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**UNITED STATES DISTRICT COURT**
**DISTRICT OF HAWAII**

STEPHEN G. AQUILINA and LUCINA J. AQUILINA, Individually and on Behalf of All Others Similarly Situated; and DONNA J. CORRIGAN and TODD L. CORRIGAN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON; LLOYD'S SYNDICATE #2003; LLOYD'S SYNDICATE #318; LLOYD'S SYNDICATE #4020; LLOYD'S SYNDICATE #2121; LLOYD'S SYNDICATE #2007; LLOYD'S SYNDICATE #1183; LLOYD'S SYNDICATE #1729; LLOYD'S SYNDICATE #510; BORISOFF INSURANCE SERVICES, INC. d/b/a MONARCH E&S INSURANCE SERVICES; SPECIALTY PROGRAM GROUP, LLC d/b/a SPG INSURANCE SOLUTIONS, LLC; ALOHA INSURANCE SERVICES, INC.; ILIKEA LLC d/b/a MOA INSURANCE SERVICES HAWAII; and DOES 1-100,

Defendants.

No. 1:18-cv-00496-ACK-KJM

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS**

Trial Judge: Alan C. Kay
Hearing Date: March 3, 2022
Trial Date: February 1, 2022 (stayed)

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Pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2) and the Court's Order Granting Preliminary Approval of Class Action Settlement, *Aquilina v. Certain Underwriters at Lloyd's London*, No. 1:18-cv-00496-ACK-KJM, 2021 WL 3611027, at *15 (D. Haw. Aug. 13, 2021) ("Preliminary Approval Order"), Plaintiffs[1] respectfully submit this Memorandum of Law in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Litigation Expenses, and Service Awards. Plaintiffs also submit the accompanying declarations of Joseph P. Guglielmo ("Guglielmo Decl.") and Daryl F. Scott ("Scott Decl."), which address several of the factors referenced under Rule 23 and Local Rule 54.2(f). *See* L.R. 54.2(f).[2]

## I. INTRODUCTION

Plaintiffs respectfully request that the Court enter an order approving: (1) Class Counsel's requested attorneys' fee award in the amount of 30% of the Settlement Fund, or $540,000 (plus interest earned), and expenses of $223,839 (plus

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Settlement Agreement and Release (the "Settlement Agreement") (ECF No. 408).

[2] In light of the Ninth Circuit's prohibition on "clear sailing agreements" with regard to attorneys' fee awards in the context of class action settlements, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 948-49 (9th Cir. 2011), as this Court discussed at the preliminary approval hearing, ECF No. 407, Plaintiffs find that Local Rule 54.2(d) and (e), which require respectively a meet and confer among the parties and a joint statement, are inapplicable. The applicable factors of Local Rule 54.2(f)(1)-(5), however, are more specifically addressed in the Guglielmo and Scott Declarations.

interest earned); and (ii) Service Awards to Plaintiffs of $5,000 (consisting of $2,500 to the Aquilina Plaintiffs and $2,500 to the Corrigan Plaintiffs). As set forth below, an award of 30% of the Settlement Fund is reasonable under Ninth Circuit authority based on the exceptional results achieved for the Settlement Class. Moreover, such an award is reasonable and appropriate as it represents a negative multiplier of 0.13, utilizing Class Counsel's normal hourly rates that have been approved by Courts in this Circuit and elsewhere, and a negative multiplier of 0.21, utilizing adjusted hourly rates that have been previously approved by Courts in this District.

Class Counsel vigorously litigated this case and achieved an excellent result for the Settlement Class in this complex, high-risk action. Specifically, by participating in the Settlement, Class Members will be made whole, receiving 100% of the premiums they paid to Defendants for surplus lines homeowner's insurance during the Class Period. In this case, the right of Defendants to sell surplus lines homeowner's insurance within the State of Hawaii effectively was at stake, requiring Class Counsel to bring significant resources to bear to oppose Defendants – who were represented by five respected law firms. Class Counsel opposed four separate motions to dismiss the First Amended Class Action Complaint (and prevailed), fully briefed class certification (filing an affirmative motion for class certification as well as opposing three separate premature motions to deny class certification and several joinders) and filed three separate opening memoranda in support of motions for

summary judgment against the four Defendants. The Parties also engaged in considerable fact and expert discovery, which required Class Counsel to dedicate attorneys nearly full time to this Litigation. Thus, the Settlement is the result of substantial and vigorous advocacy during roughly two-and-a-half years of hard-fought litigation conducted by skilled and experienced counsel.

