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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

VALERIE RHODES, a single woman, and on behalf of others similarly situated, Plaintiff, vs. WELLS FARGO BANK, NATIONAL ASSOCIATION, A National Banking Association Defendant.	NO. 2:17-CV-0093-SMJ PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND SERVICE AWARD Noted for Hearing: December 18, 2018 10:30 a.m. With Oral Argument CLASS ACTION

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I. INTRODUCTION

Plaintiff and Class Counsel aggressively but efficiently litigated this class action and achieved a significant common fund settlement of $26,305,000.00 for over 4,000 Class members. To compensate them for their efforts, Class Counsel request a fee of $3,288,125—just 12.5% of the common fund. Their request is half of the 25% of common fund benchmark recognized by the Ninth Circuit and accounts for the excellent results they obtained for the Class.

Class Counsel also respectfully request this Court approve a service award to named Plaintiff Valarie Rhodes, in the amount of $10,000 for her dedicated work on behalf of the Class.

II. RELEVANT FACTS

A. Plaintiff and Class Counsel diligently pursued relief for the Class despite challenges.

Plaintiff filed this lawsuit on December 12, 2016, alleging that the Defendant engaged in a systemic practice of unlawful pre-foreclosure entries and lock changes upon Washington borrowers' homes. ECF No. 1-2. Plaintiff alleged that these pre-foreclosure entries and lock changes (1) damaged the Class member's existing doors and locks; (2) denied Class members their right to exclusively possess their homes prior to completion of a foreclosure; and (3) in certain cases involved the unauthorized removal of the Class members' personal property. *Id*. Plaintiff asserted claims for common law trespass,

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intentional trespass (RCW 4.24.630), violations of Washington's Consumer Protection Act (RCW 19.86, *et. seq.*), and conversion. *Id*.

Class Counsel came to this case with extensive experience litigating class-wide claims against companies that order and perform pre-foreclosure lock changes and "property preservation activities" on default borrowers' homes in Washington state. Declaration of Clay M. Gatens in Support of Plaintiff's Motion for Attorneys' Fees and Service Award ("Gatens Decl.") at ¶¶ 2, 3, 4. This experience allowed Class Counsel to efficiently investigate Plaintiff's claims, analyze the risks of recovering class-wide damages, focus the litigation strategy, and aggressively advance the litigation on behalf of Plaintiff and the Class. *Id*. at ¶ 4.

Class Counsel's experience also informed Class Counsel of the significant litigation challenges and risk that surrounded this case. *Id*. These risks included on-going challenges to class wide adjudication of these types of claims, challenges to liability, threats of federal preemption of Washington law, untested damages theories, and a legislative attempt to procure retroactive immunity for defendants that engaged in pre-foreclosure lock changes. *See* Sections B–C, *infra*.

Despite knowing full well the potential challenges and risk, Plaintiff and Class Counsel brought this suit in late 2016. ECF No. 1-2. From the outset, the parties aggressively litigated the case; discovery disputes began almost immediately. Gatens Decl., at ¶ 5. Defendant's discovery productions ultimately comprised of 38 distinct

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productions totaling of over 28,000 pages of documents and approximately 5.96 gigabytes of data. *Id*. at ¶ 6. But discovery disputes continued. *Id.* at ¶¶ 5–7. Plaintiff ultimately filed a Motion to Compel Discovery Responses on September 8, 2017. ECF No. 21.

While waiting for the Court's ruling on Plaintiff's Motion to Compel Discovery Responses, Class Counsel continued their discovery review and prepared for exhaustive Rule 30(b)(6) depositions of Defendant's corporate designees. Gatens Decl. at ¶ 7. These depositions took place over two days in Des Moines, Iowa and resulted in 525 pages of deposition testimony and entry of 43 exhibits. *Id*. They largely substantiated Plaintiff's and Class Counsel's liability and damage theories and further demonstrated the appropriateness of determining the viability of those theories on a class wide basis. *Id*., at ¶ 7, Ex. A.

Soon after completing Defendant's 30(b)(6) deposition, Class Counsel prepared and sent to Defendant a demand letter containing a comprehensive analysis and calculation of Defendant's liability and damages exposure. *Id*., at Ex A. Class Counsel also incorporated into their letter favorable rulings on class certification and liability that they had obtained in other cases challenging pre-foreclosure lock changes. *Id*. These favorable rulings, coupled with Defendant's 30(b)(6) designees' testimony, bolstered Plaintiff's ability to certify a class and obtain dispositive liability and damage rulings, facilitating the settlement reached in this case. *See id.*

Lastly, Class Counsel engaged a nationally recognized consulting expert, Greenfield Advisors, to assist Plaintiff and Class Counsel in calculating the fair market rental value

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damages claimed by Plaintiff and the Class. *Id*. at ¶ 8, Ex. B. Greenfield Advisors and Class Counsel utilized a proprietary and sophisticated Automated Valuation Model to determine a rent-to-price ratio and calculate the rental value of Class members' properties during all times in which Defendant interfered with their exclusive right to pre-foreclosure possession. *Id.* at ¶ 9, Ex. B. While this process was complicated and laborious, it was necessary to determine damages suffered by each Class member. *Id.* Ultimately, the fair market rental value damages, coupled with fee restitution damages, physical damage Class members' homes, and personal property damages resulted in an initial mediation demand of $71,719,763.50.[1] *Id.* at Ex. A.

