The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFFREY REICHERT and GARY MOYER, both individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KEEFE COMMISSARY NETWORK, L.L.C. d/b/a ACCESS CORRECTIONS; RAPID INVESTMENTS, INC., d/b/a RAPID FINANCIAL SOLUTIONS, d/b/a ACCESS FREEDOM; and CACHE VALLEY BANK,

Defendants.

NO. 3:17-cv-05848-BHS

MOTION FOR APPROVAL OF ATTORNEY FEES, COSTS, AND CASE CONTRIBUTION AWARDS AS TO CLAIMS AGAINST RAPID INVESTMENTS, INC. AND CACHE VALLEY BANK

Note on Motion Calendar:
Fairness Hearing set on December 18, 2023, at 2:30 p.m.

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I. INTRODUCTION[1]

After years of hard-fought litigation – including three trips to the Ninth Circuit – Sirianni Youtz Spoonemore Hamburger PLLC ("Class Counsel") obtained a $11,600,000 settlement that will pay all class claimants ***three times their losses, plus $15***, even after the fees, costs, and incentive awards requested by this motion. Declaration of Richard E. Spoonemore, ¶9; Dkt. No. 212, ¶6. Every claimant will receive ***more*** than the Electronic Funds Transfer Act ("EFTA") would have permitted if the case had gone to trial. *See* 15 U.S.C. § 1693m(a)(1) (permitting an award of "actual damages"). With the $15 "bonus" on top of treble damages, this is even ***more*** than the Washington State Subclass could have obtained under the Washington State Consumer Protection Act. *See* RCW 19.86.090 (permitting, at most, treble damages). Even with these awards to class members, there will likely be sizable funds remaining to make *cy pres* awards to public service entities.[2]

Class Counsel was only able to achieve this result by devoting over two thousand hours of attorney time to prosecuting this case over the past five years. Spoonemore Decl., ¶2. In addition, Class Counsel advanced over $1 million in notice, expert, and other litigation costs. *Id*. at ¶6. Not only was Class Counsel's time at risk in this contingent fee case, but all of these costs – including the massive costs of initial class notice to millions of class members – were at risk. For a small firm of two partners and three other attorneys, this was truly a "bet your firm" case. The firm took out over $1 million in loans – personally guaranteed by its two partners – to fund this litigation. *Id.*

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[1] This Motion and the Declaration of Richard E. Spoonemore, with all attachments, have been prominently posted on the class action webpage to permit class members to review Class Counsel's request in order to comment, support, or object to the payments sought herein.

[2] In many class actions, unclaimed funds revert to the defendant after the claims process. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 477, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). Not here. Unclaimed amounts up to $11,000,000 will ***not*** revert to the Defendants but will instead be granted by the Court to organizations through *cy pres*. Dkt. No. 210-1, ¶9.4.

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at ¶6(a) and (b). Partner draws were forgone, and firm income was drastically affected due to the resources required to advance this case. *Id*. at ¶8.

This case was risky from the outset. Class Counsel agreed to take this case in 2018 because Keller Rohrback, the experienced and well-regarded class action firm that had originally filed this case, wanted out. *Id*. at ¶8. It had good reasons to do so:

- Keller Rohrback had just lost its EFTA claim in a functionally identical case on summary judgment in Oregon. *Brown v. Stored Value Cards*, 2016 U.S. Dist. LEXIS 113657, *4 (D. Ore., August 25, 2016) (dismissing EFTA and § 1983 claims). That case would not be reversed until 2020, two years after Class Counsel assumed responsibility for this case. *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567 (9th Cir. 2020) ("The district court dismissed Brown's EFTA claim for failure to state a claim, denied leave to file a third amended complaint, and granted summary judgment to Defendants on Brown's taking and state law claims.") (reversing and remanding).
- In a case in California, Keller Rohrback's putative class action case against another company issuing release cards was killed when the court compelled arbitration of the claim. *Reyes v. JPay, Inc*., 2018 U.S. Dist. LEXIS 237137 (C.D. Cal., June 26, 2018). Class Counsel agreed to assume responsibility for the present action just after this case was decided.
- In this case, while Keller Rohrback had defeated a motion to compel Plaintiff Jeffrey Reichert to arbitrate, the prior District Court Judge expressed skepticism that it would ever certify a class. *See* Dkt. No. 53, p. 5 ("It should be noted, however, that nothing before the Court leads it to believe that a class action is the best way to deal with this dispute…. This is just a cautionary tale for now. The Court remains skeptical on the question of class action.").
- Finally, class action litigation on behalf of prisoners and other incarcerated persons always carries a high degree of inherent risk as well. *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1121 (C.D. Cal. 2008) (prison-related litigation not "considered sympathetic or desirable by the public at large").

Class Counsel nevertheless agreed to accept this case (and the case in *Brown*) and proceeded to turn both cases around over the next five years. In this case, Class Counsel was able to obtain certification of both statewide and nationwide classes despite the Court's initial misgivings (and after being required to secure an additional class

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representative). Class Counsel then prevailed on multiple motions – and defended them successfully before the Ninth Circuit. *See Reichert v. Rapid*, 56 F.4th 1220 (9th Cir. 2022); *Reichert v. Rapid*, 2020 U.S. App. LEXIS 33219 (9th Cir., September 1, 2020); *Reichert v. Keefe Commissary Network, et al.*, 2019 U.S. Dist. LEXIS 28264 (9th Cir., September 17, 2019).