While the Ninth Circuit has noted that 25% of a common fund is the benchmark for attorneys' fee awards in this District, Plaintiffs believe that special circumstances exist here to approve an upward adjustment of 30% of the Settlement Fund. "The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *see also In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). As discussed below and in the Guglielmo Declaration, the quality of the result achieved in the Litigation and the existence of considerable litigation risk support the fee requested. Moreover, the fee request of 30% of the Settlement Fund is reasonable and warranted when considered under the applicable standards and is well within the normal range of awards made in contingent-fee consumer class actions in this Circuit. *See infra*, §III.B.3. Plaintiffs' objective in filing the lawsuit was to remedy the alleged unfair conduct and breach of various

duties owed to Plaintiffs and the Settlement Class by Defendants in the unlawful placement of surplus lines insurance that never should have been offered for sale. Plaintiffs' measure of damages has been a return of premiums arising out of Defendants' unfair conduct. Class Counsel reached a Settlement that provides a return of 100% of the premiums paid – which more than achieves the goal. Class Counsel's costs incurred in litigating the Litigation are reasonable and should be reimbursed. Lastly, the requested Service Awards for each set of Plaintiffs also are reasonable given the time and efforts Plaintiffs spent pursuing this litigation and Settlement on behalf of the Settlement Class. Moreover, such awards have been previously approved by Courts in this District and Circuit as appropriate for this type of action. Accordingly, Plaintiffs request that the Court grant this motion.

## II. FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION

The Guglielmo and Scott Declarations submitted herewith are an integral part of this submission. Plaintiffs respectfully refer the Court to these Declarations for additional detailed description of the factual and procedural history of the Litigation, the claims asserted, the extensive investigation and discovery undertaken, the settlement negotiations, Class Counsel's experience and work performed, and the numerous risks and uncertainties presented in this Litigation. An abbreviated description of Class Counsel's work in this Litigation follows.

### A. Pleadings and Motions to Dismiss

Following months of investigation by Class Counsel, on December 21, 2018, the Aquilina Plaintiffs filed the Class Action Complaint against Moa, Monarch, and the Underwriters. Guglielmo Decl., ¶¶7-8. On December 12, 2019, Plaintiffs filed the First Amended Class Action Complaint adding the Corrigan Plaintiffs, adding Aloha as a Defendant, and revising the allegations in accordance with the Court's order. *Id.*, ¶16. Following motion practice and oral argument, on June 10, 2020, the Court issued two separate orders ruling on Defendants' motions to dismiss. *Id.*, ¶23. The Court sustained Plaintiffs' claims for violations of Hawaii Revised Statutes ("HRS") §§480-1, *et seq.*, and breach of the implied covenant of good faith and fair dealing and dismissed without prejudice Plaintiffs' claims for unjust enrichment against Underwriters and Monarch. Guglielmo Decl. ¶23. Additionally, the Court denied Moa's and Aloha's motions to dismiss or, in the alternative, stay this action in its entirety, sustaining Plaintiffs' claims for violations of HRS §§480-1, *et seq.*, negligence, and unjust enrichment against Moa and Aloha. *Id.*, ¶24.

### B. Discovery Efforts

With a May 14, 2021 close-of-fact-discovery deadline and July 13, 2021 trial date, Class Counsel diligently pursued discovery, serving requests for documents, interrogatories, and requests for admission and engaging in numerous telephonic meet and confers concerning Defendants' responses. *Id.*, ¶¶34, 36. Class Counsel

deposed 13 of Defendants' Rule 30(b)(1) and 30(b)(6) witnesses. *Id.*, ¶39. Plaintiffs also subpoenaed numerous entities to obtain information relevant to the underlying claims. *Id.*, ¶48. At the time the Settlement was reached, Plaintiffs had fully briefed their motion for class certification and filed three separate opposition memoranda to Defendants' motions to deny class certification and joinder motions. *Id.*, ¶¶29, 31. Plaintiffs also had filed three motions for summary judgment against Defendants and submitted two experts reports. *Id.*, ¶32.

