffs chose to participate in this litigation as class representatives even though could potentially receive a smaller recovery than if they had acted solely on themselves and despite the professional and reputational risk. (Denver Decl. ¶ 50.) The court finds that these risks were real and substantial, and further warrant awarding an incentive payment to Ronald and Joan Evans for their participation as class representatives. See Staton, 327 F.3d at

977. The court will therefore authorize payment of a $5,000 service award.

II. Conclusion

Based on the foregoing, the court will grant final certification of the settlement class and will approve the settlement set forth in the settlement agreement as fair, reasonable, and adequate. The settlement agreement shall be binding upon all participating class members who did not exclude themselves.

IT IS THEREFORE ORDERED that plaintiffs' unopposed motion for final approval of the parties' class action settlement and attorneys' fees, costs, and a class representative service payment (Docket No. 102) be, and the same hereby are, GRANTED.

IT IS FURTHER ORDERED THAT:

(1) Solely for the purpose of this settlement, and pursuant to Federal Rule of Civil Procedure 23, the court hereby certifies the following class:

> All Net Losers, including assignees, but excluding Net Losers who have already released the Bank from IMG-related claims, and also excluding any governmental entities, any judge, justice or judicial officer presiding over this matter, and the members of his or her immediate family, the Bank, along with its corporate parents, subsidiaries and/or affiliates, successors, and attorneys of any excluded Person or entity referenced above, and any Person acting on behalf of any excluded Person or entity referenced above. . . .
>
> "Net Loser" means any Settlement Class Member who suffered a Net Loss from lending to or investing money in IMG's medical supply-related business(es). . . .
>
> "Net Loss" means the total amount transferred by a Settlement Class Member to IMG minus the total amount received back from IMG, including, but not limited to any return on investment, return of principal, fees, and other payments by IMG to the Settlement Class

> Member. For purposes of this settlement, for each Participating Class Member, the Net Loss shall be the amount of the allowed claim as reflected in the Claims Approval Order, provided that such allowed claim only includes monies provided to IMG for the purpose of lending to or investing money in IMG's medical supply-related business(es).

(Settlement Agreement ("Agreement") at §§ 1.11, 1.12, 1.26 (Docket No. 98-1 at 23, 29)

(2) The court appoints the named plaintiffs Ronald Evans, Joan Evans, and Dennis Treadway as class representative and finds that they meet the requirements of Rule 23;

(3) The court appoints Robert L. Brace and Michael P. Denver as class counsel and finds that they meet the requirements of Rule 23;

(4) The Settlement Agreement's plan for class notice is the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. The plan is approved and adopted. The notice to the class complies with Rule 23(c)(2) and Rule 23(e) and is approved and adopted;

(5) The court finds that the parties and their counsel took appropriate efforts to locate and inform all class members of the settlement. Given that no class member filed an objection to the settlement, the court finds that no additional notice to the class is necessary;

(6) As of the date of the entry of this order, plaintiffs and all class members who have not timely opted out of this settlement herby do and shall be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged defendants of and from any and all settled claims, pursuant to the release provisions stated in the

parties' settlement agreement;

(7) Plaintiffs' counsel is entitled to fees in the amount of $4,105,905, and litigation costs of $153,650;

(8) The Beverly Group, Inc. is entitled to administration costs in the amount up to $150,000;

(9) Plaintiffs Ronald Evans and Joan Evans are entitled to an incentive award in the amount of $5,000;

(10) The remaining settlement funds shall be paid to participating class members in accordance with the terms of the Settlement Agreement; and

(11) This action is dismissed with prejudice. However, without affecting the finality of this Order, the court shall retain continuing jurisdiction over the interpretation, implementation, and enforcement of the Settlement Agreement with respect to all parties to this action and their counsel of record.

Dated: November 8, 2022

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE