Robert A. Curtis, SBN 203870
rcurtis@foleybezek.com
FOLEY BEZEK BEHLE & CURTIS, LLP
15 West Carrillo Street
Santa Barbara, California 93101
Telephone: (805) 962-9495
Facsimile: (805) 962-0722

William M. Aron, SBN 234408
aron@aronlawyers.com
LAW OFFICE OF WILLIAM M. ARON
15 West Carrillo Street
Santa Barbara, California 93101
Telephone: (805) 618-1768
Facsimile: (805) 618-1580

Justin P. Karczag, SBN 223764
Justin@karczagandassociates.com
KARCZAG AND ASSOCIATES PC
1100 Wilshire Boulevard, Suite 3307
Los Angeles, California 90017
Telephone: (213) 559-7395
Facsimile: (213) 559-7396

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

HAYLEY HICKCOX-HUFFMAN, on behalf of herself and all others similarly situated,

Plaintiff,

v.

US AIRWAYS, INC., US AIRWAYS GROUP, INC., and DOES 1 through 10, inclusive,

Defendants.

Case No. 5:10-cv-05193-VKD

PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY FEES AND REIMBURSEMENT OF EXPENSES TO CLASS COUNSEL, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

Date: April 1, 2019
Time: 10:00 a.m.
Dept: Courtroom 2, Fifth Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Extra-Jurisdictional Authorities

Statutes

1. INTRODUCTION

Plaintiff and her counsel, by this application, seeks an Order from this Court, pursuant to Rules 23(h)(1) and 52(d)(2) of the Federal Rules of Civil Procedure:

(1) awarding attorneys' fees to Class Counsel, for their services in connection with the litigation and resolution of the claims asserted in this action, in the aggregate amount of $2,955,000;

(2) reimbursing Class Counsel for their reasonable expenses and non-taxable costs incurred in connection with the litigation and resolution of the claims asserted in this action in the aggregate amount of $45,611.21; and

(3) granting an incentive award to the Class Representative in the amount of $10,000.00.

For the reasons set forth herein, the requests for attorneys' fees, expenses and an incentive award are fair and reasonable under the circumstances of this case and in light of the settlement benefits achieved for the members of the Settlement Classes. Therefore, the Court should grant the application.

2. SETTLEMENT TERMS BEARING ON THIS MOTION

The relevant terms of the parties' Settlement Agreement (Dkt. No. 92.1, Exh. 1) related to attorneys' fees, expenses and incentive awards are as follows:

(1) Settlement Agreement, Paragraph 42:

> US Airways' total financial commitment under the Settlement shall be nine million eight hundred and fifty thousand dollars ($9,850,000.00). This amount shall include any Court ordered Attorneys' Fees and Expenses, Plaintiff's Incentive Award, any and all Settlement Administration Expenses, all cash awards to Class Members, and any payment of the Residual Fund. (Emphasis added.)

(2) Settlement Agreement, Paragraph 52:

> At least fourteen (14) calendar days before the Objection Deadline, Class Counsel will make an application to the Court for an award of Attorneys' Fees and Expenses in the Action. US Airways will not challenge Class Counsel's entitlement *vel non* to Attorneys' Fees and

Expenses. However, US Airways will have the right to challenge the amount of Attorneys' Fees and Expenses requested by Class Counsel. The Parties have no agreement between themselves as to the amounts of any Attorneys' Fees and Expenses that Class Counsel will request or that US Airways will or may oppose. The amount of the Attorneys' Fees and Expenses will be determined by the Court.

(3) Settlement Agreement, Paragraph 51:
In recognition of the time and effort the representative Plaintiff expended in pursuing this action and in fulfilling her obligations and responsibilities as a class representative, and of the benefits conferred on all Class Members by the Settlement, Class Counsel may ask the Court for the payment of an Incentive Award from the Settlement Fund to the representative Plaintiff. At least fourteen (14) calendar days before the Objection Deadline, Class Counsel will make an application to the Court for an Incentive Award not to exceed ten thousand dollars ($10,000.00). US Airways reserves the right to oppose the amount that Class Counsel seeks as an Incentive Award. Class Counsel and Plaintiff agree that any Court-ordered reduction in the amount of the Incentive Award shall not provide grounds for terminating the Agreement and further agree not to appeal the amount the Court orders for the Incentive Award.

3. SUMMARY OF FACTS AND PROCEDURAL HISTORY

Between November 16, 2005 and April 29, 2010, Defendants charged passengers between $15-$200 for different types of checked baggage presented by a passenger at the time of their flight. This fee was not included in the price paid by passengers for their tickets. Plaintiff alleged that by charging this fee Defendants expressly agreed to undertake, imposed on themselves, and assented to the several contractual obligations arising from payment of the baggage fee. Defendants' obligations allegedly included the obligation to timely deliver (and not lose), customers' baggage and to refund baggage fees if it failed to do so.

Boiled down to its core this case is simple, Plaintiff Huffman and members of the Settlement Class were charged baggage fees to transport their baggage, but when US Airways did not deliver the baggage to them within a reasonably timely

fashion upon their arrival, US Airways did not refund their baggage fees. As a result, on November 16, 2010, Plaintiff filed her class action complaint (the "Action") pleading various breach of contract claims, breach of the covenant of good faith and fair dealing, and tort claims. [ECF No. 1.] And on January 31, 2011, she filed her First Amended Complaint "FAC"). [ECF No. Doc 21.]

However, crafting a national class action case in way that can be described as simply as above is no easy task. As set forth in the Declaration of Justin P. Karczag ("Karczag Decl.") at paragraphs 11-18, this case was extremely difficult, unprecedented and can be broken down into two stages. The first stage is from the start of representation, and the filing of action November 16, 2010, through the work it took to successfully appeal the dismissal —which no other baggage fee case had done. And, the second stage is from the date of Mandate, May 25, 2017, to today, with a nearly ten-million dollar settlement in hand generated to benefit consumers—again, something that no other case has done.

In the context of first period, at the time of the filing of this Action, there had been multiple putative class actions filed against all of the major airlines regarding baggage fees, and *all* had failed or, upon careful analysis, Plaintiff's counsel determined that they would likely fail. (Karczag Decl., ¶¶ 12-15.) Consequently, for this Action to be successful, Plaintiff's counsel had to chart a course that would avoid all of the pitfalls that existing cases had encountered, or created for themselves, plus avoid the wreckage that those cases had created as a result of their losses. But, it was not just case law and similar cases working their way through the system that was a concern, but also, the political environment, and federal government action on baggage and/or baggage fees. (Karczag Decl., ¶¶ 11, 19.)

Consequently, Plaintiff's counsel developed a unique strategy, unlike any existing case, centrally focused on the uniform document sometimes called Terms of Transportation and other times called Contract (or Conditions) of Carriage ("TOT/COC"), that all carriers are required to have to ensure that they have

uniform relationships with their customers. This strategy sought to avoid all of the pitfalls that the other cases had faced, including not properly considering preemption, trying to avoid the TOT/COC, casting wide claims against the entire industry, relying upon nebulous tort claims, or focusing on the new first baggage fee, while creating as resilient a class and substantively viable case as could be managed. (Karczag Decl., ¶¶ 19-23.)

On February 18, 2011, Defendant US Airways, Inc. moved to dismiss Huffman's First Amended Complaint. Following briefing and argument, on April 27, 2011, Magistrate Judge Lloyd disagreed with our carefully crafted strategy, and on April 28, 2011, entered an order dismissing Huffman's claims on the ground that they were preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 40120, et seq. (the "ADA"). On May 24, 2011, Huffman filed her Notice of Appeal and the District Court's decision was ultimately evaluated by the Ninth Circuit after briefing in 2011 and 2012, including amicus briefing by the airline industry, oral argument on November 8, 2012, and supplemental briefing in May 2014. On May 3, 2017, the Court of Appeals issued its decision (Hickcox-Huffman v. US Airways, Inc., 855 F.3d 1057 (9th Cir. 2017)), reversing Magistrate Judge Lloyd's order of dismissal, and spread its mandate back to this Court on May 25, 2017. Plaintiff was successful on appeal because Plaintiff continued to push its contract-based claims to the fore, and made the correct call to distance this Action from another putative class action against airlines case that was dismissed on account of preemption, and was being heard by the Supreme Court, and which ultimately lost. *Ginsberg v. Northwest, Inc.* (9th Cir. 2011) 653 F.3d 1033, 1034. (Karczag Decl. ¶ 17.)

This commenced the second stage where, in the beginning, Plaintiff's counsel had to push the action anew, which required addressing specific issues that and updating their extensive research and analysis from six years prior. (Karczag Decl., ¶¶ 24-28). What Plaintiff's counsel discovered was that the generally

unfriendly landscape that had existed when the Action was filed and pending in the District Court, had gotten worse. Not a single baggage-fee class action case had survived. Every single other baggage fee case had been dismissed, and one, even with sanctions issued against the plaintiffs. They all either decided not to appeal, or appealed and lost on appeal. (Karczag Decl., ¶¶ 12-15.)

After a very careful analysis, pursuant to a Joint Stipulation, on September 7, 2017, Huffman dismissed her non-essential contract claims. (ECF No. 53; Karczag Decl., ¶ 27.) On September 8, 2017, Defendants filed another motion to dismiss several of the contract-based claims. The District Court granted Defendants' motion to dismiss as to two of Plaintiff's contract causes of action but overruled the motion to dismiss with respect to the Breach of Implied Contract claim. (ECF No. 65; Karczag Decl., ¶¶ 28-32.) Defendants answered on November 8, 2017 and in their 18-page Answer, admitted that they had entered into an express contract with Huffman, under which Defendants agreed to timely deliver Huffman's bags to her upon her arrival at her destination. [ECF No. 67.]

