The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

EDWARD C. HARTNETT and JULIE A. HARTNETT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WASHINGTON FEDERAL BANK,

Defendant.

NO. 2:21-cv-00888 RSM

PLAINTIFFS' UNOPPOSED MOTION AND SUPPORTING MEMORANDUM FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES FOR REPRESENTATIVE PLAINTIFF SERVICE AWARD

Noted For Hearing August 8, 2022

LR 7-1 CERTIFICATION

In compliance with Local Rule 7-1(a), the parties, through their respective counsel, have conferred. Defendant Washington Federal Bank ("Defendant" or "Washington Federal") does not oppose this Motion.

MOTION

Plaintiffs respectfully move this Court to:

(1) Award attorneys' fees of $164,999 and expenses of $4,113.95 as reimbursement for out-of-pocket costs, to be paid from the Settlement Fund as provided in the Settlement Agreement; [1]

[1] The Settlement Agreement appears at Dkt. 34.3. Capitalized terms not otherwise defined have the meanings identified in the Settlement Agreement.

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(2) Award service awards of $5,000 to each Plaintiff identified in the Court's Preliminary Approval Order, to compensate them for the time and effort they spent on behalf of the Class, to be paid from the Settlement Fund as provided in the Settlement Agreement.

This motion is supported by the Joint Declaration of Jeffrey Kaliel and Taras Kick ("Joint Decl."), filed herewith; and the record of this case. For the reasons explained in the attached Memorandum and supporting declarations, Plaintiffs request the Court grant this Motion.

MEMORANDUM IN SUPPORT

I. INTRODUCTION

As detailed in the previously-filed papers in support of preliminary approval, Class Counsel has negotiated an excellent Settlement that provides meaningful relief to the proposed Settlement Class Members and represents an outstanding early resolution of this litigation.

In short, the proposed Settlement, which was the result of hard-fought, arm's-length negotiations by experienced counsel, creates a cash Settlement Fund of $495,000, a recovery that represents approximately 100% of the total estimated actual damages, plus Defendant will separately pay all costs of notice and administration of the Settlement—an added benefit valued at $49,000 that accrues to the class. Joint Decl. ¶ 2. The Settlement funds will be automatically distributed to the members of the Settlement Class by check, without need for Class Members to complete a claim form or take any additional steps. In addition, Defendant has modified its disclosures to reflect its practices with respect to Retry insufficient fund ("NSF") and overdraft ("OD") Fees, and will pay all costs of notice and administration of the Settlement separately—meaning, in effect, that the Settlement Class has recovered significantly more than 100% of its best-case damages.

To compensate Class Counsel and the Named Plaintiffs for their efforts in reaching this

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excellent result, Class Counsel respectfully request that the Court award service awards to each Plaintiff in the amount of $5,000, attorneys' fees in the amount of 33% of the Settlement Fund ($164,999) and modest expenses in the amount of $4,113.95, in accordance with the terms of the Settlement reached between Plaintiffs and Washington Federal. The requested attorneys' fees amount to less than 30% of the valuation of the total Settlement, including the separately-paid notice and administration costs, and are *less than* the lodestar attorneys' fees incurred in this matter, amounting to a negative 0.75 multiplier.

II. BACKGROUND

Litigating this case to a successful resolution required the application of Class Counsel's collective, extensive expertise in litigation involving consumer financial services. It also involved significant commitments of time from Class Counsel. All resulted in the Settlement.

On July 1, 2021, Plaintiffs initiated this action by filing a Class Action Complaint with the caption of *Hartnett v. Washington Federal Bank*, Case No. 2:21-cv-00888-RSM-MLP, in the Western District of Washington, asserting causes of action for Breach of Contract (including Breach of the Covenant of Good Faith and Fair Dealing) (the "Complaint").[2]

Defendant moved to dismiss the Complaint on October 1, 2021. On December 7, 2021, the assigned Magistrate Judge issued a Report & Recommendation ("R&R"), recommending denial of Defendant's Motion to Dismiss. On December 21, 2021, Defendant filed Objections to the R&R. On January 18, 2022, Plaintiffs filed a Response to Defendant's Objections. The District Judge has not ruled on Defendant's Objections.

[2] This instant matter followed an earlier matter, *Dog Walkin Divas, LLC v. Washington Federal*, No. 2:20-cv-1414-RSL-MLP (W.D. Wash.), which was dismissed by Plaintiff early in the litigation. Plaintiff is that matter was also represented by Class Counsel here.

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On February 7, 2022, the Parties jointly sought a stay of the litigation in order to discuss settlement. The Court granted the stay on February 16, 2022 and extended the stay on April 5, 2022. The litigation remains stayed at this time.

The Parties thereafter engaged in informal discovery. During that process, Defendant provided Plaintiffs with data and information that allowed Plaintiffs to estimate class-wide damages. Subsequently arms-length settlement discussions resulted in an agreement in principle, and over the next several weeks the Parties exchanged draft of and finalized a full settlement agreement.

Class Counsel then supervised the selection of a Settlement Administrator, the drafting of notices and a notice plan. Finally, Class Counsel prepared and filed the Settlement Agreement along with the Motion for Preliminary Approval.

III. THE REQUESTED ATTORNEY'S FEES ARE REASONABLE

It is well established that where counsel's work results in substantial benefit to a class of individuals, counsel is entitled to an award of their attorney's fees under the common fund doctrine. Under this doctrine, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The purpose of this doctrine is "to prevent unjust enrichment by distributing the costs of litigation among those who benefit from the efforts of the litigants and their counsel." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008).

Rule 23 permits a court to award "reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). But "[c]ourts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties

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have already agreed to an amount." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). In common fund cases in the Ninth Circuit, district courts have discretion to "employ either the lodestar method or the percentage of recovery method." *Id.* at 942; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). "Under either method, the court must exercise its discretion to achieve a reasonable result." *Demmings v. KKW Trucking, Inc.*, 3:14-CV-0494-SI, 2018 WL 4495461, at *13 (D. Or. Sept. 19, 2018).

Because this class action is based on Washington law, Washington law governs the award of fees. *Vizcaino*, 290 F.3d at 1047; *see also Dennings v. Clearwire Corp.*, No. C10–1859JLR, 2013 WL 1858797, at *4 (W.D. Wash. May 3, 2013) ("The jurisdiction in this case . . . is based on diversity of citizenship under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The availability and amount of a fee award are considered substantive issues of state law for *Erie* purposes."). Like the Ninth Circuit, "Washington law recognizes both the lodestar method and the percentage of the fund methods for determining appropriate attorneys' fees." *Dennings*,2013 WL 1858797, at *5 (alterations and quotations omitted). And because the "Washington practice" is to "look[] to federal law for guidance in this area," the Ninth Circuit has authorized federal courts to exercise their discretion to use the percentage of the fund or lodestar method inclass cases governed by Washington law. *Vizcaino*, 290 F.3d at 1047 (affirming district court's application of percentage method to case brought under Washington law); *see also Clark v. Payless Shoesource, Inc.*, 2012 WL 3064288, at *1 (W.D. Wash. July 27, 2012) (applying lodestar method in case brought under Washington law).

Although courts may use either method, "the percentage method in common fund cases appears to be dominant" in the Ninth Circuit. *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046; *see also Demmings*, 2018 WL 4495461, at *13 ("Courts typically use the percentage

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approach when awarding attorney's fees with the lodestar serving as a 'cross check' on the reasonableness of the percentage."). That method "better aligns the incentives of plaintiffs' counsel with those of the class members because it bases the attorneys' fees on the results they achieve for their clients, . . ." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 440 (E.D.N.Y. 2014).

The Ninth Circuit recognizes 25% of the common fund as a "benchmark rate" in common fund cases. *Vizcaino*, 290 F.3d at 1048. But as the Ninth Circuit cautioned, the 25% benchmark rate is "a starting point for analysis" and it "may be inappropriate in some cases." *Id.* Accordingly, this percentage can be adjusted upward or downward based on the circumstances of the case. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *In re Bluetooth*, 654 F.3d at 942; *Demmings*, 2018 WL 4495461, at *13 (noting the percentage "may be adjusted . . . when special circumstances warrant a departure" (quotation omitted)).

Here, Plaintiffs' Counsel is requesting fees of $164,999 for their work in this case, which equates to 30% of the overall settlement value, including the notice and administration costs paid separately by Defendant—and is reasonable under both the percentage method and lodestar methods. Indeed, the fee request represents a *negative* lodestar multiplier here.

A. <u>The percentage of the settlement value requested by class counsel is reasonable.</u>

The first step when using the percentage method is to assess the appropriate size of the fund to "determine what portion of the common fund is for the benefit of the entire class." *In re Anthem, Inc. Data Breach Litig.*, 15-MD-02617-LHK, 2018 WL 3960068, at *7 (N.D. Cal. Aug. 17, 2018), *appeal dismissed sub nom. In re Anthem, Inc., Customer Data Sec. Breach Litig.*, 18-16826, 2018 WL 7858371 (9th Cir. Oct. 17, 2018). The Settlement provides relief to the Class

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in two primary ways: (1) a cash Settlement Fund that will automatically provide cash payments to Settlement Class Members without any requirement to submit a claim or take other action; (2) the payment of notice and administration expenses; and (3) an agreement by Washington Federal to improve the challenged bank fee disclosures. The injunctive relief is valuable, but not easily quantified. (As such, Plaintiffs do not include that amount in their valuation of the Settlement amount.) The common Settlement Fund is valued at $495,000, with no possibility of a reverter. Notice and administration expenses paid separately by Defendant are estimated at $49,000 Joint Decl., ¶ 3. This separate payment of notice and administration costs ensures the Settlement Fund is not diluted, but rather is fully made available for Settlement Class Members. *See In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *8 ("[T]he Court concludes that litigation expenses and administrative costs should be included. As to the former, the litigation expenses were necessary to litigate this case and 'make the entire action possible.' As to the latter, investing in a comprehensive notice and claims processing effort was critical to inform . . . Settlement Class Members about the Settlement and their ability to seek reimbursement for their losses." Together, the quantifiable monetary value of the Settlement is $544,000, and Class Counsel seeks an attorneys' fee award of 30% of that value.

B. The *Vizcaino* factors justify the requested fee award and an upward departure from the "benchmark."

While the 25% is the Ninth Circuit "benchmark,"it is well established that this percentage can be adjusted upward based on the circumstances of the case. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d at 272; *In re Bluetooth*, 654 F.3dat 942; *Demmings*, 2018 WL 4495461, at *13. Indeed, courts regularly grant fee awards between 20% and 30% of the settlement value. *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440, 450 (1993) (noting

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that a reasonable percentage of that recovery is "often in the range of 20 to 30 percent"); *see also, e.g., Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1023 (E.D.Cal. 2019) (awarding 33.3% of common fund in attorney's fees under percentage method); *Vizcaino*, 290 F.3d at 1050 (affirming fee award of 28% of the common fund); *Barbosa v. CargillMeat Sols. Corp.*, 297 F.R.D. 431, 448, 451 (E.D. Cal. 2013) (noting "[t]he typical range of acceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total settlement value," and approving fee award of 33% of fund).

"[I]n most common fund cases, the award exceeds [the 25%] benchmark." *Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707, at *10 (S.D. Cal. Sept. 28, 2017) (quoting *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1047 (N.D. Cal. 2008)). Indeed, courts in this circuit routinely award attorneys' fees that exceed the 25% benchmark. *See id.* (awarding 33% fee of $51 million common fund); *see also McGrath v. Wyndham Resort Development Corporation*, 2018 WL 637858 (S.D. Cal. Jan. 30, 2018 (J. Miller) (awarding 33% of common fund); *Mauss v. NuVasive, Inc.*, 2018 WL 6421623 (S.D. Cal. Dec. 6, 2018) (J. Miller) (awarding 30% of $7.9 million common fund); *Singer v. Becton Dickinson & Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, at *8 (S.D. Cal. June 1, 2010) (awarding 33% of the common fund); *Taylor*, 2015 WL 12658458, at *17 (holding that 33% was reasonable given the result, the risk, and counsel's time investment); *Campbell*, 2016 WL 6662719, at *10 (approving a fee of one-third of the common fund).

The Ninth Circuit has also upheld awards of one-third of a common fund. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming an award of one-third of total recovery); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming an award of one-third of a $12 million common fund); *Williams v. Costco Wholesale*

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Corp., 2010 WL 2721452, at *6 (S.D. Cal. 2010) (noting the typical range of attorneys' fees requests are between 20 percent and 50 percent and citing *Birch v. Office Depot, Inc*., Case No. 06 CV 1690 DMS (S.D. Cal. Sept. 28, 2007) (Dkt. No. 48) (awarding a 40% fee) and *Rippee v. Boston Mkt. Corp*., Case No. 05 CV 1359 BTM (S.D. Cal. Oct. 10, 2006) (Dkt. No. 69) (awarding a 40% fee)).

Factors that a court may consider in making such a departure include: (1) the results obtained; (2) the risks involved in the litigation; (3) counsel's skill and the complexity of the issues; (4) the effort expended by counsel; (5) the reaction of the class; (6) non-monetary or incidental benefits, including helping similarly situated persons nationwide by clarifying certain laws; (7) awards in similar cases; and (8) comparison with counsel's lodestar. *See Vizcaino*, 290 F.3d at 1048–50; *Demmings*, 2018 WL 4495461, at *13. These factors should not be used as a rigid checklist or weighed individually, but, rather, should be evaluated in light of the totality of the circumstances. *See Vizcaino*, 290 F.3d at 1048–50.

1. Counsel received terrific results for the class in light of significant risk

"The most critical factor in granting attorney's fees is the overall result and benefit to the class." *Demmings*, 2018 WL 4495461, at *14. As detailed *supra*, and in the previously-filed Motion for Preliminary Approval, both the monetary and injunctive relief in this Settlement provide substantial benefits to the class. Indeed, in the litigation and in the Settlement, Plaintiffs sought both a monetary recovery and key improvements to Washington Federal's disclosures—both of which Class Counsel obtained here. As result of the Settlement, Washington Federal is making substantial monetary relief available to its accountholders—*over 100% of actual damages*—and Washington Federal's fee practices are no longer shrouded in darkness; now

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consumers, armed with full information about the Bank's practice, can choose with whom to Bank in a more fair marketplace for banking services.

The benefits conferred by the Settlement are valued at $544,000, not counting the improvements to Washington Federal's disclosures in charging and disclosing its fees—which, while not quantifiable, provides an important benefit to Class Members going forward. The cash recovery alone represents 100% of the total alleged damages in this case, and it will be distributed directly to Class members, with no need to submit a claim, and no reversion of any funds to Defendant. All without the risk and delay to a class recovery that would have been attendant to further litigation. Even putting aside that significant litigation risk, the Settlement is excellent by any measure. As a result of the Settlement, Class Members will receive their distributions without the need to submit a claim. [3] In short, the Settlement provides significant benefits to Class Members in a difficult case with many litigation obstacles ahead. The risk of further litigation is also an important factor in determining a fair fee award. *See Vizcaino*, 290 F.3d at 1048. "When considering the risks posed in litigation, 'the risk of loss.

Factually, the case was difficult as it involved the detailed review of back-end transactional data from Washington Federal Bank, as well as review of several different versions of binding account contracts during the relevant limitations period. The fundamental contract construction issue remained unresolved when the Parties agreed to settle. That issue, along with

[3] Indeed, it is the "value to individual class members" that determines the true value of thesettlement. *See Staton*, 327 F.3d at 974. in a particular case . . . is a product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits.'" *Demmings*, 2018 WL 4495461, at *15 (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)). A high level of risk supports an upward adjustment to the percentage fee. "In cases where recovery is uncertain, an award of one third of the common fund as attorneys' fees has been found to be appropriate." *Id.* (quoting *Franco v. Ruiz Food Prods.*, No. 1:10–cv–02354–SKO, 2012 WL 5941801, at *16 (E.D. Cal. Nov. 27, 2012).).

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other merits issues and the yet to be filed and decided motion for class certification, would have been litigated aggressively. Joint Decl., ¶ 4. If Washington Federal Bank was successful in opposing class certification or at trial, that would have prevented recovering anything at all. *Id.* ¶ 5.

The substantial risks in further litigating this case support Counsel's requested fee award.

2. This was a complex lawsuit, requiring substantial time and skill

Other factors warranting an upward adjustment include the efforts of counsel and the complexity of the issues in the case. *See Vizcaino*, 290 F.3d at 1048–50; *Demmings*, 2018 WL 4495461, at *15 ("The complexity of issues and skills required may weigh in favor of a departure from the benchmark fee award." (quotation omitted)).

Not only did this litigation require substantial efforts from Class Counsel, it required significant skill to competently address complex and unsettled issues of fact and law—and even to identify the alleged wrongdoing in the first place. This is a complicated breach of contract case involving bank processing and electronic payment practices, including the dense rules of the National Automated Clearinghouse Association ("NACHA"). Washington Federal adamantly denied liability and expressed an intention to defend itself through trial. More, this area of law is a rapidly developing area of jurisprudence. Indeed, while many cases with similar theories of liability have been successful at the pleadings stage.[4] and Magistrate Judge Peterson

[4] *See Ingram v. Teachers Credit Union*, No. 49D01-1908-PL-O25431 (Marion Cnty. Ind. Super. Ct. Feb. 18, 2020); *McMurrin v. America First Credit Union*, No. 190909065 CN (3d Dist. Ct., Salt Lake Cnty., Utah May 5, 2020); *Romohr v. The Tennessee Credit Union*, No. 19-1542-BC (Davidson Cnty. Tenn. Ch. Ct. May 19, 2020); *Vocaty v. Great Lakes Credit Union*, No. 19-L-729 (Lake Cnty. Ill. Cir. Ct. June 3, 2020); *Duncan v. Bancfirst*, No. CJ-2020-298 (Okla. Cnty. Dist. Ct. June 3, 2020); *Brown v. Educators Credit Union*, No. 2019CV1814 (Racine Cnty. Wis. Cir. Ct. July 1, 2020); *Baptiste v. GTE Fed. Credit Union d/b/a GTE Fin.*, No. 20-CA-002928 (Hillsborough Cnty. Fla. Cir. Ct. July 8, 2020); *Darty v. Scott Credit Union*, No. 19L0793 (St. Clair Cnty. Ill. Cir. Ct. June 24, 2020); *Young v. The Wash. Trust Co.*, No. 1:10-cv-524-WES-PAS (D.R.I. June 2, 2020); *Jones v. Lake Michigan Credit Union*, No. 20-000240-CK (Washtenaw Cnty. Mich. Sept. 29, 2020); *Teel v. HAPO Community Credit Union*, No. 19-2-03193-03 (Super. Ct., Benton Cnty., Wa.); *Pierce v. Safe Credit Union*, Case No. 34-2020-00275892 (Super.

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recommended denying the Bank's motion to dismiss here, other courts have reached the opposite conclusion. [5]

Happily, Class Counsel are experienced in class action litigation, serving as Lead or Co-Lead Counsel in dozens of consumer class actions in federal and state courts throughout the country. Joint Decl. ¶ 6. There are very few attorneys in this state and nationally who are willing and capable of taking on a complex claim like this at all, much less with the added complexity of class action rules and pitfalls. *Id*., ¶7.

Because of the continuously developing law around the theory of liability and the uncertainty that existed throughout the litigation, Class Counsel needed a high degree of skill, both to settle the matter and to be prepared to litigate the threshold legal issue through appeal. Class Counsel's experience handling the most prominent bank fee cases and their fulsome understanding of the related legal issues helped them successfully advance this case and procure a beneficial result for the Classes.

There are few if any firms in the nation with the expertise of Class Counsel in these types of bank fee cases. Joint Decl., ¶ 8. Class Counsel leveraged that expertise to litigate this case and negotiate a favorable settlement for the Settlement Class. Without their persistence, expertise, and willingness to invest time in this matter, the Settlement Class would have been left entirely without recompense. Moreover, Class Counsel litigated this action in an efficient

Ct. of Cal., Cnty. of Sacramento); *Rivera v. IH Mississippi Valley Credit Union* (Rock Island Cnty. Ill. Cir. Ct.); *Hewitt v. UW Credit Union*, Case No. 20-cv-1295 (Dane Cnty. (WI) Circuit Court); *Silvey v. Numerica Credit Union*, No. 19-2-04344-32 (Spokane Ctny., Wa. October 12, 2020).

[5] *See, e.g. Page v. Alliant Credit Union*, No. 19-cv-5965, 2020 WL 5076690 (N.D. Ill. Aug. 26, 2020); *Marical, et al. v. Boeing Employees' Credit Union*, No. 19-2-20417-6 KNT; *Saunders v. Y-12 Fed. Credit Union*, No. E2020-00046-COA-R3-CV, 2020 WL 6499558, at *3-5 (Tenn. Ct. App. Nov. 5, 2020); *Winamaki v. Umpqua Bank*, No. 19CV52252 (Ore. Cir. Ct., Multnomah Cnty. October 30, 2020); *Haines v. Washington Trust Bank*, No. 20-2-10459-1 SEA, at 6-7 (Wash. Super. Ct. Nov. 10, 2020); *Choy v. Space Coast Credit Union*, No. 2019-CA-039839 (Fla. 18th Cir. Ct).

