

JS-6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**United States District Court
Central District of California**

PHITSAMAY FERNANDEZ, on behalf
of himself and all other similarly situated,

Plaintiff,

v.

RUSHMORE LOAN MANAGEMENT
SERVICES LLC,

Defendant.

Case No. 8:21-cv-00621-DOC-(KESx)

**ORDER GRANTING
PRELIMINARY APPROVAL [27]**

I. INTRODUCTION

Plaintiff Phitsamay Fernandez brought this putative class action suit against Defendant Rushmore Loan Management Services LLC (“Rushmore”) on behalf of a class of mortgagees, alleging that Rushmore charged borrowers convenience fees when they made mortgage payments over the phone (“Convenience Fees”). Plaintiff alleged that these fees violated the federal Fair Debt Collection Practices Act (“FDCPA”), state debt collection laws (for example, California’s Rosenthal Fair Debt Collection Practices Act), and California’s Unfair Competition Law

1 (“UCL”), and breached contracts with the borrowers. (See Second Am. Compl.,
2 [ECF No. 24.](#))

3 The parties reached a settlement on behalf of the class, and now seek
4 preliminary approval of the settlement. (Mot. for Prelim. Approval of Class Action
5 Settlement (“Motion” or “Mot.”), ECF No. ____.) For the reasons discussed below,
6 the Court **GRANTS** the Motion.

7 **II. BACKGROUND**

8 Plaintiff Fernandez filed this lawsuit on January 30, 2020, on behalf of
9 borrowers throughout the United States, including California, whose mortgage
10 loans are serviced by Rushmore. (Second Am. Compl., ¶¶ 1, 5, 72.) Plaintiff alleges
11 that Rushmore charged her and the members of the class she seeks to represent
12 Convenience Fees when they made mortgage payments over the phone (through a
13 live agent or interactive voice response (“IVR”)). (*Id.* at ¶¶ 1-3.) Plaintiff alleges
14 that Rushmore’s conduct breached the class members’ mortgage agreements and
15 violated the FDCPA, state debt collection laws, and UCL. (*Id.* at ¶¶ 83-112.)

16 On _____, 2021, the parties reached a settlement in this matter, and the
17 parties now seek preliminary approval of the settlement. (Mot., ECF No. ____).

18 **III. SETTLEMENT TERMS**

19 **A. Proposed Class**

20 The Settlement Agreement defines the proposed class as: All borrowers with
21 a mortgage loan serviced by Rushmore from whom Rushmore collected a
22 Convenience Fee during the period of January 1, 2013 through September 19, 2021.
23 (Settlement Agreement (“SA”) § 6.1.) Rushmore estimates that there are
24 approximately 122,000 loans in the class, on some of which there are multiple co-
25 borrower class members.

26 **B. Payment Terms**

27 In full settlement of the claims asserted in this lawsuit, Rushmore agrees to
28 pay \$1,645,840 (the “Settlement Fund”). (*Id.* § 3.2.) The Settlement Fund includes

1 all shares of class members who did not request exclusion (“Settlement Class
2 Members”), as well as the costs of notice and administration, any service award to
3 the class representative, and any award of attorneys’ fees and expenses. (*Id.*)

4 Every Settlement Class Member will automatically receive a share of the
5 Settlement Fund determined according to the proportional amount of Convenience
6 Fees charged to that Settlement Class Member by Rushmore within the class
7 period. (*Id.* § 5.3.) Payments to Settlement Class Members shall be made per loan,
8 such that the settlement payment on any loan with more than one Settlement Class
9 Member borrower shall be made payable jointly to all Settlement Class Member
10 borrowers on that loan. (*Id.* § 5.4.) Thus, for each loan for which more than one
11 borrower on that loan is a Settlement Class Member, the Settlement Administrator
12 shall make a single allocation to that loan payable to all co-borrower or joint
13 borrower Settlement Class Members on that loan. (*Id.*) Payments will be made by
14 check, or by certain digital payment methods at the election of Settlement Class
15 Members. (*Id.* § 5.8.)

