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11 individually, and on behalf of
12 all others similarly situated

13 **UNITED STATES DISTRICT COURT**
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

15 GARY DAVIS, an individual; on
16 behalf of himself, and as PRIVATE
17 ATTORNEY GENERAL, and on
18 behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 CHASE BANK U.S.A., N.A., a
22 Delaware corporation; and DOES 1
23 through 50, inclusive,

24 Defendants.

Case No. CV 06 4804 DDP (PJWx)

Honorable Dean D. Pregerson

**PLAINTIFF’S NOTICE OF
MOTION AND MOTION FOR
ATTORNEYS’ FEES AND
EXPENSES AND SERVICE
AWARDS; MEMORANDUM OF
POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

**[Declarations of Drew E. Pomerance,
Jeff S. Westerman, Nicole D. Fricke,
and Wyatt Lim-Tepper, and Motion
for Final Approval of Settlement Filed
Concurrently]**

Date: October 27, 2014

Time: 11:00 a.m.

Courtroom: 3

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Attorneys for Plaintiff
GENE CASTILLO, individually,
and on behalf of all others similarly situated

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1 PLEASE TAKE NOTICE that on October 27, 2014 at 11:00 a.m., or as
2 soon thereafter as the matter may be heard before the Honorable Dean D.
3 Pregerson in Courtroom 3 of the above-entitled court, located at 312 North Spring
4 Street, Los Angeles, California, Plaintiff Gene Castillo (Plaintiff) will move this
5 Court for an order approving Plaintiff's motion for attorneys' fees and expenses
6 and service awards to Gene Castillo and Gary Davis.

7 Defendant Chase Bank U.S.A., N.A. (Chase) does not oppose this motion,
8 which is being made following conferences between counsel earlier this year,
9 pursuant to L.R. 7-3.

10 This motion is based on this notice and motion, the accompanying
11 memorandum of points and authorities, the declarations of Drew E. Pomerance,
12 Nicole D. Fricke, Jeff S. Westerman, and Wyatt Lim-Tepper, and documents
13 attached thereto, all the matters of record filed with the Court, and such other
14 evidence and argument as may be submitted to the Court.

15
16 DATED: August 29, 2014 ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

17 By: s/ Drew E. Pomerance
18 DREW E. POMERANCE
19 BURTON E. FALK
20 Attorneys for Plaintiff
21 GENE CASTILLO, individually,
22 and on behalf of all others similarly situated
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1 DATED: August 29, 2014 WESTERMAN LAW CORP.

2 By: s/ Jeff Westerman
3 JEFF WESTERMAN
4 Attorneys for Plaintiff
5 GENE CASTILLO, individually,
and on behalf of all others similarly situated

6 DATED: August 29, 2014 MILBERG LLP

7
8 By: s/ Nicole Duckett Fricke
9 NICOLE DUCKETT FRICKE
10 Attorneys for Plaintiff
11 GENE CASTILLO, individually,
and on behalf of all others similarly situated

1 **I. INTRODUCTION**

2 In conjunction with Plaintiff’s concurrently filed Motion for Final Approval
3 of Settlement (Final Approval Brief), Plaintiff seeks through this motion an order
4 awarding Class Counsel attorneys’ fees and expenses in the amount of \$1.5
5 million as provided in the Stipulation and Agreement of Settlement (Settlement)
6 filed on April 23, 2014 (Docket No. 332-1). Plaintiff also applies for an order
7 awarding service awards of \$5,000 each to Plaintiff Gene Castillo and Gary Davis.

8 As more fully discussed in the Final Approval Brief and the Declaration of
9 Drew E. Pomerance filed concurrently (“Pomerance Decl.”), the Settlement is the
10 result of extensive negotiations that continued on and off for the past four years,
11 substantial discovery, investigation, and analysis to verify the size and extent of
12 the potential class, the potential damages they incurred, as well as a thorough
13 analysis of Plaintiff’s legal theories and Chase’s defenses – both on the merits and
14 having to do with class certification issues. The parties also twice mediated the
15 dispute before the Honorable Edward Infante, Ret., a former U.S. Magistrate
16 Judge and respected mediator with significant experience in mediating large,
17 complex class actions like this, and who helped broker the terms of the
18 Settlement. On June 5, 2014, the Court granted Preliminary Approval of the
19 Settlement, and approved the proposed notice program. *See* Court’s Preliminary
20 Approval Order dated June 5, 2014 (Docket No. 340.)

21 Class Counsel are requesting the Court approve payment in the amount of
22 \$1,500,000 for both attorneys’ fees and reimbursement of expenses incurred
23 during the course of this litigation. Class Counsel are also applying to the Court
24 for service awards of \$5,000 each to Plaintiff Gene Castillo and Gary Davis. The
25 requested attorneys’ fees and expenses would result in a substantial negative
26 multiplier based on the lodestar time as submitted from the three firms that
27 worked on this case over the eight years this litigation has been pending. A
28 negative multiplier makes the proposed compensation to Class Counsel extremely

1 reasonable, especially given the very favorable result for the Settlement Class.
2 Further, the requested \$1,500,000 in attorneys' fees and expenses is about 27% of
3 the \$5.5 million in cash value achieved for the Settlement Class. The request is
4 within the standard range of percentage fees approved by federal courts in this
5 Circuit and nationwide.