Few firms would have agreed to accept this engagement in light of these risks. Fewer still would have committed millions of dollars in attorney time and costs to maximize the result for the class members. Class Counsel did not cash out early or cheaply – they put their resources on the line to obtain a recovery for the class members beyond what could have been expected after a successful trial.

Class Counsel now moves for an attorney fee award equal to one-third of the settlement amount, or $3,866,666. Class Counsel recognizes that this request is at the top end of, or slightly higher than, the normal range but believes that this request is fair and reasonable given (1) the unprecedented results obtained (a recovery higher than what claimants could have achieved at trial); (2) the risks incurred (the outlay of several million dollars in attorney time and costs advanced); (3) the desirability of the case (prior counsel wanted to withdraw, an identical claim had been rejected on summary judgment in Oregon, and this Court had expressed skepticism at class certification); and (4) the length of litigation (five years). If there was ever a case in which to award an amount higher than the usual range, this is it.

Class Counsel also seeks reimbursement of the costs that it has presently advanced, in the sum of $1,080,844.47 ($1,087,753.69 minus $6,909.22 awarded as part of the *Keefe* settlement; *see* Dkt. No. 180, p. 1), plus authorization to advance additional notice and claims administration costs as those expenses are incurred. Finally, Class

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Counsel seeks approval of incentive awards of $20,000 for each of the two class representatives.

II. EVIDENCE RELIED UPON

Class Counsel relies upon the Declaration of Richard E. Spoonemore and the pleadings and records in this case.

III. LAW AND ARGUMENT

A. Legal Standards for the Approval of Attorney Fees.

A Court may award attorney fees as authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h); *see* Dkt. No. 210-1, § 12.1 (settlement agreement fees provision); 15 U.S.C. § 1693m(a)(3). Courts, however, have an "independent obligation" to ensure that the award is reasonable. *De La Torre v. CashCall, Inc.*, 2017 U.S. Dist. LEXIS 190740, at *29 (N.D. Cal., Nov. 17, 2017). Here, the settlement agreement contemplates a percentage-of-recovery attorney fee award. *See* Dkt. No. 210-1, § 12.1. There is no "clear sailing" provision – anyone with standing may object to the request. *Id.*

The results-oriented percentage-of-recovery approach is generally used in calculating fees in common fund cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). As a result, the primary consideration in the fee determination is the magnitude of the benefit conferred on class members. *Id.* at 1302. *Accord*, MANUAL FOR COMPLEX LITIGATION (4th), § 14.121 ("[T]he factor given the greatest emphasis is the size of the fund created, because 'a common fund is itself the measure of success … [and] represents the benchmark from which a reasonable fee will be awarded.'").

Once the size of the total benefit to the class is determined, the Court may award a percentage of the benefit as attorney fees. The benchmark percentage in the Ninth Circuit is 25 percent, with the opportunity to adjust the percentage upwards or downwards depending on the circumstances (including exceptional results, the level of

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the risk involved in the litigation, any additional common benefits obtained in the settlement agreement beyond the cash fund, and a showing that the fee award is similar to standard fees or other similar litigation).[3] *Vizcaino,* 290 F.3d at 1050. This list is not exhaustive. *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020). In practice, as this Court recently noted, "[i]t is true that 'in most common fund cases, the award exceeds that benchmark [of 25%],' and that 'nearly all common fund awards range around 30%." *Brown v. Papa Murphy's Holding Inc.*, 2022 U.S. Dist. LEXIS 79209, *6 (W.D. Wn., May 2, 2022) (citations omitted). *See also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377–78 (N.D. Cal. 1989) (stating that "nearly all common fund awards range around 30%").

B. Attorney Fees Totaling One-Third of the Recovery Should be Awarded.

Class Counsel seeks an award of 33⅓ percent, which is slightly higher than the usual range. Two independent reasons support this request. ***First***, awards in similar cases indicate that one-third is commonly awarded in complex class actions that do not settle early. Empirically, Class Counsel's request is in line with other class actions of this type and is consistent with a private market. ***Second***, the "usual range" reflects the "usual case." This case was far from usual. It contains ***all*** of the features that courts have identified as exceptional circumstances to warrant an upward departure from the typical range.

[3] Fees are awarded on the total amount made available to the class whether actually claimed by the class members or not. *Boeing Co.*, 444 U.S. at 479; *Williams v. MGM-Pathe Communs. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (fees based on total value of fund secured by class counsel, not amount of claims made by class members on fund); *Dennings v. Clearwire Corp.*, 2013 U.S. Dist. LEXIS 64021, *18 (W.D. Wn., May 3, 2013).

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1. Empirical and Academic Research Indicates that 33⅓ Percent is Typically Awarded in Class Actions.