16 If there is any amount in the Settlement Fund that remains following the
17 distribution of payment to Settlement Class Members, notice and administrative
18 costs, any service award to the class representative, and any award of attorneys’
19 fees and expenses, then upon approval by the Court, pursuant to the *cy pres*
20 doctrine, the remaining amount shall be paid to a 501(c)(3) charitable organization.
21 (*Id.*)

22 **C. Attorneys’ Fees and Costs**

23 The Settlement Agreement authorizes Plaintiff’s counsel to petition the Court
24 for approval of attorneys’ fees and costs in an amount not to exceed one third of the
25 Settlement Fund. (*Id.* § 8.1.)
26
27
28

1 **D. Incentive Payment**

2 The Settlement Agreement provides that Plaintiff’s counsel will petition the
3 Court for approval of an incentive award for Plaintiff in an amount not to exceed
4 \$5,000. (*Id.* § 8.2.)

5 **E. Releases**

6 The Settlement Agreement provides that all Class Members other than those
7 who opted out will release Rushmore (and its parents, subsidiaries, affiliates,
8 vendors, agents, successors, assignors, assignees, and/or assigns and their
9 respective subsidiaries, affiliates, vendors, agents, successors, assignors, assignees,
10 and/or assigns, and each of their respective present, former, or future officers,
11 directors, shareholders, employees, representatives, consultants, accountants, and
12 attorneys) from:

13 all actions, causes of action, claims, demands, obligations, or
14 liabilities of any and every kind that were or could have been asserted
15 in any form by Class Representative or Settlement Class Members,
16 including but not limited to, statutory or regulatory violations, state or
17 federal debt collection claims (including but not limited to violations
18 of the Fair Debt Collection Practices Act and the California Rosenthal
19 Act), unfair, abusive or deceptive act or practice claims, tort, contract,
20 or other common law claims, or violations of any other related or
21 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 Convenience Fees.

22 (*Id.* § 7.1.) Further, the Settlement Agreement provides that Settlement Class Members
23 waive and relinquish the rights and benefits of [California Civil Code section 1542](#) and
24 similar provisions that may be applicable to class members residing outside of California.

25 (*Id.* § 7.2.)

26 **F. Notice to Settlement Class**

27 The Settlement Agreement provides that within 10 days of entry of this
28 Order, Rushmore shall compile the Settlement Class List and provide that list to the

1 Settlement Administrator and Class Counsel. (*Id.* § 6.3.1) The Settlement
2 Administrator shall then update the entire Settlement Class List through the
3 National Change of Address (“NCOA”) database, or its equivalent, before sending
4 out Class Notice. (*Id.*) The Class Notice shall be sent by first class mail to Class
5 Members at their last known mailing address as updated by the NCOA. (*Id.* §
6 6.3.2.) The Settlement Administrator shall cause a skip trace to be run with respect
7 to any Class Notice returned as undeliverable, and shall resend the Class Notice
8 once in accordance with updated information, if any, obtained from the skip trace.
9 (*Id.*)

10 The proposed class notice was submitted with the Motion (the “Notice”). (*Id.*
11 Ex. A.) The Notice informs the Class Members that they do not need to take any
12 actions to receive their share of the settlement proceeds. (*Id.*) It also explains that
13 any Class Member who wishes to be excluded from the Settlement must submit a
14 written request for exclusion by first-class U.S. mail, postage paid, to the United
15 States Post Office box established and maintained by the Settlement Administrator
16 for the purposes of this Settlement. (*Id.*) Any request for exclusion from the
17 Settlement must be postmarked on or before the deadline, which shall be no less
18 than 60 calendar days after the Initial Mailing of the Class Notice. (*Id.*) That
19 deadline will be specified in the Notice. (*Id.*) Anyone submitting a request for
20 exclusion must set forth: (a) his or her full name and current address; (b) his or her
21 Rushmore loan number; and (c) his or her desire to be excluded from the
22 Settlement. (*Id.*) Per the Notice, any written request for exclusion submitted on
23 behalf of a Class Member will result in the exclusion of all co-borrowers or joint
24 borrowers on that same loan. (*Id.*) The Notice also informs class members how they
25 may object to the settlement. (*Id.*) Objecting Class Members who wish to appear at
26 the final approval hearing must first submit a written objection. (*Id.*)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 four 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).