On January 4, 2018, Defendants' moved for judgment on the pleadings [ECF No. 70], to which Plaintiffs' counsel properly addressed by way of non-opposition, after careful scrutiny, and the Court granted the motion. During this time and after, Plaintiff conducted pretrial discovery (Karczag Decl., ¶¶ 33-34), an inspection of the US Airways Terms of Transportation and related policies over the years, and expert analysis of data regarding checked baggage, as well as legal research regarding the sufficiency of the claims and appropriateness of class certification, all in light of the legal landscape that showed that not a single class action airline baggage fee case brought by consumers had succeeded—instead, all of them, except Huffman, had failed. Ultimately, the parties agreed to go to mediation which occurred over the course of two days of in-person sessions with private mediator Jill Sperber, Esq., of Judicate West. The result of those mediation sessions was the Settlement Agreement attached as Exhibit 1 to the Declaration of

Robert A. Curtis, Docket No. 92.1. The Settlement Agreement was submitted to the Court by way of a Motion for Preliminary Approval which was granted by this Court on October 22, 2018. [ECF No. 105.]

4. ARGUMENT

A. The Court Must Determine Whether The Amount And The Mode Of Payment Of Attorneys' Fees Are Fair And Proper

In the Ninth Circuit, "a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Staton v. Boeing*, 327 F.3d 938, 963 (9th Cir. 2003). As the Ninth Circuit Court of Appeals stated in *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999): "[i]n a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and appropriate."

In this case, the parties, by and through their respective counsel, separately agreed that the amount of the attorneys' fees and expenses will be determined solely by the Court. (Dkt. No. 92.1, Exh. 1, ¶ 52.) Class Counsel and counsel for Defendant did negotiate and agree upon a dollar cap amount ($10,000.00) that would be paid to the named Class Representative for her services as the class representatives. (*see also* Dkt. No. 92.1, Exh. 1, ¶ 52.)

B. Attorneys' Fees May Be Calculated Either As A Percentage Of The Fund Or By The Lodestar Method.

In class actions, "the district court has discretion to use either a percentage or lodestar method" in order to calculate the attorneys' fees to be awarded to counsel. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); see also *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method."); *Powers v. Eichen*, 229 F.3d 1249,

1256 (9th Cir. 2000) (the district court may exercise its discretion to choose between the lodestar and percentage method in calculating fees). The Court's ultimate goal in determining fees "is to reasonably compensate Counsel for their efforts in creating the common fund." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008).

Under the percentage-of-the-fund method of awarding attorneys' fees, the district court simply awards counsel a percentage of the value of the common fund. *Hanlon*, 150 F.3d at 1029.

Another "useful starting point for determining the amount of a reasonable fee is [1] the number of hours reasonably expended on the litigation [2] multiplied by a reasonable hourly rate." *Sorenson v. Mink*, 239 F.3d 1140, 1145 (9th Cir.2001) (relying upon Hensley, 461 U.S. at 433). The resulting figure is known as the "lodestar." To determine what qualifies as reasonable attorneys' fees, the Ninth Circuit has adopted the following twelve factors noted in Hensley (the "lodestar factors") as "guidelines [and] as appropriate factors to be considered": (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill required to perform the legal services 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, 71 (9th Cir. 1975); see also *$12,248 U.S. Currency*, 957 F.2d 1513, 1520 (9th Cir. 1992) (applying the twelve factors outlined in Kerr to the EAJA).

The Court can than make adjustments to the lodestar figure in the form of a multiplier based on the "riskiness" of the lawsuit and the quality of the attorney's work. *Jordan v. Multnomah Co.*, 815 F.2d 1258, 1262 n. 5 (9th Cir. 1986).

C. **The Attorneys' Fees Requested Are Reasonable Under Either The Percentage Method Or The Lodestar Method.**

i. The Attorneys' Fees Requested By Class Counsel Are Reasonable When Measured Against The Ninth Circuit Benchmark.

This settlement resulted in the creation of a $9,850,000.00 common fund. Class Counsel is requesting $2,955,000 (or 30% of the Settlement Fund). While the Ninth Circuit has adopted a 25% benchmark for fees based on the common fund, "in most common fund cases, the award exceeds that benchmark," and that, "absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%." *In re Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007) quoting *In re Activision Sec. Litig.*, 723. F. Supp. 1373, 1378 (N.D Cal. 1989)) (surveying cases nationwide and noting, "This court's review of recent reported cases discloses that nearly all common fund awards range around 30% ....").

"[The 25% benchmark] is a helpful 'starting point.'" *In re Online DVD-Rental Antitrust Litig.*, No. 12-15705, 2015 WL 846008, at *15 (9th Cir. 2015) quoting *Vizcaino*, 290 F.3d at 1048. In *Vizcaino*, the Ninth Circuit expressed the view that district courts should look at several factors in order to determine if the percentage requested is appropriate. The following factors were identified by the Ninth Circuit in Vizcaino: (1) the results achieved for the class; (2) the risks faced by class counsel; (3) whether class counsel's performance generated benefits beyond the creation of a cash settlement fund; (4) how the percentage compared to market rates and/or the rates set forth in counsel's retainer agreements with the class representatives; and (5) the length of the litigation and whether class counsel undertook the action on a contingency basis and were required by the litigation to forego other work. *Vizcaino*, 290 F.3d at 1048-1050.

The results achieved for the class are excellent and the risks faced by Class Counsel in this action were substantial. Over the last 10 years, multiple similar lawsuits were filed against other airlines (and this airline), by other plaintiff counsel, and all of those lawsuits have been unsuccessful. (Declaration of Robert A. Curtis ("Curtis Fee Decl." at ¶ 12.) Moreover, this Action was one of the last to be filed, and it was filed on a battleground littered with fallen soldiers. Thus, *when the Action was filed*, the risk was higher than with any other case because the landscape was so unfriendly. But, Plaintiff's counsel not only filed it and pushed it, but also went to the mat, taking it to the Ninth Circuit Court of Appeals, and winning a stunning reversal. This Action, unlike any other similar action, stands alone, in getting significant money into the hands of consumers and holding a major carrier to task for talking passengers' money and not delivering bags timely.

Furthermore, in creating the common fund for the Settlement Classes, Class Counsel risked more than $945,000 of their time and more than $45,000 in expenses. Risk is certainly a factor that must be considered in evaluating a request for attorneys' fees. See, I*n re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (finding attorneys' fees to be justified "because of the complexity of the issues and the risks"). Class Counsel undertook the risk of handling this action on a fully contingent basis. Class Counsel have expended significant time on this matter over the course of over eight years without any compensation and have advanced the costs necessary to pursue this action to its successful conclusion.

Recent decisions from courts in this Circuit confirm this trend to increase the percentage of the attorney fee upward where Counsel achieves an excellent result. See, e.g., *In re Apollo Group Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2012 WL 1378677, at *7 (D. Ariz. 2012) (33.3% fee held "more than reasonable," warranting "upward departure from the 25% benchmark figure," due to exceptional result and extreme risks); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 3:07-md-1827 SI, 2011 WL 7575003, at *1 (N.D. Cal. 2011) (awarding 30% of the

settlement fund in light of "the high risks involved in this case, the effort put forth by Plaintiff Counsel, the level of sophistication of the work done, and the extraordinary results achieved for the Class"); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000), (upholding 33% fee award); *In re Musicmaker.com Sec. Litig.*, Civil No. 00-02018, slip op. at 6 (C.D. Cal. 2002) (awarding 30% of the $13.15 million settlement where settlement reached soon after formal discovery initiated); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05CV0484 DLB, 2007 WL 3492841, at *4 (E.D. Cal. 2007) (noting "fee awards in class actions average around one-third of the recovery" and awarding a 33% fee award in a wage-and-hour class action); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *19 (C.D. Cal. 2005) (awarding a 33.3% fee of the common fund, noting that "courts in this circuit, as well as other circuits, have awarded attorneys' fees of 30% or more in complex class actions," and listing cases.)

In appropriate cases like this the Court may increase the attorney fee award upward from the 25% benchmark to as high as 33.3% and be in good company across this district, circuit, and in other circuits. As explained above, there is good cause for the Court to award a 30% attorney fee in this case.

ii. The Attorneys' Fees Requested By Class Counsel Are Fair And Reasonable Under The Lodestar Method.

In order to calculate the lodestar, the district court should multiply the reasonable hours expended on the litigation by a reasonable hourly rate. See *Sorenson*, 239 F.3d at 1145. The Court may then assess whether the fees requested are reasonable by applying the twelve lodestar factors as "guidelines [and] as appropriate factors to be considered in the balancing process required in a determination of reasonable attorney's fees." *Kerr*, 526 F.2d at 71. In this case, an analysis of the relevant lodestar factors demonstrates that the attorneys' fees requested by Class Counsel are fair and reasonable under the lodestar method.

First, a significant amount of time and effort were expended by Class Counsel in litigating this case. Over a period of time spanning over eight years, Class Counsel worked aggressively in order to position this case so that it could be resolved favorably for the members of the Settlement Classes by: (a) carefully analyzing the unfriendly and risky legal and political landscape to derive a winning strategy; (b), successfully challenging and appealing the adverse ruling, including supplemental briefing; (c) engaging in careful management of the law and motion to ensure that the core claim was protected at all cost; (d) serving formal discovery consisting of interrogatories and requests for production of documents; (e) reviewing and analyzing thousands of documents that were produced by Defendant; (f) conducting legal research concerning the claims filed in this action and the defenses raised thereto; (g) filing and opposing numerous motions; (h) hiring expert to analyze millions of lines of data and prepare complex damage models; and (i) participating in two lengthy mediation session in order to reach settlement on behalf of the Settlement Classes. (Curtis Fee Decl., ¶ 13.)

As a result of the time required and difficulties encountered in pursuing the claims in this case, Class Counsel devoted almost 1850 hours to this case. When valued at Class Counsel's normal hourly rates, the time spent by Class Counsel equates to a base lodestar of $949,669.00[1]. (Curtis Fee Decl., ¶ 14; Karczag Decl., ¶¶ 39-57; Aron Decl., ¶ 7.) For these reasons, the time spent by Class Counsel is quite reasonable, and the first lodestar factor militates heavily in favor of approving the attorneys' fees in the amount requested.

Second, this case presented several novel and difficult legal challenges. Over the last 10 years, multiple similar lawsuits were filed against other airlines, by other

[1] This lodestar total does not include the time spent preparing this Motion or it supporting declarations nor does it include any future time which we be spent drafting the Motion for Final Approval and preparing for and attending the Final Approval hearing. (Curtis Fee Decl., ¶ 14.)

plaintiff counsel, and all of those lawsuits have been dismissed at trial or after appeal; as well as other FAA preemption cases. (Karczag Decl., at ¶¶ 12-18, 54.) But for the efforts of Class Counsel no passenger in America would have received a penny! For these reasons, the second lodestar factor weighs strongly in favor of approving the attorneys' fees in the amount requested.

Third, this case required significant skill to perform the necessary legal services competently. As noted above, this case involved difficult legal issues and presented significant challenges. Class Counsel have a wealth of experience in litigating complex actions and class actions (Curtis Fee Decl., ¶ 4; Karczag Decl.., ¶¶ 42, 55), and Class Counsel proved themselves up to the task by consistently prevailing in the face of these challenges. Class Counsel spent considerable time developing their theories of liability and damages in order to credibly address merits and class certification. (Curtis Fee Decl., ¶ 8; Karczag Decl., ¶¶19-23, 25-32, 35, 36.) Class Counsel also expended substantial effort in obtaining the discovery necessary to advance these legal theories. (*Id*.) Finally, Class Counsel were able to present their case theories in a persuasive manner to the mediator in such a way as to produce a very advantageous result for the Settlement Classes. (*Id*.) For these reasons, the third and ninth lodestar factors weigh heavily in favor of approving the attorneys' fees in the amount requested.

Fourth, Class Counsel undertook the risk of handling this action on a fully contingent basis. Class Counsel have expended significant time on this matter without any compensation for eight years and have advanced and carried the expenses necessary to pursue this action to its successful conclusion. (Curtis Fee Decl., ¶ 18; Karczag Decl., ¶ 57; Aron Decl., ¶ 10.) Plainly, in the absence of their commitment to this case, Class Counsel could have devoted their efforts to one or more other class action matters. (Curtis Fee Decl., ¶ 18; Karczag Decl., ¶ 56.) The financial burdens undertaken by Class Counsel warrant strong consideration. See, *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (considering

counsel's bearing the financial burdens of the case). For these reasons, the fourth, sixth, and seventh lodestar factors weigh heavily in favor of approving the attorneys' fees in the amount requested.

Finally, the benefits that are being made available to the members of the Settlement Class are significant. Despite the major obstacles to recovery presented in this case, Class Counsel succeeded in negotiating a settlement that provides real cash benefits to the class members. At the time of settlement, Class Counsel faced numerous challenges in obtaining any recovery at all for the Settlement Classes. Although Class Counsel are confident that they would have prevailed at trial, experienced counsel can never assume success because all litigation, by its very nature, entails a high degree of risk. Class Counsel recognized this risk, along with the potential appeals that likely would follow a favorable ruling on class certification and then again after any judgment at the trial level, and took these factors into account when negotiating the terms of the Settlement Agreement. Based on the risks posed if the case were to be tried, and factoring in the time required for trial and appeals, Class Counsel feel strongly that the result obtained is an excellent settlement for the members of the Settlement Class. For these reasons, the eighth lodestar factor weighs heavily in favor of approving the attorneys' fees in the amount requested.

iii. The Attorneys' Fees Requested Reflect An Appropriate Multiplier On Class Counsel's Aggregate Lodestar.

