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THE HONORABLE KEN SCHUBERT
Department 40
Noted for Hearing: September 24, 2021 at 11:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STEVE R. MARICAL; EMILY J. ANDERSON, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

BOEING EMPLOYEES' CREDIT UNION,

Defendant.

NO. 19-2-20417-6 KNT

**PLAINTIFF'S MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND COSTS AND
CLASS REPRESENTATIVE SERVICE AWARD**

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OTHER AUTHORITIES

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1 **I. INTRODUCTION**

2 Plaintiff Steve Marical and his counsel request that the Court award Class Counsel
3 attorneys' fees of \$1,800,000, or 30% of the \$6 million Settlement Fund,¹ litigation costs of
4 \$103,375.30, and approve a \$7,500 service award for Plaintiff. Plaintiff and Class Counsel
5 litigated this case for over two years before negotiating a favorable settlement on behalf of
6 the Settlement Class. The Settlement provides significant monetary relief as well as important
7 non-monetary relief in the form of changes to the business practices that Plaintiff challenged
8 in this litigation. The substantial benefits for the Settlement Class could not have been
9 achieved without Class Counsel's time, effort, and skill, as well as Plaintiff's participation in the
10 case.

11 Class Counsel's request for an award of 30% of the Settlement Fund is in the typical
12 benchmark range for percentage-of-the-fund awards in Washington and is warranted given
13 the value of the Settlement to the Class. Class Counsel's litigation costs include amounts that
14 would be charged to a paying client and are regularly paid from class settlement funds,
15 including transcript costs, mediation fees, and travel expenses. And Plaintiff requests a
16 modest service award in line with amounts regularly approved by Washington courts. Plaintiff
17 respectfully requests that the Court grant his motion.

18 **II. STATEMENT OF FACTS**

19 The procedural history of this case and the Settlement are discussed in Plaintiff's
20 concurrently filed motion for final approval of the Settlement.

21 **III. STATEMENT OF ISSUES**

22 Whether the Court should award attorneys' fees and costs to Class Counsel and
23 approve payment of a service award to Plaintiff Marical.

24
25 _____
26 ¹ Unless defined, capitalized terms have the same meanings as those set forth in the Parties'
27 Settlement Agreement, attached as Exhibit 1 to the Terrell Declaration, or the Court's Order
Granting Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

1 **IV. EVIDENCE RELIED UPON**

2 Plaintiff relies on the declarations of Beth Terrell, E. Michelle Drake, Walter Smith, and
3 Vanessa Padelford, the motion for preliminary approval of the Settlement, the motion for final
4 approval of the Settlement, and all pleadings and papers filed in this action.

5 **V. ARGUMENT AND AUTHORITY**

6 **A. Class Counsel’s requested attorneys’ fee is reasonable and should be awarded.**

7 Class Counsel request an attorneys’ fee award of \$1,800,000, or 30% of the Settlement
8 Fund. Class Counsel disclosed their intent to request this fee award to Settlement Class
9 Members. Padelford Decl. Ex. C at ¶ 17.

10 The common fund doctrine is an equitable exception to the American rule that
11 litigants must bear their own attorneys’ fees. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
12 (1980). It is well settled that “a lawyer who recovers a common fund for the benefit of
13 persons other than himself or his client is entitled to a reasonable attorney’s fee from the
14 fund as a whole.” *Id.* The “common fund” doctrine “rests on the perception that persons who
15 obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the
16 successful litigant’s expense.” *Id.* A court with jurisdiction over the fund can “prevent this
17 inequity by assessing attorney’s fees against the entire fund, thus spreading fees
18 proportionately among those benefited by the suit.” *Id.*; *see also In re Wash. Pub. Power*
19 *Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) (“those who benefit from the
20 creation of the fund should share the wealth with the lawyers whose skill and effort helped
21 create it”). As a matter of public policy, awarding fees from the common fund promotes
22 “greater access to the judicial system” by making it easier for class action plaintiffs to obtain
23 counsel. *Bowles v. Washington Dep’t of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993).