Next, the proposed class must meet at least one of the requirements of Rule 23(b), specifically here, Rule 23(b)(3): (1) “questions of law or fact common to class members predominate over any questions affecting only individual members,” and (2) “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Where class certification is sought for settlement purposes only, the certification inquiry still “demand[s] undiluted, even heightened, attention.” *Amchem*, 521 U.S. at 620.

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). There are estimated to

1 be in excess of 122,000 potential class members, and joinder of these individuals
2 would be impracticable. Thus, this class is sufficiently numerous.

3 Next, the claims of the potential class members demonstrate common
4 questions of fact and law. *See Mazza v. Am. Honda Motor Co.*, [666 F.3d 581, 589](#)
5 (9th Cir. 2012) (“commonality only requires a single significant question of law or
6 fact.”). Plaintiff alleges that all potential class members were charged Convenience
7 Fees; that the policy of charging Convenience Fees for mortgage payments made
8 over the phone was uniform; that Rushmore’s conduct breached its contracts with
9 the potential class members and violated the FDCPA, state debt collection laws,
10 and UCL; and that the potential class members are entitled to actual and statutory
11 damages. (Second Am. Compl. ¶¶ 78-119.) At this juncture, no discernable
12 individualized issues appear to exist which might detract from the common
13 questions of fact and law. As such, the class meets this requirement.

14 Plaintiff also meets the typicality requirement. Typicality in this context
15 means that the representative claims are “reasonably co-extensive with those of the
16 absent class members; they need not be substantially identical.” *Hanlon v. Chrysler*
17 *Corp.*, [150 F.3d 1011, 1020](#) (9th Cir. 1998). Here, Plaintiff’s claims arise out of the
18 same circumstances as those of the other class members. Thus, Plaintiff shares
19 material common factual and legal issues with the other settlement class members
20 and satisfies typicality.

21 Finally, Plaintiff and her counsel satisfy the adequacy requirement for
22 representing absent class members. This requirement is met where the named
23 plaintiff and her counsel do not have conflicts of interest with other class members
24 and will vigorously prosecute the interests of the class. *Hanlon*, [150 F.3d at 1020](#).
25 Plaintiff and her counsel are aware of no potential conflicts. Counsel appears well-
26 qualified with class action litigation. In this action, counsel engaged in thorough
27 investigation, mediation, and negotiation on behalf of the class. These facts support
28

1 counsel’s adequacy and vigorous representation of the putative class. As such, the
2 proposed class and its representative satisfy the Rule 23(a) requirements.

3 **2. Rule 23(b)(3) Requirements**

4 Rule 23(b)(3) requires the Court to find that “the questions of law or fact
5 common to class members predominate over any questions affecting over
6 individual members, and that a class action is superior to other available methods
7 for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

8 Here, for the purposes of settlement, questions of law or fact common to the
9 potential class members predominate over individualized questions because the
10 issue at stake, described above, are common to the class. Further, a class action
11 appears to be a far superior method of adjudicating the class members’ claims. The
12 claim that Rushmore’s policy of charging Convenience Fees violated state and
13 federal law as to potential class members makes individual actions prone to
14 inefficiency. The cost of litigation for all potential class members to bring
15 individual actions would be inefficient, and the costs of litigation would dwarf any
16 recovery.

