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United States District Court
Central District of California

LISA SILVEIRA, on behalf of herself and all others similarly situated,

Plaintiff,

v.

M&T BANK,

Defendant.

Case No. 2:19-cv-06958-ODW(KSx)

ORDER GRANTING AMENDED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [30]

I. INTRODUCTION

Plaintiff Lisa Silveira initiated this putative class action against Defendant M&T Bank ("M&T"), on behalf of a class of homeowners, alleging that M&T charged borrowers convenience fees when they made mortgage payments over the phone. (*See* Compl. ¶ 1, ECF No. 1.) The parties have reached a settlement on behalf of the class. Silveira now moves, without opposition, for preliminary approval of the parties' proposed agreement ("Settlement Agreement"). (Am. Mot. for Prelim. Approval ("Amended Motion" or "Am. Mot."), ECF No. 30.) For the reasons below, the Court **GRANTS** Silveira's Amended Motion.[1]

[1] After carefully considering the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

II. BACKGROUND

In December 2008, Silveira purchased a home in San Luis Obispo County, California, through a loan that was secured by a mortgage on the property. (Compl. ¶ 23.) In 2016, M&T acquired the loan and became the loan servicer. (*Id.*) Silveira alleges she frequently pays her mortgage over the phone, and that M&T has charged her a $15.00 fee each time ("Pay-to-Pay Fee"). (*Id.* ¶¶ 26–27.) Silveira contends the Pay-to-Pay Fees were a direct breach of her mortgage agreement and a violation of federal and state laws. (*Id.* ¶ 29.)

On August 9, 2019, Silveira filed this lawsuit on behalf of homeowner borrowers throughout the United States, including California, whose mortgage loans are serviced by M&T. (*Id.* ¶ 36.) Silveira alleges that M&T's conduct breached the putative class members' mortgage agreements and violated the federal Fair Debt Collection Practices Act ("FDCPA"), California's Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act"), and California's Unfair Competition Law ("UCL"). (*Id.* ¶¶ 48–81.)

On February 12, 2020, the parties reached a settlement, and Silveira sought the Court's preliminary approval of the Settlement Agreement. (First Mot. for Prelim. Approval ("First Mot."), ECF No. 21.) The Court denied the Motion for Preliminary Approval and granted Silveira leave to file an amended motion. (*See* Am. Order Denying Mot. Prelim. Approval, ECF No. 29.) The Court expressed concern regarding four aspects of the proposed settlement: (1) the adequacy of the settlement fund; (2) the anticipated attorneys' fees request; (3) the anticipated incentive award request; and (4) the proposed notice to potential class members. (*Id.* at 2–6.) Silveira filed a timely Amended Motion for Preliminary Approval and again seeks preliminary approval of the Settlement Agreement.[2] (Am. Mot.) M&T joins in the Motion. (Joinder, ECF No. 31.)

[2] The Amended Motion incorporates by reference the previously filed Motion for Preliminary Approval. (Am. Mot. 1.)

III. SETTLEMENT TERMS

The key provisions of the parties' Settlement Agreement are set forth below through reference to Class Counsel's declaration.[3] (*See* Decl. of Hassan A. Zavareei ("Zavareei Decl.") Ex. 1 ("Settlement Agreement" or "SA"), ECF No. 21-1.)

A. Proposed Class

The Settlement Agreement defines the proposed Class Members as: "All borrowers with a residential mortgage serviced by M&T from whom M&T collected a Pay-to-Pay Fee [from the period of August 9, 2015, through the date of this Order]." (SA §§ 1.7, 6.1.) There are 110,871 loans in the class. (*Id.* § 1.27; Joinder 3.)

B. Payment Terms

In full settlement of the claims asserted in this lawsuit, M&T agrees to pay $3,325,000 ("Settlement Fund"). (*Id.* § 1.29.) The Settlement Fund includes the shares of Class Members who do not request exclusion ("Settlement Class Members"), as well as the costs of notice and administration, any service award to the class representative, and any award of attorneys' fees and expenses. (*Id.* §§ 1.28–1.29.)

