IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

QUAN-EN YANG, et al.	:	
	:	
Plaintiffs,	:	
	:	Case No. 403885-V
v.	:	
	:	
G&C GULF INC., et al.	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

On January 4, 2018, the court held a fairness hearing on the parties' joint motion to certify a bilateral settlement class action and to approve a partial settlement of over 16,000 claims. For the reasons discussed below, the objections are overruled, the settlement is approved, and the petitions for legal fees, expenses and awards to class representatives are granted. Separate orders implementing this decision will be entered.

Procedural History

This case was initiated on April 16, 2015. In the original complaint, named plaintiff Quan-En Yan sued G & C Gulf, Inc. (d/b/a/ G&G Towing("G&G")), and Glenn W. Cade, Jr. (the owner of the towing company) alleging that their vehicle towing tactics violated Maryland law regulating the towing of vehicles from private parking lots. Among other things, the plaintiff alleged that G&G engaged in sweep or "trespass" towing, done without specific authorization of the land owner prior to each tow. The complaint also alleged that G&G improperly asserted a possessory lien on the towed vehicles, essentially holding them for ransom unless and until the owner paid all towing and storage fees as a precondition to the vehicle's release.

After the court denied the defendants' motion to dismiss, the parties engaged in extensive discovery. In December 2015, the court was notified that the parties had reached a settlement, with the assistance of Judge Irma S. Raker, retired judge of the Court of Appeals. The parties' settlement is memorialized in an Agreement dated December 30, 2015. On January 4, 2016, the court severed the plaintiff's claims against Cade from those against G&G. On January 7, 2016, the court granted the plaintiff's motion for preliminary approval of the parties' settlement, and set a hearing on final approval for May 3, 2016.

After the hearing on May 3, 2016, the court approved the parties' agreement under Md. Rule 2-231(h), and certified a plaintiffs' class under Md. Rule 2-231(b)(1) and (b)(3).[1] No persons within the class opted-out or objected to the proposed settlement. The class certified by the court on May 3, 2016, consisted of all persons whose vehicles were non-consensually towed by G&G from a private parking lot. The class period was defined to be from April 16, 2012 through January 7, 2016. The class encompassed all persons, excluding former and present officers and agents of the defendants, whose vehicles were involved in 24,023 tows during the class period. An order for judgment under Md. Rule 2-231(i) was entered by the court on May 5, 2016, which, among other things, defined the class and approved the parties' settlement.

Co-extensive with the settlement with G&G, the plaintiffs took aim against the owners of the parking lots from which the vehicles had been towed. A second amended class complaint was filed on April 4, 2016, which named Bruce Patner, t/a Patner Properties, as an additional defendant. That complaint alleged that Patner was the owner

[1] Also on May 3, 2016, the court granted summary judgment for Cade, in his individual capacity. The court certified that judgment as final, under Md. Rule 2-602(b), on July 1, 2016.

of several parking lots located in Montgomery County and that in 1991, he had entered into a written agreement with G&G, which authorized G&G to tow cars from Patner's lots. The complaint also sought the establishment of a defendants' class, consisting of over 500 parking lot owners which, like Patner, entered into towing contracts with G&G, authorizing G&G to patrol their parking lots and "trespass tow" vehicles, basically at will. Patner was served with the class complaint on May 4, 2016, and Patner filed an answer on June 1, 2016.

The court held a status hearing on June 13, 2016. Patner (who is a licensed attorney) appeared at this conference, representing himself. A Scheduling Order for discovery regarding a defendant class was entered on June 17, 2016. On July 1, 2016, outside counsel entered an appearance for Patner.

On July 5, 2016, Patner moved to dismiss the amended class complaint for failure to state a claim. His argument was based on the fact that the car of the sole named plaintiff at that time, Yang, was not towed from a lot owned by Patner. That motion was mooted when, on July 28, 2016, the plaintiff filed a Fourth Amended Class Complaint,[2] accompanied by a motion to add two additional named plaintiffs, Mary Lois Pelz and Darcy Pelz-Butler. According to the motion and the new complaint, the additional named plaintiffs suffered cognizable harm when, on March 29, 2014, their car was towed by G&G from a parking lot in Silver Spring owned by Patner.

On August 9, 2016, Patner moved to strike the Fourth Amended Complaint, contending that the addition of two named plaintiffs was untimely. The plaintiffs responded to this motion on August 26, 2016. On August 12, 2016, the plaintiff moved

[2] Md. Rule. 2-341(a). The Fourth Amended Complaint superseded all prior pleadings. *Priddy v. Jones*, 81 Md. App. 164, 169 (1989), *cert. denied*, 319 Md. 72 (1990).

for the certification of a defendants' class. Patner filed his opposition to the class certification motion on September 16, 2016.

By ordered entered on September 6, 2016, the court denied Patner's motion to strike the Fourth Amended Complaint and granted the plaintiffs' motion to add two additional named class plaintiffs. By order entered on October 19, 2016, the court denied Patner's motion to dismiss.

By memorandum and order entered on November 18, 2016, the court granted the plaintiffs' motion and certified a defendants' litigation class. Counsel were directed to submit a proposed implementing order.[3]

On January 20, 2017, the defendant class, acting through Patner, filed a petition for writ of mandamus with the Court of Appeals, asking the Court to immediately decertify the defendant class. The writ was denied by the Court of Appeals on March 24, 2017. After several hearings, the court directed that notice for the litigation class be provided to the members of the putative defendant class.

Thereafter, counsel asked the court to stay the sending of notice and to begin mediation with Judge James R. Eyler, a retired judge of the Court of Special Appeals. The court stayed the sending of notice to the litigation class to allow the parties to mediate with Judge Eyler. On August 18, 2017, with the assistance of Judge Eyler, the parties reached a proposed settlement and signed a binding term sheet. Thereafter, the parties fought over nearly every word of the formal settlement agreement. Again, with

[3] The defendant litigation class certified by the court in November 2016, was a non-opt out class. "The court's decision was in accord with a general preference for certifying defendant classes under 23(b)(1) or (b)(2) rather than (b)(3) to promote judicial efficiency and prevent the class action device from becoming ineffective as a result of numerous opt-outs by individual defendants." *In re Integra Realty Resources, Inc.*, 354 F.3d 1246, 1266 (10th Cir. 2004). The due process rights of absent defendants were protected by allowing any defendant who wished to do so to intervene as of right and present their defenses.

the assistance of Judge Eyler, the formal settlement agreement was finally signed on October 9, 2017. The court gave preliminary approval to this proposed settlement on November 11, 2017, and authorized the sending of notice of the proposed settlement to the plaintiff class and to the defendant class.

The original lawsuit filed by the plaintiff class contends that co-defendant G&G conducted nearly 20,000 "trespass" tows in Montgomery County between April 16, 2012 and June 23, 2017. It also alleges that G&G's acts are attributable to the more than 500 "parking lot owners" which had contracts to tow with G&G. Under Montgomery County law, property owners are jointly and severally liable with the towing company, and treble damages are available if there is a violation of the ordinance.