6 All of Class Counsels' time and expense was contingent and has not been
7 reimbursed, even though this case has been pending for over eight years and Class
8 Counsel expended over \$59,000 in litigation expenses for the benefit of the
9 Settlement Class. As detailed below, the fee and expense amount requested is
10 reasonable, whether based on a percentage of recovery or lodestar approach.

11 Further, although the deadline to file objections has not yet passed, as of
12 August 25, 2014, no objections to the settlement or the proposed fee and expense
13 amount has been received.

14 By this motion, Class Counsel respectfully request that the Court award
15 attorneys' fees and expenses and award payment to Plaintiff Gene Castillo and
16 Gary Davis. The requested fees and expenses are fair and reasonable, and this
17 motion merits the Court's approval.

18 **II. CLASS COUNSELS' FEE AND EXPENSE APPLICATION**
19 **SHOULD BE FULLY APPROVED BY THE COURT**

20 **A. Class Counsel are Entitled to an Award of Attorneys' Fees and**
21 **Reimbursement of Their Expenses**

22 Having reached a class settlement with Chase, it is well established that
23 Class Counsel are entitled to seek fees and expenses from that settlement. For
24 their efforts in creating a common fund for the benefit of the Settlement Class,
25 Class Counsel may seek a reasonable percentage of the fund recovered as
26 attorneys' fees.

27 It has long been recognized in equity that "a private plaintiff, or his
28 attorney, whose efforts create, discover, increase or preserve a fund to which

1 others also have a claim is entitled to recover from the fund the costs of his
2 litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d
3 759, 769 (9th Cir. 1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)
4 ("[a] lawyer who recovers a common fund for the benefit of persons other than
5 himself or his client is entitled to a reasonable attorney's fee from the fund as a
6 whole."); *see also Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977) (holding that the
7 common fund doctrine permits a litigant who maintains a suit that results in the
8 creation of a fund in which others share a common interest to be reimbursed for
9 their attorneys' fees and expenses from that fund).

10 The purpose of this doctrine is to avoid unjust enrichment so that "those
11 who benefit from the creation of the fund should share the wealth with the lawyers
12 whose skill and effort helped create it." *In re Wash. Pub. Power Supply Sys. Sec.*
13 *Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("WPPSS"). This rule, known as the
14 common fund doctrine, is firmly rooted in American case law. *See, e.g., Tr. v.*
15 *Greenough*, 105 U.S. 527 (1882); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S.
16 116 (1885).¹

17 In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court
18 recognized that under the "common fund doctrine" a reasonable fee may be
19 based "on a percentage of the fund bestowed on the class." In this Circuit, the

20 _____
21 ¹ In *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268 (9th Cir. 1989),
22 the Ninth Circuit explained the principle underlying fee awards in common fund
23 cases:

24 Since the Supreme Court's 1885 decision in *Central Railroad*
25 *& Banking v. Pettus*, 113 U.S. 116 . . . (1885), it is well settled
26 that the lawyer who creates a common fund is allowed an *extra*
27 reward, beyond that which he has arranged with his client, so
28 that he might share the wealth of those upon whom he has
conferred a benefit . . . The amount of such a reward is that
which is deemed "reasonable" under the circumstances.

Id. at 271 (citations omitted, emphasis in original).

1 district court has discretion to award fees in common fund cases based on either
2 the so-called lodestar/multiplier method or the percentage-of-the-fund method.
3 *WPPSS*, 19 F.3d at 1296. In *Paul, Johnson*, 886 F.2d at 268, *Six Mexican*
4 *Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), *Torrissi v. Tucson*
5 *Elec. Power Co.*, 8 F.3d 1370 (9th Cir. 1993), and *Vizcaino v. Microsoft Corp.*,
6 290 F.3d 1043 (9th Cir. 2002), the Ninth Circuit expressly approved the use of the
7 percentage method in common fund cases.

8 Class Counsels' request for attorneys' fees and expenses is entirely
9 consistent with the well-established precedent in this Circuit and Class Counsel
10 respectfully submit that the Court should award attorneys' fees and expenses in
11 the amount of \$1,500,000.

12 **B. The Requested Fees and Expenses Represent A Reasonable**
13 **Percentage of the Fund Recovered for the Settlement Class**

14 In *Paul, Johnson*, the Ninth Circuit established 25% of the fund as the
15 "benchmark" award for attorneys' fees. 886 F.2d at 272; *see also Torrissi*, 8 F.3d
16 at 1376 (reaffirming 25% benchmark); *Pincay Invs. Co. v. Covad Commc'ns*
17 *Group, Inc.*, 90 Fed. Appx. 510, 511-512 (9th Cir. 2004) (same); *Fischel v.*
18 *Equitable Life Assurance Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002) (same);
19 *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (same). Nevertheless, fee
20 awards of 30% or more are not uncommon. *See, e.g., In re Activision Sec. Litig.*,
21 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989) (finding that in most cases,
22 benchmark is 30%). The guiding principle in this Circuit is that a fee award be
23 "reasonable under the circumstances." *WPPSS*, 19 F.3d at 1295.

24 The request here for combined attorneys' fees and expenses of
25 \$1,500,000—which is equal to 27% of the \$5.5 million common fund—is
26 reasonable considering the quality of representation and the contingency risk
27 undertaken by Class Counsel, the uncertainties of the litigation, and the significant
28 result achieved on behalf of the Settlement Class.

1 **C. Other Relevant Factors Considered by Courts in the Ninth**
2 **Circuit Justify the Requested Fees and Expenses in This Case**

3 The Ninth Circuit has articulated five factors as pertinent criteria for
4 evaluating the reasonableness of a fee request: (i) the results achieved; (ii) the risk
5 of litigation; (iii) the skill required and the quality of the work; (iv) the contingent
6 nature of the fee and the financial burden carried by the Plaintiff; and (v) awards
7 made in similar cases. *See Vizcaino*, 290 F.3d at 1048-50. Consideration of each
8 of these factors supports approval of the requested attorneys’ fees and expenses.

9 **1. The Results Achieved on Behalf of the Settlement Class**
10 **Members**

11 The most critical factor to be considered in granting a fee award is the
12 degree of success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co.*, No. 02-
13 ML-1475-DT(RCx), 2005 U.S. Dist. LEXIS 13627, at 27 (C.D. Cal. June 10,
14 2005) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“most critical
15 factor is the degree of success obtained”)); *see also In re King Res. Co. Sec.*
16 *Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“[t]he amount of the recovery, and
17 end result achieved are of primary importance, for these are the true benefit to the
18 client.”); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla.
19 1988), *aff’d without op.*, 899 F.2d 21 (11th Cir. 1990) (“The quality of work
20 performed in a case that settles before trial is best measured by the benefit
21 obtained.”).

22 The proposed class action settlement provides an excellent recovery for the
23 Settlement Class. As detailed in the Final Approval Brief, this Settlement
24 provides for \$5.5 million in *cash benefits* to resolve this matter. The proposed
25 Settlement is the result of dedication and nearly a decade of hard work by Class
26 Counsel and would provide immediate and substantial benefits to Settlement Class
27 Members.

28 Based on the numbers provided to Class Counsel by Chase at the time of

1 preliminary approval, the total recovery is approximately 25% of what the
2 Settlement Class alleges to be its damages. *See* Pomerance Decl., ¶¶ 13-16.
3 When measured against the results in comparable cases, Class Counsel achieved a
4 substantial recovery for the Settlement Class, and the Settlement is likely more
5 than what would have been recovered from the Defendant in the absence of a
6 settlement. Therefore, Class Counsel submits that they achieved a significant
7 recovery for Settlement Class Members and should be awarded the attorneys' fees
8 and expenses requested.

9 The result achieved here is all the more remarkable given this Court's
10 denial of the Motion for Class Certification. Nevertheless, a settlement was
11 reached that provides all cash benefits without the requirement of anyone having
12 to submit a claim form.

13 **2. The Risks of Litigation**

14 Numerous cases have recognized that risk is an important factor in
15 determining a fair fee award. *See, e.g., WPPSS*, 19 F.3d at 1299-1301.
16 Uncertainty that an ultimate recovery would be obtained is highly relevant in
17 determining risk. *WPPSS*, 19 F.3d at 1300. As the court aptly observed in *King*
18 *Resources*:

19 In evaluating the services rendered in this case, appropriate
20 consideration must be given to the risks assumed by plaintiffs'
21 counsel in undertaking the litigation. The prospects of success
22 were by no means certain at the outset, and indeed, the chances
23 of success were highly speculative and problematical.

24 *In re King Res. Co. Sec. Litig.*, 420 F. Supp. at 632, 637.

25 As set forth in the Pomerance Decl., various risks and uncertainties have
26 been present from the outset of this case and continued to make it far from certain
27 over the past eight years that any recovery from Defendant for the Settlement
28 Class would be obtained.

1 The Court denied the Motion for Class Certification. (Docket No. 291.) In
2 most such cases that would be the end. Any potential settlement on behalf of a
3 class would be highly improbable. Despite this, efforts were made to bring in
4 another class representative. (Docket No. 293.) While these efforts were
5 underway, Chase moved to dismiss the case on the grounds that the case is now
6 moot. (Docket No. 296.) While the Court vacated the hearing on the motion
7 dismiss when it preliminarily approved settlement of this case, Chase could renew
8 its motion in the absence of final settlement approval, and the Court could grant
9 the motion to dismiss. In that event, the Settlement Class would get nothing.

10 In addition, even if the Court were to deny Chase's motion to dismiss,
11 several obstacles would remain to the Settlement Class prevailing on the merits at
12 trial. A substantial risk will remain that the Settlement Class will be unable to
13 obtain certification. For example, Chase has argued and will undoubtedly
14 continue to argue in the absence of settlement that the circumstances surrounding
15 each particular transaction, including the possible violation of the terms of the
16 cardmember agreement by cardholders, will result in individualized issues.

17 Finally, even if the Settlement Class was able to achieve certification, it is
18 far from certain whether the Settlement Class would prevail on the merits. Chase
19 has vigorously disputed Plaintiff's claims on the merits. Chase contends that its
20 cardmember agreement and other materials expressly allowed it to allocate
21 payments to lower-interest balances before higher-interest balances. And, just
22 getting to a trial on the merits could take up to several years more, on top of the
23 eight years that the case has thus far proceeded. The proposed settlement
24 eliminates the risks associated with continuing litigation, including possible
25 outright dismissal, as well as the substantial risk of no recovery after several more
26 years of litigation.

27 Here, the Settlement is a great result when weighed against these substantial
28 risks of continuing to litigate. While Class Counsel believes in their ability to

1 develop a strong case against Defendant and try the case if necessary, Class
2 Counsel is fully aware of the risks of continued litigation. They remain fully
3 cognizant of the risk that Defendant could prevail on its motion to dismiss, or at
4 several other stages of litigation prior to trial.

5 At trial, issues of proof will remain as to both liability and damages. And
6 even assuming that the Settlement Class could recover a larger judgment at trial,
7 the delay through trial, post-trial motions and the appellate process would most
8 likely deny the Settlement Class any recovery for years. All of these factors
9 provide a risk that the Settlement Class could recover less than the amount of this
10 Settlement or even nothing at all. Thus, in light of these risks of continued
11 litigation, Class Counsel has achieved a substantial recovery for Settlement Class
12 Members, and the Settlement is likely more than what could be recovered from
13 the Defendant in the absence of a settlement. Therefore, Class Counsel believes
14 they achieved a significant recovery for the Settlement Class considering these
15 numerous risks and the requested fees and expenses are fully justified and should
16 be awarded.

17 **3. The Skill Required and the Quality of the Work**

18 The successful prosecution of these complex claims required the
19 participation of highly skilled and specialized attorneys. *See, e.g., Heritage Bond*,
20 2005 U.S. Dist. LEXIS 13627, at 39 (The “prosecution and management of a
21 complex national class action requires unique legal skills and abilities.”) (quoting
22 *Edmonds v. United States*, 658 F. Supp. 1126, 113 (D.S.C. 1987)). Class Counsel
23 are experienced and skilled practitioners in the class action litigation field, with
24 substantial experience in consumer class action litigation. From the outset of the
25 case in 2006, Class Counsel engaged in a concerted effort to obtain the maximum
26 recovery for the Settlement Class. As a result of these efforts, Class Counsel were
27 able to negotiate a very favorable settlement.

28 The quality of opposing counsel is also important in evaluating the quality

1 of the work done by Class Counsel. *See, e.g., In re Equity Funding Corp. Sec.*
2 *Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (The court recognized that
3 “plaintiffs’ attorneys in this class action have been up against established and
4 skillful defense lawyers, and should be compensated accordingly.”); *King Res.*,
5 420 F. Supp. at 634; *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill.
6 1974). The Defendant was vigorously represented by a prominent law firm with
7 extensive experience in defending class actions on behalf of national financial
8 institutions. The ability of Class Counsel to obtain a favorable settlement for the
9 Settlement Class in the face of such formidable legal opposition further reflects
10 the high quality of Class Counsels’ work.

11 **4. The Contingent Nature of the Fee and the Financial**
12 **Burden Carried by Class Counsel**

13 A determination of a fair fee must include consideration of the contingent
14 nature of the fee and the difficulties that were overcome in obtaining the
15 settlement. Class action litigation is intended to encourage the filing of claims to
16 “vindicate the rights of individuals who otherwise might not consider it worth
17 the candle to embark on litigation in which the optimum result might be more than
18 consumed by the cost.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338
19 (1980). Contingent-type fee arrangements play a vital role by giving a financial
20 incentive to skilled attorneys to serve as class counsel. *Id.* at 338 n.9. Plaintiff
21 respectfully submits that the requested fee of \$1,500,000—which includes the
22 reimbursement of all out of pocket expenses—is entirely reasonable and
23 consistent with the fees typically awarded in such cases.

24 It is an established practice in the private legal market to reward attorneys
25 for taking the risk of non-payment by paying them a premium over their normal
26 hourly rates for winning contingency cases. *See* Richard A. Posner, *Economic*
27 *Analysis of Law* § 21.9, at 534-35 (3d ed. 1986).

28 It has been a long-recognized rule that an attorney is entitled to a much

1 larger fee when the compensation is contingent rather than being fixed on a time
2 or contractual basis. *See Vizcaino*, 290 F.3d at 1048-50. As stated by the Ninth
3 Circuit Court of Appeals in *WPPSS*:

4 It is an established practice in the private legal market to
5 reward attorneys for taking the risk of non-payment by paying
6 them a premium over their normal hourly rates for winning
7 contingency cases . . . as a legitimate way of assuring
8 competent representation for plaintiffs who could not afford to
9 pay on an hourly basis regardless whether they win or lose.

10 *WPPSS*, 19 F.3d at 1299 (citations omitted).

11 When lead Class Counsel, Roxborough, Pomerance, Nye & Adreani, LLP,
12 undertook this matter over eight years ago on a wholly contingent basis, it was
13 with the knowledge that they could likely commit thousands of hours of hard
14 work against some of the best defense lawyers in the country with no assurance of
15 ever obtaining any compensation for those efforts. (Pomerance Decl., ¶ 24.) The
16 litigation has been pursued by Class Counsel on a wholly contingent basis.
17 (Pomerance Decl., ¶ 25.) From the outset, Class Counsel understood that they
18 were involved in complex, expensive and lengthy litigation (with no guarantee of
19 compensation for the significant investment of time, money and effort the case
20 would require). (Pomerance Decl., ¶ 26.) Class Counsel have not received any
21 payment for their efforts in prosecuting this action on behalf of the Settlement
22 Class and have advanced over \$59,000 of their own money and have invested
23 many thousands of hours in the case over the past eight years. (Pomerance Decl.,
24 ¶ 27.) This outlay of cash and personnel resources by Class Counsel has been
25 completely at risk and wholly dependent upon obtaining a substantial recovery for
26 the Settlement Class. *Id.*

27 Absent this Settlement, there was a risk that the Settlement Class Members,
28 would obtain no recovery. Based on the level of risk undertaken, it is fair to

1 award Class Counsel attorneys' fees and expenses of \$1,500,000, which is about
2 27% of the \$5.5 million cash benefit, and well within the range of attorney fee
3 awards in this Circuit.

4 **5. Awards Made in Similar Cases**

5 District courts in this Circuit have often awarded fees in excess of 25%.
6 *See Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at 20 (awarding 33.3% of
7 the common fund); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir.
8 2000), *amended*, 2000 C.D.O.S. 4890 (9th Cir. June 19, 2000) (33.3% fee award
9 upheld); *In re Musicmaker.com Sec. Litig.*, Civil No. 00-02018, slip op. at 6 (C.D.
10 Cal. Nov. 25, 2002) (awarding 30% of \$13.15 million settlement where settlement
11 reached soon after formal discovery initiated); *In re Fluor Corp. Sec. Litig.*, No.
12 SA CV 97- 0734-AHS (EEx), 1999 U.S. Dist. LEXIS 22128 (C.D. Cal. Jan. 15,
13 1999) (awarding 30% of \$18 million settlement fund where settlement reached
14 following reversal of dismissal and filing of Fourth Amended Complaint).²

15 Courts often look at fees awarded in comparable cases to determine if the
16 fee requested is reasonable. *See Vizcaino*, 290 F.3d at 1050 n. 4. A Federal
17 Judiciary Center study released in 1996, which covered all class actions in four
18 selected federal district courts with a high number of class actions, including the
19 Northern District of California, found that as to the size of attorneys' fees:
20 "Median rates ranged from 27% to 30%." Thomas E. Willging, *Empirical Study*
21

22
23 ² The result is the same in other districts. *See, e.g., Taubenfeld v. Aon*
24 *Corp.*, 415 F.3d 597 (7th Cir. 2005) (upholding award of one-third of \$7.25
25 million settlement fund in securities class action); *In re Thirteen Appeals Arising*
26 *out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir.
27 1995) (affirming a fee of roughly 30.9% of settlement); *In re Ravisent Techs. Inc.,*
28 *Sec. Litig.*, No. Civ. A. 00-CV-1014, 2005 WL 906361, at 1, 12 (E.D. Pa. Apr. 18,
2005) (acknowledging that attorney fees of 30-35% were commonly granted in
awarding 30% in fees of a \$7 million fund); *In re IBP, Inc. Sec. Litig.*, 328 F.
Supp. 2d 1056 (D.S.D. 2004) (awarding 28% where motion to dismiss pending).

1 *of Class Actions in Four Federal District Courts: Final Report to the Advisory*
2 *Committee on Civil Rules*, at 69 (Federal Judicial Center 1996). This finding is in
3 line with an analysis of fee awards in class actions conducted in 1996 by National
4 Economic Research Associates, an economics consulting firm. Using data from
5 433 shareholder class actions, the study concludes: “Regardless of case size, fees
6 average approximately 32 percent of the settlement.” Denise N. Martin, *Recent*
7 *Trends IV.- What Explains Filings and Settlements in Shareholders Class*
8 *Actions?*, at 12-13 (NERA Nov. 1996).

9 Moreover, if this were non-representative litigation, the customary fee
10 arrangement would be contingent, on a percentage basis, and in the range of 30%
11 to 40% of the recovery. *Blum*, 465 U.S. at 904 (“In tort suits, an attorney might
12 receive one-third of whatever amount the plaintiff recovers.”); *In re M.D.C.*
13 *Holdings Sec. Litig.*, No. CV 89-0090 E (M), 1990 U.S. Dist. LEXIS 15488, at 22
14 (S.D. Cal. Aug. 30, 1990) (“In private contingent litigation, fee contracts have
15 traditionally ranged between 30% and 40% of the total recovery.”); *In re Ikon* 194
16 F.R.D. 166, 194 (E.D. Pa. 2000). Thus, the customary contingent fee in the private
17 marketplace—30% to 40% of the fund recovered—is much higher than the
18 percentage fee requested in this case.³

19
20
21 ³ Professor Conte acknowledged the propriety of adequately compensating
22 counsel based on the result obtained in common fund cases:

23 “[C]ourts have been careful to award a fully compensable reasonable
24 fee based on the underlying economic inducement for class action
25 lawyers to pursue potentially expensive or complex common-fund
26 class litigation. These lawyers assume the risk of no compensation
27 unless they successfully confer common fund benefits on the class,
28 based on their reasonable expectation that they will share in the
recovery in a fair proportion, in contrast to receiving a fee based
initially on time-expended criteria that fail to give the *results-*
obtained factor primary consideration.”

1 Alba Conte, *Attorney Fee Awards* §1:9, at 27 (3d ed. 2004).

1 **D. Lodestar/Multiplier Analysis Confirms that the Requested Fees**
2 **and Expenses are Fair and Reasonable**

3 As the Ninth Circuit held in *Vizcaino*, 290 F.3d at 1050:

4 “[c]alculation of the lodestar, which measures the lawyers'
5 investment of time in the litigation, provides a check on the
6 reasonableness of the percentage award . . . [T]he lodestar
7 calculation can be helpful in suggesting a higher percentage
8 when litigation has been protracted. Thus . . . the lodestar may
9 provide a useful perspective on the reasonableness of a given
10 percentage award.”

11 Cross-checking Class Counsels’ requested fee award under the “lodestar”
12 method confirms that the requested fee and expense payment is very reasonable
13 The lodestar calculation results in a substantial *negative* multiplier, as Class
14 Counsel incurred far more in fees than the \$1.5 million they are seeking.

15 Because Plaintiff asserts a claim for relief under California’s Unfair
16 Competition Law (“UCL”), Bus. & Prof. Code §§ 17200 *et seq.*, a California
17 consumer protection statute, and the Settlement Class requires that cardmembers
18 have a California billing address, it is appropriate to consider California state law
19 fee jurisprudence in determining the reasonableness of the requested fee award.
20 Declarations to support a fee application detailing the work performed and the
21 reasonable hourly rate for such services provide ample evidentiary support for the
22 requested amount. *Wershba v. Apple Computers, Inc.*, 91 Cal. App. 4th 224, 255
23 (2001).

24 Using the lodestar method, attorneys’ fees are calculated by multiplying the
25 number of hours worked on the case by the hourly rate of each timekeeper. This
26 provides the base “lodestar” amount, which may then be enhanced or reduced by a
27 multiplier to account for a variety of factors including, but not limited to: (1) the
28 quality of the representation; (2) the contingent nature of the matter, both from the

1 point of view of eventual success on the merits and from the point of view of
 2 securing a fee award; (3) the extent to which the litigation precluded other
 3 employment by the attorneys; (4) the amount involved and the results obtained on
 4 behalf of the class by class counsel; and (5) the continuing obligation of class
 5 counsel to devote time and effort to the litigation. *Serrano*, 20 Cal. 3d at 49.

6 As set forth in the respective declarations of the three firms prosecuting this
 7 case on behalf of the Class, far more in lodestar fees were incurred than the \$1.5
 8 million they are seeking. The chart below shows what each firm has submitted
 9 with respect to: (1) their base lodestar fee; (2) the number of hours expended; and
 10 (3) the costs incurred by each firm throughout the course of this litigation.

11 <u>FIRM</u>	<u>LODESTAR</u>	<u>HOURS</u>	<u>COSTS</u>
12 RPNA	\$1,440,200.70	3,152.80	\$26,273.42
13 Westerman Law Corp.	\$26,195.00	33.10	\$49.40
14 Milberg LLP	\$1,435,076.25	2,741.95	\$32,579.05
15 Total	\$2,901,471.95	5,927.85	\$59,901.87

16 The fees and costs set forth in the chart above are supported by the separate
 17 declarations that each of the law firms submitted in support of this Motion. *See*
 18 Pomerance Decl. ¶¶ 28-37, and Exhibit (Exh.). 1; Declaration of Jeff S.
 19 Westerman (Westerman Decl.) ¶¶ 3-9, and Exh. 1; Declaration of Nicole D.
 20 Fricke (Fricke Decl.) ¶¶ 3-9, and Exh.’s 1-2. The declarations identify the
 21 attorneys who worked on the case and their hourly rates.

22 The declarations also itemize the costs each firm incurred. In determining
 23 the lodestar, courts can rely upon declarations submitted by plaintiff’s attorneys
 24 “evidencing the reasonable hourly rate for their services and establishing the
 25 number of hours spent working on the case.” *Wershba*, 91 Cal. App. 4th at 254-
 26 55.

27 A lodestar in this range reflects the substantial work performed during the
 28 eight years of litigation, using Class Counsels’ standard hourly rates that have

1 been approved by courts over the last several years. *See* Pomerance Decl. ¶¶ 28-
2 37, and Exh. 1; Westerman Decl. ¶¶ 3-9, and Exh. 1; Fricke Decl. ¶¶ 3-9, and Exh.
3 1; *see also Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 155-56
4 (2006) (abuse of discretion not to use firm’s standard full hourly rates in
5 calculating lodestar, as rates were comparable to those charged by other counsel
6 litigating consumer fraud issues); *Fischel v. Equitable Life Assurance Soc’y*, 307
7 F.3d 997 (9th Cir. 2002) (appropriate for court to consider litigation risk of non-
8 payment in setting multiplier where counsel expected to receive additional
9 compensation for such risk).

10 Class Counsel request a combined award of \$1,500,000 in attorneys’ fees
11 and costs. Of that amount, \$59,901.87 represents Class Counsels’ unreimbursed
12 costs. *See* Pomerance Decl. ¶¶ 26-37; Westerman Decl. ¶¶ 8-9, and Exh. 1; Fricke
13 Decl. ¶¶ 7-9, and Exh. 2. Deducting these costs from the total requested award
14 reveals that Class Counsel seeks \$1,440,098.13 in attorneys’ fees. Based upon the
15 attorneys’ fees requested, the lodestar multiplier for Class Counsel is actually a
16 substantial negative multiplier.

17 In many instances, class counsel is awarded its lodestar or its lodestar and a
18 positive multiplier. *See Vizcaino*, 290 F.3d at 1051 (identifying federal survey of
19 multipliers that show multipliers used by courts range between 1.0 and 4.0, and
20 most range between 1.5 and 3.0); *Ketchum v. Moses*, 24 Cal. 4th 1122, 1128
21 (2001) (referencing survey of multipliers recognizing range of between 2.0 and
22 4.0 are average under California law); *Keith*, 501 F. Supp. 403, 414 (multiplier of
23 3.5); *Wershba*, 91 Cal. App. 4th at 255 (noting that multipliers in range of 2 to 4,
24 and even higher, are typical in class litigation); *Cazares v. Saenz*, 208 Cal. App.
25 3d 279, 288 (1989) (finding under California law trial court can appropriately
26 approve a multiplier of 2.0 or more based on consideration of risk and delay
27 factors alone); *Sternwest Corp. v. Ash*, 183 Cal. App. 3d 74, 76 (1986)
28 (Remanding for a lodestar enhancement of “two, three, four or otherwise.”);

1 *Glendora Cmty. Redevelopment Agency v. Demeter*, 155 Cal. App. 3d 465, 479
2 (1984) (affirming a 12 multiplier of counsels' hourly rate and rejecting the
3 argument that the requested fee was exorbitant); *Keith v. Volpe*, 501 F. Supp. 403,
4 414 (C.D. Cal. 1980) (multiplier of 3.5); *In re Patriot Am. Hospitality Inc. Sec.*
5 *Litig.*, MDL No. C-00-1300 VRW, 2005 U.S. Dist. LEXIS 40993, at 14-15
6 (N.D. Cal. Nov. 30, 2005) (awarding multiplier of approximately 2.63).

7 Given the significant settlement amount in the face of repeated roadblocks
8 over the last eight years, and the not insignificant possibility of dismissal of the
9 case in the absence of settlement, Class Counsel's fee request for much less than
10 its lodestar is imminently reasonable. Class Counsels' efforts were performed and
11 the result achieved on a wholly contingent-fee basis, despite the significant risks
12 and determined opposition. Class Counsel respectfully submits that the requested
13 \$1,500,000 for attorneys' fees and expenses is fair and reasonable and should be
14 awarded.

15 **E. Awarding Attorneys' Fees and Expenses in Class Actions is an**
16 **Important Means of Protecting the Rights of Consumers**

17 Both the United States Supreme Court and the California Supreme Court
18 have long recognized the need for class actions in consumer cases where
19 recoveries are too small to warrant individual prosecution. As the United States
20 Supreme Court explained:

21 "The policy at the very core of the class action mechanism is to
22 overcome the problem that small recoveries do not provide the
23 incentive for any individual to bring a solo action prosecuting
24 his or her rights. A class action solves this problem by
25 aggregating the relatively paltry potential recoveries into
26 something worth someone's (usually an attorney's) labor."

27 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace*
28 *v. Van Ru Credit Corp.*, 109 F. 3d 338, 244 (1997)).

1 Over a quarter of a century ago, the California Supreme Court explained:

2 Modern society seems increasingly to expose men to . . . group
3 injuries for which individually they are in a poor position to
4 seek legal redress, either because they do not know enough or
5 because such redress is disproportionately expensive. If each
6 is left to assert his rights alone if and when he can, there will at
7 best be a random and fragmentary enforcement, if there is any
8 at all. This result is not only unfortunate in the particular case,
9 but it will operate seriously to impair the deterrent effect of the
10 sanctions which underlie much contemporary law.

11 *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 807 (1971) (quoting Kalven &
12 Rosenfield, *Function of Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1941)); *see also*,
13 *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 434 (2000) (“Courts long have
14 acknowledged the importance of class actions as a means to prevent a failure of
15 justice in our judicial system.”) The concerns the court expressed in *Vasquez*
16 apply precisely to this case. Individual consumers could or would not have
17 undertaken the years of investigation and litigation necessary to prosecute
18 individual claims against the Defendant herein. A class action was necessary to
19 vindicate the rights of the consumers.

20 Contingency fee litigation is always risky. Despite this risk, Class Counsel
21 secured an excellent result in this litigation. Further, the attorneys’ fees were
22 negotiated separately from and after the parties reached their agreement on the
23 benefits going to the Settlement Class. Pomerance Decl., ¶ 17. Class Counsel
24 respectfully submits that the award of their full request for \$1,500,000 in
25 attorneys’ fees and expenses is therefore appropriate.

26 **F. Reaction of the Settlement Class**

27 Although not articulated specifically in *Vizcaino*, district courts in the Ninth
28 Circuit also consider the reaction of the class when deciding whether to award the

1 requested fee. *Heritage Bond*, 2005 U.S. Dist. LEXIS 13627, at 48 (“The
2 presence or absence of objections . . . is also a factor in determining the proper fee
3 award.”).

4 The deadline for objections to the Settlement is not until September 18,
5 2014, making it premature to say definitively what the reaction of the Settlement
6 Class will be. After that deadline, the Parties will report on the reaction of the
7 Settlement Class and respond to any objections. As of August 25, 2014, no
8 objections have been received. Pomerance Decl. ¶ 42.

9 **III. CLASS COUNSELS’ REQUEST FOR REIMBURSEMENT OF**
10 **THEIR EXPENSES IS REASONABLE AND PROPER**

11 As set forth in the concurrently filed declarations of counsel, Class Counsel
12 have incurred a total of \$59,901.87 in unreimbursed costs and expenses
13 prosecuting this case on behalf of Plaintiff. As one commentator noted, “the
14 prevailing view is that expenses are awarded in addition to the fee percentage.”
15 1 Alba Conte, *Attorney Fee Awards* § 2.8, at 107-113 (3d ed. 2004). Courts
16 routinely reimburse plaintiff’s counsel for the costs incurred in presenting cases
17 on a contingent basis. *See In re Businessland Sec. Litig.*, No. 90-20476, 1991
18 U.S. Dist. LEXIS 8962, at 6-7 (N.D. Cal. June 14, 1991) (and cases cited therein);
19 *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735 (S.D.N.Y. 1985), *aff’d*, 798
20 F.2d 35 (2d Cir. 1986); *In re GNC S’holder Litig.*, 668 F. Supp. 450, 452 (W.D.
21 Pa. 1987). Class Counsel incurred significant costs over eight years of litigation
22 against a well-financed Defendant represented by outstanding defense counsel. In
23 light of the expenses Class Counsel incurred to bring this case to its current
24 settlement posture, Class Counsels’ request for reimbursement of costs is
25 reasonable and should be approved.

1 **IV. CLASS COUNSELS' APPLICATION FOR A SERVICE**
2 **AWARD TO PLAINTIFF GENE CASTILLO AND GARY DAVIS**
3 **SHOULD BE FULLY APPROVED BY THE COURT**

4 Class Counsel respectfully requests that Plaintiff Gene Castillo and Gary
5 Davis be awarded time and expense reimbursement of \$5,000 each. This amount
6 is based on time spent on a variety of matters, including reviewing pleadings,
7 correspondence and other documents, meeting with and discussing the case with
8 Class Counsel, responding to discovery, and being deposed. Many hours were
9 spent by Plaintiff Gene Castillo and Gary Davis for the benefit of the Settlement
10 Class. Messrs. Castillo and Davis aided not only Class Counsel, but the entire
11 Settlement Class. Courts have recognized that individuals should receive a
12 service payment for undertaking the burdens of a class representative. Pomerance
13 Decl., ¶ 43.

14 Many recent decisions, including many in the Ninth Circuit, approve time
15 and expense reimbursements to named plaintiffs in recognition of their efforts in
16 achieving the results obtained. Many cases note the obvious public policy reasons
17 for encouraging individuals with small personal stakes to serve as class plaintiffs
18 in meritorious cases. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *In re*
19 *Cendant Corp.*, 232 F. Supp. 2d 327, 344 (D.N.J. 2002); *Van Vracken v. Atl.*
20 *Richfield Co.*, 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (listing factors).

21 Decisions also note that such “awards” compensate named plaintiffs for
22 their efforts and time expended in representing a class, such as time spent in
23 deposition or helping respond to written discovery. These cases are based on the
24 fundamental premise that named plaintiffs undertake obligations, provide input
25 and take risks not shared equally by absent class members, thus justifying
26 different treatment. *See In re LDK Solar Securities Litigation*, No. 07-5182, 2010
27 U.S. Dist. LEXIS 87168, at 8-10 (N.D. Cal. July 29, 2010) (Court approved a
28 \$10,000 award to compensate the named plaintiff for out-of-pocket expenses and

1 significant time spent assisting counsel with the litigation. *See also Cicero v.*
2 *DirectTV, Inc.*, No. 07-1182, 2010 U.S. Dist. LEXIS 86920, at 19-20 (C.D. Cal.
3 July 27, 2010) (Approving \$7,500 and \$5,000 time and expense awards “for their
4 efforts on behalf of the class.”); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F.
5 Supp. 2d 844, 851 (N.D. Cal. 2005) (Approving \$5,000 awards for two named
6 plaintiffs “for their roles in prosecuting the Action on behalf of the Settlement
7 Class”); *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 (HB), 2005
8 U.S. Dist. LEXIS 7961, *9-10 (S.D.N.Y. May 5, 2005) (approving time and
9 expense reimbursements of \$25,000 and \$15,000, and noting most courts approve
10 awards in the \$10,000 to \$50,000 range.)

11 Given these amounts, Class Counsel respectfully submits that service
12 awards of \$5,000 each to Messrs. Castillo and Davis are reasonable and should be
13 approved.

14 **V. CONCLUSION**

15 For all of the foregoing reasons, Plaintiff respectfully requests that the
16 Court grant the instant motion and issue an order awarding Class Counsel
17 attorneys’ fees and expenses in the amount of \$1,500,000, and service awards of
18 \$5,000 each to Plaintiff Gene Castillo and Gary Davis.

19
20 DATED: August 29, 2014 ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

21 By: s/ Drew E. Pomerance
22 DREW E. POMERANCE
23 BURTON E. FALK
24 Attorneys for Plaintiff
25 GENE CASTILLO, individually,
26 and on behalf of all others similarly situated
27
28

1 DATED: August 29, 2014 WESTERMAN LAW CORP.

2 By: s/ Jeff Westerman
3 JEFF WESTERMAN
4 Attorneys for Plaintiff
5 GENE CASTILLO, individually,
and on behalf of all others similarly situated

6 DATED: August 29, 2014 MILBERG LLP

7
8 By: s/ Nicole Duckett Fricke
9 NICOLE DUCKETT FRICKE
10 Attorneys for Plaintiff
11 GENE CASTILLO, individually,
and on behalf of all others similarly situated

CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2014, a true and correct copy of the foregoing PLAINTIFF’S NOTICE OF MOTION AND MOTION FOR ATTORNEYS’ FEES AND EXPENSES AND SERVICE AWARDS, and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF was filed electronically and served by U.S. Mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court’s electronic filing system or by facsimile to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court’s CM/ECF System.

s/ Julie Contreras
Julie Contreras