Empirical evidence and studies of actual fee awards in class litigation indicate that the normal range of fee awards is one-third of the recovery:

> [B]ased on the opinions of other courts and the available studies of class action attorneys' fees awards (such as the NERA study), this Court concludes that attorneys' fees in the range from twenty-five percent (25%) to thirty-three and thirty-four one-hundredths percent (33.34%) have been routinely awarded in class actions. ***Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.***

Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) (emphasis added).[4]

[4] The cases awarding one-third (or more) are legion. *See, e.g., In re Zetia (Ezetimibe) Antitrust Litig.*, 2023 U.S. Dist. LEXIS 187657, *12 (E.D. Va., October 18, 2023) ("A significant award is appropriate for the attorneys because they litigated the case vigorously for nearly five years, managed the interests of the EPP Class, and fronted significant costs."); *Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, *20 (W.D. Tenn., October 4, 2023) ("District Courts in this Circuit have routinely found that an award of one-third of a common fund" is reasonable); *Bradburn v. 3M,* 513 F. Supp. 2d 322, 341-42 (E.D. Penn. 2007) (35% award); *In re Corel Corp. Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 497 (E.D. Pa. 2003) (33⅓% is within the reasonable range); *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 439 (E.D. Pa. 2001) (33⅓% is "fair and reasonable"); *In re Eng'g Animation Sec. Litig.*, 203 F.R.D. 417, 423–24 (S.D. Iowa 2001) (33⅓%); *In re Safety Components Int'l, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 101–102 (D. N.J. 2001) (33⅓% of $4.5 million settlement); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 150 (E.D. Penn. 2000) ("I conclude that an award of one-third of the settlement fund is reasonable in consideration of other courts' awards."); *Neuberger v. Shapiro,* 110 F. Supp. 2d 373, 386 (E.D. Pa. 2000) (approving 33⅓% of $4.325 million settlement); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 503 (E.D. Mich. 2000) (33⅓% of common fund); *Gaskill v. Gordon,* 942 F. Supp. 382, 387–88 (N.D. Ill. 1996) (38%), *aff'd,* 160 F.3d 361 (7th Cir. 1998); *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1380–81 (D. Minn. 1985) (35%); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 500 (D. D.C. 1981) (45%); *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, *21 (D. N.J. 2011) (collecting cases in approving 32.6% of the settlement fund as "clearly fall[ing] within this range"); *Moore v. Comcast Corp.*, 2011 WL 238821, *5 (E.D. Penn. 2011) ("Furthermore, we note that in similar cases our Court of Appeals has approved awards of counsel fees that range from 19% to 45%. The fee represents 33% of the monetary value of the settlement and in this case is comparable to the average fee customary in this circuit.") (citation omitted); *In re Ravisent Techs., Inc. Sec. Litig.*, 2005 WL 906361, at *15 (E.D. Pa. Apr. 18, 2005) (33⅓% of $7 million settlement); *Faircloth v. Certified Fin. Inc.*, 2001 WL 527489, at *12 (E.D. La. May 16, 2001) (35%); *In re Unisys Corp. Sec. Litig.*, 2001 WL 1563721, at *3–4 (E.D. Pa. Dec. 6, 2001) (33⅓% fee); *In re Neoware Sys., Inc. Sec. Litig.*, 2000 WL 1100871, at *3–4 (E.D. Pa. July 27, 2000) (33⅓%); *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, *7 (N.D. Cal. 1997) ("Courts in this district have consistently approved attorneys' fees which amount to approximately one-third of the relief procured for the class.").

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The *Shaw* court's conclusion is based on hard data. A number of courts have undertaken exhaustive reviews (often assisted by academic work) of the actual percentage awards and determined that one-third is commonplace. *See, e.g., In re Rite Aid Corp. Securities Litigation*, 146 F. Supp. 2d 706, 735 (E.D. Penn. 2001) (citing to study conducted by Professor John C. Coffee of Columbia Law School which concluded that the median fee award for settlements up to $50 million was 33⅓ percent)[5]; *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010) *(*"Recently, another court in this District took note of a study of class action fee awards within the Third Circuit Court of Appeals, and determined that the average attorney's fees percentage in such cases was 31.71% and that the median fee award was 33.3%."); *Craft*, 624 F. Supp. 2d at 1124 (citing multiple studies and highlighting one comprehensive review which concluded that "a 33% fee award is both reasonable, and in line with the general market for contingent fee work.").

The leading commentator on class actions agrees: "Empirical studies show that … fee awards in class actions average around one-third of the recovery." NEWBERG ON CLASS ACTIONS, § 14:6. *See also McNeely v. National Mobile Health Care, LLC*, 2008 U.S. Dist. LEXIS 866741, *47 (W.D. Okla., October 27, 2008) ("The requested one-third fee is customary, too. Fees in the range of at least one-third of the common fund are frequently awarded in class action cases of this general variety.") (citing cases); *Romero v. Producers Dairy Foods., Inc.*, 2007 U.S. Dist. LEXIS 86270, *9–19 (E.D. Cal., November 13, 2007) (class

[5] The percentage tends to drop in so-called "mega-fund" cases – recoveries in the hundreds of millions to billions of dollars. NEWBERG ON CLASS ACTIONS, § 14:6 (Listing fee percentages for recoveries of $300,000,000 to $7,000,000,000: "These data points suggest that mega-funds sometimes, but not always, trigger lower fee percentages…."). *See also In Re: General Instrument Securities Lit.*, 209 F. Supp. 2d 423, 433 (E.D. Penn. 2001) (noting "$100 million as the tag for a 'very large' settlement" where "courts have generally decreased the percentage" and awarding 33⅓ percent of a $48 million settlement because "while large in the abstract [it] is approximately half of the $100 million marker.").