The agreement, mediated by Judge Eyler, proposed a bilateral settlement, and resolved nearly 75% of all tows at issue in the lawsuit. It covered the period April 26, 2013 through June 23, 2017, the latter date being the date that G&G ceased operations. Tows for the period April 16, 2012 through April 25, 2013, were expressly excluded from the settlement, as Patner believed that they were beyond the three-year period of limitations and, therefore, not compensable as a matter of law.[4]

The settlement provides monetary relief for the class in the form of a payment by the settling defendants of $390 per tow into a common fund for tows conducted during the class period. By way of reference, the plaintiff class members paid, on average between $168 and $178 to redeem their vehicles from G&G. Given the non-discretionary treble damage provision of the Montgomery County Code,[5] absent defendant class

[4] The court has not yet ruled on the statute of limitations question, although it will surely be raised, and decided, at some point during the course of the litigation.

[5] § 30C-10(e).

members could be liable for between $504 and $534 per tow in damages if the case were litigated to judgment. The settlement amount is slightly more than two-thirds of the total damages that, on average, absent defendant class members could otherwise be required to pay after a trial.

Administrative costs are to be paid out of the common fund. Plaintiff's counsel may seek an award of attorney's fees of one-third of the amount actually paid into common fund, plus reimbursement of actual litigation expenses. Any fee award to plaintiffs' class counsel will not impose any additional cost on any settling defendant.[6]

The settlement agreement also calls for each defendant class members to be assessed a proportionate share of defendant class counsel's attorney's fees and expenses.[7] The settlement agreement contemplated the certification of a plaintiff class and a defendant class under Md. Rule 2-231(a) and (b)(3). Upon final approval, each settling defendant will receive a full release.

Judicial Review of Class Action Settlements

Md. Rule 2-231(h) provides: "A class action shall not be dismissed or compromised without the approval of the court." Md. Rule 2-231(h) also provides: "Notice of a proposed dismissal or compromise shall be given to all members of the class

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[6] There is a "clear sailing" provision, to which the court will devote appropriate scrutiny. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 637 (7th Cir. 2014). Notably, this case presents none of the classic "warning signs" ordinarily present in a collusive (or abusive) class settlement. The common fund is real, there are no "claims made" or "reverter" provisions, and legal fees are not paid "outside" of the common fund. *See In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

[7] Additionally, each defendant class member is to be assessed a proportionate share of the defendant's class representative fee of $54,000 (or, $2.80 per tow). As discussed below, this amounts to total defense legal fees and costs of $25 per tow. It is hard to imaging defending against a claim of this nature, even in the District Court of Maryland, for that amount.

in the manner the court directs.[8] Md. Rules 2-231(e) & (f) also require the circuit court to notify class members of their legal rights, litigation options and ability to object to any proposed settlement.[9]

Before approving a class action settlement, the court must first determine whether the requirements of Md. Rule 2-231(a) and (b) are met.[10] If so, the court then must "independently and objectively analyze the evidence and circumstances before it" in order to determine whether the proponents have demonstrated the proposed settlement to be "fair, reasonable and adequate."[11]

In considering whether to approve a class settlement on fairness grounds, the trial court must address two general baskets of issues. First, whether adequate notice of the proposed settlement was afforded to absent class members.[12] Second, whether the proposed settlement, procedurally and substantively, is fair, reasonable and adequate.[13]

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[8] Maryland Rule R 2-131(h) is derived, at least in part, from Fed. R. Civ. P. 23(e). *See Amdur v. Lizars*, 372 F.2d 103, 108 (4th Cir. 1967); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) ("the Rule 23(e) inquiry "protects unnamed class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by compromise.").

[9] As the district court observed in the Rule 23(e) context: "The content of the notice must sufficiently inform class members of the terms of the proposed settlements and their available options." *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 478 (D. Md. 2014)(footnote omitted).

[10] *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 619-20 (1997); *In re Pet Food Products Liability Litig.*, 629 F.3d 333, 341-42 (3d Cir. 2010).

[11] *In re General Motors Corp. Pick-up Truck Fuel Tanks Prods. Liability Litig.*, 55 F.3d 768, 785 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995).

[12] The type of notice required is the "best practicable under the circumstances." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 172-77 (1974).

[13] *Shenker v. Polage*, 226 Md. App. 670, 683-84 (2016). The federal courts have applied a variety of multi-factor tests under Fed. Rule 23(e). *See, e.g., Churchill Village L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th Cir. 20040(eight-factor test); *In re Integra Realty Resources*, 354 F.3d 1246, (10th Cir. 2004)(four-factor test); *In re Jiffy Lube Securities Litig.*, 927 F.2d 155, 159 (4th Cir. 1991)(four factor test); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)(nine factor

Procedural fairness looks at the process by which the settlement was reached.[14] Substantive fairness, in this context, does not require the trial court "to try the case or decide issues on the merits."[15] Instead, the court must discern whether the totality of the relevant circumstances militates in favor of, or against, approval.[16]

Although the proponents of a class settlement bear the burden of proving that it is fair, reasonable and adequate, "objectors bear the burden of proving any assertions they raise challenging the reasonableness of the class settlement."[17] In the end, however, the court cannot approve the settlement unless it is persuaded that it is both procedurally and substantively fair. The court has a "judicial duty to protect members of a class in a class action from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of the class."[18]

The Settlement Classes Satisfy Md. Rule 2-231(a) and (b)

In Maryland, "a class action is a procedural device, created by the judiciary's

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test); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)(nine-factor test). As the First Circuit has observed, federal case law decided under Rule 23 offers "laundry lists" of factors pertaining fairness and reasonableness. *Bezdek v. Vibram USA, Inc.* 809 F.3d 78, 82 (1st Cir. 2015).

[14] Among the factors to be considered in this regard are the presence or absence of collusion among the parties, the posture of the case at the time of settlement, the extent to which discovery has been conducted, the circumstances surrounding the negotiations, and the experience of counsel. *Shenker v. Polage,* 226 Md. App. at 687.

[15] *Shenker v. Polage*, 226 Md. App. at 684-85; *see In re Philadelphia Stock Exchange*, 945 A.2d 1123, 1137 (Del. 2008).

[16] *In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 455-56 (S.D.N.Y. 2004).

[17] *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 216 (E.D. Pa. 2014).

[18] *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002); s*ee Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998); *Linder v. Litton Systems, Inc.*, 81 F.R.D. 14, 19 (D. Md. 1978).

adoption of a court rule to facilitate management of multiple similar claims."[19] As a consequence, whether to certify a class is largely a discretionary call for the circuit court.[20]

In deciding whether to certify any class, even a settlement class, the court considers the merits of the controversy separately from the requirements of Md. Rule 2-231.[21] The court accepts as true the well pleaded allegations in the complaint and the answer, but may look beyond the pleadings to determine whether class certification is or is not appropriate.[22] The court then examines the nature of the claims, defenses, relevant facts developed during class discovery and the substantive law.[23]

As Judge Niemeyer noted for the Fourth Circuit:

> We must not lose sight of the fact that when a district court considers whether to certify a class action, it performs the public function of determining whether the representative parties should be allowed to prosecute the claims of the absent class members. Were the court to defer to representative parties on this responsibility by merely accepting their assertions, the court would be defaulting on the important responsibility conferred on the courts by Rule 23 of carefully determining the class action issues and supervising the conduct of any class action certified.[24]

The standard of proof of the requisites for a class action is a preponderance of the

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[19] *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 188 (2007).