Class Counsel have incurred aggregate attorneys' fees in the amount of $949,669 in this action. $541,970 of that amount was incurred by Foley Bezek Behle & Curtis LLP (Curtis Fee Decl., ¶ 14.), $172,409 of that amount was incurred by Karczag & Associates. (Karczag Decl., ¶ 39), and $235,290 of that amount was incurred by Law Offices of William Aron. (Aron Decl., ¶ 7),

Therefore, the total attorneys' fees sought ($2,955,000.00) represents a multiplier of 3.11 on Class Counsel's aggregate lodestar.

The district courts have applied a wide range of multipliers – generally ranging from 2 to 4 – in making fee award determinations. In *Vizcaino*, the Ninth Circuit included as an appendix to its opinion a table which listed 34 class actions settled between 1996 and 2001 in which attorneys' fees were awarded as a percentage of the fund. In twenty-four (24) of those cases, the district court had conducted a lodestar cross-check. The multipliers in those 24 cases ranged from a low of .6 to a high of 19.6, **with an average multiplier of 3.31**. See also, *In re Prudential Ins. Co. Sales Practices Litig.*, 148 F.3d 283, 341 (3rd Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.")

In this case, the multiplier that will result if the Court grants the attorneys' fees requested at final approval will be less than 2.99. This is a multiplier that is in the range of the multipliers that typically are approved by the district courts and below average when compared with the twenty-four case sampling in *Vizcaino*.[2]

iv. Not a Single Member of the Class Objected to The Attorneys' Fees Requested

As recognized by the Ninth Circuit in *In re: Mercury Interactive Corp. Securities*, 618 F.3d 988 (9th Cir. 2010), it is imperative under Rule 23(h) "that the class have an adequate opportunity to oppose class counsel's fee motion." This requires that, at a minimum, the deadline for filing objections to the fee application not predate the filing of the fee application. *Id.* Here, the parties have taken several steps to ensure that class members have fair and adequate notice of the fee application and sufficient time to object to the fee application if they wish to do so.

[2] In a 2015 class action decision in the District of New Jersey, Judge Linares approved a 30% fee where the multiplier was 3.97 for a group of law firms where one of the Class Counsel (Foley Bezek Behle & Curtis) was the lead counsel for the Plaintiffs. That decision is attached as Exhibit "3" to the Curtis Fee Decl.

First, the postcard Notice was mailed to 348,856 class members. This postcard gave a short summary of the fees and costs to be requested which read, "The settlement provides a $9.85 million Settlement Fund that will be used to pay ….. and (iv) Attorneys' Fees not to exceed $2,955,000 and costs and expenses not to exceed $50,000." (Curtis Fee Decl., ¶ 22, Ex. 1.) It also informed class members that they had the right to object to the attorneys' fees requested and stated "Class Counsel's motion Attorneys' Fees and Expenses and the Incentive Award will be available on the Settlement Website after they are filed and before the hearing." (*Ibid.*)

Second, the Long Form Notice that was disseminated to class members and that is posted on the Internet: (a) notifies class members of the maximum amounts of the attorneys' fees, expenses and incentive award that will be sought; and (b) notifies class members that the fee application papers will be filed prior to the deadline to opt-out or object.

Accordingly, class members have been provided with fair notice of the attorneys' fees, expenses and incentive award that are being sought and the basis for the amounts requested, as well as their right to object and instructions on how to object if they choose to do so.

To date, **no objections** have been received to the attorneys fees, costs or incentive award. (Curtis Fee Decl., ¶¶ 21, 24, and Ex. 2.) The absence of objections demonstrates that the settlement is strongly supported by the Settlement Classes. See *McPhail v. First Command Financial Planning, Inc*, 2009 U.S. Dist. LEXIS 26544, 2009 WL 839841 at *6 (S. D. Cal. March 30, 2009) ("The presence of a small minority of objectors strongly supports a finding that the settlement is fair, reasonable, and adequate.")

///

///

///

D. The Reasonable And Necessary Expenses Incurred By Class Counsel Should Be Reimbursed.

Fed.R.Civ.P. Rule 23(h) provides that: "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." The Ninth Circuit has long recognized that attorneys in class actions may be reimbursed for reasonable out-of-pocket expenses incurred in connection with the litigation. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). "Fees and costs are awarded to an attorney for his efforts in creating . . . a fund . . . for the benefit of the class whom he represents." *In re Nucorp Energy, Inc.*, 764 F.2d 655, 661 (9th Cir. 1985) (emphasis added.)

In this case, the Settlement Agreement specifies the amount of expenses for which reimbursement may be sought by Class Counsel. The parties have agreed that Class Counsel shall seek reimbursement of expenses in an amount not to exceed $50,000. Because the expenses are being reimbursed in connection with a settlement, rather than an adjudication of the claims on the merits, all of the expenses that are being reimbursed qualify as non-taxable costs under Fed.R.Civ.P. Rule 23(h).