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manner. Class Counsel were able to negotiate a Settlement early, allowing Class Members to receive their settlement benefits now—without the extensive delay entailed by pursuing this case through the outcome of the appeal, rulings on class certification and summary judgment, and the inevitable appeals that would have followed. The swift compromise resolution of the case benefits the Settlement Class and emphasizes the skill and efficiency of Class Counsel. This factor also weighs in favor of approval of the requested fees.

3. The contingent nature of the fee and financial burden carried by Class Counsel supports the requested fee.

A determination of a fair fee should include consideration of the contingent nature of the fee. *See Vizcaino,* 290 F.3d at 1050. "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994) (quoting Richard Posner, Economic Analysis of Law §21.9 (5th ed. 1998)). "Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose." *Id.* Without this incentive, few lawyers would invest years of their time and money representing a class in light of the risk of recovering nothing. *Id.* "Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work.").

> It is axiomatic that attorneys who work on a contingent-fee must charge a higher fee than those who work on a noncontingent-fee basis. . . . This "higher" fee . . . is not a bonus . . . . From a pure dollars-and-cents economic view, this higher fee is the appropriatemeasure of a reasonable fee that is required in the marketplace

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> of services: (1) to induce an attorney to agree to assume the risk that no compensation will be received unless she or he successfully achieves a benefit for the client; and (2) if ultimately successful, tocompensate for the costs suffered and investment income forgoneby delay in payment.

Newberg and A. Conte, 1 Attorney Fee Awards § 1,8 (3d ed.).

Class received no compensation for their efforts during the course of this litigation, knowing that if their efforts were unsuccessful, they would not receive payment or reimbursement for either their work or expenses. The financial risk was substantial and precluded Class Counsel from working on other matters. Class Counsel should be compensated for enduring the risks of this time-consuming and expensive contingent case.

4. The Requested Fee is Comparable to attorneys' fees awarded in other cases

Courts look to fee awards in similar cases when assessing a reasonable fee. *Demmings*, 2018 WL 4495461, at *13. Courts in the Ninth Circuit regularly award between 20% and 33% in common fund cases. *See Barbosa*, 297 F.R.D. at 448 (holding "[t]he typical range ofacceptable attorneys' fees in the Ninth Circuit is 20 percent to 33.3 percent of the total settlementvalue," and approving fee award of 33% of fund).

Courts—including those from within the 9th Circuit as noted in bold below—regularly award fees in excess of 30% when awarding attorneys' fees in similar financial services class action settlements. The following depicts these settlements nationwide, all of which resulted in fee awards at or above the 33.33% that Class Counsel requests here:

Bank Fee Case Name	**Percentage of the Fund Awarded**
Lopez v. JPMorgan Chase Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.)	**44%** of value of settlement, which includes 30% of $110 million cash fund and 30% of value of practice changes

