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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MERCEDES GUERRERO, individually and for other persons similarly situated,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

No. 12-cv-4026 WHA

CLASS ACTION

NOTICE AND MOTION FOR ATTORNEYS' FEES AND SERVICE AWARD

Hearing Date: September 2, 2014
Hearing Time: 10:30 a.m.
Courtroom 8, 19th Floor, SF
Hon. William Alsup

NOTICE AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 2, 2014 at 10:30 a.m., or as soon as the matter may be heard, in the United States District Court of the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, California, Courtroom 8, 19th Floor, Honorable William Alsup presiding, Plaintiff and Class Counsel will and hereby do move the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure for an order awarding attorneys' fees and expenses to Class Counsel and a service award to the representative plaintiff.

This motion is supported by the Order Granting Preliminary Approval of Class Action Settlement (Dkt. No. 212) and associated filings, the memorandum below, and the following supporting documents:

1. May 29, 2014, Expert Report of Birny Birnbaum (attached as Ex. C to Loser Decl.);
2. July 3, 2014, Declaration of Thomas E. Loeser; and
3. March 9, 2014, Declaration of Plaintiff Mercedes Guerrero (Dkt. No. 200).[1]

[1] Plaintiff will submit a proposed order regarding attorneys' fees with her motion for final approval on July 16, 2014.

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I. INTRODUCTION

On April 7, 2014, this Court preliminarily approved the parties' proposed Settlement Agreement that provides for injunctive relief plus a $625,000.00 *non-reversionary* common fund for the benefit of "[a]ll persons with a residential mortgage loan secured by an FHA mortgage, who were charged by Wells Fargo Bank, N.A., or an affiliate of Wells Fargo Bank, N.A., for force-placed flood insurance on property in California from July 31, 2008, through August 16, 2013, where such flood insurance was procured with the assistance of QBE Insurance Corporation or American Security Insurance Company, or their affiliates. This class excludes charges collected or extinguished through foreclosure, short-sale agreement, or grant of a deed in lieu of foreclosure or through cancellation or waiver by borrower's agreement with the lender." (The "Class").

In this motion, Class Counsel requests an attorney fee award of 23% of the common fund, including expenses. This is the amount Class Counsel agreed to in its application to the Court to represent Ms. Guerrero and the Class. Out-of-pocket expenses total $17,449.53, therefore, the net attorney's fees requested total just 20% of the common fund ($126,300/$625,000). Class Counsel requests a service award of $7,500 for Plaintiff Mercedes Guerrero. The Court-appointed Claims Administrator (Gilardi & Co.) estimates and has capped its fees and costs related to settlement administration at $28,604. The overall settlement distribution proposed in this motion is as follows:

Gross Settlement Fund	$625,000.00	100%
Attorneys' Fees incl. Expenses	($143,750.00)	23%
Service Award	($7,500.00)	1.2%
Settlement Administration	($28,604.00)	4.58%
Net Distribution to Class	**$445,146.00**	**71.22%**

II. SUMMARY OF ARGUMENT

The proposed distribution set forth above is fair and reasonable and should be approved. Consistent with its proposal to the Court during the application process, Class Counsel is seeking an award of 23% of the Gross Settlement Fund, which constitutes approximately $126,300 in attorney time and $17,450 in out-of-pocket expenses. This amount should be approved because the net fee is far below the 25% of a common settlement fund "benchmark" for a reasonable class action fee award in the Ninth Circuit. "Thus, 25% of the fund is the appropriate percentage absent

some strong reason to make an upward or downward departure." *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D. Cal. 2008). The requested service award of $7,500 is typical and reasonable, and fully supported in this case by the scale of the benefit Ms. Guerrero provided to the Class, among other factors. *See Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 U.S. Dist. LEXIS 38667, at *108-09 (N.D. Cal. Apr. 1, 2011).

Class Counsel has obtained an excellent settlement for the Class, and no special circumstances justify a further downward departure from the 25% benchmark fee award. This is not a "megafund" settlement ($50 million or more) where the 25% benchmark is frequently scrutinized to avoid windfalls. To the contrary, for settlement funds even in the $20 million dollar range (which is yet 30 times bigger than this settlement), "25% is very much the norm." *Bernardino*, 624 F. Supp. 2d at 1127. Nor is this a situation where the value of the fund is debatable. Although Class Counsel also obtained injunctive relief, and legal precedent supports including the value of the injunctive relief in a quasi percentage-of-the-fund calculation, here Class Counsel has conservatively based the requested attorneys' fee solely on the *cash value of the non-reversionary common fund* that Wells Fargo will deposit in escrow.

The 20% sub-benchmark net fee and 3% costs award is also reasonable and appropriate because the settlement is an excellent result, obtained on a purely contingent basis, under complex and risky circumstances. Specifically, Plaintiff confirmed through discovery and with the assistance of her expert that the proposed Gross Settlement Fund represents approximately 370% of the commissions received by Wells Fargo during the Class Period in connection with Class member policies from its lender-placed flood insurance ("LPFI") vendors. This number is significant given that this Court has held in other LPFI cases that claims related to Plaintiff's other asserted theories for damages are not viable. *See Cannon v. Wells Fargo Bank N.A.*, No. C-12-1376 EMC, 2013 WL 3388222, at *6 (N.D. Cal. July 5, 2013) (dismissing LPFI claims based upon "backdating" LPI coverage).