24 Where, as here, counsel in a class action seek fees from the common fund, courts have
25 discretion to employ either the lodestar method or percentage-of-recovery method to
26 calculate a reasonable fee. *Id.* When determining the appropriate fee from a common fund,

1 the percentage-of-the-fund method is preferred. *Id.* The percentage method aligns lawyers’
2 interest with the interest of class members, since it encourages lawyers to concentrate their
3 efforts on achieving the highest possible recovery for the class, which in turn increases the fee
4 award. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)
5 (“Because the benefit to the class is easily quantified in common-fund settlements, we have
6 allowed courts to award attorneys a percentage of the common fund in lieu of the often more
7 time-consuming task of calculating the lodestar.”); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d
8 294, 300 (3d Cir. 2005) (recognizing that the percentage method “is generally favored in
9 common fund cases because it allows courts to award fees from the fund ‘in a manner that
10 rewards counsel for success and penalizes it for failure’” (citation omitted)); *see also* William
11 B. Rubenstein, *Why the Percentage Method?*, 2 Class Action Attorney Fee Digest 93 (March
12 2008) (“[U]nder the percentage method, counsel has an interest in generating as large a
13 recovery for the class as possible, as her fee increases with the class’s take, while keeping her
14 hours to the minimum necessary to do the job effectively.”);² Task Force on Contingent Fees,
15 Tort Trial and Insurance Practice Section of the American Bar Association, *Report on*
16 *Contingent Fees in Class Action Litigation*, 25 Rev. Litig. 459, 469 (2006) (noting that the
17 percentage method “has numerous advantages over the lodestar method,” including its
18 simplicity, the disincentive for attorneys to “bill unnecessary hours or to use three lawyers
19 when one would do,” and the fact that it “ties the lawyers’ fee directly to the success of the
20 litigation”).

21 The lodestar method, by contrast, is typically used in cases involving a fee-shifting
22 statute or when the class’s recovery is difficult to determine. *See Bowles*, 121 Wn.2d at 72
23 (“While the lodestar method is generally preferred when calculating *statutory* attorney fees,
24 the percentage of recovery approach is used in calculating fees under the common fund
25 doctrine. The primary explanation for this distinction is that *statutory* attorney fees are

26 ² Available at <https://billrubenstein.com/wp-content/uploads/2019/08/Rubenstein->
27 [_Mar08_column.pdf](https://billrubenstein.com/wp-content/uploads/2019/08/Rubenstein-Mar08_column.pdf).

1 separately assessed against the defendant while common fund attorney fees are taken
2 directly from the recovery obtained by the plaintiffs.” (citations omitted)); *In re Bluetooth*, 654
3 F.3d at 941 (courts use the lodestar method when the relief is “primarily injunctive in nature
4 and thus not easily monetized”); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)
5 (noting that courts use the lodestar method when “there is no way to gauge the net value of
6 the settlement or any percentage thereof”). The lodestar method has been criticized as
7 encouraging lawyers to prolong litigation and discourage early settlements that would benefit
8 the class. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.5 (9th Cir. 2002) (“[I]t is
9 widely recognized that the lodestar method creates incentives for counsel to expend more
10 hours than may be necessary on litigating a case so as to recover a reasonable fee, since the
11 lodestar method does not reward early settlement”); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*,
12 396 F.3d 96, 121 (2d Cir. 2005) (noting that the lodestar method “create[s] an unanticipated
13 disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s]
14 district courts to engage in a gimlet-eyed review of line-item fee audits” (alterations in
15 original) (citation omitted)).

16 1. The percentage-of-recovery analysis supports Class Counsel’s fee request.

17 Under the “percentage of recovery” method attorneys are awarded a reasonable
18 percentage of the total recovery, “often in the range of 20 to 30 percent.” *Bowles*, 121 Wn.2d
19 at 72; *City of Seattle v. Okeson*, 137 Wn. App. 1051, 2007 WL 884827, at *7 (2007)
20 (unpublished) (“Twenty to thirty percent of the recovery is a typical benchmark used in
21 awarding attorney fees under the common fund doctrine, but that figure can be adjusted
22 based on the circumstances of the case.”); *see also Ikuseghan v. Multicare Health Sys.*, No.
23 C14-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (awarding fee of 30% of
24 the fund); *Estate of Brown v. Consumer Law Assocs., LLC*, No. 11-cv-0194-TOR, 2013 WL
25 2285368, at *4 (E.D. Wash. May 23, 2013) (awarding fee of 30% of the fund). Courts in this
26 state can and do award fees even greater than 30% of a common fund. *See A.M. v. Moda*

1 *Health Plan, Inc.*, C 14-1191 TSZ, 2015 WL 9839771, at *3 (W.D. Wash. Nov. 3, 2015)
2 (awarding fee of 35% of settlement fund); *Dennings v. Clearwire Corp.*, No. C10-1859JLR, 2013
3 WL 1858797, at *8 (W.D. Wash. May 3, 2013) (awarding fee of 35.78% of the fund); *see also*
4 Order Granting Plaintiff’s Unopposed Motion for Final Approval of Class Action Settlement
5 and Award of Attorneys’ Fees, Costs and Service Award ¶ 19, *Strong v. Numerica Credit Union*,
6 No. 17-2-01406-39 (Yakima County Super. Ct. Feb. 14, 2020) (awarding one-third of fund)
7 (attached to Terrell Decl. as Ex. 6); Final Approval Order and Entry of Judgment ¶¶ 18-21,
8 *Dougherty v. Barrett Business Servs., Inc.*, No. 17-2-05619-1 (Clark County Super. Ct. Nov. 8,
9 2019) (awarding one-third of fund) (attached to Terrell Decl. as Ex. 7); Order Approving Award
10 of Attorneys’ Fees and Costs ¶ 10 (“Costco Order”), *Terrell v. Costco Wholesale Corp.*, No. 16-
11 2-19140-1 SEA (King County Super. Ct. June 19, 2018) (awarding one-third of fund) (attached
12 to Terrell Decl. as Ex. 8); Order and Judgment Finally Approving Class Action Settlement ¶ 13,
13 *Wodja v. Wash. State Emps. Credit Union*, No. 16-2-12148-4 (Pierce County Super. Ct. June 22,
14 2018) (awarding one-third of fund) (attached to Terrell Decl. as Exs. 4 & 5).

15 Class Counsel’s request for an award of 30% of the Settlement Fund is in the typical
16 benchmark range and warranted given the value of the Settlement to the Class. The
17 \$6,000,000 Settlement Fund will ensure that Settlement Class Members recover a significant
18 percentage of the NSF and Overdraft fees they paid to BECU during the Class Period. *See*
19 *Bowles*, 121 Wn.2d at 72 (“In common fund cases, the size of the recovery constitutes a
20 suitable measure of the attorneys’ performance.”). The non-monetary relief is particularly
21 valuable in this case because BECU has agreed to (1) publish prominently on its website a link
22 to a statement clearly describing BECU’s overdraft and NSF policies in detail, including the fact
23 that overdraft and NSF fees are calculated based on Available Balance rather than Ledger
24 Balance and describing the differences between those two Balances; (2) create a formal policy
25 governing refunds of NSF and Overdraft fees, by which BECU will, upon request from a BECU
26 member in good standing, refund at least one NSF or Overdraft fee annually; (3) create a

1 notification to be sent to any member receiving a NSF or Overdraft refund, informing the
2 member of the basis for the fee, and offering money management resources; (4) remind Class
3 Members of the options for opting in or out of overdraft coverage and the Courtesy Pay for
4 Debit overdraft program; and (5) within three years of Settlement, implement a checking
5 account product featuring no NSF or overdraft fees. Settlement Agreement ¶¶ 51-55.³

6 This Settlement was negotiated at a time when Class Counsel had a good
7 understanding of the risks and expense to the Class of continued litigation. Because of their
8 experience litigating these types of cases, Class Counsel were able to pursue targeted
9 discovery to understand the strengths and weaknesses of the case, negotiate a settlement,
10 and avoid years of costly litigation. The Settlement returns a significant portion of the NSF and
11 overdraft fees Class Members paid to BECU without requiring them to file claims and
12 institutes concrete changes to BECU's practices that will benefit all of its current and future
13 members.

14 2. A lodestar crosscheck confirms the reasonableness of the requested fee.

15 Courts sometimes use a lodestar crosscheck to ensure the reasonableness of the fee
16 award. William B. Rubenstein, *Newberg on Class Actions* § 15:84 (5th ed. June 2021 update).
17 The court first calculates the "lodestar" by multiplying the reasonable hours expended by a
18 reasonable hourly rate and may then enhance the lodestar with a multiplier to arrive at a
19 reasonable fee. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193
20 (1983).

21 Class Counsel devoted 1,917.5 hours to the litigation and resolution of this case,
22 incurring a lodestar of \$1,022,986. Terrell Decl. ¶ 15; Smith Decl. ¶¶ 5-6; Drake Decl. ¶ 4. This
23 does not include the hours Counsel wrote off through the exercise of billing judgment. Class
24 Counsel spent considerable time investigating the claims, researching and analyzing legal
25 issues, conducting discovery, briefing motions, and engaging in settlement negotiations. Class

26 ³ The Settlement Agreement and Release is attached as Exhibit 1 to the Terrell Declaration.
27

1 Counsel's work was essential to ensure the successful prosecution and settlement of this case.
2 *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“[L]awyers are not
3 likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees.
4 The payoff is too uncertain, as to both the result and the amount of the fee.”).

5 Class Counsel's hourly rates of \$400-\$820 for attorneys and \$200-\$330 for paralegal
6 and support staff time are reasonable. In assessing the reasonableness of an hourly rate,
7 courts consider “the usual billing rate, ... the level of skill required by the litigation, time
8 limitations imposed on the litigation, the amount of the potential recovery, the
9 attorney's reputation, and the undesirability of the case.” *Bowers*, 100 Wn.2d at 587; *see also*
10 *Rivas v. BG Retail, LLC*, No. 16-cv-06458-BLF, 2020 WL 264401, at *7 (N.D. Cal. Jan. 16, 2020)
11 (“To determine the prevailing market rate, courts may rely on attorney affidavits as well as
12 ‘decisions by other courts awarding similar rates for work in the same geographical area by
13 attorneys with comparable levels of experience.’” (citation omitted)). Class Counsel are
14 experienced, highly regarded members of the bar with extensive expertise in class actions and
15 complex litigation involving claims like the claims at issue in this case. They have provided the
16 Court with declarations describing their background and experience. Terrell Decl. ¶¶ 19-27;
17 Drake Decl. Ex. A; Smith Decl. ¶¶ 2-4. Class Counsel set their rates for attorneys and staff
18 members based on a variety of factors, including the experience, skill, and sophistication
19 required for the types of legal services performed, the rates customarily charged in the
20 markets where legal services are typically performed, and the experience, reputation, and
21 ability of the attorneys and staff members. Terrell Decl. ¶ 16; Smith Decl. ¶ 9.

22 Similar or higher rates have been approved numerous times in class action cases.
23 Terrell Decl. ¶ 17; Drake Decl. ¶ 3; Smith Decl. ¶ 10; *see also, e.g.,* Costco Order ¶ 10
24 (approving similar rates for Terrell Marshall and Berger Montague); Final Approval Order and
25 Judgment ¶ 19, *Mael v. Evanger's Dog & Cat Food Co., Inc.*, No. 3:17-cv-05469-RBL (W.D.

1 Wash. June 12, 2020), ECF No. 138 (approving partner rates of \$500-\$750 per hour);⁴ *Stewart*
2 *v. Snohomish County Public Utility Dist. No. 1*, No. C16-0020-JCC, 2017 WL 4538956, at *1
3 (W.D. Wash. Oct. 11, 2017) (paralegal rates ranging from \$145 to \$240 are reasonable); Order
4 Entering Final Approval of Class Settlement at 7-8, *Rinky Dink v. World Business Lenders, LLC*,
5 No. 2:14-cv-0268-JCC (W.D. Wash. May 31, 2016), ECF No. 92 (approving partner rates of
6 \$500-\$650); *Barnett v. Wal-Mart Stores, Inc.*, No. 01-2-24553-8 (King County Super. Ct. July
7 20, 2009) (Judge Spector approving fee request based on rates ranging from \$100 to \$760);
8 *Splater v. Thermal Ease Hydronic Systems, Inc.*, No. 03-2-33553-3 (King County Super. Ct. July
9 31, 2009) (Judge Washington approving fee request based on rates ranging from \$100 to
10 \$760); Order at 3, *Bowen v. CSO Financial, Inc.*, No. C17-cv-00677-JCC (W.D. Wash. July 10,
11 2018), ECF No. 38 (approving fee request based on similar rates, including \$600 for Beth
12 Terrell).⁵

13 In recognition of the attorneys' fee awards that courts in this jurisdiction have
14 approved at slightly lower hourly rates, Class Counsel have also calculated their lodestar at
15 rates ranging from \$400-\$650 for attorneys and \$125-\$200 for paralegals and staff. Terrell
16 Decl. ¶ 18; Drake Decl. ¶ 5. At these rates, Class Counsel's lodestar is \$946,084.

17 Class Counsel's fee request represents a multiplier of 1.75 on their lodestar, or 1.9 on
18 the adjusted lodestar. Both multipliers are reasonable. *See Bowles*, 121 Wn.2d at 73 (finding
19 reasonable a fee awarded under the percentage method that was three times the lodestar
20 amount); *see also Bowers*, 100 Wn.2d at 601 (it was not an abuse of discretion to award a fee
21 that was a 50% premium on lodestar "to reflect the contingent nature of the recovery of
22 fees"). Courts approach multipliers differently when the lodestar method is used a crosscheck
23 than when using the lodestar method in fee-shifting cases, where "the question of whether a
24 multiplier is permitted is a question of statutory interpretation" and "courts are somewhat

25 _____
26 ⁴ The hourly rates are set forth in counsel's declaration filed at ECF No. 128.

27 ⁵ The hourly rates are set forth in counsel's declaration filed at ECF No. 35.

1 hesitant to make the shift broader than is necessary” since the adversary pays the fee.
2 Newberg § 15:91. “[I]n common fund cases, courts that employ a pure lodestar method are
3 not bound by the Supreme Court’s rulings that limit multiplied lodestars in the fee-shifting
4 context.” *Id.*; *see also Vizcaino*, 290 F.3d at 1051 (“The bar against risk multipliers in statutory
5 fee cases does not apply to common fund cases” and “courts have routinely enhanced the
6 lodestar to reflect the risk of non-payment in common fund cases.”).

7 Multipliers are commonplace in attorneys’ fee awards in class actions, particularly
8 when the lodestar method is used to cross-check a percentage-of-the-fund fee. Newberg
9 § 15:49 (“In common fund cases, fee adjustments—or multipliers—are common.”). As the
10 Washington Supreme Court has recognized, “[t]he experience of the marketplace indicates
11 that lawyers generally will not provide legal representation on a contingent basis unless they
12 receive a premium for taking that risk.” *Bowers*, 100 Wn.2d at 598 (citation omitted); *see also*
13 Newberg § 15:91 (“[B]ecause most class suits are contingent fee cases in which counsel only
14 get paid if they prevail, a bonus is generally defensible on the ground that it provides an
15 incentive that encourages lawyers to undertake such work—absent some ‘upside’ on their
16 loan of services to their clients, they would have no economic reason to invest in such
17 cases.”); Richard A. Posner, *Economic Analysis of Law* 783 (8th ed. 2011) (“A contingent fee
18 must be higher than a fee for the same legal services paid as or after they are performed. The
19 contingent fee compensates the lawyer not only for the legal services he renders but for the
20 loan of those services. The implicit interest rate on such a loan is high because the risk of
21 default (the loss of the case, which cancels the client’s debt to the lawyer) is much higher than
22 in the case of conventional loans, and the total amount of interest is large not only because
23 the interest rate is high but because the loan may be outstanding for years—and with no
24 periodic part payment, a device for reducing the risk borne by the ordinary lender.”).

25 Courts typically award multipliers ranging from one to four. *Vizcaino*, 290 F.3d at 1051
26 n.6 (collecting cases and finding that in approximately 83% the multiplier was between 1.0
27

1 and 4.0 and affirming a multiplier of 3.65). Courts find higher multipliers appropriate when
2 using the lodestar method as a crosscheck for an award based on the percentage method.
3 See, e.g., *Costco Order* ¶ 10 (approving a fee of 30% of the common fund that represented a
4 3.73 multiplier on counsel’s lodestar); *Steiner v. Am. Broad Co., Inc.*, 248 F. App’x 780, 783 (9th
5 Cir. 2007) (finding a multiplier of approximately 6.85 to be “well within the range of
6 multipliers that courts have allowed” when crosschecking a fee based on a percentage of the
7 fund); *McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 1:16-cv-00157-DAD-JLT, 2017
8 WL 5665848, at *8 (E.D. Cal. Nov. 27, 2017) (finding a multiplier of 3.95 “within the range of
9 acceptable lodestar multipliers previously approved by this court and others”); *Maley v. Del*
10 *Global Techs. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002) (finding a “modest multiplier of 4.65 is
11 fair and reasonable” when cross-checking a fee of 33½% of the settlement fund); *Di Giacomo*
12 *v. Plains All Am. Pipeline*, No. Civ. A. H-99-4137, 2001 WL 34633373, at *11 (S.D. Tex. Dec. 19,
13 2001) (finding a multiplier of 5.3 appropriate in crosschecking a fee of 30% of the settlement
14 fund); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298-99 (N.D. Cal. 1995) (finding that
15 a multiplier of 3.6 was “well within the acceptable range” and explaining that “[m]ultipliers in
16 the 3-4 range are common”).

17 The factors courts consider support the requested multiplier, including the risk of
18 nonpayment, the delay in payment, the benefit obtained for the class, and the quality of the
19 representation. See David F. Herr, *Manual for Complex Litig.* § 14.122 (4th ed. May 2021
20 update). Class Counsel achieved an excellent result, requiring BECU to pay \$6 million for the
21 benefit of the Settlement Class despite strong defenses to class certification and liability. Class
22 Counsel provided high quality representation throughout the litigation and resolution of the
23 case. And Class Counsel undertook this litigation on a contingency basis with no guarantee of
24 payment and to the preclusion of other work. Terrell Decl. ¶ 13; Smith Decl. ¶ 7; Drake Decl.
25 ¶ 8. A multiplier of 1.75, or 2.0 at the adjusted rates, is fair compensation for Class Counsel’s
26 work and the risk they assumed.

1 The Washington Supreme Court has held that the factors set out in Rule of
2 Professional Conduct 1.5(a) may also guide a court’s analysis of the reasonableness of a fee
3 request. *See Mahler v. Szucs*, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998) (overruled on
4 other grounds). Those factors include the skill required to perform the legal services properly,
5 whether the representation precludes other employment by the lawyer, the fee customarily
6 charged in the locality for similar legal services, and the amount involved and the results
7 obtained. This case demanded litigators with Class Counsel’s skill and experience and
8 precluded work on other matters, a 30% fee in contingency cases is customary in Washington,
9 and Class Counsel obtained excellent results for the Class.

10 **B. Class Counsel request reimbursement of litigation costs that would be charged to a**
11 **paying client.**

12 Class Counsel incurred \$103,375.30 in litigation costs, including expert fees, filing and
13 service fees, database hosting and electronic document production costs, mediation fees,
14 postage, and transcript costs. These costs were reasonable and necessary to this litigation and
15 the type of costs normally charged to a paying client. Terrell Decl. ¶ 28. Courts routinely
16 reimburse these types of costs. Newberg § 16.10 (class counsel can typically recover costs
17 from a common fund that would “normally be charged to a paying client”); *Harris v.*
18 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover “those out-of-pocket
19 expenses that would normally be charged to a fee paying client”); *Corson v. Toyota Motor*
20 *Sales U.S.A., Inc.*, No. CV 12-8499-JGB, 2016 WL 1375838, at *9 (C.D. Cal. Apr. 4, 2016)
21 (“Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance
22 telephone calls, computer legal research, postage, courier service, mediation, exhibits,
23 documents scanning, and visual equipment are typically recoverable”); *Hopkins v. Stryker*
24 *Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (awarding
25 costs for document review, depositions, and experts).

1 **C. Plaintiff's requested service award should be approved.**

2 Plaintiff requests a service award of \$7,500 in recognition of his efforts on behalf of
3 the Settlement Class. "At the conclusion of a class action, the class representatives are eligible
4 for a special payment in recognition of their service to the class." Newberg § 17:1. Courts
5 approve service awards in most class suits that average between \$10,000 and \$15,000. *Id.*
6 Service awards "are intended to compensate class representatives for work undertaken on
7 behalf of a class" and "are fairly typical in class action cases." *In re Online DVD-Rental Antitrust*
8 *Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted). The awards recognize the effort
9 class representatives expend and the financial or reputational risk they undertake in bringing
10 the case, and to recognize their willingness to act as private attorneys general. *Rodriguez v. W.*
11 *Publishing*, 563 F.3d 948, 958-59 (9th Cir. 2009). They are generally approved if they are
12 reasonable and do not undermine the class representative's adequacy. *See Radcliffe v.*
13 *Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013).

14 Mr. Marical assisted counsel with the investigation and litigation, responded to written
15 discovery and sat for a lengthy deposition, and was available by telephone during the
16 mediation. His efforts and willingness to pursue this action were crucial to its successful
17 resolution. Terrell Decl. ¶ 29. A \$7,500 service award is consistent with awards in similar
18 cases. *See Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash.
19 2009) (collecting cases approving service awards ranging from \$5,000 to \$40,000); *Probst v.*
20 *Wash. Dept. of Ret. Sys.*, 150 Wn. App. 1062, 2009 WL 1863993, at *5-6 (Wash. Ct. App. June
21 30, 2009) (unpublished opinion) (affirming service award of \$7,500).

22 **VI. CONCLUSION**

23 Plaintiff respectfully requests that the Court grant his motion for an award of
24 attorneys' fees and costs and approve payment of a \$7,500 service award for Plaintiff Marical.
25
26
27

1 **VII. LCR 7(5)(B)(VI) CERTIFICATION**

2 I certify that this memorandum contains 4, 143 words in compliance with the Local
3 Civil Rules.

4 RESPECTFULLY SUBMITTED AND DATED this 10th day of September, 2021.

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