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Jacobs v. Huntington Bancshares Inc. No. 11-cv-000090 (Lake County Ohio)	**40%** of value of settlement, which includes 40% of $8.975 million and 40% of $7 Million in debt forgiveness
***Farrell v. Bank of Am., N.A.*, 327 F.R.D. 422 (S.D. Cal. 2018), *aff'd sub nom. Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628 (9th Cir. 2020)**	**40%** of 37.5 million common fund
Wolfgeher v. Commerce Bank, N.A., No. 1:09-MD-02036-JLK (S.D. Fla.) (Dkt. 3574),	**38%** of $18.3 million common fund
***Nelson v. Rabobank, N.A.*, No. RIC 1101391 (Cal. Supr.)**	**35.2%** ($750k fee includes % of practice changes)
In re Checking Account Overdraft Litig., No. 1:09-MD-02036-JLK, 2020 U.S. Dist. LEXIS 142012 (S.D. Fla. Aug. 10, 2020)	**35%** of $7.5 million
Molina v. Intrust Bank, N.A., No. 10-CV-3686 (Dist. Ct. Ks.)	**33%** of $2.7 million
Hawkins et al v. First Tenn. Bank, N.A. (Cir. Ct. Tenn.)	**35%** of $16.75 million
Swift v BancorpSouth, No. 1:10-cv-00090-GRJ (N.D. Fla.)	**35%** of $24 million
Casto v. City National Bank, N.A., No. 10-C-1089 (Cir. Ct. W.Va.)	**33.33%** of $3 million
Schulte v. Fifth Third Bank, No. 09-cv-6655 (N.D. Ill.)	**33.33%** of $9.5 million
Johnson v. Community Bank, N.A., No. 12-cv-01405-RDM (M.D. Pa.)	**33.33%** of $2.5 million
Bodnar v. Bank of America, No. 5:14-cv-03224-EGS (E.D. Pa.)	**33.33%** of $27 million
Holt v. Community America Credit Union, No. 4:19-CV-00629-FJG (W.D. Mo.)	**33.33%** of 3.078 million
White v. Members 1st Federal Credit Union, Case No. 1:19-cv-00556-JEJ (W.D. Pa.)	**33.33%** of $910,000
***Figueroa v. Capital One*, Case No. 3:18-cv-00692-JM-BGS (S.D. Cal.)**	**33.33%** of $13 million
Liggio v. Apple Federal Credit Union, No. 1:18-cv-01059-LO-MSN (E.D. Va.)	**33.33%** of $2.7 million
Lambert v. Navy Fed. Credit Union, No. 1:19-cv-103-LO-MSN, 2019 U.S. Dist. LEXIS 138592, at *3 (E.D. Va.)	**33.33%** of $16 million

As the requested fee is clearly in line with other similar bank fee litigation around the nation that settled for a similar amount, the fee requested is reasonable.

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C. A cross-check of the requested fees under the lodestar method also demonstrates the fee request is reasonable.

To determine the reasonableness of a fee award, courts may compare the percentage of the common fund with counsel's lodestar calculations. *See Vizcaino*, 290 F.3d at 1050–51; *Demmings*, 2018 WL 4495461, at *13 (noting a "comparison with counsel's lodestar" is a factor to consider in assessing a reasonable percentage fee award). While courts have discretion to choose the percentage or lodestar approach, the Ninth Circuit expressly "encourage[s] district courts to cross-check their attorneys' fee awards using a second method of fee calculation." *Johnson v. MGM Holdings, Inc.*, 943 F.3d 1239, 1242 (9th Cir. 2019).

"Under the lodestar method, the Court multiplies a reasonable number of hours by a reasonable hourly rate." *Demmings*, 2018 WL 4495461, at *13 (quoting *Fischel*, 307 F.3d at 1006). "Once the lodestar has been calculated, 'the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *Id.* at 740 (quoting *In re Bluetooth*, 654 F.3d at 941–42). The lodestar method is typically utilized in cases brought under fee shifting statutes and "where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized." *In re Bluetooth*, 654 F.3d at 941; *see also Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 922 (9th Cir. 2014) *vacated as moot*, 772 F.3d 608 (9th Cir. 2014).

When conducting a cross-check using the lodestar, "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean counting . . . [courts] may rely on summaries submitted by the attorneys and need not review actual billing records." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) (alternations in original). Where the Court

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uses the lodestar "as a cross-check to the percentage-of-the-fund amount sought," it may accept class counsel's explanation of fees as reasonable when supported by "sworn declarations" describing Counsel's work in the case. *Id.*

Should the Court choose to use a "lodestar cross-check," the requested fee is reasonable as it amounts to a *negative* multiplier of 0.75 for the risk involved in the suit. Joint Decl. ¶ 9 (showing time broken down by task and lawyer with lodestar totaling $219,669.20). As detailed in the supporting Joint Declaration, Counsel spent hours developing and drafting the complaint, drafting pleadings and briefs, pursuing informal discovery, negotiating the Settlement, and supervising the distribution of notice.

Compared to the negative multiplier sought here, courts in the Ninth Circuit routinely approve lodestar cross-checks where the fee awarded is 10 times or more the lodestar incurred. In different consumer financial services litigation in this Circuit, for example, the lodestar multiplier far exceeded the one requested here. In *Lloyd v. Navy Fed. Credit Union*, No. 17-CV-1280-BAS-RBB, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019), *reconsideration denied in part*, No. 17-CV-1280-BAS-RBB, 2019 WL 2602516 (S.D. Cal. June 25, 2019), for example, Judge Bashant approved an award of $6,125,000 in attorneys' fees, which represented 25% of the common fund, despite the fact that a lodestar cross-check would result in a multiplier of 10.96. The Court nevertheless decided to use the percentage-of-the-fund approach, reasoning that, "Faced with the prospect of potentially no recovery for the class, Class Counsel have obtained a meaningful recovery for the class as a whole." *Id. See also Vizcaino*, 290 F.3d at 1051 n.6 (noting multipliers of up to 19.6); *see also Steiner v. American Broadcasting Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming fee award where the lodestar multiplier was 6.85); *In Re Wells Fargo & Co. Shareholder Deritivive Litigation, et. al. v. Cochran*, No. 20-15898, 2021

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WL 1511501, at *2 (9th Cir. Apr. 16, 2021) (3.8 multiplier cross check was not unreasonable); *McGrath v. Wyndham Resort Development Corporation*, 2018 WL 637858 (S.D. Cal. Jan. 30, 2018) (awarding attorneys' fees with 4.8 multiplier); *Pan v. Qualcomm Incorporated*, 2017 WL 3252212 (S.D. Cal. July 31, 2017) (multiplier of 3.5 was reasonable); *Hazlin v. Botanical Laboratories, Inc.*, 2015 WL 11237634 (S.D. Cal. May 20, 2015) (awarding multiplier of 2.88 in consumer class case); *Beaver v. Tarsadia Hotels*, No. 11-CV-01842-GPC-KSC, 2017 WL 4310707, at *12 (S.D. Cal. Sept. 28, 2017) (approving multiplier of 2.89).

Class Counsel's negative multiplier of 0.75 is well below that typically awarded in contingent litigation and justified based on the time and risk that counsel faced in this litigation and the excellent results obtained in this complex case. The risks of the litigation and the skill required to achieve the outstanding relief for the class support the modest multiplier requested.

IV. THE REQUESTED EXPENSES ARE SUPPORTED AND REASONABLE

Attorneys who create a common fund are entitled to reimbursement of expenses advanced for the benefit of the class." *Vincent*, 2013 WL 621865, at *5. "Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *In re Omnivision*, 559 F. Supp. 2d at 1048 (citing *Harris v.Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)). Class Counsel seek reimbursement of $4,113.95 for the reasonable expenses incurred to advance this litigation. Joint Decl., ¶ 13. These expenses are largely filing and pro hac vice fees. Id.

V. THE SERVICE AWARDS ARE SUPPORTED AND REASONABLE

Plaintiffs request the Court award $5,000 to each of them for their time, effort, and risk in connection with the Action. Each of the Plaintiffs appointed by the Court as Class Representatives in its Order Granting PreliminaryApproval stepped forward to put their name and reputation on

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the line for the sake of the Class, and their efforts throughout this litigation were essential to bringing about the Settlement.

"Incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class action cases." *Online DVD-Rental*, 779 F.3d at 943. Though fairly typical, such awards are discretionary and "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *see also Demmings*, 2018 WL 4495461, at *12. "Incentive awards are generally approved so long as the awards are reasonable and do not undermine the adequacy of the class representatives." *Zamora Jordan v. Nationstar Mortg., LLC*, 2:14-CV-0175-TOR, 2019 WL 1966112, at *9 (E.D. Wash. May 2, 2019); *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013). "In assessing the reasonableness of an incentive award, courts look to the number of plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment." *Zamora Jordan*, 2019 WL 1966112, at *9; *Online DVD-Rental*, 779 F.3d at 947.

The requested service awards are consistent with other incentive awards in this district for protracted, complex litigation. *See, e.g., Demmings*, 2018 WL 4495461, at *12 (granting $7,500 inventive award and noting it was "similar in size to incentive awards granted to class representatives in this circuit").

VI. CONCLUSION

Class Counsel respectfully submit that the fees, expenses and service awards they request are fair and reasonable in this case and ask this Court to award the relief they request.

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RESPECTFULLY SUBMITTED AND DATED August 8, 2022.

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CERTIFICATE OF SERVICE

I certify that on this day, a copy of the foregoing document was electronically served on the following individuals via the manner indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated August 8, 2022.

Trish Bashaw, Paralegal
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