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action fee awards average around one-third of the recovery). Class Counsel's request here is squarely within the actual percentage awarded in class action litigation.

In addition, the requested percentage is a very common – if not prevailing – percentage found in private contingent fee agreements. Judge Coughenour's comparison to what a rational attorney entering into a private contract would require is apt here:

> Class Counsel argue that due to a variety of factors, including the nature of the Defendant, the novel and complex issues presented, the risk and expense of litigating a class action, ***no rational private lawyer in the nation would have taken this case for less than one-third of any recovery. The Court agrees***.

Vizcaino v. Microsoft Corp., 142 F. Supp. 2d 1299, 1304 (W.D. Wn. 2001) (emphasis added). *See also Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623 (S.D. N.Y. 2012) ("Class Counsel's request for one-third of the fund" approved "because 'reasonable, paying client[s]' typically pay one-third of their recoveries under private retainer agreements.") (*quoting Reyes v. Altamarea Group, LLC*, 2011 WL 4599822, *8 (S.D. N.Y. 2011). *See also Brumley v. Camin Cargo Control, Inc.*, 2012 WL 1019337, *12 (D. N.J. 2012) ("The attorneys' fees request of one-third of the settlement fund also comports with privately negotiated contingent fees negotiated on the open market."); *Matheson v. T-Bone Restaurant, LLC*, 2011 WL 6268216, *8 (S.D. N.Y. 2011) (same); *Willix v. Healthfirst, Inc.*, 2011 WL 754862, *7 (E.D. N.Y. 2011) ("A percentage-of-recovery fee award of 33⅓%" is a "presumptively reasonable fee" because it "takes into account what a 'reasonable, paying client' would pay."); *deMunecas v. Bold Food, LLC*, 2010 WL 3322580, *9 (S.D. N.Y. 2010) (one third is "consistent with the norms of class litigation" and is supported by what "paying clients" typically agree to and pay in private litigation).

Even before considering the unusual aspects of this case, Class Counsel's request is reasonable and within the normal range of awards in a class action.

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2. The Circumstances of this Case Justify 33⅓ Percent.

The "usual range" is not a cap or ceiling on fees. *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1310 (9th Cir. 1990) ("The benchmark percentage should be adjusted … when special circumstances indicate that the percentage recovery would be either too small or too large…."). When supported by "the complexity of the issues and the risks," a court can – and should – depart from that range. *In re Pacific Enterprises Securities Lit.*, 47 F.3d 373, 379 (9th Cir. 1995) (approving 33⅓ percent award). *See also Morris v. Lifescan*, Inc., 2003 U.S. App. LEXIS 820, *4 (9th Cir., January 16, 2003) (approving 33 percent award: "We have previously held that an attorney's fee award of 33 percent was not an abuse of discretion."); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 460 (9th Cir. 2000) (affirming 33⅓ percent award).

Courts awarding more than the usual range have identified several factors that make a case "unusual" such that a higher percentage is required. "Unusual" factors justifying a higher percentage include (1) unusually good results (measured from a class member's perspective), (2) lengthy litigation, (3) complex and novel issues, (4) high quality of legal work and effort, (5) extraordinary risk, (6) rejection of the case by other lawyers, (7) the lack of any prejudice to class members if the requested award is approved, and (8) the favorable reaction of the class members. *Vizcaino*, 290 F.3d 1048–50.

This case does not contain just one or two of these unusual elements – it contains ***all*** of them:

a. Extraordinary Results

While the total size of the benefit is critical in common fund fee analysis, from a class member's perspective the most important consideration is the percentage of their loss recovered by class counsel's efforts:

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> In assessing "size of the settlement" factor and whether the settlement was favorable to the plaintiffs and class members, the district court may also want to determine what percentage of the plaintiffs' and class members' approximated actual damages that the settlement figure represents. This figure, when viewed in context of the risk of nonrecovery, may be helpful in determining how well the counsel did for their clients.

Conte, ATTORNEY FEE AWARDS § 2:8 (3d ed.). The "usual" or "typical" range of 20–30 percent contemplates compromise settlements which are often small fractions of a class member's actual loss. When class counsel can recover more than a small fraction of a class's losses, courts find the recovery "unusual" such that an award of 33⅓ percent or more is warranted. *In Re: Heritage Bond Lit.*, 2005 U.S. Dist. LEXIS 13555, *62 (C.D. Cal., June 10, 2005) (awarding 33⅓ percent because of "exceptional result" in obtaining a settlement for 23 percent of class members' losses, citing cases awarding 33⅓ percent or more for recoveries ranging from 10 to 17 percent of class members' losses).

Here, Class Counsel was able to obtain an amount that will provide all claimants three times their actual loss, plus $15. This is a better result than could have been obtained at trial. This should be recognized for what it is: an extraordinary result for the class members and a highly unusual factor that justifies an upward departure from the usual range.

b. Length of Litigation

Unusually long litigation is a factor that justifies an upward adjustment to the usual range of fees:

> Although an evaluation of the risk involved is relevant, an analysis of the contingency factor involves far more than an *ex post facto* guesstimate as to the likelihood of plaintiff ultimately succeeding on the merits. The court should look at the costs and impact on the lawyers of undertaking the case on a contingency basis, inquiring into the extent to which it

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> required significant resources to be allocated to the case. ***An important consideration in this regard is the length of time that has elapsed between commencement of the litigation and the fee award, as well as whether it was foreseeable that the litigation would be protracted***.