### C. The Mediation

Beginning in January 2021, Plaintiffs and certain Defendants began informal settlement discussions and exchanged proposals and counterproposals to resolve the litigation. *Id.*, ¶49. On March 26, 2021, the Parties engaged in a virtual mediation before respected mediator Keith Hunter. *Id.*, ¶50. For weeks thereafter, the Parties continued negotiations with Mr. Hunter's assistance. *Id*. On June 1, 2021, the Parties executed a Terms Sheet memorializing the material terms to achieve global resolution of the Litigation. *Id.*, ¶52. Thereafter, the Parties continued to work on finalizing the remaining Settlement terms and notice documents and executed the Settlement Agreement on July 13, 2021 (ECF No. 405-3). Following oral argument on Plaintiffs' motion for Preliminary Approval of the Settlement, the Parties revised the Settlement to address the Court's concerns regarding various provisions of the

Settlement. *Id.*, ¶¶55-56. On July 30, 2021, Plaintiffs filed a revised Settlement Agreement, which the Court preliminarily approved on August 13, 2021. *Id.*, ¶56.

## III. THE ATTORNEYS' FEE REQUEST SHOULD BE APPROVED

### A. Legal Standards Governing the Award of Attorneys' Fees in Settled Class Actions

Under the common fund doctrine, "a litigant or 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 the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). If the Settlement Agreement is approved, the Settlement Class will receive distributions from the $1,800,000 common fund generated by the efforts of Class Counsel. Paying reasonable attorneys' fees from the common fund compensates Class Counsel for bringing and prosecuting the Litigation.

Where a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method to determine whether the requested fees are reasonable. Preliminary Approval Order, 2021 WL 3611027, at *15. As the Court previously noted, the lodestar method is more commonly used in cases where the settlement involves injunctive relief. *Id.* For a cash-only settlement, like this one, "[b]ecause the benefit to the class is easily calculated in a common fund case, courts may award a percentage of the common fund rather than engaging in a lodestar analysis to determine the reasonableness of the fee request." *Id.* When using the percentage

method, courts are also encouraged to conduct a cross-check under the lodestar method to "guard against an unreasonable result[.]" *Id.*; *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award").

Although the benchmark for attorneys' fees calculations in the Ninth Circuit is 25% of the common fund, "[a] district court may depart from the benchmark" if it is "made clear by the district court how it arrives at the figure ultimately awarded." *Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). The exact percentage awarded varies depending on the facts of the case, and "in most common fund cases, the award exceeds that benchmark" of 25%. *Knight v. Red Door Salons, Inc.*, No. 08-01520, 2009 WL 248367, at *3 (N.D. Cal. Feb. 2, 2009).

Courts consider six factors to determine whether a departure from the benchmark is appropriate, including: (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; and, (6) whether the case was handled on a contingency basis. *Vizcaino*, 290 F.3d at 1048-50; *see also Martin v. Marriott Int'l, Inc.*, No. CV 18-00494-JAO-RT, 2021 WL 4888973, at *6 (D. Haw. Oct. 19, 2021).

Here, an award of 30% of the Settlement Fund is warranted because, among other things, "counsel achieved extraordinary results" in an action that presented a large risk of nonpayment due to the novelty of the causes of action. *See* Preliminary Approval Order, 2021 WL 3611027, at *16. Indeed, even if the requested 30% of the Settlement Fund and expenses are awarded to Class Counsel, each eligible Settlement Class Member still stands to receive at least 100% of the premiums they paid during the Class Period. Given the significant risks Class Counsel faced in obtaining any relief, coupled with the fact that Class Counsel's lodestar to achieve this tremendous result results in a negative multiplier, Plaintiffs submit that the 30% requested fee award is reasonable. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) ("negative multiplier suggests that the percentage-based amount is reasonable and fair").

**B. An Award of 30% of the Settlement Fund Is Reasonable**

Class Counsel's request for attorneys' fees is appropriate under the percentage of the recovery method. *See Boeing Co.*, 444 U.S. at 478. The guiding principle in this Circuit is that a fee award be "'reasonable under the circumstances'" and the Ninth Circuit has held that an award of attorneys' fees up to 33 1/3% of the fund can be reasonable. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). As discussed below, consideration of the relevant factors used by Courts

in this Circuit demonstrate the requested fee award is reasonable under the circumstances and should be approved.

**1. Class Counsel Achieved an Exceptional Result**

Courts consistently recognize that the result achieved is the most important factor to be considered in awarding attorneys' fees. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained").