Plaintiff and Class Counsel's strategic and efficient use of Defendant's documents and system, Defendant's deposition testimony, their pending discovery motion, favorable rulings on class certification and liability in similar cases, and extensive class wide damage calculation modeling, were persuasive and effective. On November 28, 2017 the parties, along with associated counsel, attended mediation in San Francisco, CA in front of the Hon. William J. Cahill (Ret.) with JAMS. *Id*., at ¶ 10; Declaration of Beth Terrell ("Terrell Decl."), at ¶ 8. Although the parties spent all day mediating with Judge Cahill, they were unable to reach settlement. *Id* at ¶ 11. Through Judge Cahill, the parties continued to engage in settlement discussion for a number of weeks subsequent to the in-person mediation. *Id.*

[1] This demand amount did not include treble damages or attorney's fees or costs.

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They ultimately entered into a term sheet containing the terms of settlement in principle between the parties. *Id*. at Ex. D. The term sheet contained the general terms of settlement, including a common fund settlement in the amount of $23,850,000. *Id.*

Class Counsel drafted a comprehensive settlement agreement that contained as exhibits drafts of the pleadings necessary for a motion for preliminary approval of the settlement. *Id.* at ¶ 12. Class Counsel exchanged these drafts with Defense counsel and was surprised to learn the parties did not agree to the scope of the release. *Id.* Class Counsel therefore drafted a motion to enforce the terms of the settlement as set forth on the signed term sheet. *Id*. Plaintiff and Class Counsel also advocated for an additional mediation session. *Id*.

The parties eventually agreed to attend a second mediation, hiring Eric D. Green of Resolutions, LLC in Boston, Massachusetts, a nationally recognized mediator with extensive experience resolving large class action lawsuits. *Id.* at ¶ 13. The second mediation lasted all day and well into the evening. *Id*. At its conclusion, the parties entered into a comprehensive Settlement Agreement and Release of Claims. *Id*. at Ex. F. (the "Settlement Agreement"). The Settlement Agreement *increased* the common fund settlement by almost $2.5 million, for a total common fund of $26,305,000.00 *Id.*

On June 19, 2018 Plaintiff filed her Motion for Preliminary Approval of Class Settlement. ECF No. 59. On June 25, 2018 the Court entered its Order Granting Unopposed Motion for Preliminary Approval of Class Settlement. ECF No. 62.

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B. The Settlement.

The settlement requires the Defendant to pay 26,305,000.00 into a non-reversionary common fund (the "Settlement Fund"). Gatens Decl., Ex. F at § V. 1. Each Class member who submits a valid claim form will be deemed a "Settlement Class Member" and will receive a share of the Settlement Fund, after deduction of approved settlement costs, as follows: (i) $80.00 as compensation for physical damage done to the Class member's property when a lock was drilled out and replaced; (ii) $100.00 for each Settlement Class Member regarding whom Defendant has evidence of personal property removal; and (iii) rental value damages from the remaining Settlement Fund calculated based on each Settlement Class Member's reasonable fair market rental value damage as calculated by damages consultant Greenfield Advisors. *Id.* at § V. 3(a)-(c). Because it is not likely that there will be a 100% claims rate, and because Class Counsel is seeking a fee and cost award significantly less than 25% of the common fund, the average Settlement Class Member award will likely exceed $5,500.00 per Settlement Class Member. The settlement provides significant monetary relief for the Class.

III. AUTHORITY AND ARGUMENT

A. The percentage-of-the-fund method is the appropriate method for determining a reasonable attorneys' fee in this case.

Because Washington law governs all of the claims in this case, attorneys' fees should be awarded in accordance with Washington law. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). "Under Washington law, the percentage-of-recovery approach

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is used in calculating fees in common fund cases." *Id*. (citing *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993)). "In common fund cases, the size of recovery constitutes a suitable measure of the attorney's performance." *Bowles*, 121 Wn.2d at 72. And the percentage-approach makes sense: "When attorney fees are available to prevailing class action plaintiffs, plaintiffs will have less difficulty obtaining counsel and greater access to the judicial system. Little good comes from a system where justice is available only to those who can afford its price." *Bowles*, 121 Wn.2d at 71; *compare Vizcaino*, 290 F.3d at 1050 n.5 (noting perverse incentives created by lodestar method).

By contrast, Courts typically apply the lodestar method only when the class-wide recovery is difficult to quantify. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (courts use the lodestar method when the relief is "primarily injunctive in nature and thus not easily monetized"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (the lodestar method is appropriate when "there is no way to gauge the net value of the settlement or any percentage thereof."). Here, the benefit to the Class is easily quantified: it is the $26,305,000.00 common fund.

The percentage-of-the-fund method is the appropriate method for determining a reasonable fee in this case. Class Counsel's efforts resulted in a $26,305,000 common fund, all of which will be distributed to Class members after administration expenses, Court-approved fees and costs, and Court-approved service awards are deducted. Class Counsel levied their significant experience in litigating class claims for pre-foreclosure lock

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changes to negotiate an early and substantial settlement—the first and most substantial settlement in this field—which kept the total attorneys' fees and costs low in comparison to the significant benefit to the Class. Using the percentage method in this case will recognize Class Counsel's efficiency and the significant recovery they obtained for the Class without penalizing Class Counsel for an early settlement that avoided the increased expense and risk of protracted litigation.

B. A fee award request of 12.5% of the common fund is reasonable under the circumstances.

The Ninth Circuit instructs that 25% is "a proper benchmark figure," with common fund fees typically ranging from 20% to 30% of the fund. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) (citation omitted); *see also In re Bluetooth*, 654 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure."). The 25% benchmark is the starting point for the analysis, and the percentage may be adjusted up or down based on the court's consideration of "all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. In *Vizcaino*, the court considered the following factors in upholding a 28% fee: (1) whether counsel achieved exceptional results for the class; (2) the level of risk involved in the case; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) whether the requested percentage is at or below the market rate; and

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(5) whether the case was litigated on a contingency basis, required counsel to incur costs, and required counsel to forego other work. *Vizcaino,* 290 F.3d at 1048–50.

Here, Class Counsel request an "all in" fee and cost award of 12.5% of the common fund, equaling $3,288,125.00. This fee award is considerably less than the $6,576,250.00 fee award that would be calculated from this Circuit's 25% bench-mark. As detailed below, this request appropriately satisfies the *Vizcaino* factors and recognizes "the circumstances of the case." *Id.*, at 1048.

1. Class Counsel achieved an exceptional result for the class.

a. *Class Counsel leveraged their experience and past successes into an exceptional result for the class.*

Cognizant of the many barriers that could have prevented class members from obtaining *any* recovery, Class Counsel deployed an aggressive and efficient litigation strategy from the moment it filed Ms. Rhodes complaint. That strategy ultimately garnered a swift and significant settlement for the Plaintiff and the Class. Class Counsel have spent the better part of a decade gaining specialized knowledge of the policies, practices, and legal landscape pertinent to the pre-foreclosure property preservation industry. Gatens Decl. at ¶¶ 2–4. They used that experience to narrowly target this litigation and focus on the most viable liability and damage theories. *Id*. For example, Class Counsel focused this case on lock changes, as opposed to less viable theories challenging exterior-only trespasses, breach of contract, or arising out of Fair Debt Collection Practices Act.

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Compare ECF No. 1–2 *with Jordan v. Nationstar Mortg., LLC*, No. 2:14-cv-0175-TOR, ECF No. 71 (E.D. Wash. Aug. 10, 2015), *Bund v. Safeguard Props., LLC*, No. C16-920MJP, 2018 U.S. Dist. LEXIS 6217 (W.D. Wash. Jan. 12, 2018), *and Bess v. Ocwen Loan Servicing, LLC*, 727 Fed. Appx. 918 (9th Cir. 2018).

Class Counsel's experience also allowed them to immediately issue comprehensive discovery targeted at Defendant's common policies and practices pertaining to pre-foreclosure lock changes; sort through tens of thousands of pages of non-responsive or irrelevant productions; move the discovery stage of the litigation forward rapidly (culminating in damaging Fed. R. Civ. P. 30(b)(6) depositions); and set the stage for an early and favorable settlement. Gatens Decl., at ¶¶ 4, 7. Class Counsel also utilized liability and class certification rulings it obtained in similar cases to facilitate early settlement. Gatens Decl., at Ex. A; *see also Jordan*, No. 2:14-CV-0175-TOR, ECF No. 207; *Jordan v. Nationstar Mortg., LLC*, No. 2:14-cv-0175-TOR, 2017 U.S. Dist. LEXIS 193000 (E. D. Wash. Nov. 21, 2017); *Bund*, 2018 U.S. Dist. LEXIS 6217. Leveraging their past successes, Class Counsel were able to avoid the need to duplicate similar certification and dispositive motions practice. And the efficiency with which Class Counsel obtained this settlement is itself a benefit to the Class: "further litigation would have delayed any potential recovery for the Class and have been costly and risky." *Perkins v Linkedin Corp.*, No. 13-cv-04303-LHK, 2016 U.S. Dist. LEXIS 18649 at *6 (N.D. Cal. Feb. 16, 2016).

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b. Class Counsel obtained a significant common fund settlement for Plaintiff and the Class.