Every Settlement Class Member will automatically receive a share of the Settlement Fund determined according to the proportional amount of Pay-to-Pay Fees charged to that Settlement Class Member by M&T within the class period. (*Id.* § 5.3.) Payments will be made per loan, such that the settlement payment on any loan with more than one borrower shall be made payable jointly to all Settlement Class Member borrowers on that loan. (*Id.* § 5.4.) Payments will be made by check. (*Id.* § 5.7.)

If there is any amount in the Settlement Fund remaining after the initial distribution of checks to Settlement Class Members, that amount will be distributed on a *pro rata* basis to Settlement Class Members who cashed their initial checks. (*Id.* § 5.9.) If any amount remains in the Settlement Fund after the secondary

[3] As discussed in more detail below, the Court grants Silveira's Amended Motion, and appoints her counsel Tycko & Zavareei LLP and Bailey & Glasser LLP as "Class Counsel."

distribution, or if there are not enough funds to make a secondary distribution economically feasible, then pursuant to the *cy pres* doctrine, the remaining amount shall be paid to a 501(c)(3) charitable organization upon approval by the Court. (*Id.*)

C. Attorneys' Fees, Costs, and Incentive Award

The Settlement Agreement authorizes Class Counsel to petition the Court for approval of attorneys' fees and costs in an amount not to exceed one-third of the Settlement Fund ($1,108,333). (*Id.* § 8.1.) It also authorizes Class Counsel to petition the Court for approval of an incentive award for Silveira in an amount not to exceed $10,000. (*Id.* § 8.2.) However, Class Counsel now represents that it will not seek fees exceeding the 25% benchmark, and Silveira will not seek an incentive award exceeding the $5,000 benchmark. (Am. Mot. 9–10.)

D. Releases

The Settlement Agreement provides that all Settlement Class Members will release M&T from:

> [A]ll actions, causes of action, claims, demands, obligations, or liabilities of any and every kind that were or could have been asserted in any form by Class Representative or Class Members, including but not limited to, statutory or regulatory violations, state or federal debt collection claims (including but not limited to violations of the Fair Debt Collection Practices Act and the California Rosenthal Act), unfair, abusive or deceptive act or practice claims, tort, contract, or other common law claims, or violations of any other related or comparable federal, state, or local law, statute or regulation, and any damages (including any compensatory damages, special damages, consequential damages, punitive damages, statutory penalties, attorneys' fees, costs) proximately caused thereby or attributable thereto, directly or indirectly, and any equitable, declaratory, injunctive, or any other form of relief arising thereunder, whether or not currently known, arising out of, based upon or related in any way to the collection or attempted collection of Pay-to-Pay Fees.

(*Id.* § 7.1.) Further, the Settlement Agreement provides that Settlement Class Members waive and relinquish the rights and benefits of California Civil Code

section 1542 and similar provisions that may be applicable to Class Members residing outside of California. (*Id.* § 7.2.)

E. Notice to Settlement Class

The parties submit an amended proposed notice ("Notice") with the Motion. (Decl. of Cameron Azari, Ex. A ("Am. Notice"), ECF No. 31–3.) The Notice informs the potential Class Members that they have three options: (1) participate in the settlement; (2) opt out of the settlement; or (3) object to the settlement. (*Id.* at 3–4.) The Notice provides detailed information as to how a Class Member may pursue his or her selected option. (*Id.*)

Within ten days of entry of this Order, M&T shall provide a list of Settlement Class Members to the Settlement Administrator and Class Counsel. (*Id.* § 6.3.1.) The Settlement Administrator will then update addresses, mail the Notice, and manage mail returned as undeliverable. (*Id.* §§ 6.3.1–6.3.2.)

IV. ANALYSIS

The Court must first address whether the class may be provisionally certified for settlement purposes only, then evaluate the fairness, adequacy, and reasonableness of the proposed settlement, and finally review the adequacy of the proposed Notice.

A. Class Certification

Class certification is a prerequisite to preliminary settlement approval. Class certification is appropriate only if each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 621 (1997). Under Rule 23(a), the plaintiff must show that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and 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).

1. Rule 23(a) Requirements

The proposed class meets all of the 23(a) factors. First, it is sufficiently numerous. While "[n]o exact numerical cut-off is required," "numerosity is presumed where the plaintiff class contains forty or more members." *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009). The parties represent that there are 110,871 potential members of the class. Thus, the class is sufficiently numerous.

Second, the claims of the potential Class Members demonstrate common questions of fact and law. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) ("[C]ommonality only requires a single significant question of law or fact."). Here, the claims of the Class Members are based on the same factual predicate as Silveira's, namely that Class Members were charged Pay-to-Pay Fees; that the policy of charging Pay-to-Pay Fess for mortgage payments made over the phone was uniform; that M&T breached its contracts with the Class Members and violated the FDCPA, Rosenthal Act, and UCL; and that the Class Members are entitled to actual and statutory damages. (Compl. ¶¶ 36–42.) At this juncture, no discernable individualized issues appear to exist which might detract from the common questions of fact and law. As such, the class meets the commonality requirement.

Third, Silveira satisfies the typicality requirement. Typicality in this context means that the representative claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Here, Silveira's claims arise out of the same circumstances as those of the other Class Members, specifically whether M&T charged borrowers Pay-to-Pay Fees during the Settlement Class Period. (*See generally* Compl.) Thus, Silveira shares material common factual and legal issues with the other Class Members and satisfies typicality.

Fourth, Silveira and Class Counsel satisfy the adequacy requirement for representing absent Class Members. This requirement is met where the named

plaintiff and her counsel do not have conflicts of interest with other Class Members and will vigorously prosecute the interests of the class. *Hanlon*, 150 F.3d at 1020. Here, Silveira's interests are coextensive with the interests of the class, and there is no evidence to suggest that Silveira or Class Counsel have any conflict of interest with other Class Members. Class Counsel appear well-qualified to be handling this class action litigation. (Zavareei Decl. ¶ 14, Ex. 2 ("Firm Resume").) In this action, Class Counsel has engaged in thorough investigation and negotiations on behalf of the class. (*See id.* ¶ 9.) These facts support Class Counsel's adequacy and ability to vigorously represent the putative class. As such, the proposed class and its representative satisfy the Rule 23(a) requirements.

2. Rule 23(b)(3) Requirements

Next, Silveira seeks class certification under Rule 23(b)(3), which requires the Court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Here, questions of law or fact common to the Class Members predominate over individualized questions because the issues at stake—whether M&T's policy of charging Pay-to-Pay Fees was in breach of the Class Members' contracts and a violation of federal and state law—are common to the proposed class. (First Mot. 19.) Further, a class action appears to be a far superior method of adjudicating the Class Members' claims. (*Id.* at 21.) It would certainly be inefficient for all potential Class Members to bring individual actions, and the costs of litigation would dwarf any recovery. (*Id.*) Accordingly, the class meets the requirements of Rule 23(b)(3).

As each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met, the class may be provisionally certified for settlement purposes.

B. Fairness of Settlement Terms

The Court must also consider whether the Settlement Agreement warrants preliminary approval. For preliminary approval, "the court evaluates the terms of the settlement to determine whether they are within a range of possible judicial approval." *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 319 (C.D. Cal. 2016) (internal quotation marks and alterations omitted). A court may preliminarily approve a settlement and direct notice to the class if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Hanlon*, 150 F.3d at 1026. "The settlement must stand or fall in its entirety"; a court may not "delete, modify or substitute" its provisions. *Id.*

Here, the settlement negotiations appear fair and adequate and the proposed settlement terms appear to come within the range of possible judicial approval.