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

20 **B. Fairness of Settlement Terms**

21 The Court must also consider whether the proposed settlement warrants
22 preliminary approval. For preliminary approval, “the court evaluates the terms of
23 the settlement to determine whether they are within a range of possible judicial
24 approval.” *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 319 (C.D. Cal. 2016)
25 (internal quotation marks and alterations omitted). A court may preliminarily
26 approve a settlement and direct notice to the class “if the proposed settlement
27 appears to be the product of serious, informed, non-collusive negotiations, has no
28 obvious deficiencies, does not improperly grant preferential treatment to class

1 representatives or segments of the class, and falls within the range of possible
2 approval.” *In re Tableware Antitrust Litig.*, [484 F. Supp. 2d 1078, 1079](#) (N.D. Cal.
3 2007). “It is the settlement taken as a whole, rather than the individual component
4 parts, that must be examined for overall fairness.” *Hanlon*, [150 F.3d at 1026](#). “The
5 settlement must stand or fall in its entirety”: a court may not “delete, modify or
6 substitute” its provisions. *Id.*

7 The settlement negotiations appear fair and adequate and the proposed
8 settlement terms appear to come within the range of possible judicial approval.

9 ***1. Adequacy of Negotiations***

10 The Court is satisfied that the Settlement Agreement was the product of
11 “serious, informed, non-collusive negotiations.” *Spann*, [314 F.R.D. at 319](#). The
12 parties thoroughly investigated their claims and exchanged information. Plaintiff
13 asserts that the settlement negotiations were done at arm’s length and that Class
14 Counsel considered the exposure analysis of continuing to litigate her claims.
15 Under these circumstances, the Court accepts that the settlement negotiations were
16 adequate.

17 ***2. Settlement Terms***

18 After carefully reviewing the terms of the Settlement Agreement, the Court
19 finds that the settlement does not unfairly give preferential treatment to any party
20 and falls within the range of possible approval.

21 Assessing a settlement proposal requires the district court to balance a
22 number of factors: the strength of plaintiffs’ case; the risk, expense,
23 complexity, and likely duration of further litigation; the risk of
24 maintaining class action status throughout the trial; the amount
25 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.

26 *Hanlon*, [150 F.3d at 1026](#). “Ultimately, the district court’s determination is nothing
27 more than an amalgam of delicate balancing, gross approximations, and rough
28 justice.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, [221 F.R.D. 523, 525-26](#)

1 (C.D. Cal. 2004) (internal quotation marks omitted). “The initial decision to
2 approve or reject a settlement proposal is committed to the sound discretion of the
3 trial judge.” *Id.*

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

11 **3. Settlement Funds**

12 The Court notes no obvious deficiencies in the amount and allocations of
13 settlement funds.

14 *a. Incentive Award*

15 The Settlement Agreement provides that Plaintiff will petition the Court in
16 advance of Final Approval for an incentive award not to exceed \$5,000 for
17 Phitsamay Fernandez as Class Representative. (SA § 8.2.) “[D]istrict courts
18 [should] scrutinize carefully [incentive] awards so that they do not undermine the
19 adequacy of the class representative.” *Radcliffe v. Experian Info. Sols. Inc.*, [715](#)
20 [F.3d 1157](#). 1163 (9th Cir. 2013). In evaluating incentive awards, the court should
21 look to “the number of named plaintiffs receiving incentive payments, the
22 proportion of the payments relative to the settlement amount, and the size of each
23 payment.” *In re Online DVD-Rental Antitrust Litig.*, [779 F.3d 934, 947](#) (9th Cir.
24 2015) (quoting *Staton v. Boeing Co.*, [327 F.3d 938, 977](#) (9th Cir. 2003)).

25 Plaintiff submits that, as the lead plaintiff, she assisted counsel with
26 gathering evidence necessary to prosecute the class claims, maintained contact with
27 counsel, and reviewed the Settlement Agreement. The Court finds that while
28

1 preliminary approval is appropriate, final approval will depend on Plaintiff
2 providing sufficient information to support the requested incentive award.