[20] *Marshall v. Safeway, Inc.*, 437 Md. 542, 562-65 (2014).

[21] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. at 177; *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662, 665 (M.D. Fla. 1996).

[22] *Creveling v. GEICO*, 376 Md. 72, 88-89 (2003).

[23] *Philip Morris v. Angeletti*, 358 Md. 689, 727 (2000); *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996).

[24] *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366-70 (4th Cir. 2004).

evidence.[25] The party seeking class certification bears the burden of proof and must satisfy the court as to all four threshold factors of Md. Rule 2-231(a).[26] The proponent also must show that a putative class meets the requirements of one of the sub-categories of Md. Rule 2-231(b).[27]

Numerosity

Under Md. Rule 2-231(a)(1) the question to be answered is whether the class is so numerous as to make joinder of all putative class members impracticable under the circumstances of the case.[28] The test is not the impossibility of joinder,[29] and there is no magic number – large or small – that automatically achieves impracticability.[30]

The decision on numerosity must be based on evidence, not assumptions.[31] The parties must make at least a threshold showing regarding the size of the class, the location

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[25] *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 40-42 (2d Cir. 2006); *Gariety v. Grant Thornton, LLP*, 368 F.3d at 366; *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 767 (7th Cir. 2001).

[26] *Creveling v. GEICO*, 376 Md. at 89. *See also General Telephone Co. v. Falcon*, 457 U.S. 147, 155 (1982); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008).

[27] *Creveling v. GEICO,* 376 Md. at 88; *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. at 190.

[28] *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 n. 13 (1982).

[29] *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993); *Philip Morris, Inc. v. Angeletti*, 358 Md. at 732-33.

[30] *Bender v. Sec. Maryland Dep't of Personnel*, 290 Md. 345, 356 (1981)(suggesting 350 is sufficient); *Kirkpatrick v. Gilchrist*, 56 Md. App. 242, 248-50 (1983)(suggesting 500 is sufficient); *Christiana Mortg. Corp. v. Delaware Mortg. Bankers Ass'n*, 136 F.R.D. 372, 377 (D. Del. 1991); 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1762 (2d ed. 1986).

[31] *Robidoux v. Celani*, 987 F.2d at 935.

of the class members, and the amount (or range) of each member's potential claim.[32]

In this case, the proposed plaintiffs' class easily satisfies the numerosity requirement, covering 16,329 tows in Montgomery County. Numerosity is also satisfied as to the proposed defendant class, with 511 potential class members. The court finds that the joinder of all of the plaintiffs and all of the defendants in a single case would be impracticable. Md. Rule 2-231(a)(1) is satisfied.

Common questions of fact or law

Under Md. Rule 2-231(a)(2), common questions of law or fact must exist but these common questions need not predominate over individual issues.[33] The basic question is whether class action treatment will promote judicial economy by permitting an issue, or issues, potentially affecting every class member to be litigated in an economical fashion.[34]

If a lawsuit has a common nucleus of operative facts that has not already been resolved, commonality usually is established.[35] In this case, from reading the Fourth Amended Complaint, along with the documents and deposition testimony adduced during class discovery, the court readily concludes that the commonality requirement is satisfied. Among the common questions to be decided in this case are whether G&G and the

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[32] *See Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662, 666 (M.D. Fla. 1996); *Alvarado Partners, L.P. v. Metha*, 130 F.R.D. 673 (D. Colo. 1990); *Stoudt v. E.F. Hutton & Co., Inc.*, 121 F.R.D. 36 (S.D.N.Y. 1988).

[33] *Bergmann v. Board of Regents*, 167 Md. App. 237, 287-88 (2006).

[34] *General Telephone Co. v. Falcon*, 457 U.S. at 155. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997); *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992); 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE, § 1763 (2d ed. 1986).

[35] *Philip Morris, Inc. v. Angeletti*, 358 Md. at 733-737; *Cf. ACandS, Inc. v. Goodwin*, 340 Md. 334, 395 (1995)(permitting a consolidated, mass trial of common issues in asbestos claims).

parking lot owners had a duty to permit vehicle owners to retake their vehicles without up-front payment of towing and storage costs, whether a possessory or storage lien was improperly exercised against each of the towed vehicles, whether improper credit card fees were imposed, and whether the towing receipts conformed to the applicable county and state laws. [36]

Other common questions are whether the parking lot owners, by virtue of their contract with G&G are jointly and severally liable to the plaintiffs for G&G's towing violations of the Maryland Tow Law,[37] the Montgomery County towing ordinance,[38] and the common law.[39] The court finds that Md. Rule 2-231(a)(2) is satisfied for both proposed classes.

Typicality

The basic typicality questions are: (i) whether similar legal theories underlie the claims of the representative parties and those of the putative class members; and (ii) whether the same course of conduct was directed at the class as a whole.[40]

The claims of the class members are not required to be identical.[41] A fact pattern that shows that the defendants directed the same or a similar course of conduct towards

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[36] There are additional common legal and factual questions, such as whether G&G "patrol" towed vehicles from the owners' lots without express authorization for each tow.

[37] MD. CODE TRANSPORTATION ART. § 21-10A-01 *et seq.*

[38] MONTGOMERY COUNTY CODE § 30C-1, et seq.

[39] *See T.R. Ltd. v. Lee*, 55 Md. App. 629 (1983).

[40] *Philip Morris,* 358 Md. 689 at 737-40 (2000); *Bergmann v. Board of Regents*, 167 Md. App. at 288.

[41] *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 200 (S.D.N.Y. 1992.

all plaintiff class members usually will suffice.[42] Differences in damages among class members, alone, usually are insufficient to undermine typicality.[43]

The court finds that the gravamen of the Fourth Amended Complaint does not depend upon the individual circumstances of the named class plaintiffs, the plaintiff class, the named defendant or the defendant class members. The simple fact is that each car was towed by G&G, and towed from one or more parking lots owned or managed by either the named defendant or the members of the defendant settlement class. In each case, G&G had a contract with the owner or manager of the parking lot, usually in writing. As a consequence, the claims and defenses of the representative parties are typical within the meaning of Md. Rule 2-231(a)(3).

Contrary to arguments made by objectors, typicality is not undermined in this case by possible differences in the conduct of each defendant or that some of them may have had variants of the standard G&G towing contract. The court finds for present purposes that each class defendant, during the class period, had in effect a towing agreement with G&G. Although some of the written contracts may have been modified over time, the record evidence persuades the court that any modifications are not so substantial as to militate against class certification. The basic contention in this case is that the defendants authorized G&G "tow at will" and that G&G did so.