"The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award." *In re Omnivision*, 559 F. Supp. 2d at 1046. After the first round of mediation the parties reached a non-reversionary common fund settlement of $23,850,000.00 in favor of the Plaintiff and the Class. Gatens Decl. at Ex. D. And while this initial settlement for $23,850,000.00 was remarkable in and of itself, Plaintiff and Class Counsel ultimately *walked away* from the deal, refusing to agree to the expanded release sought by the Defendant without further compensation for the Class. *Id.* at ¶ 12. Class Counsel then expended considerable time and energy preparing to move to compel enforcement of the original settlement while simultaneously negotiating with Defendant to engage in a second mediation. *Id.*

Class Counsel's efforts were effective: at the second mediation, Class Counsel increased the settlement amount by $2,455,000, for a total non-reversionary common fund of $26,305,000. *Id.* at Ex. F. Class Counsel's management of this case was a substantial success. *Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (noting plaintiffs' "substantial success").

2. Class Counsel assumed a significant risk of no recovery.

Class Counsel's fee request is also intended to recognize the significant risk they assumed in this case. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55

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(9th Cir. 2015) (Upholding fee award and noting that "class counsel risked great time and effort and advanced significant costs on behalf of the class action.").

Class Counsel represented Plaintiff and the Class entirely on a contingent basis. Gatens Decl. at ¶ 15. "With respect to the contingent nature of the litigation … courts tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees." *Destefano*, 2016 U.S. Dist. LEXIS at *60 (citing *In re Wash. Public Power*, 19 F.3d at 1299).

There was therefore a very real risk that Class Counsel would not recover their fees and costs at all. Class Counsel had already suffered significant losses in similar cases—including a pre-foreclosure lockout case against Wells Fargo. Gatens Decl. at ¶ 16; Declaration of Peter Spadoni ("Spadoni Decl.") at ¶¶ 7–8. At the time they filed Ms. Rhodes complaint, Class counsel had not obtained any favorable judgment or settlement in any related case. *See id.* And despite their success in front of the State Supreme Court in *Jordan*, 185 Wn.2d 876, similar cases demonstrate that pre-foreclosure lock out cases did (and continue to) carry significant risk.

After the Washington Supreme Court's July 7, 2016 ruling, *Jordan* was remanded back to the District Court for further proceedings. *See Jordan*, 185 Wn.2d 876. The Federal Housing Finance Agency ("FHFA") almost immediately successfully moved to intervene and argued that federal law preempted Washington law prohibiting pre-foreclosure lock

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changes on any home in which a government sponsored entity ("GSE")—most notably Fannie Mae and Freddie Mac—held any interest. *Jordan*, No. 2:14-CV-0175-TOR, ECF No. 113, ECF No. 118; Gatens Decl., at ¶ 17. FHFA's arguments weighed heavily on Class Counsel: they had no way to know the number of potential class members in this case with GSE loans, but the percentage could very well have been most or all of the class. Gatens Decl., at ¶ 17. On March 19, 2017, the Court denied FHFA's motion. *Jordan v. Nationstar Mortg., LLC*, 240 F. Supp.3d 1114 (E.D. Wash. 2017). But FHFA remained an active party in the case and continued to emphasize the risk of a successful appeal at the conclusion of the litigation. *See Jordan*, No. 2:14-cv-0175-TOR, ECF Nos. 152, 274, 278; Gatens Decl., at ¶ 18.

Along with the FHFA, the defendant in *Jordan* also filed a Motion to Decertify the Class, arguing that numerous individualized issues precluded class-wide adjudication. *Jordan*, No. 2:14-cv-0175-TOR, ECF No. 119; Gatens Decl., at ¶ 19. Because Class Counsel (rightly) suspected that Wells Fargo's practices in procedures would largely mirror those at issue in *Jordan*, they knew Nationstar's motion could make or break the instant case. Gatens Decl., at ¶ 19.

Further, another pre-foreclosure lock change case was on appeal to the Ninth Circuit when Class Counsel was considering Ms. Rhodes' case. *See Bess*, 727 Fed. Appx. 918; Gatens Decl., at ¶ 20. The defendant in *Bess* had filed two separate motions to dismiss, both of which were granted. *Bess v. Ocwen Loan Servicing, LLC*, No. C15-5020BHS, 2015

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U.S. Dist. LEXIS 32367 (W.D. Wash. Mar. 16, 2015), 2015 U.S. Dist. LEXIS 70603 (Jun 1, 2015). Class Counsel's appeal could have created binding appellate precedent undermining putative class members' claims in this case. *Bess*, 727 Fed. Appx. 918; Gatens Decl., at ¶ 20. A motion to dismiss class allegations and seeking sanctions filed by the defendant in a similar case was likewise pending at this time. *Bund*, No. 2:16-cv-920, ECF No. 14; *see also Kautsman v. Carrington Mortg. Servs., LLC*, No. C16-1940JCC, 2017 U.S. Dist. LEXIS 162894 (W.D. Wash. Oct. 2, 2017).[1]

The stigma surrounding defaulted borrowers also posed risk to class-wide recovery. Gatens Decl., at ¶ 21. Among other things, Defendant asserted or implied defenses premised on the notion that, because borrowers had defaulted on their loan obligations they had failed to provide proper notice of their claims, caused their own damage, failed to mitigate their damages, or were subject to off-sets. *Id.* While Class Counsel never lent much credence to the merits of these arguments, they did recognize that Defendant's defenses could have some limited appeal to a jury and therefore could not be discounted in their entirety. *Id.*

Lastly, and perhaps most significantly, Class Counsel faced substantial risk posed by lender and loan servicing industry lobbyists' efforts to obtain legislation that would immunize them from liability for pre-foreclosure lock changes. Gatens Decl., ¶ 22.;

[1] Class counsel is not involved in this case.

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Declaration of Joseph Jordan ("Jordan Decl."), ¶¶ 3–14; Declaration of Lili Sotelo ("Sotelo Decl."), ¶¶ 2–14. Following the *Jordan* decision, big players in the lender and loan servicing industries dedicated significant efforts spanning two legislative sessions in an attempt to fashion an end-run around the State Supreme Court's decision and achieve retroactive immunity for pre-foreclosure lock changes. *Id.* Had these efforts been successful (they ultimately were not) Plaintiff, the Class, and Class Counsel's ability for any recovery from the Defendant would have evaporated. *Id.*

3. Class Counsel's skill and performance delivered a significant recovery for the class that included benefits beyond the cash settlement.

Class Counsel brought more to this case than experience; they matched skilled and resourced opposing counsel. "The quality of opposing counsel is also relevant to the quality and skill that class counsel provided," *Destefano*, 2016 U.S. Dist. LEXIS 17196 at *59. Lead Defense counsel consisted of two partners from a reputable law firm with over 187 attorneys. Gatens Decl., at ¶ 23. Class Counsel's ability to negotiate a favorable settlement despite defense counsel's quality, experience, and abundant resources supports Class Counsel's fee request. *See, e.g., Lofton v. Verizon Wireless (VAW) LLC*, No. C 13-05665 YGR, (N.D. Cal. May 27, 2016) (the "risks of class litigation against an able defendant well able to defend itself vigorously" support a higher fee award).

a. Class Counsel's performance generated benefits beyond the

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cash settlement fund

Class Counsel's performance also generated benefits beyond the common settlement fund. *Cf Vizcaino*, 290 F.3d at 1049 (citing to the District Court's finding that class "counsel's performance generated benefits beyond the cash settlement fund."). In the course of the litigation, the Defendant confirmed that—due to Class Counsel's efforts—it no longer conducted pre-foreclosure lock changes in Washington State. Gatens Decl., at ¶ 24, Ex. G; *see Vizcaino*, 290 F.3d at 1049 ("During the litigation, Microsoft agreed to…change its personal classification practices."). Class Counsel has provided far-reaching non-monetary benefits to the class and Washington borrowers in general.

4. Awards in similar cases demonstrate that the requested fee is reasonable.

Class Counsel's request for 12.5% of the common fund is well below the 25% common fund benchmark in this circuit and it is well below percentage fee awards in other common fund settlement cases. *See e.g. Vizcaino*, 290 F.3d at 1047 (awarding 28% of the common fund); *Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 161–66, 240 P.3d 790 (2010) ("40 percent contingency fee based on the $5 million settlement was fair and reasonable); *Desio v. Emercon Electric Co.*, No. 2:15-CV-00346-SMJ, ECF No. 84 (E.D. Wash. Feb. 7, 2018) (awarding 25% of the common fund); *Plumbers Union Local No. 12, Pension Fund v. Ambassadors Group Inc.*, 2012 U.S. Dist. LEXIS 26232 (E.D. Wash., Feb. 28, 2012) (awarding 22% of the common fund).

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A fee award of 12.5% of the common fund is all the more appropriate in this case because it is an "all in" rate that includes Class Counsel's expenses. Consideration of all relevant factors confirms the reasonableness of the requested 12.5% of the settlement fund.

C. A lodestar crosscheck is not required but confirms that the requested fee is reasonable.

When a court selects the percentage-of-the fund method to calculate a reasonable fee, the court may use the lodestar method as a "crosscheck" to determine that the amount awarded is reasonable. *Online DVD*, 779 F.3d at 949; *see also Glass v. UBS Fin. Servs.*, No. C-16-4068MMC, 2007 U.S. Dist. LEXIS 8476, *46 (N.D. Cal. Jan. 26, 2007) (citing *Vizcaino*, 290 F.3d at 1050–51) ("The Ninth Circuit has held that the Court may, but is not required to, compare the lodestar and the 25% benchmark to determine if the 25% benchmark results in an inappropriately high or low fee."). The "primary basis of the fee award remains the percentage method." *Vizcaino*, 290 F.3d at 1047, 1050–51; *see also In Re Bluetooth*, 654 F.3d at 942 (discussing the benefits of the percentage method "in lieu or the often more time-consuming task of calculating the lodestar); *Glass v. UBS Fin. Servs.*, 331 F. Appx. 452, 456–57 (9th Cir. 2008) (affirming a 25% common fund fee award after an "informal" lodestar crosscheck and despite "the relatively low time-commitment by plaintiff's counsel" because "the district court did not abuse its discretion in giving weight to other factors, such as the results achieved for the class and the favorable timing of the settlement").

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Class Counsel's lodestar information confirms that the requested fee is reasonable.

1. Class Counsel's rates are consistent with rates in the community for similar work performed by professionals with comparable skill, experience, and reputation.

When utilizing a lodestar cross check to assess a percentage fee of a common fund, the Ninth Circuit instructs District Courts to apply reasonably hourly rates for the region. *Online DVD-Rental*, 779 F.3d at 949; *In re Bluetooth*, 654 F.3d at 941. "Generally, the relevant community is the forum in which the district court sits." *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). "Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *see also Gates v. Deukmejian*, 987 F.3d 1392, 1407–08 (9th Cir. 1992). In determining the reasonable hourly rate, courts consider declarations from counsel describing the experience and skill of the attorneys and staff members who worked on the case and declarations of other attorneys regarding the prevailing market rate. *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998).

Class Counsel have set their rates for attorneys and paralegals based on a variety of factors including each professional's experience, ability, skill, education, and reputation in the legal community. Gatens Decl. at ¶¶ 27–42, 45, 51–52, Ex H; Terrell Decl. at ¶ 10, Ex. 3; These rates are consistent with the prevailing market rate in the Eastern District of Washington. Gatens Decl., at ¶¶ 51–52, Ex. I; Declaration of Dale Forman ("Forman

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Decl."), at ¶ 5; *Barrientos Martinez v. Auvil Fruit Company, Inc.*, No. 2:16-cv-0356-RMP, ECF No. 58 at ¶ 23 (E.D. Wash. Aug. 27, 2017); *id.* at ECF No. 57 at ¶ 5. Counsel's fee request does not include work completed by administrative or clerical staff. Gatens Decl., at ¶ 48, Ex. H; Terrell Decl., at Ex. 3.

Class Counsel's rates are also consistent with those approved by this district in other cases. *See e.g.* Gatens Decl., at Ex. I (Chart of approved rates in the Eastern District of Washington by Erica Hartlep, Staff attorney to U.S. District Court Senior Judge Edward F. Shea, last updated April 10, 2015). *Plumbers Union Local No. 12, Pension Fund v. Ambassadors Group, Inc.*, (E.D. Wash. Feb. 28, 2012) (approving paralegal rates at $150/hour in 2012); *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-cv-3016-TOR, 2016 U.S. Dist. LEXIS 92110, *23 (E.D. Wash. Jan. 12, 2016) (finding reasonable prevailing rates exceeding $400 per hour for experienced counsel in 2016). They are likewise consistent with those approved by the Western District of Washington. *See e.g. In re Infospace*, 330 F. Supp.2d 1203, 1213–14 (W.D. Wash. 2004) (approving hourly rates ranging from $300 to $425 in 2002). Class Counsel's rates are reasonable, particularly given their expertise and the risk inherent in this case. *See Gatens Decl.*, at ¶ 47.

2. <u>Class Counsel expended a reasonable number of hours litigating the case.</u>

Hours are generally "reasonably expended in pursuit of the ultimate result achieved

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in the same manner that an attorney traditionally is compensated by a fee-paying client." *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983)). Class Counsel have provided a narrative description of their work on this case as well as their detailed billing records detailing the work performed by each attorney and paralegal. Gatens Decl, at Ex. H.[1]

To-date Class Counsel has billed a total of 1,676.59 hours litigating, settling, and administering this case. Gatens Decl., at ¶ 56, Ex. H. This total excludes time that Class Counsel removed as duplicative, administrative, or arguably excessive. *Id*. at ¶ 48. While beneficial to the Class, Class Counsel have included none of the time dedicated to opposing banks' and loan servicers' legislative efforts to eliminate the Class's claims. *Id*., at ¶ 22. The resulting hours are *less* than those that would be billed to a fee-paying client in a non-contingent case. *Id.*, at ¶ 56. Class Counsel's total lodestar is $541,355.75. *Id.*

Knowing it was possible they would never be paid for their work, counsel had no incentive to act in a manner that was anything but economical. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingent cases in the hopes of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."); *see* Spadoni Decl. at ¶¶ 8–15;

[1] Class Counsel redacted work product from their billing records. *See Democratic Party of Wash. v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004) (recognizing that litigants are "entitled for good reason to considerable secrecy about what went on between client and counsel, and among counsel" and redactions appropriately "preserve secrecy about something the … lawyers talked about, and some issue of … law they researched").