Class Counsel seek reimbursement of their expenses in the total amount of $45,611.21 (Curtis Fee Decl., ¶ 19; Karczag Decl., ¶ 58; Aron Decl., ¶ 11.) These expenses are extremely reasonable under the circumstances considering: (1) the duration of the litigation – nearly eight years; (2) the fact that case went up to the Ninth Circuit; (3) the fact that Class Counsel were required to travel extensively from Southern California (where all counsel reside) to the Northern District for hearings and appearances; and (5) the fact that the case had a two lengthy mediations session before an established and experienced mediator. All of the expenses for which Class Counsel seek reimbursement were reasonably and necessarily incurred in connection with the prosecution and resolution of this action. (Curtis Fee Decl., ¶ 20; Karczag Decl., ¶ 58; Aron Decl., ¶ 11.)

For these reasons, Class Counsel respectfully request that this Court grant their request for reimbursement of expenses in the amount of $45,611.21.

E. The Incentive Awards Requested Are Reasonable And Should Be Awarded

In fulfilling her duties as the class representative in this action, Plaintiff Hickcox-Huffman devoted significant amounts of her personal time to, inter alia: reviewing the complaint before it was filed; gathering documents to support her claims; responding to written discovery requests propounded by Defendant and gathering responsive documents; reviewing legal documents (including the Settlement Agreement) provided to her by Class Counsel; and conferring with Class Counsel regarding various litigation-related issues. (Curtis Fee Decl., ¶ 25.)

In light of the services that she rendered in this action, granting an incentive award to Plaintiff is justified for several reasons. First, Plaintiff should be recognized for taking the initiative to contact counsel and to retain Class Counsel's services for purposes of filing and pursuing this action on behalf of the other members of the Settlement Classes. Second, Plaintiff devoted substantial time and effort in order to ensure the prosecution of this lawsuit to a successful conclusion. Third, incentive awards promote the public policy of encouraging individuals with a small financial interest in the outcome of litigation to nonetheless step forward and assume a "vanguard" role by litigating their individual claims for the benefit of all other members of a class. Fourth, the federal district courts across the country routinely grant incentive awards in class actions. Fifth, this case has been pending for an unusually long period of time, and she has maintained her status as a fiduciary of the class for 8 years now.

i. The Court Has The Discretion To Grant Incentive Awards In This Action.

The trial court has discretion to grant incentive awards to the class representatives. *In re Mego Fin'l Corp. Sec. Litig. v. Nadler*, 213 F.3d 454, 463

(9th Cir. 2000). The criteria that courts have considered when determining whether to grant an incentive award and the amount of the award include: (1) the risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D.Cal.1995).

The Ninth Circuit confirmed the propriety of incentive awards in *Staton v. Bo*eing, 327 F.3d 938 (9th Cir. 2003). In *Staton*, the Ninth Circuit acknowledged that incentive awards properly may be awarded in class actions. *Id.* at 976-977. The Ninth Circuit described the following factors to be considered in granting incentive awards:

> The district court must evaluate their awards individually, using "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefited from those actions, ... the amount of time and effort the plaintiff expended in pursuing the litigation.

Id. at 977, quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998).

ii. Plaintiff Should Be Granted An Incentive Award By This Court.

Applying the criteria set forth in *Van Vranken* and *Staton*, it is clear that the incentive award requested for Plaintiff in this action a reasonable under the circumstances.

First, as with any plaintiff who files a civil action, Plaintiff undertook the financial risk that, in the event of a judgment in favor of Defendant in this action, she could have been saddled with the costs awarded in favor of the Defendant.

Second, Plaintiff devoted substantial time and effort in order to assist in the prosecution of this litigation. Among other things, Plaintiff was required to spend

time: reviewing the complaint before it was filed; gathering documents to support her claims; responding to written discovery requests propounded by Defendant; reviewing legal documents (including the Settlement Agreement) provided to her by Class Counsel; and conferring with Class Counsel regarding various litigation-related issues. (Curtis Fee Decl., ¶ 25.)

Third, Plaintiff has been required to participate in this litigation for a long amount of time – over eight years.

Therefore, the incentive award that is being requested for Plaintiff ($10,000) is reasonable and appropriate in light of: (1) the risks associated with bringing this lawsuit; (2) the time and effort expended as the Plaintiff in this action; and (3) Plaintiff's substantial participation in, and contribution to, the results obtained in this action.

iii. The Federal District Courts Routinely Grant Incentive Awards.

Federal district courts routinely grant incentive awards to compensate class representatives, named plaintiffs, and even non-representative class members for services provided on behalf of the class and for the risks incurred in involving themselves in class action litigation. See, *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001). In *Ingram*, the district court awarded incentive payments of $300,000 to each named plaintiff in recognition of the services that they provided to the class by responding to discovery requests, participating in the mediation process, and taking the risk of stepping forward on behalf of the class. Plaintiff undertook the same risk by stepping forward and commencing this litigation, and Plaintiff faithfully discharged her duties as the class representative throughout the course of this action.