7B FED. PRAC. & PROC., *Attorney Fees – Standards for Assessing*, § 1803.1 (3d ed.) (emphasis added). Courts have awarded counsel 33⅓ percent where (like this case) the litigation was pending for six or seven years. *See, e.g., Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1295 (11th Cir. 1999) (adjusting fee up from 30 to 33⅓ percent "for the time taken to reach settlement" through "seven years of litigation"); *In re: General Instrument Securities Lit.*, 209 F. Supp. 2d 423, 433 (E.D. Penn. 2001) (33⅓ percent awarded in a case that spanned six years). The unusual length of this litigation justifies an upward departure from the typical range.

c. Complexity and Novelty of Issues

"Courts have recognized that the novelty, difficulty, and complexity of the issues involved are significant factors in determining a fee award." *In Re: Heritage Bond Lit.*, 2005 U.S. Dist. LEXIS 13555, *66 (C.D. Cal., June 10, 2005) ("…Courts in this circuit, as well as other circuits, have awarded fees of 30% or more in complex class actions").

> Cases of first impression generally require more time and effort on the attorney's part. ... [Counsel] should not be penalized for undertaking a case which may "make new law" … [but] be appropriately compensated for accepting the challenge.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir. 1974).

This was not a cookie-cutter security or stock-drop case. Class Counsel did not ride the coattails of a regulator or governmental entity. Indeed, Class Counsel had to blaze a new path forward given that when it first undertook representation, another court in this circuit had rejected an identical EFTA claim (*see Brown*, 2016 U.S. Dist. LEXIS 113657), a court in California had compelled arbitration (*see Reyes*, 2018 U.S. Dist. LEXIS

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237137), and this Court had expressed extreme skepticism as to whether it could be maintained as a class (*see* Dkt. No. 53, p. 5).

Class Counsel prosecuted the first cases in this circuit interpreting and enforcing the EFTA to protect the rights of released prisoners and are among the very first such cases in the country. Cases under the EFTA are inherently complex, given the extensive regulatory system of rules and exceptions that have been promulgated to interpret the law. Between the complex law and the complexity of class actions, these are not straightforward cases. *See, e.g., Friedman v. 24 Hour Fitness USA, Inc.*, 2010 U.S. Dist. LEXIS 143816, at *24 (C.D. Cal. July 12, 2010) (noting the complexity of a class action lawsuit that included a claim under the EFTA). Despite the novelty and complexity of the case, Class Counsel was able to obtain a remarkable result for class members.

d. Quality of Legal Work

The Court, which devoted substantial judicial resources in this case, is in the best position to assess the skill and quality of legal work performed by Class Counsel. Class Counsel only notes that this case involved highly technical issues relating to obscure EFTA concepts, as well as issues related to the complex regulatory scheme underlying EFTA. It took three trips to the Court of Appeal to achieve this result. Class Counsel's ability to navigate these waters was, in conjunction with the legal arguments, critical to the success of the action.

Class Counsel's ability to settle this case on terms that provide more than full compensation to class members was directly related to Class Counsel's history and success in litigating class action lawsuits, including similar cases against other debit card issuers. The settlement agreement in this case drew heavily upon Class Counsel's extensive experience in this area and class action settlements in general. *See* Dkt. No. 71,

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¶¶5–6. Class Counsel has been recognized by courts for their experience and skill in class action litigation. *See id*.

e. Extraordinary Risk

When Class Counsel agreed to assume responsibility for this case, its prospects looked bleak. A similar EFTA claim made in *Brown*, 2016 U.S. Dist. LEXIS 113657, had been dismissed. Moreover, the prior District Court Judge in this case had noted in an Order that it was unlikely that a class would be certified. *See* Dkt. No. 53, p. 5 ("The Court remains skeptical on the question of class action."). Most telling of all, however, was that a very experienced and capable class action firm, Keller Rohrback, was looking to exit both this case and the *Brown* action. Spoonemore Decl., ¶8.

Notwithstanding these risks, Class Counsel agreed to assume responsibility for the case. Class Counsel was able to obtain certification of a nationwide class, notwithstanding the Court's initial comments, and that certification carried a new set of risks.

Providing notice – including direct mail notice – to the several million nationwide class members was an incredibly expensive venture. Spoonemore Decl., ¶6(a). Of course, Class Counsel was required to front this initial class notice because there had been no finding of liability. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 356, 98 S.Ct. 2380, 2391 (1978). To fund notice Class Counsel exhausted their firm's line of credit and took out additional loans – loans that the firm's two partners personally guaranteed – to pay for expenses of class notice and litigation costs. Spoonemore Decl., ¶6(a) and (b). Class Counsel would have been personally responsible for repayment if the case had not resulted in a recovery. *Id*.

This is an extraordinary commitment for a small firm. *See* A. Conte, ATTORNEY FEE AWARDS, § 2.22 (3d ed. 2012) ("special factors" include "burdens caused by the

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expenditure of time and money by a small firm"); *Municipal Authority of Town of Bloomsburg v. Com. of Pa.*, 527 F. Supp. 982, 994 (M.D. Penn. 1981) ("expending 795.3 hours … without any guarantee of remuneration over a period of almost two years" is "a substantial financial risk to a small firm").[6]

Not only was this time and money at risk, but the lengthy delay itself impacted firm revenue. Spoonemore Decl., ¶3. Judge Coughenour's comment in *Vizcaino* holds here:

> Class Counsel also incurred hundreds of thousands of dollars in expenses in connection with the *Vizcaino* case, had to forgo significant other work to pursue the case, and the firm's annual income greatly declined as a consequence.

Vizcaino, 142 F. Supp. 2d at 1305. Class Counsel took reduced draws, funded the costs with earned firm income and loans, and was forced to turn away hourly work and other attractive contingent fee matters because of the time and financial commitment demanded by this litigation. Spoonemore Decl., ¶8. These risks were far from typical, even for a contingent fee case.

This risk justifies an upward adjustment from the usual range:

> [T]he Court recognizes that the case was extremely risky for class counsel to pursue because of negative facts, no controlling law and the vigorous defense of the case. Courts have recognized that a high risk factor is one reason for increasing class counsel's attorney fee award above the "benchmark" 25% fee. *In re Pacific Enterprises Securities Litigation,* 47 F.3d 373, 379 (9th Cir. 1995) (33% of the common fund as attorneys fees was justified because of the complexity of the issues and the risks)….

Vizcaino, 142 F. Supp. 2d at 1303.

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[6] Here, Class Counsel spent over 2,000 hours over a period of five years. Spoonemore Decl., ¶2.

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f. Rejection of Case by Other Lawyers

The benchmark percentage should be adjusted up (or down) depending on the desirability of the case:

> A court's consideration of this factor recognizes that counsel should be rewarded for taking on a case from which other law firms shrunk. Such aversion could be due to any number of things, including social opprobrium surrounding the parties, thorny factual circumstances, or the possible financial outcome of a case. All of this and more is enveloped by the term "undesirable."

In re Sunbeam Sec. Litig., 176 F. Supp. 2d 1323, 1336 (S.D. Fla. 2001).

As noted above, this case was originally commenced, and subsequently rejected, by another Seattle firm experienced in complex class actions. Spoonemore Decl., ¶8. Rejection was not an irrational choice given the decision from the Federal District Court in Oregon, the granting of a motion to compel arbitration in California, and Judge Leighton's skepticism as to the propriety of a class being certified in this case. Furthermore, the class consisted of individuals arrested and incarcerated – individuals who are not viewed sympathetically. *See, e.g., Craft*, 624 F. Supp. 2d at 1121.

Ultimately, Class Counsel accepted these risks because they believed that the Defendants were taking advantage of people in their worst moments – and charging fees for illusory services that the individuals never requested. These types of decisions should be incentivized:

> Class Counsel accepted these cases nonetheless, and the truly noteworthy risks that went with them. As discussed above, given the positive societal benefits to be gained from lawyers' willingness to undertake difficult and risky, yet important, work like this, such decisions must be properly incentivized.

In re Checking Account Overdraft Litig., 830 F. Supp. 2d 1330, 1364 (S.D. Fla. 2011).

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g. Lack of Any Prejudice to Class Member if Request is Approved.

Finally, a fee award of 33⅓ percent of the total benefit ***will not result in a single claim being reduced***. No class member will receive less of a recovery if the Court awards 33⅓ as opposed to 30 percent. This factor is so unusual that Class Counsel was unable to find any analogous case.

h. The Reaction of Class Members.

It is too early in the claims process for the Court or Class Counsel to conclusively evaluate the reaction of the class. However, the calls and emails to date are all supportive, with multiple class members taking time to express thanks to Class Counsel. This factor will be updated in the Motion for Final Approval upon the close of the comment period.

C. The Lodestar Cross-Check Supports an Award at One-Third of the Recovery.

1. Standards for the Lodestar Cross-Check: Multipliers of Four or Less Do Not Justify a Reduction in Fees.

An examination of Class Counsel's lodestar "is merely a cross-check on the reasonableness of the percentage figure." *Vizcaino*, 290 F.3d at 1050, n.5. "The Court is not required to conduct a lodestar cross-check." *Benson v. Doubledown Interactive, LLC*, 2023 U.S. Dist. LEXIS 97758, *8 (W.D. Wn., June 1, 2023) (*citing Farrell v. Bank of Am. Corp., N.A.*, 827 F. Appx. 628, 631 (9th Cir. 2020)). But if it does, the "primary basis of the fee award remains the percentage method" while the cross-check is simply a "reasonableness" perspective on that percentage. *Vizcaino,* 290 F.3d at 1050.

A cross-check that is less than four times the lodestar passes the reasonableness test. *Vizcaino*, 290 F.3d at 1051 (multiplier of 3.65 is "within the range of multipliers applied in common fund cases"); *Mejia v. Walgreen Co.*, 2021 U.S. Dist. LEXIS 56150, *23–24 (E.D. Cal., March 23, 2021) (multipliers between 3 and 4 routinely approved). The

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Ninth Circuit has approved multipliers of up to seven. *Steiner v. Am. Broad Co.*, 248 Fed. Appx. 780, 783 (9th Cir., August 29, 2007) ("Based on class counsel's total hours, the lodestar multiplier was approximately 6.85. Although this multiplier is higher than those in many common fund cases, it still falls well within the range of multipliers that courts have allowed.") (citations omitted).

2. Class Counsel's Hourly Rate for the Cross-Check.

The current hourly rates for Mr. Spoonemore (32 years of experience), Ms. Hamburger (31 years of experience), and Mr. Youtz (46 years of experience) are $750/hour. The hourly rates for Ann Merryfield (30 years of experience) and Daniel Gross (30 years of experience) are $695/hour. These rates are well in line with the rates for Seattle attorneys with similar experience. Wolters Kluwer publishes its yearly "Real Rate Report" – an analysis of law firm rates, trends, and practices. *See* www.wolterskluwer.com/en/solutions/enterprise-legal-management/legalview-analytics/real-rate-report. Due to its extensive database, its reports are recognized as being the best guideposts for legal rates. *Sarabia v. Ricoh United States, Inc.*, 2023 U.S. Dist. LEXIS 85742, at *23–24 (C.D. Cal., May 1, 2023) ("To determine reasonable hourly rates for partners, associates, and paralegals, numerous courts in this District and elsewhere have turned to the annual Real Rate Report as a helpful guide. … Courts have

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consistently found that the Real Rate Report reflects true market rates more accurately than self-reported rates in various practice areas.").[7]

According to the Real Rate Report, the 2022 data (which would be expected to rise for 2023 due to inflationary pressures) is as follows:

City	Matter Type	N	1st Quartile	Median	3rd Quartile	2022 Mean	2021 Mean	2020 Mean
Seattle	Litigation – Partner	76	$497	$655	$760	$635	$567	$510

Spoonemore Decl., *Exh. 4*. Class Counsel's normal hourly rates, from $696 to $750, are well within a reasonable range (between the median and 3rd quartile) given that all the attorneys have 30 or more years of experience.

3. The Hours Spent Advancing the Interests of the Class.

To date, Class Counsel has expended 2,399.20 hours on this matter. Spoonemore Decl., ¶2, *Exh. A*.[8] More time will be spent between now and the closure of the case, particularly given the number of class members requiring assistance or asking questions of Class Counsel. The time was all reasonably spent advancing the interests of the class and reflects the significant commitment that Class Counsel has devoted to this matter. In addition to the usual litigation activities necessary to bring a case of this size to a

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[7] *See also Potter v. Big Text Trailer Mfg.*, 2020 U.S. Dist. LEXIS 73826, at *21-22 (C.D. Cal. Mar. 2, 2020) ("The Real Rate Report identifies attorney rates by location, experience, firm size, areas of expertise and industry, as well as specific practice areas, and is based on actual legal billing, matter information, and paid and processed invoices from more than eighty companies…."). Courts have found that the Real Rate Report is "a much better reflection of true market rates than self-reported rates in all practice areas." *Hicks v. Toys 'R' Us-Del., Inc., No.*, 2014 U.S. Dist. LEXIS 135596, at *4 (C.D. Cal. Sept. 2, 2014). *See also Eksouzian v. Albanese*, 2015 U.S. Dist. LEXIS 189545, at *8 (C.D. Cal. Oct. 23, 2015) (Real Rate Report is a "much better barometer of the reasonable rates"); *Tallman v. CPS Sec. (USA), Inc.*, 23 F. Supp. 3d 1249, 1258 (D. Nev. 2014) (considering the Real Rate Report); *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 433 (S.D.N.Y. 2012) (same).

[8] The time description in the detail attached to the Spoonemore Declaration is redacted. Class Counsel is still litigating two other similar cases – including *Brown* – and the time descriptions might be useful to opposing counsel in those cases. Class Counsel therefore offers to submit unredacted copies of time entries to the Court for an *in-camera* review, if the Court deems it necessary.

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successful conclusion under an inherently complex statutory and regulatory scheme, some unique features demanded a large investment in time.[9]

For example, one of the significant issues in the case was whether the institutions that used Rapid's release card gave releasees a choice between the release card and a check. Defendants maintained that many institutions gave a choice, sharply reducing the number of people who met the class definition. Dkt. No. 87 (class only includes individuals who were "not offered an alternative method for the return of their money"). Class Counsel, assisted by staff, reached out to approximately ***950 facilities*** throughout the nation to secure admissible evidence (declarations, business records obtained through records requests, statements of position on letterhead, and the like) to show that, with only a couple of exceptions, class members had no choice. This involved working with local counsel in some states (in some jurisdictions, only a resident or local counsel can make a records request), talking to local sheriffs, and issuing subpoenas, all to obtain this critical information. As documented in Class Counsel's time records, this was a labor-intensive task that occurred throughout 2020. It was also critical to the success of the case and the size of the recovery for class members.

4. The Lodestar Cross-Check is Much Less than Three, Which Confirms its Reasonableness.

At Class Counsel's usual hourly rate, the multiplier is currently 2.12 (and decreasing daily as the notice and settlement process proceeds). Spoonemore Decl., ¶5. If the Court uses the 2022 median of $655/hour, then the multiplier is 2.4. Spoonemore Decl., *Exh. 4*. Both are well within the Ninth Circuit's range of reasonableness and do not justify a reduction of the percentage sought. *Vizcaino*, 290 F.3d at 1051.

[9] This case traveled to the Ninth Circuit on three separate occasions –additional intensive tasks that took a substantial commitment of time.

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D. Litigation Costs Should Be Reimbursed.