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Gatens Decl., at ¶ 47. Class Counsel's work in this case has been undertaken to the exclusion of other billable work. Spadoni Decl., at ¶ 16; Gatens Decl., at ¶ 47. Plaintiff had only one partner level attorney working on this case and used associates and paralegals where possible. Gatens Decl., Ex. H. Plaintiff sent only one attorney to conduct two days of out-of-state depositions and only two attorneys to participate in two out of state mediations which ultimately resulted in the settlement agreement in this case. *Id.* at ¶ 7; Terrell Decl., at ¶ 8.

In short, Class Counsel leveraged their experience and prior successes to efficiently develop the central facts and legal issues that shaped the favorable outcome of this case for Plaintiff and the Class. They were able to do so with the ultimate effect of achieving an early resolution that ensured class members timely and substantial recovery.

3. <u>The implied multiplier is reasonable and appropriate.</u>

"The purpose of this multiplier is to account for the risk Class Counsel assumes when they take on a contingent-fee cases." *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 U.S. Dist. LEXIS 16838, at *11 (N.D. Cal. Feb. 6, 2013). (citation omitted). Multipliers are commonplace in attorneys' fees awards in class actions, particularly where the lodestar method is used to cross-check a percentage-of-the-fund-fee. *See* Richard A. Posner, Economic Analysis of the Law 783 (8th Ed. 2011). "[I]n common fund cases, courts that employ a pure lodestar method are not bound by the Supreme

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Court's rulings that limit multiplied lodestars in the fee-shifting context." *Id.*; *see also Vizcaino*, 290 F.3d at 1051 ("The bar against risk multipliers in statutory fee cases does not apply to common fund cases" and "'courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.'").

a. The implied multiplier is well within the typical range considered by the Ninth Circuit.

In the Ninth Circuit, multipliers can "range from 1.2 to 4 or even higher." *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1170 (C.D. Cal. Sep. 14, 2010); *Vizcaino*, 293 F.3d at 1051 n.6 (finding multipliers ranging from 0.6–19.6). Class Counsel requests only 12.5% of the common fund, an implied multiplier of 6. Gatens Decl., at ¶ 56. Class Counsel recognizes that this implied multiplier trends towards the "high end" of a traditional implied multiplier. But their request is still well within the typical range approved in this circuit. *See e.g. Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780 (9th Cir. 2007) (holding that the 6.85 implied multiplier was "well within the range of multipliers that courts have allowed"); *Craft v. City of San Bernardino*, 624 F. Supp.2d 1113, 1125 (C.D. Cal. 2008) (explaining that 5.2 is a "high end multiplier" but "there is ample authority for such awards resulting in this range or higher"); *Wenzel v. Colvin*, No. EDCV 11-0338JEM, 2014 U.S. Dist. LEXIS 105823, *10 (C.D. Cal. Aug. 1, 2014) (approving a 6.06 implied multiplier in light of class counsel's quick settlement of the case); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C07-15923WHA, 2015 U.S. Dist. LEXIS 67298, *23 (N.D.

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Cal. May 21, 2015) (awarding a 5.5 implied multiplier). Class Counsel's fee request is likewise well within the range approved by other circuits in cases cited favorably by Ninth Circuit District Courts. *See e.g. Craft*, 624 F. Supp.2d at 1125 (citing favorably *In re Merry-Go-Round Enterprise, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000) (implied multiplier of 19.6), *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 U.S. Dist. LEXIS 9705 (E.D. Pa. 2005) (implied multiplier of 15.6), *In re Cendant Corp. PRIDES Litig.*, 243 F.ed 722, 732 (3d Cir. 2001) (implied multiplier of 7), and *In re Rite Aid Corp. Secs. Litig.*, 362 F. Supp. 2d 587 (E.D. Pa. 2005) (multiplier of 6.96)); *see also Buccellato v. AT&T Operations, Inc.*, No. C10-00463LHK, 2011 U.S. Dist. LEXIS 85699, *5 (N.D. Cal. Jun. 30, 2011) (citing favorably *Weiss v. Mercedez-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1304 (D. N.J. 1995) (9.3 implied multiplier), and *Roberts v. Texaco*, 979 F. Supp. 185 (S.D. N.Y. 1997) (5.5 implied multiplier)).

4. <u>The implied multiplier is reasonable under the circumstances.</u>

Courts often consider the following factors when assessing the reasonableness of a multiplier: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience,

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reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). The foremost consideration "is the benefit obtained for the class." *In re Bluetooth*, 654 F.3d 941–42.

Application of these factors confirms that an implied multiplier of 6 is both reasonable and appropriate in this case. Class Counsel took this case on a contingent basis and to the preclusion of other work and to the detriment of their annual compensation. Gatens Decl., at ¶¶ 15, 44, 47; Spadoni Decl., at ¶¶ 9–16. They took this case despite the risk of protracted litigation or early dismissal. *Id*. They went toe to toe with an experienced and well-resourced litigation team and were able to marshal their hard-earned experience litigating class wide claims arising from pre-foreclosure lock changes to obtain an excellent result for the class. Gatens Decl., at ¶ 23. They obtained a very favorable class settlement relatively early in the litigation—the first class-wide settlement of this nature in the nation. *Id*., at ¶ 25. That Class Counsel was able to do so efficiently without resorting to protracted litigation should not undermine the reasonableness of their fee request.

Counsel "should not be 'punished' for efficiently litigating this action, or for otherwise providing class members with the benefits of their experience gained litigating similar class cases." *Bayat v. Bank of the West*, No. C-13-2376EMC, 2017 U.S. Dist. LEXIS 50416 (N.D. Cal. Apr. 15, 2015). The requested multiplier should reward "Class Counsel for its efforts in achieving a swift settlement while recognizing that counsel's

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efficiency actually reduced its lodestar." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liabl. Litig.*, 2017 U.S. Dist. LEXIS 65931, *613–14 (N.D. Cal. Apr. 12, 2017). The lodestar cross check should not be used in such a way as to deter early settlement. *See Vizcaino*, 290 F.3d 1043, n.5 ("We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances it may be a relevant circumstance that counsel achieved a timey result for the class members in need of immediate relief."). The implied multiplier is reasonable given the circumstances of this case. *Cf Wenzel*, 2014 U.S. Dist. LEXIS at *10.

Class Counsel's fee request is particularly appropriate because they are only requesting 12.5% of the common fund—$3,288,125.00 *below* the Ninth Circuit's 25% benchmark. Class Counsel are not seeking separate reimbursement for their costs. *See* Gatens Decl., at ¶ 44, 53–55; *cf Vincent v. Hughes Air W.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also Bowles*, 121 Wn.2d at 70–74. Class Counsel are not seeking reimbursement for the 92.65 hours Mr. Gatens spent opposing bank and loan servicers' attempts to undue the *Jordan* decision. Gatens Decl., at ¶¶ 22, 56. Nor are Class Counsel requesting the Court award them fees for projected time they anticipate they will spend drafting and filing their motion for final approval, administering the settlement, addressing any objections and appeals, and responding to class members through final approval and distribution of the settlement funds. *Id.* at ¶ 49; *cf Kangas v. Volkswagen Grp. Of America, Inc.*, No. 17-

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176279, 2018 U.S. App. LEXIS 20420, *8 (9th Cir. Jul. 23, 2018) (Court can include "projected time in its lodestar cross-check").

In light of the circumstances in this case, the implied multiplier demonstrates that Class Counsel's request for only 12.5% of the fund is both reasonable and appropriate.

D. Plaintiff requests a service award of $10,000.

Service 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 (quoting *Rodriguez v. W. Publishing*, 563 F.3d 948, 958-59 (9th Cir. 2009)). Such awards recognize the effort class representatives expend and the financial or reputational risk they undertake in bringing the case, and to recognize their willingness to act as private attorneys general. *W. Publishing*, 563 F.3d at 958-59.

Valerie Rhodes requests a $10,000 service award—well under .001% of the total common fund. Declaration of Valerie Rhodes ("Rhodes Decl.") at ¶ 2.; Gatens Decl., at ¶ 58. Ms. Rhodes dedicated countless hours to this litigation, responding promptly to requests from counsel, producing documents and drafting discovery responses, and participating in strategic and settlement discussions. Rhodes Decl., at ¶¶ 3–5; Gatens Decl., at ¶ 58. Ms. Rhodes regularly communicated with Class Counsel. *Id.* Moreover, Ms. Rhodes committed to serving as the face of this litigation—publicly facing the stigma surrounding a loan default that many wish to avoid. Rhodes Decl., at ¶ 5. This case has also affected other loans with which she was involved. *Id.* Ms. Rhodes request is both

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reasonable and consistent with awards in other courts. *See e.g. Rinky Dink, Inc. v. World Bus. Lenders, LLC*, 2016 U.S. Dist. LEXIS 70858, *18 (W.D. Wash. May. 31, 2016 (awarding $10,000 each to two of three named plaintiffs); *Lehman v. Nelson*, 2015 U.S. Dist. LEXIS 180785, *18 (W.D. Wash. Aug. 4, 2015) (awarding $10,000 to named plaintiff); *Pelletz v. Weyerhauser Co.*, 592 F. Supp.2d 1322, 1330, n.9 (W.D. Wash. 2009) (approving $7,500 awards and collecting cases granting incentive awards ranging from $5,000 to $40,000).

IV. CONCLUSION

Class Counsel request that the Court approve an all-in fee and cost award of 3,288,125.00, which is 12.5% of the common fund created by Class Counsel's work on behalf of the Class. Plaintiff requests a service award of $10,000 in recognition of her representation of the class in this case.

RESPECTFULLY SUBMITTED AND DATED this 1st day of October, 2018.

s/CLAY M. GATENS
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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DATED at Wenatchee, Washington this 1st day of October, 2018.

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