Even if this Court allowed Plaintiff to recover her full damages on her backdating claims, the Gross Settlement Amount represents a recovery of approximately 319% of those damages. And it represents 180% of total available damages for Plaintiff's commission and backdating claims

combined. And even after the deductions from the Gross Settlement Fund requested by this motion, payments to Class members will exceed their best-case scenario damage, with an estimated payout of approximately 128%, which exceeds the recovery this Court already determined would be adequate for the Class.[2]

Importantly, this is a *non-reversionary, fully funded* settlement pursuant to which every Class member will be mailed a check for their share of the Net Settlement Fund, and any residual resulting from uncashed checks will either be redistributed to Class members or will revert to a Court-approved *cy pres* recipient depending on the remaining amount. This is an excellent settlement because it truly and efficiently provides Class members with meaningful cash compensation that they could not have otherwise obtained, *as well as* injunctive relief that ensures that Wells Fargo does not recommence charging commissions on LPFI for at least three years.

The extraordinary 180% of damages settlement in this case results from the combination of a tireless plaintiff who refused to back down against a mega-bank, and a dedicated consumer-protection law firm that was willing to utilize all its resources in prosecution of this case, notwithstanding its comparatively small value. Wells Fargo knew and understood that Class Counsel was willing and able to take this case to trial as scheduled in April 2014. It knew that Ms. Guerrero would be an outstanding trial witness and that she had a compelling story to tell. This knowledge was no-doubt a driving factor in Wells Fargo's willingness to settle the case with a common fund that significantly exceeded best-case scenario Class damages. Plaintiff's and Class Counsel's work in this case is validated by a comparison of this matter to other cases involving lender-placed insurance that have been dismissed or had class certification denied.[3]

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[2] *See* April 7, 2014 Order Granting Unopposed Motion for Preliminary Approval of Class Action Settlement, Dkt. No. 212. At the time of that motion, Class data previously provided by Wells Fargo indicated that the payout would be 121.8%. Updated data provided by Wells Fargo has caused an upward revision of the payout to 128%.

[3] *See, e.g.*, *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098 (11th Cir. 2014) (affirming dismissal of lender-placed insurance lawsuit); *Cohen v. American Sec. Ins., Co.*, 735 F.3d 601 (7th Cir. 2013) (same); *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432 (1st Cir. 2013) (*en banc*) (split decision resulting in affirming dismissal of force-placed flood insurance action); *Miller v. Wells Fargo Bank, N.A.*, No. 13-cv-1541, 2014 WL 349723 (S.D.N.Y. Jan. 30, 2014) (dismissing force-placed insurance claims); *Ali v. Wells Fargo Bank, N.A.*, No. 13-cv-876, 2014

A lodestar cross-check further validates the reasonableness of the 23% sub-benchmark fees and costs requested in this case. Class Counsel's aggregate reported lodestar, excluding time spent on the application process to be Class Counsel, is $236,402.[4] The net fee request of $126,300 thus results in a lodestar multiplier of 0.53. That is, *Class Counsel is seeking a fee that is about half the amount actually expended in prosecuting this case and obtaining this settlement*. In stark contrast, a multiplier of 2.5 would be well within the typical range for successful common fund cases like this case. Under Ninth Circuit authority, a multiplier *increasing actual attorneys' fees* is considered reasonable to compensate Class Counsel for, among other things, the serious contingency risk in this case, as well as other cases that are not successful. An enhanced fee represents a reasonable expectation in cases like this, where there was the very real possibility of an unsuccessful outcome and no fee of any kind, resulting in a complete loss of the time and expenses that Class Counsel advanced for the benefit of Plaintiff and the Settlement Class. Yet here, pursuant to its proposal to the Court during the application process to be Class Counsel, Class Counsel seeks no such enhancement. Instead, the Class obtains the benefit of a 47% discount off the attorney time actually expended in prosecuting this case.

Furthermore, reimbursement of reasonable out-of-pocket litigation expenses is routine under the common fund doctrine. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir.

WL 345243 (W.D. Okla. Jan. 24, 2014) (same); *Decambaliza v. QBE Holdings, Inc.*, No. 13-cv-286-bbc, 2013 U.S. Dist. LEXIS 153392 (W.D. Wis. Oct. 25, 2013) (same); *Degutis v. Financial Freedom LLC*, 978 F. Supp. 2d 1243 (M.D. Fla. 2013) (same); *Cannon v. Wells Fargo Bank, N.A.*, No. C-12-1376 EMC, 2013 U.S. Dist. LEXIS 93080 (N.D. Cal. July 2, 2013) (dismissing backdating claims); *LaCroix v. U.S. Bank, N.A.*, No. 11-cv-3236, 2012 WL 2357602 (D. Minn. June 20, 2012) (dismissing force-placed insurance claims); *Gibson v. Chase Home Fin. LLC*, No. 8:11-cv-1302, Dkt. Nos. 102 & 108 (M.D. Fla. Apr. 2, 2012 & Apr. 30, 2012) (same and then striking counts of amended complaint concerning force-placed insurance); *McKenzie v. Wells Fargo Home Mortg., Inc.*, No. 11-cv-4965, 2012 WL 5372120 (N.D. Cal. Oct. 30, 2012) (dismissing over-insurance claims); *Blass v. Flagstar Bancorp, Inc.*, 841 F. Supp. 2d 1280 (S.D. Fla. 2012) (dismissing force-placed insurance claims); *see also Gustafson v. BAC Home Loans Servicing, LP*, 294 F.R.D. 529 (C.D. Cal. 2013) (denying class certification); *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373, 2013 WL 139913 (S.D. Fla. Jan. 10, 2013) (denying class certification); *Gordon v. Chase Home Fin. LLC*, No. 8:11-cv-2001, 2013 WL 436445 (M.D. Fla. Feb. 5, 2013) (denying class certification).