Litigation costs are recoverable in a class action settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003); *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit by the settlement."). The expenses are awarded "in addition to the fee percentage." A. Conte, ATTORNEY FEE AWARDS, §§ 2.08, 2.19 (3d ed. 2012); *In re Businessland Sec. Litig.*, 1991 U.S. Dist. LEXIS 8962, *6 (June 18, 1991) (same; collecting cases). Reimbursement of the costs is subject to the court's determination of relevance and reasonableness. *Id.*

As of October 31, 2023, Class Counsel has incurred – and paid out-of-pocket – $1,087,753.69 in litigation costs. *See* Spoonemore Decl., ¶6 (detailing costs), *Exh. 2* (spreadsheet of costs), and *Exh. 3* (invoices in alphabetical order). Additional costs may be incurred related to claims processing and class management through the conclusion of this case, and Class Counsel will detail all of those costs when the Motion for Final Approval is filed. Class Counsel has paid for all litigation costs out of pocket, with no guarantee of ever being repaid if the action were lost. *Id.*, ¶8. Class Counsel also paid in advance for the costs of class notice and claims administration. *Id.*, ¶6(b). To float the costs necessary to prosecute this action, Class Counsel secured loans from Washington Trust Bank, personally guaranteed by the two partners in the firm.[10] *Id.*, ¶8. Class

[10] As detailed in the spreadsheet attached to the Spoonemore Declaration, Class Counsel seeks reimbursement for the $41,241.79 in interest incurred to date on these loans. *See, e.g., Meyer v. Citizens & Southern Nat'l Bank*, 117 F.R.D. 180, 183 (M.D. Ga. 1987) ("A loan was needed to cover the expenses of litigation and the loan required payment of interest which Plaintiffs' counsel had to pay and which they have paid. The Court takes judicial notice of the high cost of money and of the enormous costs incurred in complex litigation of this type, and the only way to completely compensate the Plaintiffs and their counsel in this class action is to award not only the costs (which would only cover the principal of the loan) but also the interest.").

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Counsel had every incentive to be cautious in incurring costs given that it was at risk until the settlement of the case. All of those costs were necessary to give notice and to prosecute this matter or administer the settlement.

As a total of $6,909.22 in litigation costs were awarded in the *Keefe* settlement (*see* Dkt. No. 180, p. 1), Class Counsel presently seeks reimbursement in the sum of $1,080,844.47 ($1,087,753.69 expended to date minus $6,909.22 already awarded). Spoonemore Decl., ¶7.

E. Additional Costs Should Be Authorized From the Settlement Amount as They Become Due.

Additional costs will be incurred through the claims process, which is ongoing. Class Counsel will document those additional costs in connection with the Motion for Final Approval.

F. A Case Contribution Award of $20,000 to Each Named Plaintiff Is Appropriate.

The Settlement Agreement provides for Case Contribution Awards to be paid to the Class Representatives. Dkt. No. 210-1, § 12.3. Such awards are "fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.,* 563 F.3d 948, 958 (9th Cir. 2009). Case contribution awards "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, and, sometimes, to recognize their willingness to act as a private attorney general." *Id.* at 958–59. "When litigation has been protracted, an incentive award is especially appropriate." *In re Nucoa Real Margarine Litig.*, 2012 U.S. Dist. LEXIS 189901, at *116–17 (C.D. Cal. June 12, 2012).

When evaluating a proposed case contribution award, the Court must consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff

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expended in pursuing the litigation and reasonable fears of workplace retaliation" when determining whether an incentive award is appropriate. *Staton,* 327 F.3d at 977, *quoting Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998). "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook,* 142 F.3d at 1016 (approving a $25,000 incentive award).

Here, Plaintiffs have dedicated substantial time, effort, and risk to protect the interests of the class. Spoonemore Decl., ¶10. Plaintiff Reichert found counsel to bring this case. Both Plaintiffs gathered and organized documents, participated in lengthy depositions, and were important participants in the case and its resolution. *Id.* Moreover, both permitted their circumstances – arrest and detention – to be made public to pursue remedies on behalf of the class. Many potential representatives refuse to lend their name publicly in these circumstances. The Court should award each representative $20,000 for both their efforts and willingness to represent the interests of the class, despite the public embarrassment that might result.

IV. CONCLUSION

Class Counsel respectfully requests that the Court approve, direct, and authorize the Claims Administrator and/or Class Counsel to pay the following amounts out of the Settlement Fund:

(a) an award of attorney fees of $3,866,666, one-third of the settlement amount, to be paid to Class Counsel;

(b) an award of all unreimbursed litigation costs attributed to the claims resolved in this settlement totaling $1,080,844.47 to date to be paid to Class Counsel, with any additional costs to be submitted in connection with the Motion for Final Approval;

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(c) case contribution awards of $20,000 for each named plaintiff (for a total of $40,000);

(d) as set forth in this Court's prior Order Appointing Notice and Claims Administrator (Dkt. No. 220, ¶1) and the Addendum to Settlement Agreement (Dkt. No. 210-2, ¶3), Kroll may be paid from the Settlement Fund upon express approval of its invoices by both Class Counsel and Defense Counsel; and

(e) Class Counsel shall detail all distributions and expenditures from the Settlement Fund to the Court at the closure of the settlement fund.

Respectfully submitted: November 3, 2023.

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