3 *b. Attorneys' Fees and Costs*

4 The Settlement Agreement authorizes Class Counsel to seek attorneys' fees
5 of up to one third of the Settlement Fund. "While attorneys' fees and costs may be
6 awarded in a certified class action where so authorized by law or the parties'
7 agreement . . . courts have an independent obligation to ensure that the award, like
8 the settlement itself, is reasonable, even if the parties have already agreed to an
9 amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir.
10 2011). Twenty-five percent recovery is the benchmark for attorneys' fees, though
11 courts in the Ninth Circuit have found upward departures to fall within the
12 acceptable range. *See id.* at 942 (noting 25% benchmark); *Powers v. Eichen*, 229
13 F.3d 1249, 1256-57 (9th Cir. 2000) (upward departure acceptable when expressly
14 explained). Further, "[w]here a settlement produces a common fund for the benefit
15 of the entire class, courts have discretion to employ either the lodestar method or
16 the percentage-of-recovery method." *In re Bluetooth*, 654 F.3d at 942.

17 Counsel are experienced class action litigators and the fee request falls within
18 the range identified as potentially acceptable in the Ninth Circuit. Accordingly,
19 preliminary approval is appropriate, though final approval will depend on counsel
20 providing sufficient information to support the requested award.

21 *4. Release of Claims*

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

1 underlying the claims in the settled class action.”) (internal quotation marks
2 omitted).

3 The release here is narrowly tailored and limited to claims pled or that could
4 have been pled based on the facts alleged in the Complaint. Thus, while the release
5 is broad in that it releases claims both known and unknown, the released claims are
6 appropriately limited to the factual predicate of this action.

7 **C. Sufficiency of Notice**

8 To find notice to absent class members sufficient, the Court must analyze
9 both the type and content of the notice. Here, the Court finds that the proposed
10 Notice is sufficient.

11 ***1. Type of Notice***

12 “[T]he court must direct to class members the best notice that is practicable
13 under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B). For class action settlements,
14 “[t]he court must direct notice in a reasonable manner to all class members who
15 would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1)(B). The parties agree
16 that the Settlement Administrator will distribute notice to all potential class
17 members. (SA § 6.3) The contact information for potential class members is
18 available through Rushmore’s records, and the Settlement Administrator will send
19 notice via U.S. Mail. (*Id.* § 6.3.2.) Prior to mailing the Notice, the Settlement
20 Administrator will use the NCOA to verify the accuracy of the addresses. (*Id.*) The
21 Settlement Administrator shall cause a skip trace to be run with respect to any Class
22 Notice returned as undeliverable, and shall resend the Class Notice once in
23 accordance with updated information, if any, obtained from the skip trace. (*Id.*) The
24 Class Members will have sixty days from the date the Administrator mails the
25 Notice to request exclusion or object to the Settlement Agreement. (*Id.* §§ 12.1,
26 13.1.)

27 The Court finds the procedures for notice sufficient and the most practicable
28 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 class 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 the Notice contains all the information required under the Federal Rules. The Notice includes the basics of the case, the class definition, and the class action’s claims. (Notice at 1.) The Notice further explains the procedure for opting out and objecting to the settlement. (*Id.* at 3.) The Notice indicates that to participate and receive an award, a class member need not do anything. (*Id.* at 1.) Further, the Notice provides that remaining a member of the class and receiving a payment will result in the class member giving up his/her claims and being bound by the Settlement Agreement. (*Id.* at 1-2, 4.)

V. CONCLUSION

The Court **GRANTS** the Motion for Preliminary Approval of Class Action Settlement. The final approval hearing shall be held on _____ at _____ at the Ronald Reagan Federal Building and United States Courthouse 411 West Fourth Street, Courtroom 9 D, Santa Ana, CA, 92701-4516.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: October 28, 2021



DAVID O. CARTER
UNITED STATES DISTRICT JUDGE