[4] *See* Declaration of Thomas E. Loeser in support of Plaintiff's Motion for Attorney Fees and Service Award ("Loeser Decl.").

1977).[5] Yet here, in order to incentivize Class Counsel to minimize litigation expenses, such expenses are included in the 23% fee sought. Finally, the proposed service award of $7,500 to the Class Representative plaintiff is also typical and reasonable, and fully supported in this case by the scale of the benefit to the Class, among other factors. With deference to the Court's previously stated resistance to service awards to representative plaintiffs in Class actions, here Plaintiff Mercedes Guerrero played a major role in obtaining the 180% of damages settlement and devoted significant time and effort to obtaining this excellent result. She forewent time at work and with her family for the benefit of the Class. Given the outstanding result achieved by Ms. Guerrero's efforts – a result that significantly exceeds best-case scenario Class damages – and the discount the Class is receiving on the fees of Class Counsel, it is reasonable for the Court to compensate Ms. Guerrero with the modest service award requested.

III. STATEMENT OF THE CASE

A. Lender-Placed Flood Insurance Litigation is Complex, Expensive and Risky

This Court is an authority on recent litigation alleging abusive lender-placed insurance. *See, e.g.*, *Hofstetter v. Chase Home Fin., LLC*, No. 10-1313-WHA (N.D. Cal. 2011); *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, No. 11-3058-JCS (N.D. Cal. 2012) (hazard insurance); *Cannon v. Wells Fargo Bank N.A.*, No. C-12-1376 EMC (N.D. Cal. July 5, 2013) (flood and hazard insurance); *McKenzie v. Wells Fargo Bank, N.A.*, No. 11-04965-JCS (N.D. Cal. 2013) (flood insurance); *Leghorn v. Wells Fargo Bank, N.A.*, No. 13-00708-JCS (N.D. Cal. 2013) (flood insurance).

Challenges to force-placed insurance practices are complex and expensive and require litigation against some of the most imposing and resourced defendants in the United States. Due to the relatively low damages per individual, it is not feasible for consumers to obtain compensation for the challenged practices but for the expertise and resources of contingency class action law firms like Class Counsel. Moreover, the contingent nature of this type of litigation subjects such

[5] Likewise, the fees and costs of the Court-appointed Claims Administrator (Gilardi & Co.) total just 4.58% of the Gross Settlement Fund. These fees and costs demonstrate an efficient and economical distribution of the Net Settlement Fund to the estimated 1,909 Class members.

firms to substantial economic risk. *See, e.g., Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 436 (1st Cir. 2013) (affirming dismissal of LPFI complaint with prejudice for failure to state a claim); *Gordon v. Chase Home Fin., LLC*, No. 8:11-cv-2001, 2013 WL 436445 (M.D. Fla. Feb. 5, 2013) (order denying class certification of LPFI case).

Force-placed *flood* cases involve heightened complexity and risk, because of the effect of the National Flood Insurance Act ("NFIA") and Federal Emergency Management Agency ("FEMA") regulations. *See, e.g., Kolbe*, 738 F.3d at 447-449. Thus, by way of example, whereas the *McNeary* plaintiffs had viable claims that JPMorgan violated the covenant of good faith simply by procuring FPI *hazard* at exorbitant prices, no comparable pricing claim was available in this FPI flood case. *See McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 956-58 (N.D. Cal. 2012), *cf. McKenzie v. Wells Fargo Bank, N.A.*, 931 F. Supp. 2d 1028, 1045-46 (N.D. Cal. 2013).

NFIA and FEMA regulation implicate all claims for relief in force-placed *flood* cases. In another FPI case in this district, for example, Judge Chen ultimately dismissed all FPI flood claims that did not involve "kickback" allegations. *See Cannon v. Wells Fargo Bank, N.A.*, 917 F. Supp. 2d 1025, 1057 (N.D. Cal. 2013) (dismissing "pure" excessive coverage claims with prejudice), 2013 U.S. Dist. LEXIS 93080, at *27 (N.D. Cal. July 2, 2013) (dismissing "pure" backdating claims with prejudice); *but see Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1119 (N.D. Cal. 2013) (allowing backdating theory). Moreover, even FPI kickback claims are risky through trial and appeal because, loan servicers argue, the ultimate premium price paid by the borrowers is plainly less than that authorized by the pervasive federal scheme.

The risks to class members and their counsel in FPI litigation extend beyond the risks of dispositive motions, class certification hurdles, and trial. Class members and their counsel could also have their cases wiped out by a competing class case with less aggressive plaintiffs' attorneys.

B. The Settlement Was Achieved By Dedicated Class Counsel

This settlement is the result of Ms. Guerrero's efforts and those of her consumer-protection lawyers dedicated to the best interests of the Class it served in this case. This case began unusually, however, for Class Counsel. Class Counsel was co-lead counsel in a different LPFI case in this

district when it learned of this Court's request for application for class counsel in this case. When Class Counsel was appointed, the Class was already conditionally certified and much litigation and discovery had already occurred. The Court sought counsel to represent the Class who would take over the case and proceed directly to trial, if necessary, even though the Class was quite small. Class Counsel took on that assignment even though it was apparent that a full recovery of litigation fees and expenses was, due to the small size of the Class, unlikely. *See* Loeser Decl., ¶ 6.

