IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK BUTTERLINE, et al	:	CIVIL ACTION
	:	
v.	:	No. 15-1429
	:	
THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, et al	:	

ORDER

AND NOW, this 7th day of September, 2022, upon consideration of the Parties' Joint Motion for Approval of Settlement, it is ORDERED that the motion is GRANTED.[1] In so holding, the Court finds that the requirements for class certification have been met and the proposed settlement is fair, reasonable, and adequate.

It is further ORDERED the Parties' Joint Motion for Attorneys' Fees, Expenses, and Service Awards is also GRANTED.[2]

BY THE COURT:

/s/ Juan R. Sánchez
Juan R. Sánchez, C.J.

[1] Federal Rule of Civil Procedure 23 governs class actions in federal court. The prerequisites to class certification are set forth in Rule 23(b) as follows:

> (1) numerosity (a "class [so large] that joinder of all members is impracticable");
> (2) commonality ("questions of law or fact common to the class");
> (3) typicality (named parties' claims "are typical . . . of the class"); and
> (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

Fed. R. Civ. P. 23(a).

In addition to the requirements under Rule 23(a), the class must satisfy the requirements of Rule 23(b)(1), (2), or (3). Under Rule 23(b)(3), the provision at issue in this case, (1) common questions must "predominate over any questions affecting only individual members" and (2) class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Finally, the class must be sufficiently definite and ascertainable. Fed. R. Civ. P. 23(c)(1)(B).

The parties agree that all four elements of Rule 23(a) are satisfied. Discovery revealed there are approximately 100 Class Members, thereby satisfying the numerosity requirement. It would be impractical to join all Members, many of whom are unaware of their claims. Each of these Members were subject to the same harm caused by the same uniform conduct by Defendant, and thus commonality is met as well. Plaintiff Butterline's claim is typical of those of the class, and both class counsel and plaintiff adequately represent the class's interests.

This putative class also satisfies both the predomination and superiority prongs of Rule 23(b)(3). Each Member's claim is founded on the same issue of law and fact: "whether or not Class Members are owed the excess proceeds of their Sheriff Sales." A class action is the superior method of adjudicating this dispute, especially as it is resulting in settlement, for reasons of judicial efficiency and fairness. Lastly, 23(c)(1)(B) is satisfied, as the class is defined with precise and objective criteria. Further, discovery has already produced the 100 properties that fall into the class, making it completely defined.

In addition to satisfying the requirements for certification under Rule 23, "a class action cannot be settled without . . . a determination that the proposed settlement is fair, reasonable and adequate." *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 349 (3d Cir. 2010); *see also* Fed. R. Civ. P. 23(e)(2). In assessing fairness, the Court must consider the nine factors identified in *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). These factors are:

> (1) The complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id. These factors weigh in favor of approval. The complexity, expense and duration of the litigation are all significant and if the case were to continue, the parties would incur substantial additional costs. Second, there have been no objections or opt-outs. The claims rate as of August 29 was 30%, which, according to the parties, exceeds the average. The third factor supports settlement because the parties did engage in written discovery and deposition of witnesses. Settlement only occurred after almost seven years of adversarial litigation, including investigation and dispositive motions practice. By the time of the proposed settlement, the parties clearly had a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and defenses. The fourth and fifth factors go to the risks of establishing liability and damages. The denial of dispositive motions suggests that liability is a real possibility, but not guaranteed. The *Girsh* factor on individual damages calculations does not necessarily weigh in favor of approval, as the proposed settlement will pay out Actual Damages if possible. The sixth factor also supports approval because no class has yet been certified, and because of the potential for appeal. The seventh factor, the ability of Defendant to withstand a greater judgment, is neutral, because while Defendants could likely afford to pay a greater amount, the judgment should be considered in connection with the uncertainty of establishing liability. The eighth and ninth categories involve weighing the reasonableness of the settlement in light of the best possible recovery and the attendant risks. While the total Settlement Fund is not particularly

large when considered in context with other class action settlements, it represents 100% of Members' damages. Counsel claims this factor strongly supports final approval. The beliefs of experienced counsel as to the fairness of settlements should be granted significant weight. *In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001).

[2] "[A] thorough judicial review of fee applications is required in all class action settlements." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 333 (3d Cir. 1998) (citation omitted). In common fund cases, the percentage of recovery method is appropriate. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("[W]e reiterate that the percentage of common fund approach is the proper method of awarding attorneys' fees.").

Several factors should be considered in assessing a fee award in a common fund case:

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000). "These factors listed above need not be applied in a formulaic way. Each case is different, and in certain cases, one factor may outweigh the rest." *Id.*

The common fund in this case is $576,500, which will be distributed to about 100 Class Members. There have been no objections to the settlement terms by Members. Plaintiff's counsel has established their skill and efficiency in this area, as demonstrated by the higher-than-average claims rate to date. The risk of non-payment was significant because this action was prosecuted on an entirely contingent basis. The contingency risk weighs heavily in favor of the 30% fee, which is "fairly standard." *In re Rite Aid*, 396 F.3d at 303. The litigation was extremely drawn out, lasting about seven years. While this is a relatively small Settlement Fund, counsel represents that each Member will be paid out entirely for their losses. Each of the *Gunter* factors is satisfied, meaning that the request for attorneys' fees is reasonable under the percentage of recovery method.

The Third Circuit has also recommended cross checking the fee using the "lodestar method." *In re AT&T Corp.*, 455 F.3d 160, 169 (3d Cir. 2006). The number of hours spent on this case is reasonable, and courts have approved similar rates in the past. *See Fulton-Green v. Accolade, Inc.*, No. 18-cv-274, 2019 WL 4677954, at * 12 (E.D. Pa. Sept. 23, 2019) (approving a rate of $975 per hour). Based on counsel's declarations, the hourly rates times the number of hours worked results in a total lodestar of $2,050,001.69. Counsel is requesting $285,000 in fees and expenses, resulting in a lodestar multiplier of 0.14. As this is only a fraction of their billing totals, the lodestar cross-check indicates that their request for fees is reasonable.

Finally, the request for an incentive fee of $2,500 for Plaintiff Mark Butterline is also reasonable. Incentive or service awards are typically used to "'compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation, and to 'reward the public service of contributing to the enforcement of mandatory laws.'" *Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 334 n.65 (3d Cir. 2011) (quoting *Bredbenner v. Liberty Travel, Inc.*, No. 09-cv-905, 2011 WL 1344745, at *22 (D.N.J. Apr. 8, 2011)). Service awards have ranged from $2,000 to $10,000 in this Circuit.