Class Counsel achieved more than a "reasonable" settlement; instead, they achieved a superior result. The Settlement Fund of $1.8 million represents roughly 100% of each Class Member's total damages for purchasing the Lloyd's surplus lines policies at issue in the Litigation, meaning that Class Members will receive a recovery of 100 cents on the dollar, if not more, from the Settlement Fund. Gugliemo Decl., ¶4; *see Martin*, 2021 WL 4888973, at *6 (awarding 30% attorneys' fee award where "[p]laintiffs' counsel obtained a favorable result that benefits the class members"). Courts in this Circuit and elsewhere have found that settlements achieving 20% of damages or less, constituted exceptional results warranting an upward departure from the 25% benchmark. *See In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *4 (N.D. Cal. Aug. 3, 2016) (holding that 20% antitrust recovery in a megafund case warranted "a modest increase over the Ninth Circuit benchmark"); *see also In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("a total award of approximately 9% of the

possible damages . . . weighs in favor of granting the requested 28% fee"); *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *7-8 (C.D. Cal. June 10, 2005) (upward adjustment warranted where the court found that the "the Settlement Fund, as a percentage of recovery, is greater than recoveries obtained in other cases where courts have awarded attorneys' fees of one-third of a common fund"); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003).

Here, the Settlement achieves a full return of premiums paid by Class Members. Continued litigation would have posed substantial risks and could have resulted in no recovery at all. Given the significant objections that Defendants raised at class certification and summary judgment, there was an unquestionable risk that the Court could have denied certification or dismissed some, or all, of the Settlement Class's claims at summary judgment. Instead, the Settlement Fund ensures that all Class Members will receive a complete recovery of all of the premiums they paid to Defendants during the Class Period for surplus lines insurance and is clearly an exceptional result, warranting an upward departure from the 25% benchmark.

Lastly, the Mail Notice disclosed to Class Members that Class Counsel would seek up to 33% in attorneys' fees from the Settlement Fund. ECF No. 408, Ex. A. To date, no objection to the Settlement or proposed attorneys' fees has been filed. *See Martin*, 2021 WL 4888973, at *6 (noting that "the Court has received no

objections to the settlement or the requested fees"). Class Counsel now seeks 30% – less than the amount it disclosed in the Mail Notice.

Thus, it is clear that Class Counsel delivered a significant benefit to Class Members and the results achieved factor supports the requested fee.

**2. The Litigation Was Exceptionally Risky for Class Counsel**

Risk is an important factor in determining a fair fee award. *See, e.g., In re Washington Pub. Power Supply Sys. Sec. Litig.* ("*WPPSS*"), 19 F.3d 1291, 1299-1301 (9th Cir. 1994); *Vizcaino*, 290 F.3d at 1048 (risk of dismissal or loss on class certification is relevant to evaluation of a requested fee). Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *Id.*; *see also Ladore v. Ecolab, Inc.*, No. CV 11-9386, 2013 WL 12246339, at *11 (C.D. Cal. Nov. 12, 2013) ("The risks assumed by [c]lass [c]ounsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel's proper fee award."). This includes the risk of advancing costs and the contingent nature of work performed. *Ladore*, 2013 WL 12246339, at *11. Here, Class Counsel engaged in hard-fought litigation for approximately three years without any compensation. Plaintiffs faced substantial risks and uncertainties that were present from the outset of this litigation that made it far from certain that any recovery for the Class would be obtained.

First, Defendants vigorously denied that the Hawaii Surplus Lines Act ("HSLA"), HRS §431:8-301(a), imposed any diligent search requirement on them and they denied that Plaintiffs sustained any damages, citing to payments they had made to Plaintiffs under their surplus lines insurance policies. *See, e.g.*, ECF Nos. 219, 228, 285 (Monarch's motion to deny class certification and Aloha's and Underwriters' joinders). At all times in the Litigation, Defendants asserted that Plaintiffs did not have standing or damages. Based on the discovery taken, as well as Class Counsel's interpretation of the HSLA, Class Counsel believe that they could have won on liability and proved damages, but knew that success at summary judgment and trial was far from certain. As a complex consumer class action, this case would entail hard-fought and lengthy litigation. Guglielmo Decl., ¶74.