In similar situations, federal district courts have recognized such efforts by class representatives (and even non-class representative named plaintiffs) on behalf of the class by granting incentive awards to them. See, e.g., *Williams v. Kaiser*

Sand and Gravel Co., 1995 US Dist. LEXIS 14262 (N.D. Cal. 1995) (approving an additional payment to a class representative "as compensation for its time and effort expended in the case"); *Hughes v. Microsoft Corp.*, 2001 US Dist. LEXIS 5976 (W.D. Wash. 2001) (approving differing incentive payments based on duration of involvement and level of risk to class representatives); *Gaskill v. Boula*, 1995 US Dist. LEXIS 18576 (E.D. Ill. 1995) ("these individuals [class representatives] invested their time and effort and exposed themselves to litigation costs even though they might lose. Equity requires that they receive greater compensation than others who did not."); *In Re Dun & Bradstreet Credit Services Customer Litigation*, 130 F.R.D. 366, 376 (S.D. Ohio 1990) (granting incentive awards to class representatives to compensate them for "time, risk and expenses"); *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989), aff'd 925 F.2d 1464 (6th Cir. 1991) (approving incentive payments to eighty-eight witnesses and named plaintiffs, stating: "Named plaintiffs and witnesses are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne").

iv. Incentive Awards Promote An Important Public Policy.

Granting incentive awards to those who serve as class representatives and/or individual class members who make a meaningful contribution to the case promotes the public policy goal of encouraging individuals with a small financial interest in the outcome of the litigation to step forward and assume a vanguard role in litigating their individual claims for the benefit of all other members of a class. Such incentive awards also properly acknowledge the discovery obligations and other burdens that such individuals bear during the litigation of the case.

Accordingly, fairness dictates that the individual responsible for commencing the class action and pursuing the case to a successful conclusion be the recipient of

some measure of compensation. Granting the incentive award requested for Plaintiff will ensure just such an equitable result.

v. The Incentive Award Requested Is In Line With Other Cases.

Although the amounts of the incentive awards granted by courts vary, it is not uncommon for a court to award each class representative thousands of dollars as an incentive award. See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463 (approving incentive awards of $5000 to the two class representatives of 5,400 class members in a class action settled for $1.725 million); *Van Vranken*, 901 F. Supp. at 300 (approving incentive award to single class representative in the amount of $50,000); *Williams*, 1995 U.S. Dist LEXIS 14262 (approving incentive award to plaintiff in the amount of $10,000); *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F. Supp. 525, 535 (E.D. Pa. 1990) (approving $5000 incentive awards for one representative of each of nine plaintiff classes as part of class action settlement); In re Domestic Air Transp. Antitrust Litigation, 148 F.R.D. 297, 357-358 (N.D. Ga. 1993) (approving incentive awards to class representatives in aggregate amount of $142,000); *In re Dun & Bradstreet*, 130 F.R.D. at 373-374 (approving incentive awards to class representatives in aggregate amount of $215,000); *In re Employee Benefit Plan Sec. Litig.*, 1993 U.S. LEXIS 21226, Fed. Sec. L. Rep. (CCH) ¶ 97699 (D. Minn.1993) (approving incentive awards to each class representative in the amount of $5000); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 138 (W.D. Ky. 1992) (approving the payment of $5,000 to each plaintiff as part of class settlement); *Enterprise Energy v. Columbia Gas Transmission*, 137 F.R.D. 240, 250-51 (S.D. Ohio 1991) (approving $50,000 in incentive payments to each of six class representatives).

Therefore, the incentive award requested for Plaintiff is in line with the incentive awards granted by federal district courts in numerous other cases across the country.

5. CONCLUSION

For the foregoing reasons, this Court should enter an Order:

(1) awarding attorneys' fees to Class Counsel, for their services in connection with the litigation and resolution of the claims asserted in this action, in the aggregate amount of $2,955,000;

(2) reimbursing Class Counsel for their reasonable expenses and non-taxable costs incurred in connection with the litigation and resolution of the claims asserted in this action in the aggregate amount of $45,611.21; and

(3) granting an incentive award to the Class Representative in the amount of $10,000.00.

Dated: February 7, 2019

FOLEY BEZEK BEHLE & CURTIS, LLP
LAW OFFICE OF WILLIAM M. ARON
KARCZAG AND ASSOCIATES PC

By: /s/ Robert A. Curtis
Robert A. Curtis
Attorneys for Plaintiff
HAYLEY HICKCOX-HUFFMAN, on behalf of herself and proposed Settlement Class