The court finds that the claims of the named plaintiffs vis-à-vis the named and putative defendant class members to be typical because each is alleged to have arisen from the same alleged practice or course of conduct by G&G which, the plaintiffs alleged and class discovery strongly suggests, was expressly authorized by each member of the

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[42] *In re Prudential Securities Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y. 1995).

[43] *Walsh v. Northrop-Grumman Corp.*, 162 F.R.D. 440, 445 (E.D.N.Y. 1995).

defendant class.[44] As a consequence, the claims and defenses in this case for both plaintiffs and defendants are typical.

Adequacy of Class Representation

The requirement of adequacy of representation is a fundamental element of due process. Both the named defendant and defendant's counsel must meet the tests of adequacy under Md. Rule 2-231(a)(4).[45] The court finds that they easily meet the test in this case. The court finds that each of the proposed settlement classes are represented by able counsel with extensive experience in federal and state class action litigation, and who have masterfully represented the interests of their respective classes.

The court also finds that the claims of the representative plaintiffs are not conflicting or inconsistent with the claims of the plaintiff settlement class members. They are completely aligned. The court also finds that the similar nature of the defendants' defenses are such that the defenses of Patner are not conflicting or inconsistent with the defenses of the defendant settlement class members.

The court recognizes that Patner was a reluctant defendant. However, the court finds that he has been staunch in defense of the defendant class. "[T]he fact that the named representatives are reluctant does not necessitate the denial of class certification if the court finds that they have the incentive and ability to protect the entire class effectively."[46]

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[44] *See Phillip Morris, Inc.*, 358 Md. at 200.

[45] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Philip Morris, Inc.*, 358 Md. at 740-743.

[46] C. Wright, A. Miller & M. Kane, 7A FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §1770 at 478 (2005) (footnote omitted)

The burden to show both prongs of adequacy is on the party that requests class certification.[47] Further, under Md. Rule 2-231, the court has an independent duty to assure the adequacy of both the named class representatives and their counsel.[48] This determination requires careful scrutiny by the court to ensure that the class representatives and class counsel can fairly and adequately protect the interests of the absent class members.[49] The court finds that adequacy of counsel and the class representatives under Md. Rule 2-231(a)(4) has been established.

The Defendants' Class

Like Federal Rule 23,[50] Md. Rule 2-231, allows for defendant class actions. Indeed, Md. Rule 2-231(a) expressly states that "[o]ne or more members of a class may sue *or be sued* as representative parties on behalf of all. . . ." (emphasis added). However, defendants' class actions, especially bilateral ones -- where a plaintiffs' class is suing a defendants' class -- present special problems of fairness, efficiency and, most importantly, due process.[51] Defendants' class actions also present unique questions regarding two discrete legal issues: the plaintiffs' standing to sue any or all of the defendants and whether the putative defendants' class survives a rigorous analysis for

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[47] See *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481-82 (5th Cir. 2001); *Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494 (S.D.N.Y. 1994), *aff'd*, 67 F.3d 1072 (2d Cir. 1995); *Johnpoll v. Thornburgh*, 898 F.2d 849 (2d Cir. 1990).

[48] *Philip Morris, Inc.*, 358 Md. at 742-43 & nn.23 & 24; *see also Talley v. ARINC, Inc.*, 222 F.R.D. 260, 270-71 (D. Md. 2004).

[49] *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 728 (11th Cir. 1987).

[50] *See* W. Rubenstein, NEWBERG ON CLASS ACTIONS §§ 5:1-5:3 (5th ed. 2012).

[51] *See* 7A C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE §1770 (2005).

typicality and, to a marginally lesser extent, commonality.[52]

The court resolved these questions when it issued its decision in November 2016 certifying a defense litigation class. The court remains persuaded that its initial analysis was correct and that objections to the proposed settlement, based on the propriety of the court's certification of a defendants' litigation class, are overruled.[53] For litigation purposes, the court certified a "no opt-out" defendants' class. [54]

The court finds that this case may be maintained as a bilateral class action under Md. Rule 2-231(b)(3) for settlement purposes. There are common over-riding legal claims held by all members of the plaintiff settlement class, and common over-riding defenses held by all members of the defendant settlement class. The court finds that common questions predominate over individualized questions, and that disposing of a large number of claims (over 16,000) by way of a class settlement is the superior vehicle to effectively resolve a substantial part of this lawsuit. The court finds that an opt-out class is appropriate for settlement purposes, to protect the individual defenses of the class members.

Notice to the Settlement Classes

Before turning to fairness and adequacy of the proposed settlement, the court

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[52] The analysis of commonality for a defendants' class, however, is similar to the analysis employed for a plaintiffs' class. *See Sebo v. Rubenstein*, 188 F.R.D. 310, 318 (N.D. Ill. 1999). At the least, the alleged common issue must "touch and concern all members of the class." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2565 n. 7 (2011).

[53] At least one objector argued that the court's certification decision unfairly forced Pater to settle. The court disagrees.

[54] The court continues to believe that the opt-out class described in subsection (b)(3) if of little utility in the context of a defendants' litigation class because the defendants can simply opt-out and effectively defeat class certification by heading for the door. *See* Newberg on Class Actions § 5:25 at 474-75; *In re Arthur Treacher's Franchise Litig.*, 93 F.R.D. 590, 595 (E.D Pa. 1982).

logically should first determine whether the notice that was given to each settlement class was adequate.[55]

The escrow administrator earlier appointed by the court, Strategic Claims Services ('SCS"), using G&G's database produced during discovery, determined there to have been 21,138 vehicles towed during the settlement class period. Following preliminary approval, SCS was able to identify and locate 16,742 of the 21,138 plaintiff class members. Notice to these class members was sent by first class mail. Of the 16,742 notices mailed to the plaintiff class, only 1,704 were returned as undeliverable. SCS then conducted a search using public databases, and obtained new addresses for 1,127 of the plaintiff class members and re-mailed the notice. As a result, of the 16,742 notices sent out to the plaintiff class, only 577 notices, or less than 4%, were confirmed as not having been received. In addition to the notice by first-class mail, plaintiffs' class counsel has maintained a website (www.TowingClassAction.com), that has been visited by thousands of viewers each month.

As a result of these efforts, no member of the plaintiff class opted out of the settlement. No member of the plaintiff class objected to the settlement.

The court easily finds that adequate notice was given to the absent plaintiff class members. 16,742 notices were sent by first class mail and, ultimately, only 577 notices were confirmed as not having been received. Effectively, the plaintiff class in this case has been notified twice. First, when notice was given for the settlement with G&G and, second, when notice was given for the proposed settlement with the defendant class.

[55] *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 214 (E.D. Pa. 2014).