Second, the theory of the case here is unique. Class Counsel is not aware of any other similar class action litigation asserting comparable claims against insurers and retail brokers for improper sales of surplus lines insurance. Id., ¶75. As such, Class Counsel knew at the outset of the Litigation that they would have to brief novel theories to achieve any success in the Litigation. Undoubtedly, liability issues were likely to boil down to a hotly contested and inherently unpredictable "battle of the experts" and expenses would be substantial. *Thompson v. Transamerica Life Ins. Co.*, No. 2:18-CV-05422, 2020 WL 6145104, at *3 (C.D. Cal. Sept. 16, 2020), *appeal dismissed*, No. 20-56088, 2021 WL 1546066 (9th Cir. Apr. 14, 2021)

(plaintiffs' counsel undertook the litigation despite the risk that resolution of the issue would no doubt devolve into a "battle of the experts"). If litigation were to continue, pre-trial motion practice would have ensued and trial preparation would have been underway, taking tremendous time and resources. The Court's ruling on the pending class certification motions likely would lead to the inevitable Rule 23(f) interlocutory appeal, potentially delaying prosecution of the case should a stay pending appeal be granted. Given the inherent risks that existed and the prospect of protracted litigation, engendering enormous time and monetary expenditure, an upward adjustment from the benchmark is warranted here.

**3. Class Counsel's Performance Generated Benefits Beyond the Cash Settlement Fund**

The Settlement requires that Underwriters and Monarch pay up to $50,000 for the costs of Settlement Administration. ECF No. 408, ¶4.4. This significant provision allows for the costs of Settlement Administration to be borne by Defendants, rather than Class Members. This results in Class Members receiving extra money from the Settlement Fund, as the common fund will not be used to pay the costs of Settlement Administration unless the costs exceed $50,000. Therefore, this factor further weighs in favor of the fee request.

**4. The Requested Fee Is Consistent with the Market Rate**

Courts often look at fees awarded in comparable cases to determine if the fee requested is reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. In general, cases of under

$10 million will often result in result in fees in the range of 30%. *See Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (citing cases); *see also In re Nuvelo, Inc. Sec. Litig.*, No. C 07-04056, 2011 WL 2650592, at *2 (N.D. Cal. July 6, 2011) (finding upward adjustment warranted, awarding 30% of settlement fund and noting that numerous cases within the Ninth Circuit and elsewhere that have awarded between 30% and 33%). Moreover, the fees paid in comparably-sized consumer protection cases in this District and elsewhere support the 30% fee award requested. *See, e.g.*, *Martin*, 2021 WL 4888973 (awarding 30% fee in action alleging Hawaii Revised Statutes Chapter 480 unfair and deceptive acts and practices and unjust enrichment claims); *Howerton v. Cargill, Inc.*, No. CIV. 13-00336-LEK-BMK, 2014 WL 6976041, at *6 (D. Haw. Dec. 8, 2014) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes); *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes); Order Granting Final Approval of the Class Action Settlement, *Smith v. Bank of Hawaii*, No. 1:16-cv-00513-JMS-WRP, ECF No. 233, ¶14 (D. Haw. Dec. 22, 2020) (awarding 30% attorneys' fee award in action under unfair and deceptive acts and practices statutes).

Courts have held that an upward adjustment from the benchmark to one-third of a common fund was appropriate where the percentage of recovery for class

members represented an exceptional result. *See Waldbuesser v. Northrop Grumman Corp.*, No. CV 06-6213, 2017 WL 9614818, at *2 (C.D. Cal. Oct. 24, 2017) (awarding one-third fee where counsel recovered 40% of damages and noting "the exceptional result achieved in this action justifies an attorney fee award of one-third of the settlement fund"). As previously stated, Class Members will recover 100% of their damages here from purchasing Lloyd's surplus lines policies. *See also supra*, §III.B.1. This result is far above what most class action settlements achieve, and may not have been obtained had the case proceeded to trial. Given the novelty of the claims, time, and effort to develop, litigate and achieve the extraordinary result for the Class, and the complexity of claims, a 30% award is appropriate.

