2.4 Memorandum in Support of Certifying Class, Approving Settlement, Providing Notice to Class

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

SUZANNE M. REED AND DONALD D. REED, suing individually, on behalf of the general public and on behalf of all others similarly situated,

Plaintiffs,

[vs.]

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION;

Defendants.

CASE NO.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN ORDER CERTIFYING A CLASS, PRELIMINARILY APPROVING SETTLEMENT AGREEMENT, PROVIDING NOTICE TO THE CLASS AND SCHEDULING THE

FINAL APPROVAL HEARING

CLASS ACTION

I. INTRODUCTION

After extensive discovery and negotiations, the parties to this consumer class action have reached a settlement of the case providing for the establishment of a $9.05 million common fund and the entry of a permanent injunction. As in any class action, the settlement agreement is subject initially to preliminary approval and then to final approval by the Court after notice to the class and a hearing. As explained below, the settlement negotiated by the parties is fair, reasonable, provides substantial benefits to the class and should be preliminarily approved by the Court in all respects. The parties also

request that the Court certify a class pursuant to the Settlement Agreement, order notice to the class and schedule a further hearing to decide whether the settlement should be finally approved.

II. STATEMENT OF THE CASE

This case involves a challenge to the practices of the Bank of America National Trust & Savings Association ("the Bank") in "force placing" and charging customers for collateral protection insurance ("CPI"). The complaint in this action was filed on May 28, 1992. It states causes of action for violations of Business and Professions Code §17200 and §17500, for breach of contract, for violations of the Consumers Legal Remedies Act, for declaratory relief and for unjust enrichment damages.

The class described in the complaint and stipulated to by the Bank consists of certain automobile loan customers of the Bank. The terms of the loan agreements signed by these customers allowed the Bank to purchase and charge customers for comprehensive and collision insurance in the event the customers failed to purchase or maintain such insurance. The complaint alleges that the Bank acted unfairly, unlawfully, and in violation of the loan agreements in force placing and charging customers premiums for what is known as collateral protection insurance ("CPI"). More specifically, plaintiffs contend that the Bank charged class members for insurance coverages which they were not obligated to pay for, charged them amounts as insurance premiums which were actually paid to the Bank by insurance carriers, and improperly assessed class members finance charges on the additional insurance coverages and payments to the Bank.

Throughout the case, the Bank has vigorously resisted all the plaintiffs' claims and has denied any wrongdoing or liability. The Bank contends that it lawfully purchased and charged class members for CPI, that any payments made to the Bank were lawfully and appropriately paid, that the Bank properly assessed class members finance charges on CPI premiums and that class members are legally obligated to pay all amounts assessed.

As the files and records in this case demonstrate, this case has been diligently and aggressively litigated since its inception. The factual record has been developed through extensive discovery and investigation. Plaintiffs have obtained, reviewed and analyzed thousands of pages of documents, conducted depositions of the Bank and its insurance carrier, and initiated and participated in substantial written discovery. Depositions were also taken of the individually named plaintiffs. As a result, the parties entered settlement negotiations with sufficient information to evaluate the merits of the case, the relative strengths and weaknesses of their positions, and the risks of continued litigation.

The parties' efforts to negotiate settlement began in June 1993 and were finalized in September. They included the exchange of additional information beyond that provided through formal discovery. A settlement in the case was eventually achieved as a result of settlement conferences conducted by the Honorable Thomas M. Jenkins (a retired judge of the Santa Clara Superior Court) and direct negotiations between the parties. These negotiations have resulted in a settlement agreement which plaintiffs believe is fair, reasonable and in the best interests of the class. It is the product of hard bargaining and compromises by both sides. The magnitude of the $9.05 million common fund and the scope of the permanent injunction alone demonstrate that the settlement will produce substantial benefits and that it constitutes a significant accomplishment for the class.

III. THE TERMS OF THE SETTLEMENT

In order to resolve the claims of the class to the extent provided in the settlement agreement, the Bank has agreed to the certification of a class for purpose of settlement. The class is defined as

> all California persons who purchased vehicles financed by the Bank and who paid or were charged any amount of insurance premiums or finance charges as a result of CPI placed between May 28, 1987 and June 30, 1993 under Participation Agreements between the Bank and Progressive, and whose policies have not been

> fully cancelled and who do not make a timely request for exclusion, but excluding the Representative Plaintiffs.

See Settlement Agreement, attached as Exhibit A to the Declaration of Mark A. Chavez filed herewith, at §1.15 [not reprinted *infra*].

As set forth in detail in the papers filed with this Court on June 3, 1993 in support of Plaintiffs' Motion For Class Certification, the class described above has a well-defined community of interests in that there are common questions of law and fact among its members, class representatives with claims typical of the class, and class representatives who adequately represent the class.

A proposed order certifying a settlement class and appointing the law firm of Farrow, Bramson, Chavez & Baskin as class counsel is attached to the settlement agreement as Exhibit A and also filed separately herewith [not reprinted *infra*]. The parties request that this order be entered at the hearing on this motion.

Under the settlement agreement, the Bank will establish a common fund for the class in the amount of $9.05 million. The common fund will consist of $3.313 million in cash and $5.737 million in credits against payments owed by class members. Interest will accrue at the rate of 2.57% on the cash portion of the common fund. The Bank has also agreed to reimburse the two Representative Plaintiffs in the total amount of $5,300 of the sums they paid to the Bank.

The payments to class members will be credited and distributed in accordance with the formulas set forth in section 3 of the settlement agreement. After attorneys' fees and costs, in an amount to be approved by the Court, are awarded, the remainder of the cash portion of the common fund will be distributed to class members who have fully paid the amounts assessed for CPI as of the end of October 1993. If a check is returned, the Bank will take steps to locate a new address for the class member and re-send the check. The credit payments to class members who still owe amounts for CPI as of the end of October will be applied to their outstanding loan balances as if they were

payments made in cash by class members on the distribution date. If, due to payments received by the Bank after October 1993, the balance on the class member's account is too low to absorb the entire credit allocable to such account, a check in the amount of the remaining amount of credit will be mailed to the last known address for such account. The Bank has also agreed that, after applying the credits to class members accounts, it will inform credit reporting agencies of the lowered balance on outstanding accounts.

Both cash and credit payments will be made automatically, without the need for any claims forms to be submitted by class members.

As a further benefit to the class, the Bank will pay all costs of class notice separate and apart from the common fund. These amounts and the costs of settlement administration will be paid directly by the Bank. Any cash left from shares of class members who cannot be located will be used first to reimburse the Bank for efforts to locate class members whose checks have been returned (up to $1.50 per address search) and for corrections of credit reports (up to $1.50 per correction), with the residue to be donated to the San Francisco Legal Services Foundation.

In addition to the monetary benefits to the class, the Bank has agreed to the entry of a permanent injunction, to be in effect for two years following final approval of the settlement. A copy of the injunction agreed to is attached as Exhibit B to the Settlement Agreement [not reprinted *infra*]. The injunction to be entered will enjoin and refrain the Bank from: (a) charging its customers for any CPI on automobiles with any repossession expense, repossession storage, mechanics liens, towing expense, repossessed collateral, conversion, waiver of actual cash value, worldwide, or zero deductible coverages; (b) force placing and charging its customers for any CPI on automobiles with a method of calculating earned premiums upon cancellation other than pro rata;[1] (c) accepting any form of insurance tracking service paid for through amounts billed to borrowers as

---

1 This term of the injunction is conditioned upon the Bank's CPI insurance carrier receiving the requested approval from the California Department of Insurance.

"insurance premiums"; (d) accepting any form of commission, contingent commission, expense reimbursement, retro transfer, fee, credit or any other form of payment from an insurance company for the placement of CPI on automobiles; (e) charging customers interest calculated based upon an amount or date different from the amount or the date premium charges for the required insurance are actually paid to an insurance carrier; and (f) failing to report to credit reporting agencies reductions in outstanding loan balances due to any credits provided by the Bank pursuant to the Settlement Agreement.

A proposed form of order preliminarily approving the terms of the settlement is attached as Exhibit C to the Settlement Agreement and also filed separately herewith [not reprinted *infra*]. The parties request that this order be entered at the hearing on this motion.