C. Class Counsel Obtained an Excellent Settlement for the Class

Plaintiffs' and Class Counsel's efforts have resulted in an excellent settlement for the common benefit of all Class members. *See* Loeser Decl., ¶¶ 12-17. The $625,000 settlement fund constitutes 180% of the theoretical best-case damages scenario, which includes complete recovery of backdating claims.[6] *See id.*, ¶ 14. Given the risks of these claims, another relevant metric is that the Gross Settlement Fund represents 370% of the total commissions paid to Wells Fargo or its affiliates for LPFI during the Class Period. *See id.* Importantly, the entire Net Settlement Fund will be paid directly to all Class members to the extent that they are locatable and cash the check that is sent to them. *Id.*, ¶ 15. Such "check-in-the-mail" payments represent an excellent result in a Class settlement of this type. *See id.*

The Settlement Agreement also provides for injunctive relief. *See id.*, ¶ 16. There is a three-year complete moratorium on the receipt of commissions by Wells Fargo and its affiliates. *See id.* Absent the negotiated injunctive relief, Wells Fargo could restart its commission-based LPFI practices at anytime and pass those costs on to Class members. Thus, the injunctive relief will lead to a direct and monetizable benefit to Class members whose loans continue to be serviced by Wells Fargo. *See id.*

[6] As the Court is aware, there is a split of authority on the viability of Plaintiff's backdating claims. *See, e.g.*, *Cannon v. Wells Fargo Bank, N.A.*, No. 12-cv-1376, 2013 WL 3388222 (N.D. Cal. July 5, 2013) (dismissing backdating claims); *Leghorn*, 950 F. Supp. 2d at 1113 (denying motion to dismiss backdating claims). Notwithstanding the risks inherent in litigating backdating claims in this Court, Class Counsel was successful in negotiating substantial relief to redress these claims in this Settlement.

Class Counsel have calculated – in conjunction with their damages expert – that the value of the injunctive relief in this case could be as much as $148,500, which is the expected amount of commissions that Wells Fargo will no longer collect from the Class over the next three years. *See* Loeser Decl., ¶ 17. However, because there is no way to determine how much of the commissions savings will result in a reduction of premium charges by the insurance providers, the end value to the Class could be much less, or even zero. *See id.* Because it cannot be calculated with any degree of certainty, Class Counsel has not assigned an economic value to the injunctive relief to support this request for attorneys' fees. That determination is simply unnecessary for this sub-benchmark percentage-of-the-fund fee application.

Whether or not quantified monetarily, "the non-financial benefits to the class of the injunctive relief … may generally support a fee award at the benchmark level." *Fraley v. Facebook, Inc.*, No. C-11-1726 RS, 2013 U.S. Dist. LEXIS 124023, at *8-9 (N.D. Cal. Aug. 26, 2013). "The question is not whether a dollar value can be associated with the injunctive relief, but whether that relief benefits the class and at least ameliorates some of the alleged concerns raised by the complaint." *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 944 (N.D. Cal. Aug. 26, 2013). That is certainly true here. One of the central allegations in Plaintiff's complaint was that the payment of commissions to Wells Fargo in connection with LPFI artificially drove up the costs of LPFI to cover the commission payments. The injunctive relief ensures that for at least three years, that practice is over.

D. This Motion Provides Class Members With Notice and the Opportunity to Object to the Proposed Attorneys' Fees, Expenses and Service Award

Plaintiff's motions for final approval, attorneys' fees and expenses, and service awards are to be filed by July 16. Dkt. No. 216. Any objections to the Settlement by Class members are due by August 8, 2014. *See id*. The Court-approved Notice of Class Action Settlement that was disseminated to Class members discloses that Class Counsel will seek an award of attorneys' fees "not to exceed twenty-three percent (23%) of the Gross Settlement Fund including Class Counsel's actual expenses" and a service award for the Named Plaintiff "not to exceed $7,500." *See* Notice of Class Action Settlement (available at www.wells-fargo-california-fha-flood-insurance-

settlement.com). The Class Notice does not, however, provide further detail concerning the applications for attorneys' fees and expenses, and service awards.

Accordingly, this motion and supporting papers are being filed by July 3, 2014, in order to ensure adherence to the letter and spirit of the Ninth Circuit's instructions in *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010). Class Counsel will make these documents available on or about July 3, 2014, at the settlement website, thus providing Class members with over a month to review and respond.[7]

IV. ARGUMENT

A. The Court Should Grant Class Counsel's Request for fees and expenses below the Ninth Circuit Benchmark of 25% of the Settlement Fund

In its application to be Class Counsel, Hagens Berman agreed up front to include expenses in a percentage-of-the-fund fee award and set forth a matrix of the fee to be sought based upon the size of the common fund created and the stage of litigation reached. *See* Application for Appointment of Hagens Berman Sobol Shapiro LLP As Class Counsel (lodged pursuant to L.R. 1-5(m) *in camera* and under seal on July 9, 2013). Under that matrix, for a common fund between $500,001 and $1,000,000, and after motions to dismiss through class certification, the proposed percentage fee, inclusive of expenses, is 23%. Even though, as set forth below, Hagens Berman has incurred fees nearly double 23% of the common fund in this case, Hagens Berman limits its request to that proposed amount.

1. The "benchmark" for a reasonable fee award is 25% of the common fund.

"Where a settlement produces a common fund for the benefit of the entire class," it is well settled that Ninth Circuit district courts should "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." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-1050 (9th Cir.

[7] Consistent with applicable caselaw, *see infra*, Class Counsel are not filing their actual billing time records with this motion, but will provide such records for *in camera* review if deemed necessary. Given the nearly 50% discount on fees sought in this motion, it is difficult to perceive any benefit to be gained from a line-by-line review of contemporaneous billing records.

2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989).

Although district courts retain discretion to determine a reasonable attorneys' fee award in any class action case, extensive law and policy clearly favors the 25% benchmark in common fund cases such as this one. *See id*. The percentage-of-fund method is favored in common fund cases because it helps "ensure faithful representation by tying together the interests of class members and class counsel." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). Conversely, the lodestar method is more difficult to manage and creates inherent incentives for over-litigation. *Craft*, 624 F. Supp. 2d at 1127. In 1989, the Ninth Circuit formally established the 25% figure as the "benchmark" pursuant to a convergence of authority that it was a typical and appropriate contingency fee in these cases. *See Paul, Johnson*, 886 F.2d at 272 (citing *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 679, 692 (M.D. Ala. 1988)).

2. While Class Counsel has agreed to a sub-benchmark fee of 23%, no "special circumstances" justify a further downward departure from the 25% benchmark.

Twenty-five percent would apply as a minimum and be reasonable in this case as the benchmark because this is a true all-cash $625,000 (*i.e.*, non-megafund) common fund settlement. *See Craft*, 624 F. Supp. 2d at 1127. Moreover, Class is relatively small in size and thus, notwithstanding the 180% recovery, the settlement fund is also relatively small, Ninth Circuit precedent would support a fee even in excess of 25%.

> In awarding percentages of the class fund, courts frequently take into account the size of the fund. Often, but not always, fees of less than 25% will be awarded in megafund cases (cases of $50 Million or more)… Cases of under $10 Million will often result in fees above 25%... For cases of the size of this fund, 25% is very much the norm.
>
> This case is neither a megafund case in which fees more commonly will be under the 25% benchmark, or an under $10 Million case in which they are often more than 25%. Thus, 25% of the fund is the appropriate percentage absent some strong reason to make an upward or downward departure.

Id. In *Craft*, the district court granted a benchmark award of 25% of a $25.550 million settlement fund, resulting in a 5.2 multiplier, plus reimbursement of expenses of just over $70,000. *Id*. at

1125, 1127. Obviously, comparison to the recovery and actual fees expended in this case dictates that the fee sought here is remarkably small and patently reasonable.

3. The 23% sub-benchmark fee award requested is reasonable and appropriate in this case.

Here, the Court should award the 23% requested, which is below the benchmark. "Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. In *Vizcaino*, the Ninth Circuit articulated the following non-exhaustive factors that supported the 28% percent of the common fund awarded by the district court in that case: (1) the results for the class; (2) the risk for its counsel; (3) non-monetary benefits; (4) market rate or reasonable expectation of fee award; and (5) the burden on class counsel of prosecuting the case. *See id*. at 1048-50. Similarly, *Craft* identified the following as factors that "courts often consider" in this context: "(1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's loadstar." 624 F. Supp. 2d at 1116-17; *Wren*, 2011 U.S. Dist. LEXIS 38667, at *79 (accord).

Application of these factors to this case demonstrate good cause to award the sub-benchmark fee of 23%, as well as the absence of any "special circumstances" or "strong reason" justifying any further downward departure from the benchmark. *See In re Bluetooth*, 654 F.3d at 942; *Craft*, 624 F. Supp. 2d at 1127. First and foremost, as set forth above and in the Settlement Agreement, Class Counsel produced an excellent result for the Class, in excess of best-case scenario damages as well as non-monetary benefits that are not accounted for in the sub-benchmark attorney fee percentage. Class Counsel achieved this result on a purely contingent basis, assuming serious risk of non-payment, including advancing over $17,450 in out-of-pocket expenses for the benefit of the Class. *See Vizcaino*, 290 F.3d at 1048 ("[r]isk is a relevant circumstance" in applying the percentage fund method). Class Counsel took on this risk, expending great effort and skill to work through complex issues, precisely because it had a reasonable expectation of the fee set forth in Class Counsel's application to this Court, which contemplated and provided a discount to the

benchmark contingency fee. Class Counsel's experience and qualifications are not in question. *See* Loeser Decl., ¶¶ 3-5, 23-44.

This case involved levels of complexity, effort, and contingency risk that fall well within the range suitable for the 25% benchmark percentage-of-fund award. Indeed, the relative rapidity and efficiency with which Class Counsel achieved the successful result following appointment is a positive factor supporting the benchmark award in this case. In the Ninth Circuit, the rule is that class counsel should not "necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief." *Vizcaino*, 290 F.3d at 1050 n.5. Here, delivering the settlement funds and injunctive relief to the Class sooner added real value because the case could easily have been litigated for three times as long to reach a worse result.

4. Awards in similar cases demonstrate that Class Counsel seek a reasonable fee.

As described above, Class Counsel's request for 23% of the Gross Settlement Fund is beneath the Ninth Circuit's established benchmark. *Paul, Johnson*, 886 F.2d at 272. The requested amount here is below comparable cases. *See Buccellato v. AT&T Operations, Inc.*, No. 10-00463, 2011 U.S. Dist. LEXIS 111361 (N.D. Cal. June 30, 2011) (25%); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) (25%); *Grannan v. Alliant Law Group, P.C.*, No. C10-02803, 2012 WL 216522 (N.D. Cal. Jan. 24, 2012) (25%); *Reed v. 1-800 Contacts, Inc.*, No. 12-cv-02359, 2014 WL 29011 (S.D. Cal. Jan. 2, 2014) (25%); *In re Sorbates Direct Purchaser Antitrust Litig.*, No. 98-4886, 2002 U.S. Dist. LEXIS 23468, at *9-10 (N.D. Cal. Nov. 15, 2002) (25%); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995) (25%). As these cases demonstrate, 25% is consistent with recognized "market rates" in this District. *See Vizcaino*, 290 F.3d at 1050 (noting that "market rates" are a question of "lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size").

In fact, the request here is modest compared with the percentages awarded plaintiffs' counsel in other complex consumer class action cases in this Circuit. *See, e.g., Walsh v. Kindred Healthcare*, No. C-11-00050 JSW, 2013 WL 6623224 (N.D. Cal. Dec. 16, 2013) (awarding 30% of

$8.25 million settlement fund in a consumer class action where additional injunctive relief was obtained); *In re: TFT-LCD (Flat Panel) Antitrust*, No. 07-1827 (N.D. Cal. Jan. 14, 2013) (30%); *Meijer v. Abbott Labs.*, No. 07-05985, Dkt. No. 514 (N.D. Cal. Aug. 11, 2011) (33 1/3%).

Since establishing the 25% benchmark, courts within the Ninth Circuit have routinely awarded fees above this level in various types of complex litigation. *See, e.g., In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33% fee award); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-1365, 2010 U.S. Dist. LEXIS 49482 (N.D. Cal. Apr. 22, 2010) (awarding 30% fee of $15 million settlement fund); *In re CV Therapeutics, Inc. Sec. Litig.*, No. 03-3709, 2007 U.S. Dist. LEXIS 98244 (N.D. Cal. Apr. 4, 2007) (30%); *Brailsford v. Jackson Hewitt Inc.*, No. 06-00700, 2007 U.S. Dist. LEXIS 35509 (N.D. Cal. May 3, 2007) (awarding 30% of settlement fund); *In re Heritage Bond Litig.*, MDL No. 02-1475, 2005 U.S. Dist. LEXIS 13555, at *59 n.12 (C.D. Cal. June 10, 2005) (noting that more than 200 federal cases have awarded fees higher than 30%); *Hernandez v. Kovacevich "5" Farms*, No. 04-cv-5515, 2005 U.S. Dist. LEXIS 48605, at *25-31 (E.D. Cal. Sept. 30, 2005) (awarding 33.3% of the $2.52 million settlement in an employment class action); *Linney v. Cellular Alaska P'ship*, No. 96-3008, 1997 U.S. Dist. LEXIS 24300, at *20 (N.D. Cal. Jul. 18, 1997) (33.3% fee), *aff'd*, 151 F.3d 1234 (9th Cir. 1998); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (32.8% fee).

5. A lodestar cross-check supports a 23% sub-benchmark award.

Class Counsel's aggregate lodestar is $256,830. Class Counsel has written off time spent in the process of submitting its application to be Class Counsel, other than time spent that directly benefited prosecution of the case (*i.e.*, intervewing Plaintiff and case research). The resultant net total for purposes of the lodestar cross-check is $236,402.

See Loeser Decl., ¶¶ 26-28; Ex. A.

Class Counsel's lodestar is based on routine, contemporaneous timekeeping in increments of one-tenth per hour. *See id.*, ¶ 26. Timekeepers have had their hourly rates approved in this and other district courts in connection with comparable fee applications. *See id.*, ¶ 29.

A lodestar cross-check supports a benchmark fee award in this case because it results in a fractional multiplier of 0.53. That is, due to Class Counsel's commitment in its prior application to

the Court, Class Counsel is requesting substantially less in fees than it actually expended prosecuting this case. It is undebatable, therefore, that the lodestar cross-check supports Class Counsel's request for a 23% fee. *See Craft*, 624 F. Supp. 2d at 1125 (surveying percentage fee awards and multipliers); *Vizcaino*, 290 F.3d at 1052 (appendix lists percentage fee awards and multipliers); *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (awarding a fee of 25% of the fund, which made the effective multiplier 6.85). This fee, set at the bargained-for rate in Class Counsel's application, thus represents the "lawyers' *reasonable* expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size." *Vizcaino*, 290 F.3d at 1050 (emphasis added). The fractional multiplier in this case at the very least confirms that the 23% sub-benchmark fee is a reasonable and appropriate contingency fee here.

In the Ninth Circuit, the lodestar cross-check is simply that: *a cross-check* for reasonableness of the benchmark. *Vizcaino*, 290 F.3d at 1050-51. For true common fund cases like this, "the primary basis of the fee award remains the percentage method." *Id*. at 1050. The purpose of the lodestar cross-check is as a tool to help assess whether special circumstances justify deviating from the benchmark fee award. *See id*.; *In re Bluetooth*, 654 F.3d at 942. Thus, a "lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point." *Craft*, 624 F. Supp. 2d at 1122. And its "cross-check calculation need entail neither mathematical precision nor bean counting…. [courts] may rely on summaries submitted by the attorneys and need not review actual billing records." *Covillo v. Specialty's Café*, No. C-11-00594 DMR, 2014 U.S. Dist. LEXIS 29837, at *21-22 (N.D. Cal. Mar. 6, 2014) (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005)). Here, the cross-check is satisfied because it shows that the 23% sub-benchmark will plainly not result in an unreasonable windfall fee regardless of any plausible adjustments to the lodestar. In fact, it shows that the Class has obtained the benefit of a 47% discount from Class Counsel's normal and customary rates in complex litigation such as this case.

B. Class Counsel's Fee Request Includes Its Out-Of-Pocket Expense Reimbursements

Class Counsel's aggregate litigation expenses in this case to date are $17,499.53. *See* Loeser Decl., ¶ 46. Class Counsel has broken out its expenses by category. *See id.* Under the common fund doctrine, Class Counsel are routinely entitled to reimbursement of such expenses incurred in obtaining the settlement. *See Vincent*, 557 F.2d at 769. Class Counsel will incur additional time and expenses between the filing of this brief and final approval, including time and expenses associated with the reply to this motion, travel to the final approval hearing and preparation for and attendance at the final approval hearing. Notwithstanding standard practice of expense reimbursement *in addition to fees*, Class Counsel is absorbing all expenses actually incurred within the 23% sub-benchmark fee request.

C. The Claims Administrator Has Agreed to Perform Its Services for a Reasonable and Appropriate Fee

The Claims Administrator, Gilardi & Co., has agreed to perform the services necessary in this case for a fee capped at $28,604. A detailed proposal describing the work to be done for that fee was provided with Plaintiff's Unopposed Motion for Preliminary Approval of the Settlement. *See* Dkt. No. 199-4. Under that proposal, Gilardi & Co. budgeted $10,944 for class notification (including via First Class Mail, web-page hosting, and telephone), $2,610 for processing, and $15,050 for distribution of settlement damages. *See id.* Based upon Hagens Berman's extensive experience in Class Actions and Class Action settlement distributions, Gilardi & Co.'s fees in this case are reasonable and are appropriate. *See* Loeser Decl., ¶ 47. Importantly, Class Counsel believe that it could not perform these same services in house for less than the amount agreed to by Gilardi & Co. *See id.*

D. The Court Should Grant Plaintiff's Request for a Modest Service Award

The Agreement provides for a $7,500 service award to the Class Representative, Mercedes Guerrero, as reimbursement for her significant time and effort as Class Representative. Long before this case was ever filed, Ms. Guerrero had been battling Wells Fargo concerning what she perceived to be its unfair LPFI practices. *See* Loeser Decl., ¶ 8. In particular, Ms. Guerrero

protested Wells Fargo requiring her to carry $245,000 in flood insurance even though her loan principal was under $50,000 and her assessors value was under $80,000. *See id.*

Ms. Guerrero had sought the assistance of counsel but had been told that Wells Fargo was too big to fight. *See id.*, ¶ 9. Ultimately, Ms. Guerrero responded to a notice by prior counsel in this case who were seeking additional class representatives. That notice campaign occurred *after this Court had dismissed the over-insurance claims*. Ms. Guerrero was enlisted as a class representative plaintiff, but she was not told by prior counsel that the over-insurance claims, the claims that were most important to Ms. Guerrero, had already been dismissed. *See id.*

Ms. Guerrero learned that there were no over-insurance claims in this case only after she read the Court's Order on Conditional Certification, when she also learned and began to understand that prior class counsel was inadequate. *See id.*, ¶ 10. While disappointed that her long struggle with Wells Fargo had once again appeared to founder, Ms. Guerrero agreed to soldier on, and agreed to invest considerable time in the process of interviewing and selecting replacement Class Counsel. *See id.* Ms. Guerrero interviewed four sets of interested counsel and had multiple teleconferences with each team. She prepared several letters concerning the process and submitted her views to the Court. *See id.*

Once Hagens Berman was selected as Class Counsel, Ms. Guerrero immediately became involved in the litigation and was of substantial assistance to Class Counsel in prosecuting this action on behalf of all Class members. *See id.*, ¶ 11. Her strong and unwavering stance at mediation directly led to: (1) the outstanding monetary recovery in this case, which will more than provide a complete monetary recovery to Class members; and (2) the injunctive relief. *See* Loeser Decl., ¶ 12; Declaration of Mercedes Guerrero, Mar. 9, 2014 (Dkt. No. 200) ("Guerrero Decl."), ¶¶ 3-6. The service award is reasonable and reflects modest compensation for the actual time and expense borne by Ms. Guerrero. *See, e.g., Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294 (N.D. Cal. 1995).

The Ninth Circuit and other federal courts have repeatedly approved the award of service payments to class representatives to recognize their time, efforts, and the risks they undertake on behalf of a class. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000);

Glass v. UBS Fin. Servs., Inc., No. C-06-4068 MMC, 2007 WL 221862, at *16-17 (N.D. Cal. Jan. 26, 2007); *Van Vranken*, 901 F. Supp. at 300. Relevant factors for the evaluation of the amount of the service award made to the class representative include "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions ... and reasonabl[e] fear[s of] workplace retaliation." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) (citation omitted); *see also Van Vranken*, 901 F. Supp. at 300 (approving $50,000 award for the representative Plaintiff).

Here, Mercedes Guerrero took very real steps to advance the interests of the Class members in this litigation. Ms. Guerrero: (1) devoted significant time and effort, keeping, organizing and producing all her documents, and providing information sought in discovery and relevant to the allegations in the FAC; (2) devoted significant time to prepare for deposition; (3) travelled from Mojave, California to San Francisco, California, and back, for her deposition; (4) was deposed for an entire day (8 hours) by defense counsel; (5) pursuant to the Court's order, interviewed four sets of proposed class counsel over four separate days; (6) wrote letters to proposed counsel and to the Court to assist in the class counsel selection process; (7) devoted significant time to prepare for mediation, including reviewing and commenting on mediation submissions and strategy; (8) travelled from Mojave to San Francisco, and back for the mediation; (9) attended the full-day mediation with Magistrate Judge Corley and participated significantly in the mediation; (10) participated telephonically in numerous conferences concerning trial preparation and the settlement negotiations in this case; and (11) devoted significant time toward providing information and her declaration for this preliminary approval motion. *See* Guerrero Decl., ¶ 6.

Moreover, Ms. Guerrero took the extraordinary step of agreeing to serve as Class Representative, with all of the attendant duties, and agreed to put the interests of the Class ahead of her own. Without her efforts and willingness to take on her own lender and mortgage servicer, the Class would not have obtained the benefits of the excellent settlement in this case. Comparing the degree to which the Class has benefitted to the proposed award is itself a compelling argument in

favor of approving the award: the $7,500 requested represents just 1.2 percent of the common fund;[8] each Class member would be contributing a small fraction of their extraordinary settlement damages payment to compensate the representative for her effort and initiative in bringing the case. Ms. Guerrero was kept informed of developments in the case, and when asked, she was always willing to review documents and filings related to the case and provide her views and insights. As a result of her continued efforts, the Class members will benefit from an outstanding settlement. The proposed service payment of $7,500 to Ms. Guerrero will fairly compensate and reimburse her for the actual time and effort she has expended in prosecuting this case. It is not a windfall for illusory or exaggerated efforts, rather just compensation for the time Ms. Guerrero actually spent working on this case to achieve this settlement, when she could have been working or spending time with her family. *See* Guerrero Decl., ¶¶ 7, 9.

The other factors also support the proposed service award. Here, Plaintiff took on significant risk, real and perceived, in suing a large bank that serviced her home mortgage loan, and performed her duties admirably over the course of this case. *See* Loeser Decl., ¶ 13; Guerrero Decl., ¶¶ 3-7.

The proposed service awards do not implicate the concerns expressed by the Ninth Circuit in *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157 (9th Cir. 2013). Of course, "district courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Id.* at 1164. In *Radcliffe*, when one group of named plaintiffs disagreed with a proposed settlement, class counsel withdrew from their representation, and then entered into a class settlement agreement under the authority of other named plaintiffs.

[8] The requested service award in this case is relatively modest compared to the awards granted in other complex litigation. *See, e.g.*, *Ralston v. Mortgage Investors Grp., Inc.*, No. 5:08-cv-00536-JF (PSG), 2013 WL 5290240, at *5 (N.D. Cal. Sept. 19, 2013) (approving service payment of $12,500); *Vedachalam v. Tata Consultancy Servs.*, No. 06-0963, 2013 U.S. Dist. LEXIS 100799, at *7 (N.D. Cal. July 18, 2013) (approving service awards of $25,000 and $35,000 for class representatives); *Meijer, Inc. v. Abbott Labs*, No. 07-5985, Dkt. No. 514 (N.D. Cal. Aug. 11, 2011) (granting award of $60,000 per class representative on $52 million settlement); *Lewis v. Wells Fargo* & Co., No. 08-2670, Dkt. No. 315 (N.D. Cal. Apr. 29, 2011) (approving service awards of $22,000 and $20,000 for named plaintiffs); *In re CV Therapeutics*, 2007 U.S. Dist. LEXIS 98244, at *5 (approving $26,000 award "for reimbursement of time and expenses incurred in representing the class").

See id. at 1162.[9] That class settlement agreement provided for service awards up to $5,000 only to those named plaintiffs "serving as class representatives in support of the Settlement." *Id.* (quoting the agreement). Extrinsic evidence also indicated that class counsel used the "conditional incentive awards" to coerce support for the settlement. *See id.* at 1164-65. *Radcliffe* held this created a structural conflict that rendered the class representation inadequate such that the settlement could not be approved. *See id.* at 1168.

The *Radcliffe* concerns are not present here. The Settlement Agreement did not provide for conditional incentive awards. *See* Dkt. No. 203-1, Settlement Agreement, ¶ 33. Class Counsel never used incentive awards to pressure the Class Representative to accept the proposed settlement. *See* Loeser Decl., ¶¶ 20-21; Guerrero Decl., ¶ 8. On the contrary, Plaintiff understood and agreed that her duty was to represent the interests of the Class as a whole, and that she could receive no special treatment compared to other Settlement Class members. *See* Loeser Decl., ¶ 20.

The proposed service award simply has no relation to the adequacy of the Class Representative or her counsel in this case. To the extent Ms. Guerrero was informed of the possibility of a modest service award, she was never promised any such award nor did she expect anything in particular except fair and customary treatment. *See id.* Ms. Guerrero's motivation to sign the Settlement Agreement had nothing to do with the possibility of an incentive award. *See id.*, ¶ 21. In making the decision to sign the Settlement Agreement, Ms. Guerrero understood that she had the right to support, object to, or comment upon the proposed settlement without affecting the possibility of an incentive award. *See id.* In addition, although the amount of the service award that would be requested was disclosed in the Notice, to date, there have been no Class member objections to the proposed Settlement and thus, no objections to the proposed service award. *See id.*, ¶ 48. For all of these reasons, the Court should award Ms. Guerrero the modest $7,500 service award requested here.

[9] Source documents underlying *Radcliffe*, such as the settlement agreement and final approval order, are available for download at www.bankruptcydischargesettlement.com.

V. CONCLUSION

Class Counsel respectfully request that the Court approve and order: (1) attorneys' fees to Class Counsel of 23% of the all-cash non-reversionary common fund provided under the Settlement Agreement, including litigation expenses; and (2) a service award of $7,500 to Mercedes Guerrero.

DATE: July 3, 2014

Respectfully submitted,

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