**5. The Burdens Class Counsel Experienced While Litigating the Case Weigh in Favor of the Requested Fee**

This factor considers burdens such as the cost of litigation, duration, and foregoing other work. *Vizcaino*, 290 F.3d at 1048-50. Class Counsel have incurred substantial costs in attorney time and litigation expenses detailed in Sections III.C. and IV., *infra*. Including the months of research prior to bringing the Litigation, Class Counsel has devoted approximately three years to the case, at times requiring attorneys to work exclusively on the Litigation, billing thousands of hours researching and drafting the legal claims, propounding and responding to numerous sets of discovery, reviewing documents, briefing arguments, preparing for and taking depositions, working with experts, and arguing before this Court. *See*

Guglielmo Decl., ¶¶7-48. Each Defendant was represented by separate counsel and the meet and confer process during discovery took hundreds of hours of attorney time, with no guarantee that this attorney time and expenses would ever be recouped. *Id*., ¶73. Because each Defendant briefed each motion individually, rather than filing a joint briefing, Class Counsel were required to devote additional time to respond to arguments raised by each of the Defendants, carefully briefing the nuanced issues that were raised by each Defendant. *Id.*, ¶75. At all times, Class Counsel had to forego significant other work to ensure that the proper number of resources could be dedicated to the Litigation. Therefore, this factor supports the reasonableness of the fee request.

**6. The Case Was Handled on a Contingency Basis**

The Ninth Circuit has long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all for their work. *WPPSS*, 19 F.3d at 1299 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *Vizcaino*, 290 F.3d at 1051 (courts reward successful class counsel in contingency cases "for taking the risk of nonpayment by paying them a premium over their normal hourly

rates"). It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard A. Posner, ECONOMIC ANALYSIS OF LAW §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *WPPSS*, 19 F.3d at 1299.

Class Counsel undertook this action on an entirely contingent basis, assuming a substantial risk that the Litigation would yield no, or very little, recovery and leave them uncompensated for their time and substantial out-of-pocket expenses. Guglielmo Decl., ¶73; Scott Decl., ¶¶8-9. Indeed, Class Counsel have received no compensation for their efforts and costs. Guglielmo Decl., ¶73. Absent this Settlement, there was a sizeable risk that, at the end of the day, Class Members, as well as their counsel, would obtain no recovery. Despite the litigation risks, Class Counsel were able to forge a resolution that provides significant monetary relief to the Class. Even if the requested 30% is awarded, Class Counsel will not be fully compensated for the time and effort expended in litigating and obtaining the Settlement for the Class. Thus, there is little doubt that Class Counsel undertook a significant risk here and the fee award, respectfully, should reflect that risk.

### C. A Lodestar Cross-Check Supports the Fee Request

Although not mandatory, many courts also perform a "cross-check" of the percentage fee award against the applicable lodestar to confirm the reasonableness of the percentage award. *See In re Bluetooth, Headset Prod. Liab. Litig.*, 654 F.3d 935, 944-45 (9th Cir. 2011); *see also Martin*, 2021 WL 4888973, at *7 n.6 (noting that where used as a cross check, the court need not "carefully scrutinize the nature of the tasks completed and make any necessary deductions for non-compensable time" included in the lodestar); *Almodova v. City & Cty. of Honolulu*, No. CIV. 07-0078-LEK, 2011 WL 4625692, at *5 (D. Haw. Sept. 30, 2011); *Shea v. Kahuku Hous. Found Inc.*, No. CIV. 09-00480-LEK, 2011 WL 1261150, at *6 (D. Haw. Mar. 31, 2011).[3] The lodestar cross check routinely awards multipliers of the lodestar because of the risk of losing, an ever-present risk of contingency litigation. *See Vizcaino*, 290 F.3d at 1051 (stating that "courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases" and noting that "[t]his mirrors the established practice in the private legal market of rewarding attorneys

[3] In compliance with LR 54.2(f)(2), Class Counsel have herewith provided the Court with sufficient detail to perform a lodestar calculation for any cross-check the Court may wish to perform. Guglielmo Decl., Ex. A. Of note, Wood Law Firm, LLC, is not seeking any attorneys' fee award in this Litigation and Class Counsel is not seeking an attorneys' fee award on behalf of Foster Law Offices, which withdrew as counsel for Plaintiffs (ECF No. 402). Guglielmo Decl., ¶66. Further, the attorneys' fees of Damon Key Leong Kupchak Hastert, LLC ("Damon Key Leong") are being submitted as a litigation expense, as Scott+Scott pays Damon Key Leong for its invoiced services as local counsel on a monthly basis. Scott Decl., ¶9.

for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases").

Here, Class Counsel's requested fee will result in a negative multiplier. Class Counsel spent 6,301.50 hours litigating the Litigation, producing a lodestar amount of $4,206,913.50 based on historical, standard hourly rates of counsel that range from $400 to $900. *See* Scott Decl., ¶6.[4] The hours billed in this matter were spent drafting pleadings and briefs, engaging in party and third-party discovery, and negotiating the Settlement. Guglielmo Decl., ¶¶7-48. Class Counsel billed at their standard hourly rates, which have been accepted by District Courts in this Circuit and elsewhere. *See, e.g.*, *In re Vizio, Inc. Consumer Privacy Litig.*, No. 8:16-ml-02693, ECF Nos. 308-18, 337 (C.D. Cal) (approving Scott+Scott's rates); *In re GSE Bonds Antitrust Litig.*, No. 19-CV-1704, 2020 WL 3250593, at *5 (S.D.N.Y. June 16, 2020) (same); *Alaska Electrical Pension Fund v. Bank of Am.*, No. 1:14-cv-07126, ECF No. 742, ¶¶5, 7 (S.D.N.Y. Nov. 30, 2018) (same); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-cv-07789, 2018 WL 5839691, at *5 (S.D.N.Y. Nov. 8, 2018) (same); *Morrow v. Ann, Inc.*, No. 1:16-cv-03340, ECF Nos. 70-71, 94 (S.D.N.Y.) (same).

[4] Indeed, even if the Court were to reduce Class Counsel's hourly rates to $300 per hour, the total lodestar amount would total $1,798,107, which would still result in a negative multiplier of 0.30.

To align more closely with customary rates charged in this District, Class Counsel has also calculated its lodestar using adjusted Hawaii hourly rates. These rates were calculated by using the using rates approved for plaintiffs' attorneys in recent Hawaii complex litigation. *See Martin v. Marriott Int'l, Inc.*, No. 1:18-cv-00494-JAO-RT, ECF No. 169-8 (D. Haw. Aug. 2, 2021), *Smith v. Bank of Hawaii*, No. 1:16-cv-00513-JMS-WRP, ECF No. 217-1 (D. Haw. Apr. 10, 2020), and *Sheehey v. Bhanot*, No. 1:13-cv-00663, ECF No. 390-1 (D. Haw. Mar. 30, 2018). Under the adjusted Hawaii hourly rates, Class Counsel's lodestar is $2,588,099.50 using rates that range from $575 for partners to $300 for associates. Thus, an award of 30% represents a negative multiplier of 0.21 using adjusted Hawaii hourly rates.

Class Counsel's lodestar using rates previously approved by Courts in this Circuit and elsewhere would result in a negative multiplier of 0.13. A multiplier of less than one (or a negative or fractional multiplier) demonstrates that the requested fee is well within the range of reasonableness. *See, e.g.*, *Zyda v. Four Seasons Hotels and Resorts*, No. CV 16-00591-LEK-RT, 2020 WL 9762910, at *3 (D. Haw. Apr. 1, 2020) (noting that a lodestar crosscheck "results in a *negative* lode-star that further supports the reasonableness of attorneys' fees in this matter"); *Howerton*, 2014 WL 6976041, at *4 (awarding 30% attorneys' fee award where lodestar multiplier was between 0.62 and 1.39, depending on geographic valuation of lodestar submitted); *Covillo v. Specialtys Cafe*, No. C-11-00594, 2014 WL 954516, at *7 (N.D. Cal. Mar.

6, 2014) ("Plaintiffs' requested fee award is approximately 65% of the lodestar, which means that the requested fee award results in a so-called negative multiplier, suggesting that the percentage of the fund is reasonable and fair."). The negative multiplier further demonstrates that the requested fee is within the range of reasonableness because courts in this jurisdiction often award multipliers in the 1-4 range. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 n.6 (finding multipliers ranged as high as 19.6, though most run from 1.0 to 4.0).

The lodestar crosscheck further weighs strongly in favor of the reasonableness of the requested fee award.

## IV. THE REQUESTED EXPENSES ARE REASONABLE

Attorneys who create a common fund or benefit for a class are entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund or benefit, so long as the submitted expenses are reasonable, necessary, and directly related to the prosecution of the action. *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008) ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."). The appropriate analysis to apply in deciding which expenses are compensable is whether the particular costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cty., Okla.*, 8 F.3d 722,

725-26 (10th Cir. 1993); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995). Class Counsel in this case have incurred expenses in the aggregate amount of $223,839 while prosecuting the action. Guglielmo Decl., ¶71; Scott Decl., ¶8.

The categories of expenses for which Class Counsel seeks reimbursement – filing, service and other court fees (*e.g.*, *pro hac vice* fees); electronic document review platform, courier/overnight delivery; court transcripts; photocopies; postage; telephone/facsimile; travel (meals, hotels, and transportation); outside consultants/experts; local counsel attorneys' fees invoiced on a monthly basis; and mediation – are the types of expenses routinely charged to hourly paying clients and should, therefore, be reimbursed out of the common fund. *See*, *e.g.*, *In re Toys R Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 469 (C.D. Cal. 2014) ("'Expenses such as reimbursement for travel, meals, lodging, photocopying, long-distance telephone calls, computer legal research, postage, courier service, mediation, exhibits, documents scanning, and visual equipment are typically recoverable.'"); *Benedict v. Diamond Resorts Corp.*, No. 1:12-cv-00183-DAE-BMK (D. Haw. June 6, 2013), ECF No. 92 (approving $48,833.77 reimbursement expenses for expert; airfare, hotel, and meals associated with mediation sessions and court hearings; and other typical litigation costs such as filing fees, copying costs, and document discovery); *Donkerbrook v. Title Guar. Escrow Servs., Inc.*, No. Civ. 10-00616 LEK, 2011 WL 3649539, at *11 (D. Haw.

Aug. 18, 2011) (approving reimbursement of mediator fees, travel, *pro hac vice* application fees, and copying, fax, postage, and messenger charges). Courts find that hourly arrangements with local counsel are compensable expenses. *See Willcox v. Lloyds TSB Bank, plc*, No. 13-cv-00508-ACK-RLP, 2016 WL 7238799, at *13 (D. Haw. Dec. 14, 2016) (awarding requested costs where "mainland counsel has paid all of local counsel's fees and expenses out of pocket").

Therefore, Class Counsel requests that the Court award expenses in the amount of $233,839.00, plus interest.

## V. SERVICE AWARDS FOR PLAINTIFFS ARE WARRANTED

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir.2003). To evaluate the reasonableness of a requested payment, courts should consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Id.* (citation omitted). "Incentive awards are discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

Plaintiffs seek Service Awards of up to $2,500 each to the Aquilina Plaintiffs and the Corrigan Plaintiffs in compensation for their involvement in this Litigation and service on behalf of other Class Members. As the Court recognized, "[t]he Aquilinas and the Corrigans have played a critical role in this litigation over the last three years." *Aquilina*, 2021 WL 3611027, at *17. The Aquilina Plaintiffs and Corrigan Plaintiffs provided tremendous assistance in the prosecution of the Litigation, expending numerous hours reviewing drafts of pleadings and discovery responses, participating in telephone calls with Class Counsel, retrieving documents to produce during discovery, responding to several discovery requests from Defendants, and reviewing and approving the Settlement. Guglielmo Decl., ¶¶42-47. The requested Service Awards will have minimal impact on the amount of Settlement Funds available to Class Members. *Aquilina*, 2021 WL 3611027, at *17. Additionally, awards of this size and greater are routinely awarded to class representatives in this District and elsewhere. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving incentive awards of $5,000 each to two class representatives in a settlement of $1.725 million); *Martin*, 2021 WL 4888973, at *7 (finding $2,500 incentive payment per class representative reasonable); *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008) (collecting cases and noting that "[c]ourts have generally found that $5,000 incentive payments are reasonable"). Therefore, the requested Service Awards are reasonable.

## VI. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court enter the proposed Fee Order, which awards Class Counsel attorneys' fees of 30%, or $540,000, plus interest, expenses of $233,839.00, plus interest, and Service Awards to Plaintiffs of $5,000 (consisting of $2,500 to the Aquilina Plaintiffs and $2,500 to the Corrigan Plaintiffs).

Dated: November 22, 2021

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**CERTIFICATION OF SERVICE**

I hereby certify that on November 22, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

*s/ Joseph P. Guglielmo*
Joseph P. Guglielmo

## CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 6,164 words (excluding the parts of the brief exempted by LR7.5(d)) according to the word count provided by Microsoft Word 2016, word processing software.

Dated: November 22, 2021

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