1. Adequacy of Negotiations

The Court is satisfied that the Settlement Agreement was the product of "serious, informed, non-collusive negotiations." *Spann*, 314 F.R.D. at 319. The parties thoroughly investigated their claims and engaged in two full-day, in-person mediations before a respected retired judge. (Zavareei Decl. ¶¶ 3–6.) Class Counsel asserts that the settlement negotiations were done at arm's length and that Class Counsel considered the exposure analysis of continuing to litigate Silveira's claims. (*Id.*¶ 7.) Under these circumstances, the Court accepts that the settlement negotiations were adequate.

2. Settlement Terms

After carefully reviewing the terms of the Settlement Agreement, the Court finds that the settlement does not unfairly give preferential treatment to any party and falls within the range of possible approval. As the Ninth Circuit has explained:

> Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' 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, 150 F.3d at 1026. "Ultimately, the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations, and rough justice." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525–26 (C.D. Cal. 2004) (internal quotation marks omitted). "The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Id.*

Here, as with most class actions, there is a risk to both parties in continuing toward trial. The parties reached settlement before resolving a possible motion to dismiss, discovery motions, motion for class certification, dispositive motions, and trial preparation. The Settlement Agreement treats all members of the settlement class equally, awarding each Settlement Class Member a *pro rata* share of the Settlement Fund. (SA § 5.3.) Accordingly, the settlement does not unfairly favor any member, represents a compromise, and avoids uncertainty for all parties involved.

3. Settlement Funds

The Court finds that the $3,325,000 Settlement Fund is reasonable. "[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is [thus] not to be judged against a hypothetical or speculative measure of what might have been

achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982). "Even a fractional recovery of the possible maximum recovery amount may be fair and adequate in light of the uncertainties of trial and difficulties in proving the case." *Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 611 (E.D. Cal. 2015) (citing *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000)).

In the Order Denying the Motion for Preliminary Approval of Class Settlement, the Court requested additional information regarding the number of Class Members, the actual amount of fees M&T collected, and approximately how much each Class Member paid in fees. (Am. Order Denying Prelim. Approval 3.) This additional information was necessary to determine whether the $3,325,000 Settlement Fund was within the range of possible approval. (*Id.*)

In the Amended Motion, Silveira explains that M&T collected a total of $9,581,409.20 in Pay-to-Pay Fees from 110,871 loans during the class period. (Am. Mot. 3.) Thus, the $3,325,000 Settlement Fund is 34.7% of the total amount of the fees that M&T collected, which is line with other court-approved class action settlements involving Pay-to-Pay Fees. (*Id.*); *see, e.g.*, *Sanders v. LoanCare, LLC*, No. CV 18-9376 PA (RAOX), 2020 WL 8365241, at *6 (C.D. Cal. Dec. 4, 2020) (collecting cases; granting final approval of a $3.4 million settlement that represented 38.64% of the total fees collected from the class members). Here, 42% of the Class Members paid a Pay-to-Pay Fee only once during the Class Period, which was typically $15. (Am. Mot. at 3–4.) On average, Class Members paid approximately $86 in Pay-to-Pay Fees. (*Id.* at 4.)

The Settlement Fund will be distributed to Class Members using a *pro rata* method. (*Id.* at 4.) This means that those who were charged more in fees, "will receive a greater share of the fund because the monetary recovery paid from the Net Settlement Fund will be strictly proportional to the total dollar amount of [Pay-to-Pay] Fees each Class Member paid during the Class Period." (*Id.* at 8.) Silveira contends

that "this *pro rata* distribution is abundantly fair and appropriate because each class member who participates in the settlement . . . will get a share of the common fund that reflects his or her actual percentage of the total convenience fees paid." (*Id.*) For example, if the Pay-to-Pay Fees a Class Member paid over the Class Period amounted to 1% of the total Pay-to-Pay Fees, then that Class Member would be allocated 1% of the Settlement Fund. (Joinder 8.)

Based on the foregoing, the Court finds that the Settlement Fund is well within the range of possible approval and results in a fair and equitable distribution of the funds.