With respect to the current proposed settlement, the plaintiff class was clearly advised of the nature of the action, the definition of the classes to be certified, the class claims, the proposed class recovery, the amount of legal fees and expenses to be sought, the proposed payments to two named plaintiffs and the *cy pres* recipients, and the binding effect of a judgment on class members. Importantly, no member of the plaintiff class has objected or sought to opt-out.

Further, the website maintained by plaintiffs' class counsel has been visited by thousands of viewers and hundreds of plaintiff settlement class members have telephoned plaintiffs' class counsel to discuss the settlement, obtain more information about it and to find out how they can assist class counsel.[56]

As required by the preliminary approval order, SCS mailed fourteen-page notices to each of the 511 absent defendant class members on October 31, 2017. The addresses used were those obtained from the G&G database and information available from the Maryland State Department of Assessments and Taxation. Only 75 notices were returned as undeliverable and, of those, 62 were re-mailed. Only 13 of the notices to the defendant class remain undeliverable.

The notice to the defendant settlement class fully explained the nature of the case, the nature of each defendant settlement class member's potential liability, the terms of the settlement, and the procedure for submitting objections or opting out of the proposed settlement. The notice expressly explained that objections or opt-outs were due by December 15, 2017, -- forty-five days after the notices were mailed on November 1, 2017. Each notice also identified the number of tows associated with the individual

[56] Affidavit of Richard S. Gordon at ¶¶ 34-44.

defendant class member recipient and the amount each would be required to pay as damages under the settlement. The notice also identified an estimated range of the *pro rata* share of attorneys' fees and the representative fee that each would have to pay.

In addition to the notices mailed to each defendant class member, defense class counsel created and maintained a publicly accessible website (www.TowingDefenseClassAction.com), that contained detailed information about the case, including spreadsheets identifying the tows associated with each defendant. The site also contained the pleadings, motions and other documents that had been filed during the litigation.

Defense counsel also undertook the time-consuming task of contacting each defendant settlement class member by telephone to inquire whether notice had been received and to offer to answer any questions about the proposed settlement. Defense class counsel were able to make contact with nearly all of the 511 defendant settlement class members.

In the end, only 29 defendant settlement class members opted out, correlating to only 1,453 tows. Given the size of the plaintiff class and the number of total tows at issue, this is a modest number of opt outs.

Federal Realty Trust objected on the basis that some notices were sent to properties that it owns instead of its corporate offices, allegedly in contravention of the court's order. Federal Realty Trust appeared at the fairness hearing and was given the option at that time of opting-out of the settlement if it felt that it had not received adequate notice. Federal Realty Trust declined the court's invitation to opt out.

Wedgewood Court Townhouses Homeowners Association and Brownstone at Wheaton Homeowner's Association also filed written objections with respect to notice, arguing that they were not given sufficient time to make an informed decision. These defendant class members too declined the court's invitation, at the fairness hearing, to opt out.[57]

Based on the foregoing, the court finds that notice to the defendant settlement class was fair and consistent with Md. Rule 2-231(h) and due process. The court also finds that all members of the defendant settlement class received actual notice of the pendency of the litigation and the proposed settlement. The notice given in this case to the defendant class was extensive and remarkably thorough.[58]

Fairness of the Bilateral Class Settlement

In evaluating the fairness of a proposed class settlement, the trial court should consider the posture of the case at the time settlement was contemplated, the extent to which discovery had been conducted, the circumstances surrounding the parties' negotiations and counsels' experience in similar class litigation.[59]

The posture of the case, including post-certification of both a plaintiff and defendant litigation class, militates in favor of approval. The record demonstrates that "this settlement was not entered into haphazardly with an underdeveloped understanding

[57] Other defendant settlement class members also objected to the notice. For example, Brookfield Properties Office Partners, Inc., objected to notice on the ground that the five parking lot locations that were served with the notice are simply portfolio companies and not the same as the corporate parent. Every defendant that objected on the ground of inadequate notice was given the option at the fairness hearing to opt out. None elected to do so.

[58] *See Pollard v. Remington Arms Co.*, 320 F.R.D. 198, 208-215 (W.D. Mo. 2017).

[59] *In re Jiffy Lube Securities Litig.*, 927 F.2d at 159; *Shenker v. Polage*, 226 Md. App. at 684-85.

of the merits of the case. Rather, as [the record] demonstrate[s], the strengths and weaknesses of this case were well-developed for all parties, such that this factor also militates in favor of the [s]ettlement."[60]

The court finds that each side thoroughly investigated the strengths and weaknesses of its positions through comprehensive discovery and motions practice before entering into substantive discussions. Patner and the plaintiffs had engaged in extensive discovery on class issues, including the review of the thousands of documents produced by G&G and the deposition of Patner. Among the documents reviewed were G&G's written towing contracts and detailed spreadsheets specifically identifying tows G&G made from defendant class members' properties during both the settlement and litigation periods. Also, a corporate designee of G&G was deposed, albeit before Patner was sued.

To his credit, Patner first sought an extraordinary writ in the Court of Appeals before deciding that settlement should be pursued in a serious way. Clearly, Patner was neither "faint-hearted" nor lacking in diligence. As well, the plaintiffs were well informed, well prepared and quite willing to take this case to trial.[61]

The settlement in this case was achieved only after more than six months of contentious negotiations, supervised by Judge Eyler. In that regard, it is important to note that Judge Eyler, an experienced litigator in his own right, is well known for his

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[60] *In re Mills Corp. Securities Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009).

[61] The plaintiffs' willingness to go to trial is further evidenced by that fact that the proposed settlement is only a partial settlement, and that the litigation will continue as to the defendants who opted-out, as well as for the "front-end" litigation class period claims. There is nothing about this case that suggests that plaintiffs' counsel were seeking a quick or easy pay-day. *See Boyd v. Bell Atlantic-Maryland, Inc.*, 390 Md. 60, 78-80 & n. 6 (2005).

scholarly decisions on the most complex issues of Maryland law.[62] Judge Eyler's close supervision of the settlement discussions lends support to the conclusion that negotiations were arms' length and the product of a fair process.[63]

The court also finds that the settlement was negotiated by capable and experienced class action counsel for both sides. Lead counsel in this case have been at the forefront of major class action cases in federal and state courts, and are very experienced in the nuances of class action litigation.[64] In short, the court finds the settlement reached in this case to be procedurally fair.

Reasonableness and Adequacy

The substantive prong of the analysis focuses on whether the proposed settlement is adequate for the plaintiffs' class and reasonable for the defendants' class. In this context, the court considers the strengths and weaknesses of the parties respective litigating positions. Of all of the claims alleged in the Fourth Amended Complaint, the counts based on the Montgomery County Towing Ordinance are the most potent. This local law "applies to the towing of a motor vehicle from private property . . . . without the consent of the owner."[65] The ordinance imposes various requirements on towing operators and property owners, including the rates that may be charged, the signs that must be posted to give notice of towing procedures, procedures for authorizing and

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[62] *E.g.*, *Wasserman v. Kay*, 197 Md. App. 586 (2011); *Bender v. Schwartz*, 172 Md. App. 648 (2007).

[63] *See*, e.g., *In re Telik, Inc. Securities, Litig.*, 576 F. Supp. 2d 570, 576 9S.D.N.Y. 2008); *In re Elan Securities Litig.*, 385 F. Supp. 2d 363, 369 (S.D.N.Y. 2005).

[64] *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 466, 474 (S.D.N.Y. 1998); *In re National Student Marketing Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974).

[65] Montgomery County Code § 30C-1(a)(1).

executing tows, and procedures for redeeming and storing vehicles.[66]

With regard to potential damages, the ordinance provides, with certain exceptions, that "a property owner and towing company are jointly and severally liable for the violation of *any duty* imposed by this Chapter on the towing company, with a right of contribution or indemnification."[67] Damages "are three times the amount of any towing, release or storage fees charged."[68] In other words, the ordinance makes defendant class members jointly and severally liable with G&G for any violations that G&G may have committed with respect to tows from their property. The ordinance also subjects them to treble damages without any required showing of malice, bad faith, scienter, or other sort of enhanced proof. Viewed another way, the ordinance imposes near strict liability on property owners for any violations G&G may have committed and, if liability is found, treble damages are likely automatic.

The only real way for a defendant to challenge the plaintiffs' claims in this case is to present some form of individualized proof with respect to particular persons whose cars were towed from their property.[69] Some absent defendant class members (29 out of more than 500) have chosen to do so. Yet the risks remain high, and the court finds that the certainty of settlement far outweighs the risk and additional legal expense of litigating the case to a final judgment and through all appeals. As Patner logically has determined,

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[66] Montgomery County Code §§ 30C-4; 30C-5(b), 30C-5(c)-(f), 30C-9.

[67] Montgomery County Code §30C-10(c) (emphasis added).

[68] Montgomery County Code § 30C-10(e).

[69] As noted, the ordinance already has withstood one constitutional challenge. *Cade v. Montgomery County*, 83 Md. App. 419 (1990). While other broad-based challenges are possible, it is also possible that they too would not be successful, either at trial or on appeal.

continuing to litigate this case through trial and appeals, which will take several years, does not make economic sense for the defendant class under the circumstances.

Also of importance is the very limited degree of opposition to the proposed bilateral settlement. No plaintiffs have opted out. Only 29 defendants (out of over 500) have opted out. Although there were a larger number of objections, none of those who objected took the court's offer at the fairness hearing to opt out if they believed the deal to be truly unpalatable.

Moreover, the vast majority of the objections filed in this case, and heard at the fairness hearing, have little to do with whether the proposed settlement is fair, reasonable or adequate. Instead, most of the objections presented set forth defendant class members' perceived individualized defenses to the plaintiffs' claims, disagreements with the wisdom of the Montgomery County Towing ordinance or commentary on individual defendants' towing practices. To the extent that the objections are properly characterized as individualized defenses, they are overruled because the court already has afforded two safety valves. First, in certifying the litigation class in November 2016, the court made it clear that any defendant that wanted to intervene could intervene. Some defendants have requested to do so and the court granted their motions.[70] Second, the proposed defendant settlement class, unlike the litigation class certified by the court, is an opt-out class under Md. Rule 2-231(b)(3). In other words, no defendant is required to participate in the settlement if it does not believe it to be meritorious or in its interest to do so. Even absent

[70] These defendants are Wedgewood LLLP, Stonebridge Homeowners Association, North Creek Condominium, Parkside Plaza Condominium, Grosvenor Park Maintenance Trust, and Kohls Department Stores, Inc.

these safety valves, however, the proposed settlement is reasonable and adequate.[71]

Some objectors complained that the settlement did not include tows before April 26, 2013. Counsel for Patner believes that these front-end claims are barred by the statute of limitations. For that reason, they were excluded from the proposed settlement. This decision was entirely sensible. Assuredly, Patner would have been criticized if he had agreed to settle any tows that seemingly are barred by limitations. Patner correctly carved these claims out of the settlement, leaving them for resolution later in the case. As it stands, no defendant class member will pay damages for pre-April 26, 2013 tows at this time, and any class member with tows during the front-end period retains the right to litigate its liability for them. All claims for tows that are covered by the settlement will be released upon payment.

Other objections take issue with the amount to be paid per tow. They complain that $390 per tow exceeds the average charge incurred for a tow as it appears in G&G's database. They also object that the proposed settlement amount is much more than G&G paid, per tow, when it settled with the plaintiff class. These objections ignore several fundamental points. First, the Montgomery County ordinance imposes joint and several liability on property owners and managers for a towing company's actions with respect to tows from a property. Second, the ordinance imposes treble damages on the property owners for G&G's violations of the ordinance. Third, G&G would have gone into

[71] The court has not considered the "objections" levied by those defendants that have opted out of the proposed settlement because the settlement, if approved, does not affect their legal rights in any pertinent fashion. Simply put, in this case the opt-outs do not have standing to object. *See Waller v. Financial Corp of America*, 828 F.2d 579, 582-83 (9th Cir. 1987); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1387 (D. Md. 1983); *Stanger v. Mellon Bank, N.A.*, 1989 WL 56402 (W.D. Pa. 1989).

bankruptcy, but for its settlement with the plaintiffs, leaving the defendant class in no better position than it is today. Finally, subtracting G&G's contribution, the settlement amount still represents a significant discount on each defendant settlement class members' potential damage exposure, even excluding anticipated legal fees in the event of further litigation.

Some objectors also claim that they do not know precisely the amount they will be assessed. This objection is without merit. The notice approved by the court and provided to class members explained, at page 14, that settling class members would be assessed a *pro rata* share of fees and provided a method for calculating an estimated range of what their total exposure might be. The final assessment is expected to fall within this range, as explained in Patner's written submission filed in advance of the fairness hearing. This is simply a function of any *pro rata* assessment that depends upon the final amount of tows and participation by defendant class members. The plan of allocation in this case is sufficiently described and is subject to continuing court supervision.[72]

Attorneys' Fees, Litigation Expenses and Incentive Awards

Plaintiffs' Class Legal Fees

There are two generally recognized methods of calculating compensation for class counsel, the percentage of the fund method and the lodestar method. The current trend among the trial courts in the Fourth Circuit is to use the percentage method, with the lodestar method used as a cross-check.[73] Among the factors to be considered when using

[72] *In re Philadelphia Stock Exchange, Inc.*, 945 A.2d at 1135-36.

[73] *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 462 (D. Md. 2014).

the percentage of the fund method are: "(1) the results obtained for the class; (2) the quality, skill, and efficiency of the attorneys involved; (3) the risk of nonpayment; (4) objections by members of the class to the settlement terms and/or fees requested by counsel; (5) awards in similar cases; (6) the complexity and duration of the case; and (8) public policy."[74] The factors are not necessarily formulaic and should be applied in a case-specific fashion.[75]

Plaintiffs' counsel has requested an award of legal fees of one-third of the common fund, plus reimbursement of $16,770 in litigation expenses. No member of the plaintiff settlement class has objected. The only objections lodged with respect to the award of legal fees requested by plaintiffs' class counsel is that some defendants thought they were "too high." No specific attack was put forth by any party.

Of course, the burden is on the proponent of a fee award to persuade the court that the request is fair. The court is not placing any burden on the objectors. The court will employ the percentage of fund method in this case, back-checked by the factors listed in Rule 1.5(a) of the Maryland Rules of Professional Conduct, a method approved by the Court of Appeals in *United Cable Television of Baltimore v. Burch*[76] and the Supreme Court of Delaware in *Goodrich v. E.F. Hutton Group, Inc.*[77]

Using the percentage of fund method in a case such as this, one in which a real fund common fund is established and is of substantial dimension, makes sense. The

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[74] *Boyd*, 299 F.R.D. at 463.

[75] *In re Rite Aid Securities Litig.*, 396 F.3d 294, 301 (3d Cir. 2005).

[76] 354 Md. 658, 687 (1999). These factors are now codified in Md. Rule 2-703(f)(2); *see Monmouth Meadows v. Hamilton*, 416 Md. 325, 333-34 (2010).

[77] 681 A.2d 1039, 1044-50 (Del. 1996); *see In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1069-76 (Del. Ch. 2015).

settlement secures a substantial recovery for nearly two-thirds of the vehicle owners who were the subject of G&G's towing practices. Each plaintiff class member will receive in cash substantially more than they had to pay G&G to re-take their car. The payments of the defendant settlement class members are easily expected to exceed $6 million. The success achieved for the plaintiff class is substantial and real. It took over six months of hard fought mediation to hammer out the proposed settlement agreement. Previously, plaintiffs' counsel had litigated against G&G, successfully, and then against Patner. Plaintiffs' counsel logged more than 1,500 hours, which displaced time from other matters.

To be sure, this case was time intensive and involved novel and difficult legal issues. To the court's knowledge, this case represented the first time that a defendants' litigation class has been certified in Maryland and also the first certified bilateral class action. The undertaking by all counsel has been tremendous. All of the relevant Rule 1.5(a) factors militate in favor of the fee requested by plaintiffs' class counsel.

The court also has considered the awards in other cases.[78] For example, in 2014, in *DeCohen v. Abbasi, LLC*,[79] Judge Quarles awarded legal fees in the amount of one-third of the common fund in a multi-million-dollar recovery.

Last year, in *Huyer v. Buckley*,[80] the Eight Circuit expressly rejected an objector's challenge to the district court's award of legal fees to plaintiffs' class counsel "in the

[78] The Maryland cases are listed in the brief filed by plaintiffs' class counsel.

[79] 469 F.R.D. at 480-81.

[80] 849 F.3d 395 (8th Cir. 2017).

amount of one-third of the total settlement."[81] The appellate court gave three reasons for its decision. First, it concluded that the trial court properly considered the relevant "time, effort and experience" factors, akin to those set out in Md. Rule 1.5(a), first developed by the Fifth Circuit in *Johnson v. Georgia Highway Express*.[82] Second, the Eight Circuit held that under the percentage of benefit method, the award approved by the trial judge was in line with other awards in similar cases.[83] Finally, the appellate court noted that the trial judge had "verified the reasonableness of the award by crosschecking it against the lodestar method."[84]

A similar result was reached in *Strougo v. Bassini*,[85] a securities class action settled in 2003 under the Investment Company Act of 1940. In that case, the district court approved an award to plaintiffs' class counsel of one-third of the total recovery, given the complexity and protracted nature of the litigation.[86]

In 2016, in *Laffitte v. Robert Half Int'l, Inc.*, the Supreme Court of California affirmed the trial court's attorney's fee award of one third of the common fund using the percentage of the fund method.[87] As is the case here, there was no reverter (to the defendants) in *Laffitte*, and the common fund was real, not one simply constructed (*i.e.*, a

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[81] 849 F.3d at 399.

[82] 488 F.2d 714, 719-20 (5th Cir. 1974).

[83] 849 F.3d at 399.

[84] 849 F.3d at 399.

[85] 258 F. Supp.2d 254 (S.D.N.Y 2003).

[86] 258 F. Supp.2d at 262-63.

[87] 376 P.3d 672 (Cal. 2016).

claims made fund) to justify a fee award.[88]

The court is fully satisfied, and finds, that an award of legal fees to plaintiffs' class counsel of one-third of the common fund is fair and reasonable.

Defendants' Class Legal Fees[89]

Patner retained Kramon & Graham when he was named as a defendant in the Second Amended Complaint. At the time counsel entered their appearance on behalf of Patner, the case had already been pending for more than a year and the plaintiff class had already settled with G&G.

Given the posture of the case, defense counsel immediately drafted and served discovery requests and conducted an investigation into the claims of the plaintiff class. During the first phase of their representation, defense counsel moved to dismiss the Third Amended Complaint, moved to strike the Fourth Amended Complaint and opposed the plaintiffs' motion to add named class representatives. Defense counsel also reviewed thousands of pages of documents that had been produced during the first phase of the litigation, as well as all pleadings and motions that previously had been filed in the case. Defense counsel also fielded and initiated dozens of telephone calls to and from absent class members (as well as their attorneys) and ultimately convened a joint defense group to discuss the novel issue presented by this bilateral class action.

During the second phase of the litigation, Kramon & Graham's attorneys reviewed and responded to the plaintiff motion to certify a defendant' class. The motion

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[88] 376 P.3d at 686-87.

[89] Patner's fee application is supported by the affidavit of James P. Ulwick, Esquire, the affidavit of Matthew S. Patner, and detailed time and billing records of defense counsel. Other than generic objections, no defendant raised any specific objections to defense counsel's hourly rates or time charges. The court credits the factual submissions of defense counsel.

presented novel legal issues, as this case presented the first instance in which the court might certify a bilateral class. Counsel also had to review the hundreds of towing contracts, continue to pursue discovery and convene the joint defense group.

After the bilateral class action was certified by the court in November 2016, counsel for Patner took the understandable step of petitioning the Court of Appeals to issue a writ of mandamus and to decertify the class.[90] During this third phase, defense counsel also drafted a reply to the plaintiffs' opposition to the petition for a writ of mandamus, and motions to stay in both the circuit court and the Court of Appeals.

While the petition was still pending in the Court of Appeals, defense counsel was required to continue with the litigation at the trial level as the motions for a stay were denied. Kramon & Graham lawyers also sought additional discovery from the named plaintiffs, as well as continued their coordination with the defense group.