The settlement agreement provides for notice to the class through first class mailing of the notices attached as Exhibit D to the settlement agreement ("Class Notice"), and publication of the summary notice attached as Exhibit F to the Settlement Agreement ("Summary Notice") [not reprinted *infra*]. The language of the Class Notice and the Summary Notice have been negotiated and agreed to by the parties. The notices will inform class members of the terms of the settlement and advise them of their rights to be excluded from the class and to object to the terms of the settlement at the final approval hearing. The parties request that the Court approve the proposed forms of notice.

IV. THE SETTLEMENT AGREEMENT SHOULD BE PRELIMINARILY APPROVED AS FAIR, REASONABLE AND ADEQUATE

Judicial approval of class action settlements requires a two-step process. In the first step, the court makes a preliminary determination as to whether the settlement falls "within the range of possible approval". Alaniz v. California Processors, Inc. (N.D.Cal. 1976) 73 F.R.D. 269, 273; H. Newberg, Newberg on Class Actions (3d.ed. 1993) §11.25. As one court has observed, "[t]his determination is similar to a determination that there is 'probable cause' to think the settlement is fair and reasonable." Alaniz, 73 F.R.D. at 273.

Once the settlement is found to be "within the range of possible approval," (ibid.) a final approval hearing is scheduled and notice is provided to the class.

The second step involves a final determination, following a hearing at which pertinent evidence and any objections by class members may be considered, that the settlement is fair, reasonable and adequate from the standpoint of the class. Newberg on Class Actions, §11.41. The courts generally favor settlements of class actions. "There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval." Id. at §11.41 at p.11-88. In determining whether class action settlements should be approved

> Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. [citation omitted] . . . They do not decide the merits of the case or resolve unsettled legal questions.

Carson v. American Brands, Inc. (1981) 450 U.S. 79, 88 n.14.

In order to begin the approval process, plaintiffs move for orders certifying the class, and preliminarily approving the settlement agreement, providing notice to the class, and scheduling the final approval hearing. In view of the record before the Court, plaintiffs respectfully submit that this motion should be granted. The settlement is well-within "the range of possible approval" and should be preliminarily approved in all respects.

The settlement was negotiated at arm's length by knowledgeable class counsel with the assistance of Judge Jenkins, an independent mediator. The settlement will produce substantial benefits for the class. The value of these benefits is enhanced by the fact that they will be provided to class members now, without the delay, burden and risks of further litigation. The settlement agreement is fully supported and recommended by Judge Jenkins (Declaration of Thomas M. Jenkins, filed herewith) and by plaintiffs' counsel. At the final approval hearing, plaintiffs will apply for any award of attorneys'

fees and costs in the amount of 15% of the common fund. In recent years, the courts have widely-recognized that in common fund settlements of class actions, the award of attorneys' fees and costs should be a percentage of the common fund. See, e.g., Blum v. Stenson (1984) 465 U.S. 886, 900 n.16; Camden I Condominium Ass'n v. Dunkle (11th Cir. 1991) 946 F.2d 768; Paul, Johnson, Alston & Hunt v. Graulty (9th Cir. 1989) 886 F.2d 268; In Re Activision Securities Litigation (N.D. Cal. 1989) 723 F.Supp. 1373. The percentage of the fund awarded generally ranges between 20% and 30%. In Re Activision Securities Litigation, supra, 723 F.Supp. at 1377. The Ninth Circuit has established 25% of the fund as the "bench mark" award that should be given in common fund cases. Paul, Johnson, Alston & Hunt, supra, 886 F.2d at 272. Similarly, the Eleventh Circuit has adopted the 25% bench mark. Camden I Condominium Ass'n, supra, 946 F.2d at 377.

The 15% award requested by plaintiffs is significantly below the range generally awarded. It also amounts to less than half of the fees plaintiffs' counsel would recover under a standard contingency fee arrangement. In view of the result achieved in this case and the substantial risks assumed by plaintiffs' counsel, the 15% award is reasonable and appropriate.

V. CONCLUSION

For the foregoing reasons, the Court should grant plaintiffs' motion for orders certifying a class for settlement, and preliminarily approving the settlement agreement, providing notice to the class and scheduling the final approval hearing.

Respectfully submitted,

Attorneys for Plaintiff

Dated: