UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

BRADLEY SHAW, THOMAS MCCARTHY, MICHELLE M. CHEVALIER-FLICK, and MARK SPIVEY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SCHELL & KAMPETER, INC. d/b/a DIAMOND PET FOODS INC.,

Defendant.

CASE NO. 2:20-cv-01620-RAJ

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS

NOTE ON MOTION CALENDAR: AUGUST 20, 2021, 9:00 A.M.

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I. INTRODUCTION

Defendant is a manufacturer of pet foods. Specifically, Defendant sells under multiple brands various "Grain Free" dogfood products. After conducting extensive testing of Defendant's "Grain Free" dogfood products, Plaintiffs alleged the "Grain Free" representations were false. Defendant denies Plaintiffs' allegations and has steadfastly defended its products — and the truth of its advertising — throughout the course of this litigation and during settlement negotiations with the Honorable Diane Welsh (Ret.) and the Honorable Wayne Andersen (Ret.).

Plaintiff brought this lawsuit to remedy the harm resulting from Defendant's representations that its products sold during the Class Period were "Grain Free." Defendant has agreed to pay up to $4,000,000 to pay $10.00 for each purchase up to $100.00 to Class Members who make valid claims and provide proof of purchase and $5.00 to Class Members who make valid claims without proof of purchase. This is a substantial recovery considering the cost of the dogfood at issue varied from $28.99 to $52.99.

Class Counsel remain confident that Plaintiffs' claims are strong. However, consumer class actions are risky to prosecute. Diamond Pet Foods Inc., a well-resourced company, was represented by a national law firm with its headquarters in this District and planned to vigorously defend itself but for this settlement. During settlement negotiations with two experienced mediators, Class Counsel could not ignore the risk Plaintiffs would certainly face at class certification and at trial. Plaintiffs asserted claims on behalf of consumers from multiple jurisdictions across the country, including Washington, California, New York, and Ohio. At class certification, Plaintiffs would certainly face the argument that choice-of-law issues create manageability problems that do not exist in the settlement context. *See In re Hyundai & Kia Fuel Econ. Litig.*, 26 F.3d 539, 563 (9th Cir. 2019). Defendant would have argued that Plaintiffs could not prove that all of its products contained a material amount of grain, and even if they did contain grain, it would not cause their pets any adverse health

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problems. Plaintiffs also would have been required to complete costly expert work to show that consumers paid a price premium due to Defendant's alleged misrepresentations.

Well aware of these challenges, Class Counsel negotiated an excellent settlement that requires Defendant to pay up to $4,000,000 to Class members who purchased the products. The settlement also requires Defendant to change its labeling to reflect that the products may contain trace amounts of grain. Class Counsel seek reasonable compensation for their efforts on behalf of Plaintiffs and the Class. They request a fee award of $1,150,376, which is approximately 28.8% percent of the $4,000,000 constructive common fund that Defendant has agreed to pay. Further, Class Counsel is seeking reimbursement of $49,624 in out-of-pocket costs they incurred prosecuting this action. Class Counsel also seek approval of service awards of $5,000 for the Class Representatives, which are reasonable and in line with the Ninth Circuit's requirements. For these reasons, Class Counsel's motion should be granted.

II. AUTHORITY AND ARGUMENT

A. Class Counsel's requested fees are reasonable.

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)). Rule 23(h) requires that class members have the opportunity to object to the fee motion. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010). Class Counsel are filing their motion in advance of the objection deadline and will address any objections in their motion for final approval.

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

"In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). As the Supreme Court has long recognized, "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from

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the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *see also, Mills v. Elec. Auto-Lite Co*., 396 U.S. 375, 393 (1970); *Cent R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885).

Courts in the Ninth Circuit have discretion to award attorneys' fees using either the percentage of the fund method or the lodestar method when settlement of a class action creates a common fund. *Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1047 (9th Cir. 2002). The method a district court chooses to use, and its application of that method, must achieve a reasonable result. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). "Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *In re Coord. Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997).

Courts in the Ninth Circuit have awarded fees based on the creation of a "constructive common fund". *See Nwabueze v. AT & T Inc.*, No. C 09–01529 SI, 2013 WL 6199596, at *11 (N.D. Cal. Nov. 27, 2013) (noting that where a settlement does not create a common fund from which to draw, courts may analyze the case as a "constructive common fund" for fee-setting purposes (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir.2011))); *see also Evans v. Linden Rsch., Inc.*, No. C-11-01078 DMR, 2014 WL 1724891, at *6 (N.D. Cal. Apr. 29, 2014) ("The court will evaluate the requested fee under the percentage method and analyze the recovery obtained as a constructive common fund); *See Vizcaino,* 290 F.3d at 1050 (the percentage of the fund is the typical method of calculating class fund fees).

Under Washington law, the percentage-of-recovery approach is used in calculating fees when a settlement fund is established for the benefit of a class. *Bowles v. Dep't of Ret. Sys.,* 121 Wash.2d 52, 72, 847 P.2d 440 (1993). Courts prefer the percentage method because it confers "significant benefits ... including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires." *Tait v. BSH*

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Home Appliances Corp., No. SACV10-0711 DOC (ANx), 2015 WL 4537463, at *11 (C.D. Cal. July 27, 2015). *See also* REPORT OF THE THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES, 15 (Oct. 8, 1985), 108 F.R.D. 237, 255 (1986) ("recommend[ing] that in the traditional common-fund situation … the district court … should attempt to establish a percentage fee arrangement"). Class Counsel's efforts resulted in a $4,000,000 constructive fund, *in addition to* injunctive relief, notice costs, attorneys' fees and costs, and service awards. Percentage awards of between 20% and 30% are "customary." *Bailey v. Kinder Morgan G.P., Inc.*, No. 18-cv-03424-TSH, 2020 WL 5748721, at *5 (N.D. Cal. Sept. 25, 2020); *Vizcaino,* 290 F.3d at 1047. 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. The relevant circumstances include (1) the results achieved for the class, (2) the risk counsel assumed, (3) the skill required and quality of the work, (4) the contingent nature of the fee, (5) whether the fee is above or below the market rate, and (6) awards in similar cases. *Id.* at 1048-50. Consideration of the relevant circumstances supports a fee award equal to 28.8% of the constructive common fund, or $1,150,376.

a. *Class Counsel achieved an excellent result for the Class.*

In determining an appropriate attorneys' fee award, "the most critical factor is the degree of success obtained." *Johnson v. Metro-Goldwyn-Mayer Studios Inc.*, No. C17-541RSM, 2018 WL 5013764, at *5 (W.D. Wash. Oct. 16, 2018) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)), *aff'd sub nom. Johnson v. MGM Holdings, Inc*, 943 F.3d 1239 (9th Cir. 2019), and *aff'd sub nom. Johnson v. MGM Holdings, Inc*, 794 F. App'x 584 (9th Cir. 2019). "Attorney's fees are never 'attributable to' an attorney's work on the action. They are 'attributable to' the relief obtained for the class." *Id.* (quoting *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013)). Exceptional results are a relevant circumstance. *See Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1377 (9th Cir. 1993) (considering counsel's "expert handling of the case").

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Class Counsel achieved great benefits for the Class in this case: a claimant with proof of purchase can receive $10.00 for $10.00 of product purchased up to $100.00 and a claimant without proof of purchase can receive $5.00. Defendant agreed to pay valid claims up to $4,000,000. In addition, Class Counsel achieved a label change on the Nature's Domain products that states, "The facility in which this food is made also makes food that may contain other ingredients, such as grains. Trace amounts of these other ingredients may be present." This is significant and tangible relief for the class. Class members were unlikely to pursue any relief on an individual basis and now will recover some of the money they paid to Defendant for mislabeled petfood. Class Counsel secured a substantial fund that will provide cash payments to claimants in amounts of significance (up to $100.00), and options for claimants with proof of purchase or no proof of purchase. *See Johnson v. Gen. Mills, Inc.*, No. SACV 10-00061-CJC, 2013 WL 3213832, at *3 (C.D. Cal. June 17, 2013) (finding settlement that allowed recovery without proof of purchase to be "a good result for the class"). The benefits secured in this case are significant when compared to relief secured in other food and beverage mislabeling settlements. S*ee, e.g., Marty v. Anheuser-Busch Cos.*, No. 13-CV-23656-JJO, 2015 WL 10858371, at *2 (S.D. Fla. Oct. 22, 2015) (providing for $.50 to $1.75 per unit for multi-bottle packs of beer, capped at $50 per Settlement Class Household with proof of purchase or $12 without proof of purchase); *Theodore Broomfield v. Craft Brew All., Inc.*, No. 17-CV-01027-BLF, 2020 WL 1972505, at *9 (N.D. Cal. Feb. 5, 2020) (providing for relief of $1.25 to 2.75 for a maximum of $10 without proof of purchase or $20 with proof of purchase); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588 (N.D. Cal. 2020) (providing for relief of $10 for class members without proof of purchase, $20 with proof of purchase up to a maximum of $30 per household); *Retta v. Millennium Prod., Inc.,* No. CV15-1801 PSG AJWX, 2017 WL 5479637 (C.D. Cal. Aug. 22, 2017) (providing for relief of up to $35 cash or $35 in vouchers without proof of purchase, and $60 in cash or up to $60 worth of vouchers with proof of purchase); *Lerma v. Schiff Nutrition Int'l, Inc.*, No. 11CV1056-MDD, 2015 WL 11216701

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(S.D. Cal. Nov. 3, 2015) (providing relief of $22 without proof of purchase and $46 with proof of purchase).

Valued as a whole, the benefits conferred in this case are significant. Based on the amounts class members can receive by submitting a claim, Plaintiffs' expert calculated the total value of the settlement, taking into account claims rates, to range between $2,240,000 to $5,590,000. Bernatowicz Dec. ¶ 26. Hence, the $4,000,000 constructive fund negotiated in this case here falls within the range calculated by Plaintiffs' expert regarding the total value of the settlement. *Id.* ¶ 26. Further, Plaintiffs' expert calculated the total value of the injunctive relief secured is as worth $54,290,000 to $91,690,000. *Id.* ¶ 33. Hence, the value of the relief secured for the Class, and even future purchasers of Diamond products that will benefit from the injunctive relief secured in this settlement, is significant.

b. *Class Counsel assumed a risk with a contingent nature of the fee.*

Class Counsel litigated this case without any guarantee that they would recover any fees, costs, or time. On behalf of Plaintiffs, Class Counsel advanced significant sums in expert costs and mediation costs without any assurance they would receive any of it back. Class Counsel's fee request also reflects that the case was risky and handled on a contingency basis. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015); *Vizcaino*, 290 F.3d at 1048. Class Counsel represented Plaintiffs and the Class entirely on a contingent basis. They devoted extensive time to this case while foregoing opportunities to work on other cases. Further, due the "battle of the experts" that Plaintiffs would have surely encountered at the summary judgment stage, Class Counsel faced the very real risk they would not recover any fees and costs. "The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046-47 (N.D. Cal. 2008).

In addition, there is inherent risk in pursuing consumer fraud class actions. *See Kakani v. Oracle Corp.*, No. 06-06493WHA, 2007 WL 4570190, at *4 (N.D. Cal. Dec. 21, 2007)

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(noting that consumer fraud cases are more uncertain than certain other types of class actions). Here, Class Counsel assumed the risk of challenging Diamond, a well-resourced defendant that would have continued to vigorously defend its business practices had the litigation gone forward. At mediation, Diamond contested its liability, asserting that Class Members had suffered no injury and lacked standing to bring their claims, and planned to file a motion to dismiss, an opposition to class certification, and a motion for summary judgment. Absent settlement, Diamond would have had the opportunity to argue these motions, increasing the possibility Class Members might recover nothing had litigation continued. The risk of little or no recovery weighs in favor of the requested fee award. *See Destefano v. Zynga*, No. 12-cv-04007-JSC, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) (noting the "substantial" risk associated with "obtaining [and maintaining] class certification"); *Bower v. Cycle Gear, Inc.*, No. 14-CV-02712-HSG, 2016 WL 4439875, at *7 (N.D. Cal. Aug. 23, 2016) (noting risks of obtaining class certification, surviving summary judgment, prevailing at trial, and "withstanding a potential appeal"); *Roberti v. OSI Sys., Inc.*, No. CV13-09174 MWF (MRWx), 2015 WL 8329916, at *6 (C.D. Cal. Dec. 8, 2015) (the defendant's "vigorous opposition" represented a "substantial" risk weighing in favor of the requested attorney's fees).

c. *Class Counsel's skill and quality of work support the fee.*

Class Counsel drew on their experience in litigating consumer mislabeling cases to develop the legal theories Plaintiffs asserted and then developed evidence to support the Class's claims. The quality of their representation is reflected in the work they performed throughout the case and, ultimately, in the favorable settlement for the Settlement Class. *See Moreyra v. Fresenius Med. Care Holdings, Inc.*, No. SACV-10-517 JVS (RZx), 2013 WL 12248139, at *3 (C.D. Cal. Aug. 7, 2013) (noting that the result is "[t]he single clearest factor reflecting the quality of class counsels' services") (quoting *In re Heritage Bond Litig,* No. 02-ML-1475-DT(RCX), 2005 WL 1594389, at *12 (C.D. Cal. June 10, 2005)). The biggest hurdle for Class Counsel was negotiating favorable terms at such an early stage in the litigation. At mediation,

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Class Counsel was able to convey to Diamond that it would be costly to litigate this case and a settlement was the best option for Diamond. Class Counsel's skill in negotiating class action settlements led to an early settlement with tangible benefits as opposed to drawn out litigation with a risk the Class could receive nothing. Further, Diamond is represented by Perkins Coie LLP, with its headquarters in this District. Perkins Coie LLP is arguably the premier food and beverage class action defense firm in the United States. In 2017, Perkins Coie LLP partner David T. Biderman was named "MVP" of the Year in the Food and Beverage sector by legal news company Law360. At mediation, Diamond and its counsel indicated they were more than willing, and able, to litigate this case through trial if a settlement was not reached. Class Counsel's ability to negotiate a favorable settlement despite the vigorous opposition of Defendant's counsel also supports their fee request. *See, e.g.*, *Lofton v. Verizon Wireless LLC*, No. C 13-05665 YGR, 2016 WL 7985253, at *1 (N.D. Cal. May 27, 2016) (the "risks of class litigation against an able defendant well able to defend it itself vigorously" support an upward adjustment in the fee award). This factor weighs in favor of Class Counsel's fee request.

d. *Awards in similar cases confirm the requested fee is reasonable.*

Courts in the Ninth Circuit have recognized that "fee awards of approximately 33⅓% are typical for settlements up to $10 million." *Zamora v. Lyft, Inc.*, No. 3:16-cv-02558-VC, 2018 WL 4657308, at *3 (N.D. Cal. Sept. 26, 2018). *See Estate of Brown v. Consumer Law Assocs*., No. 11-CV-0194-TOR, 2013 WL 2285368, at *3 (E.D. Wash. May 23, 2013) (approving settlement of class claims under Consumer Protection Act paying class members and estimated 30% of funds collected for challenged debt adjusting practices); *Ikuseghan v. Multicare Health Sys.*, No. C14-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (approving as fair and reasonable an award of 30% of the settlement fund); *Dennings v. Clearwire Corp*., No. C10-1859JLR, 2013 WL 1858797, at *8 (W.D. Wash. May 3, 2013), *aff'd* (Sept. 9, 2013) (35.78%). *See also, e.g.,* Final Order Approving Class Action Settlement and Awarding Attorneys' Fees and Expenses at 9, *South Ferry LP # 2 v. Killinger,* No. 04–

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1599 (W.D. Wash. Jun. 5, 2012) (29%); *Garcia v. Gordon Trucking, Inc.,* No. 10–324, 2012 WL 5364575, at *3, 10 (E.D. Cal. Oct.31, 2012) (33%); *Schiller v. David's Bridal, Inc.,* No. 10–616, 2012 WL 2117001, at *20 (E.D. Cal. Jun.11, 2012) (32.1%); *Singer v. Becton Dickinson & Co.,* No. 08–821, 2010 WL 2196104, at *2, 9 (S.D. Cal. Jun.1, 2010) (33⅓%); *Vasquez v. Coast Valley Roofing, Inc.,* 266 F.R.D. 482, 492 (E.D. Cal. 2010) (33.3%); *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 463 (9th Cir. 2000) (33 ⅓%).

2. A lodestar crosscheck confirms the requested fee is reasonable.

The Court is not required to perform a lodestar crosscheck. *See Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630 (9th Cir. 2020) ("This Court has consistently refused to adopt a crosscheck requirement, and we do so once more."). Even if it chooses to do a lodestar crosscheck, "[t]he aim is to 'do rough justice, not to achieve auditing perfection.'" *In re Apple Inc. Device Performance Litig.*, No. 5:18-md-02827-EJD, 2021 WL 1022866, at *7 (N.D. Cal. Mar. 17, 2021) (quoting *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 WL 6619983, at *14 (N.D. Cal. Dec. 18, 2018)); *see also In re Capacitors Antitrust Litig.*, No. 3:14-cv-03264-JD, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018) (a cross-check does not require "mathematical precision nor bean-counting" and may be based on summaries rather than billing records). Courts use a two-step process in applying the lodestar method. First, the court calculates the "lodestar figure" by multiplying the number of hours reasonably expended by a reasonable rate. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). Once the lodestar is determined, the amount may be adjusted to account for several factors, such as the benefit obtained for the class, the risk of nonpayment, the complexity and novelty of the issues presented, and awards in similar cases. *See In re Bluetooth*, 654 F.3d at 942. The foremost consideration is the benefit obtained for the class." *Id.*

Although the class settlement was negotiated within several months of Plaintiffs' filing of their complaint, Class Counsel devoted time and resources to investigating the claims well before commencing the lawsuit. This investigation included expert work analyzing various

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Diamond products. Bryson Dec. ¶ 2, Schaffer Dec. ¶ 6, Mason Dec. ¶ 2. The settlement negotiations were contentious and time consuming and included full-day mediations with experienced mediators. Bryson Dec. ¶ 6, Schaffer Dec. ¶¶ 26-34, Mason Dec. ¶ 5. The efficiency with which Class Counsel obtained this settlement is itself a benefit to the class. Courts recognize that classes benefit from early resolution when "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 WL 613255, at *2 (N.D. Cal. Feb. 16, 2016); *see also In re Aftermarket Auto. Lighting Prods. Antitrust Litig.*, No. 09 MDL 2007, 2014 WL 12591624, at *4 (C.D. Cal. Jan. 10, 2014) (recognizing the benefit of counsel's "effective and efficient" prosecution). The hours Class Counsel expended reasonably reflect the work performed on behalf of the Class.

Class Counsel's rates are "reasonable and comparable to the fees generally charged by attorneys with similar experience, ability, and reputation for work on similar matters in this judicial district." *Rivas v. BG Retail, LLC*, No. 16-CV-06458-BLF, 2020 WL 264401, at *7 (N.D. Cal. Jan. 16, 2020). "To determine the prevailing market rate, courts may rely on attorney affidavits as well as 'decisions by other courts awarding similar rates for work in the same geographical area by attorneys with comparable levels of experience.'" *Id.* (citation omitted); *see also Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007) (affidavits by plaintiffs' counsel and fee awards in other cases are sufficient evidence of prevailing market rates). Class Counsel have provided the Court with declarations describing their background and experience. Counsel set their rates for attorneys and staff members based on a variety of factors, including, among others: the experience, skill and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where legal services are typically performed; and the experience, reputation and ability of the attorneys and staff members. Bryson Dec. ¶¶ 16-20, Schaffer Dec. ¶¶ 14-22, Mason Dec. ¶ 10. Class Counsel's hourly rates are consistent with rates approved by courts in this district, which

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typically range up to $650, but sometimes up to $750. *See Mael v. Evanger's Dog & Cat Food Co., Inc.*, No. 3:17-cv-05469-RBL, ECF No. 128 at Ex. 1 & ECF No. 138 (W.D. Wash. 2020) (approving partner rates of $500-$750 per hour); *Rinky Dink v. World Business Lenders, LLC*, No. 2:14-cv-0268-JCC, ECF No. 92 at 7-8 (W.D. Wash. May 31, 2016) (approving partners' rates of $500–$650); *Rinky Dink, Inc. v. Elec. Merchant Sys., Inc.*, No. C13-1347-JCC, ECF Nos. 145 & 151 (W.D. Wash. April 19, 2016) (approving rates of $450–$650 for senior associates and partners); *Zwicker v. Gen. Motors Corp.*, No. C07-0291 JCC (W.D. Wash. 2008) (approving partners' rates up to $650); *Dell v. Carideo*, No. C06-1772 JLR (W.D. Wash. 2010) (approving comparable rates to those sought here); *Khadera v. ABM Indus., Inc.* C08-0417 RSM (W.D. Wash. Oct. 2012) (same); *Arthur v. Sallie Mae, Inc.* C10-00198 JLR (Sept. 2012 W.D. Wash.) (same); *Meilleur v. AT&T Corp.* C11-01025 MJP (W.D. Wash. March 2013) (same). These numbers yield a lodestar of $569,582.50. Bryson Decl. ¶ 20.

Courts then consider the appropriate multiplier to apply. The multiplier is determined by dividing the total fees sought by the lodestar. *See Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *4 (N.D. Cal. Feb. 6, 2013). "The purpose of this multiplier is to account for the risk Class Counsel assumes when they take on a contingent-fee cases." *Id.* (citation omitted). Multipliers are commonplace in attorneys' fee awards in class actions, particularly when the lodestar method is used to crosscheck a percentage-of-the-fund fee. *See* Richard A. Posner, Economic Analysis of Law 783 (8th ed. 2011) ("A contingent fee must be higher than a fee for the same legal services paid as or after they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is high because the risk of default (the loss of the case, which cancels the client's debt to the lawyer) is much higher than in the case of conventional loans, and the total amount of interest is large not only because the interest rate is high but because the loan may be outstanding for years—and with no periodic part payment, a device for reducing the risk borne by the ordinary lender."); *see also* John

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Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 480 (1981) ("A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.").

In the Ninth Circuit, multipliers "ranging from one to four are frequently awarded." *Vizcaino*, 290 F.3d at 1051 n.6 (collecting dozens of class action lodestars and finding that in 83% of the cases the lodestar was between 1.0 and 4.0). Courts find higher multipliers appropriate when using the lodestar method as a crosscheck for an award based on the percentage method. *See, e.g., Steiner v. Am. Broad Co., Inc.*, 248 F. App'x 780, 783 (9th Cir. 2007) (finding a multiplier of approximately 6.85 to be "well within the range of multipliers that courts have allowed" when crosschecking a fee based on a percentage of the fund); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-CV-03698-NC, 2018 WL 2183253, at *7 (N.D. Cal. May 11, 2018) (finding a 4.375 multiplier to be reasonable in crosschecking a fee of 25% of a settlement fund); *McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 1:16-cv-00157- DAD-JLT, 2017 WL 5665848, at *8 (E.D. Cal. Nov. 27, 2017) ("awarding attorneys' fees at a 25 percent benchmark of the common fund would yield a lodestar multiplier of 3.95, which is within the range of acceptable lodestar multipliers previously approved by this court and others"); *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 3446596, at *6 (E.D. Mich. Aug. 11, 2017) (finding a multiplier of 4 to be reasonable in crosschecking a fee of 25% of a settlement fund); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (finding a "modest multiplier of 4.65 is fair and reasonable" when cross-checking a fee of 33⅓% of the settlement fund); *Di Giacamo v. Plains All Am. Pipeline*, No. Civ. A. H-99-4137, 2001 WL 34633373, at *11 (S.D. Tex. Dec. 19, 2001) (finding a multiplier of 5.3 appropriate in crosschecking a fee of 30% of the settlement fund).

Courts may 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

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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, 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); *see also Vizcaino*, 290 F.3d at 1051 (noting that the district court found a 3.65 multiplier to be reasonable after considering the factors in *Kerr*).

Here, Class Counsel seek a fee award of $1,150,376, which is a 2.0 multiplier on their $569,582.50 lodestar. The *Kerr* factors support Class Counsel's requested 2.0 multiplier. Class Counsel spent over 1000 hours litigating this case resolution because of the extensive investigative work done to ensure the case was properly vetted. Further, this case involved the filing of two separate actions and two separate mediations. The skill and effort to drive Diamond into a settlement by initiating lawsuits in two separate forums illustrate Class Counsel's skill in leading this case to an early resolution. Further, Class Counsel took on the case on a contingent basis and to the preclusion of other work. They were able to achieve a favorable settlement for the class that is comparable to other similar settlements (and superior to many) despite the challenges presented by this litigation and with great efficiency. Class Counsel have substantial experience in litigating consumer class action cases and used that experience to efficiently litigate this case and achieve an excellent settlement for the Class. Lastly, Class counsel litigated this case with significant risks due to the contingent nature of their representation. There was no certainty Class Counsel would ever be paid and could have litigated this case for years and not received any compensation for their time and efforts. In sum, Plaintiffs' requested multiplier of 2.0 is reasonable.

3. Class Counsel's litigation costs were necessarily and reasonably incurred.

Class Counsel further request reimbursement of $49,624 in litigation costs, consisting

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of $34,199.51 in expert fees, $7,214 in mediation costs, and over $6,404 in filing fees and research costs. Bryson Decl. ¶ 22. "It is appropriate to reimburse attorneys prosecuting class claims on a contingent basis for 'reasonable expenses that would typically be billed to paying clients in noncontingency matters,' *i.e.*, costs 'incidental and necessary to the effective representation of the Class.'" *In re Capacitors*, 2018 WL 4790575, at *6 (citation omitted). These costs were necessary to the litigation, reasonable in amount, and the type of costs typically billed to paying clients. *See Dickey v. Advanced Micro Devices, Inc.*, No. 15-cv-04922-HSG, 2020 WL 870928, at *9 (N.D. Cal. Feb. 21, 2020) (approving "professional service fees (for experts and investigators), travel fees, and discovery-related fees"); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2020 WL 4212811, at *42 (N.D. Cal. July 22, 2020) (approving reimbursement of costs for expert fees, travel, transcripts, document management, copying, mailing and serving documents, electronic research, and filing and court fees).

4. Service awards for the Class Representatives are reasonable.

Service awards compensating named plaintiffs for work done on behalf of a class are "fairly typical" in class action cases. *See Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir. 2019) (quoting *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)); *Pelletz v. Weyerhaeuser Co.,* 592 F. Supp. 2d 1322, 1329 (W.D. Wash. Jan. 9. 2009) ("The trial court has discretion to award incentives to the class representatives."). In reviewing whether an incentive award is appropriate, the court should take into account "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] the amount of time and effort the plaintiff expended in pursuing the litigation." *SFBSC Mgmt.*, 944 F.3d at 1057 (quoting *Staton v. Boeing Co.*, 327 F.3d 928, 977 (9th Cir. 2003)). Service awards of $5,000 each will compensate the Class Representatives for their time and effort in stepping forward to serve as proposed class representatives, assisting in the investigation, keeping abreast of the litigation, and meeting and communicating with Class

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Counsel on an ongoing basis regarding the progress of the litigation, settlement efforts, and settlement terms. *See* Decl. ¶ 23. The requested $5,000 awards are reasonable and in line with service awards in the Ninth Circuit. *See In re Yahoo Mail Litig.*, No. 13-CV-4980- LHK, 2016 WL 4474612, at *11 (N.D. Cal. Aug. 25, 2016) ("The Ninth Circuit has established $5,000.00 as a reasonable benchmark [for service awards]."); *Pelletz,* 592 F. Supp. 2d 1322, 1329-30 & n.9 (approving $7,500 incentive awards where named plaintiffs assisted Class Counsel, responded to discovery, and reviewed settlement terms, and collecting decisions approving awards ranging from $5,000 to $40,000).

III. CONCLUSION

For the above reasons, Plaintiffs respectfully request the Court grant this motion and award Class Counsel $1,150,376 in attorneys' fees, which includes $49,624 in litigation costs, and award service payments of $5,000 each to Plaintiffs Bradley Shaw, Thomas McCarthy, Michelle M. Chevalier-Flick, and Mark Spivey.

RESPECTFULLY SUBMITTED AND DATED this 16th day of July, 2021.

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