After the Court of Appeals denied the petition for a writ of mandamus, Patner agreed to participate in mediation due to the risks involved in going to trial in this case, as well as the burgeoning defense costs. As noted above, the parties retained Judge Eyler to conduct the mediation. The process overseen by Judge Eyler was, to say the least, protracted and contentious.[91] It lasted for more than six months, and entailed dozens of in-person meetings, telephone calls and e-mail exchanges among counsel and Judge

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[90] Although rarely granted, the Court of Appels has used the mechanism of mandamus under unique circumstances to wade into cases before the entry of a final judgment. *E.g., St. Joseph Medical Center, Inc. v Turnbull,* 432 Md. 529 (2013); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689 (2000). The court finds that Patner's application for a writ of mandamus was substantially justified under the circumstances of this case and was undertaken in large measure to protect the rights of the absent class members. Notably, Kramon & Graham pursued this extraordinary remedy for a flat fee of $40,000. Their lodestar for this work was $96,687.

[91] As Judge Eyler noted at the fairness hearing, Patner was personally involved in the mediation process and contributed to its success.

Eyler.[92] As Judge Eyler commented at the fairness hearing, many options concerning settlement parameters were floated, discussed and, after debate, discarded. The mediation culminated in a term sheet in August 2017, to which the court granted preliminary approval on October 11, 2017.

After the court gave preliminary approval to the settlement and the proposed form of notice, Kramon & Graham's lawyers launched a concerted effort to reach every single absent class member to ensure that they did not "overlook" the notice, and that they understood their right to opt-out or to object if they did not like the settlement. Six associates and two partners spent more than 400 hours explaining the proposed settlement, the reasons for it and its ramifications to absent class members and their counsel.

The court has carefully reviewed Kramon & Graham's time and billing records. The court finds that the firm provided legal services worth more than $500,000 to the defendant class.[93] Kramon & Graham, however, is seeking a legal fee of only $400,000, which is a 20% discount from its actual time charges.

As noted above, this case presented novel and difficult legal issues for defense counsel and required the investment of significant time and resources. The stakes were enormous, especially given that the Montgomery County Code imposes joint and several

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[92] There were eight in-person mediation sessions, and Judge Eyler expended sixty hours of time on the case, not including his travel or administrative time.

[93] Mr. Ulwick was billed at $595 per hour. Ms. Lewis at $425 per hour. Associates were billed at $255 per hour. The court finds the rates charged by Kramon & Graham's lawyers to be fair and reasonable, and in accord with those charged by counsel in similar complex cases that are litigated in this court. *See Balderrama v. Lockheed Martin, Inc.*, 2015 WL 3874239 at * 7 (June 12, 2015), *rev'd on other grounds*, 227 Md. App. 476 (2016).

liability on property owners and mandatory treble damages in the event of a violation.[94] Further, Maryland law does not permit the exercise of a possessory lien over a towed vehicle.[95]

Defense counsel appropriately challenged this court's adverse rulings every step of the way, particularly the court's ruling concerning a mandatory defense litigation class. When the Court of Appeals denied the petition for a writ of mandamus, defense counsel pursued the next best option, a settlement that provided absent class members with the right to opt-out and to continue to litigate, if they so choose, their unique defenses or other issues.

The court is easily persuaded that the legal fees charged by defense are fair and reasonable. Patner has "funded" the defense of this litigation since he was named as a defendant. No absent defendant class member has volunteered to assist him.

Class Representative Awards

Service, or incentive, awards to class representatives may be granted when their efforts substantially contribute to the litigation or settlement of the case.[96] Among the factors the court should consider are the actions the named plaintiffs (or named defendants) have taken to protect the class's interests, the degree to which the class benefitted from those actions, and the amount of time and efforts they expended in

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[94] *See Cade v. Montgomery County*, 83 Md. App. 419, *cert. denied*, 320 Md. 350 (1990)(Montgomery County Code). Courts have fairly routinely rejected challenges to the validity of similar state and local towing laws. *See Tillison v. McKenna*, 424 F.3d 1093 (9th Cir. 2005); *Crane Towing, Inc. v. Gorton*, 570 P.2d 428 (Wash. 1977); *Berry v. Hannigan*, 7 Cal. App.4th 587 (1992).

[95] *T.R. Ltd. v. Lee*, 55 Md. App. 629, 634-35 (1983), *cert. denied*, 298 Md. 395 (1984).

[96] *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 867-68 (8th Cir. 2017); *Jones v. Dominion Resources, Inc.*, 601 F. Supp.2d 756, 767-68 (S.D. W. Va. 2009).

pursuing the litigation, assisting counsel and participating in the settlement negotiations.[97]

Plaintiffs' counsel request an aggregate award of $5,000 to Mary Lois Pelz and Darcy Pelz-Butler, who were added to the case when Patner was brought in as a defendant. These additional named plaintiffs, the court finds, assisted class counsel and provided valuable documentation and information relating to the tows from Patner's property. They were prepared to be deposed, and their participation in the case continues. The sum requested is reasonable.

Defense counsel request an incentive award for Patner of $54,000. Several objectors have questioned this request, calling it "high." The court finds that the request, which amounts to less than $3.00 per tow at issue, is reasonable under the unique circumstances of this case. Unlike named plaintiffs, who volunteer, Patner was essentially "conscripted" when the plaintiffs made him the named defendant. He neither sought nor acquiesced in his role. Given the unique posture of the case when he was named as a defendant, Patner had much to lose and almost nothing to gain from the litigation. Nonetheless, he fought vigorously, the court finds, for the rights of the defendant class at every step of the case. Any defendant class members' *pro rata* share of Patner's representative fee is *de minimis* compared to the burden Patner had carried. Not surprisingly, on multiple telephone calls, defendant class counsel asked counsel for other defendant class members whether they wished to intervene and become class representatives – all declined for the obvious reason that they did not wish their clients to shoulder the responsibility or risk of doing so.

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[97] *Caligiuri*, 855 F.3d at 867-88; *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Singleton v. Domino's Pizza,* LLC 976 F. Supp. 2d 665, 690-91 (D. Md. 2013).

Finally, at the fairness hearing, Judge Eyler confirmed that Patner was substantively and substantially involved in the protracted settlement negotiations, and was resolute about protecting the rights of the absent class members. The court credits Judge Eyler's observations, as well as the factual assertions in Patner's affidavit.[98] For all of these reasons, Patner's request will be granted.

Cy Pres

The settlement agreement provides that any unclaimed funds remaining in the common fund, after full distribution to the class members, to be paid to certain charitable organizations. The designated recipients are CASA of Maryland, the Montgomery County Bar Foundation, Vehicles for Change and the University of Maryland Francis King Carey School of Law. Each, the court finds, is an appropriate recipient of *cy pres* funds. The use of *cy pres* in this case is appropriate because unclaimed funds will not revert to the defendants and, instead, will benefit public, charitable, institutions.[99]

Conclusion

For the reasons set forth above, the bilateral class settlement is approved. The objections are overruled. The petitions for legal fees and expenses, incentive awards and *cy pres* awards are granted. IT IS SO ORDERED this 16th day of January, 2018. Separate implementing orders will be entered by the court.

Ronald B. Rubin, Judge

[98] Patner has spent over 200 hours of his personal time on this case, and in a role as a class steward for which he did not volunteer.

[99] *See In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 523 (D. Md. 2002); 3 H. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 10.17 (4th ed.).