4. *Attorneys' Fees and Incentive Award*

The Court expressed concern with the provisions of the Settlement Agreement that authorize Class Counsel to petition for attorneys' fees and costs of up to one-third of the Settlement Fund and a $10,000 incentive award for Silveira serving as Class Representative. (Am. Order Denying Mot. for Prelim. Approval 4–5.) In the Amended Motion, Class Counsel agrees not to seek fees exceeding the 25% benchmark, and Silveira agrees not to seek an incentive award exceeding the $5,000 benchmark. (Am. Mot. 9–10.) Accordingly, the Court finds that preliminary approval of these terms is appropriate, though the final approval will depend on Class Counsel and Silveira providing adequate support for the requested awards.

5. Release of Claims

"Beyond the value of the settlement, potential recovery at trial, and inherent risks in continued litigation, courts also consider whether a class action settlement contains an overly broad release of liability." *Spann*, 314 F.R.D. at 327; *see also Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action." (internal quotation marks omitted)).

The Settlement Agreement releases all claims that were brought or could have been brought based on the factual predicate in the action. (SA § 7.1.) While such a release is broad in that it releases claims both known and unknown, the Court finds the released claims are appropriately limited to the factual predicate of this action.

C. Sufficiency of Notice

Finally, the Court must analyze both the type and content of the Notice to ensure it is sufficient.

1. Type of Notice

Under Rule 23, "the court must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). For class action settlements, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Here, the Parties agree that the Settlement Administrator will distribute Notice to all potential Class Members. (SA § 6.3.) "M&T almost exclusively uses U.S. Mail . . . to communicate with its customers." (Am. Mot. 11.) Class Members' contact information is available through M&T's records, and the Settlement Administrator will send Notice via U.S. Mail. (*Id.* § 6.3.2.) The Settlement Administrator will use the National Change of Address database (or its equivalent) to verify the accuracy of the addresses. (*Id.*) In the event that any individual's Notice is returned as undeliverable, the Settlement Administrator will attempt to locate a current address using a skip trace. (*Id.*) Class Members will have sixty days from the date the Administrator mails the Notice to request exclusion or object to the Settlement Agreement. (*Id.* §§ 11.1, 12.1.) The Court finds the procedures for notice sufficient and the most practicable under the circumstances.

2. Content of Notice

Class notice must state "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court

will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B)(i)–(vii). "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) (internal quotation marks omitted). The notice "does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims, and it does not require an estimate of the potential value of those claims." *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012).

The Court finds that the Notice contains the information required under Rule 23. The Notice includes the basics of the case, the class definition, and an explanation of the class-action claims. (Am. Notice.) The Notice also explains the procedures for opting out or objecting to the settlement. (*Id.* at 3.) The Notice indicates that unless a prospective class member chooses to opt out of the settlement, he or she will be deemed a Class Member and receive a portion of the settlement. (*Id.*) Further, the Notice provides that remaining a member of the class and receiving a payment will result in the Class Member giving up his or her claims and being bound by the Settlement Agreement (*Id.* at 1–4.)

In regard to the Notice's format, the Court previously expressed concern that the Notice was indistinguishable from junk mail because it buried the name "M&T" in the text. (*Id.* at 6.) The parties have since revised the formatting, and now the Notice prominently displays M&T's logo at the top of the first page. (Am. Notice 1.) This change sufficiently addresses the Court's previous concerns.

Accordingly, the Court finds both the type, content, and format of the proposed Notice are sufficient for granting preliminary approval of the Settlement Agreement.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Silveira's Amended Motion for Preliminary Approval of Class Action Settlement. The Court (1) preliminarily approves the parties' Settlement Agreement; (2) provisionally certifies the Class as defined in the Settlement Agreement; (3) appoints Silveira as Class Representative; (4) appoints Tycko & Zavareei LLP and Bailey & Glasser LLP as Class Counsel; and (5) approves the form and method of the parties' proposed Notice. Attorneys' fees and incentive award calculations will remain conditional upon sufficient proof therefor.

The final approval hearing shall be held on September 27, 2021, at 1:30 p.m. at the United States Courthouse, 350 West First Street, Courtroom 5D, Los Angeles, CA 90012.

IT IS SO ORDERED.

May 6, 2021

OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE