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Class Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JEFF BECK, individually; et al., Plaintiffs, vs. CITY OF WHITEFISH, a Montana municipality; and DOES 1-50, Defendants.	)	CAUSE NO. CV-22-44-DLC-KLD **CLASS COUNSEL'S FEE APPLICATION AND MEMORANDUM IN SUPPORT**

CITY OF WHITEFISH, a Montana municipality,	)
Third-Party Plaintiff,	)
vs.	)
FINANCIAL CONSULTING SOLUTIONS GROUP, INC.,	)
Third-Party Defendant.	)

INTRODUCTION

The parties have reached a settlement in this case (the "Settlement"). *See* (Doc. 213-1). While approval of the Settlement was not conditioned on any minimum attorneys' fee and costs award or the payment of service awards to the Class Representative Plaintiffs, Defendant City of Whitefish (the "City") and Third-Party Defendant Financial Consulting Solutions Group, Inc. ("FCS Group") agreed not to oppose Class Counsel's fee, costs, and service award requests. *See* (Doc. 213-1 at 14-15). Pursuant to the Court's Order granting preliminary approval of the Settlement (Doc. 218), Class Counsel hereby submits their Fee Application, requesting compensation for their costs and work in recovering a common fund settlement on behalf of those benefitted by it and service awards on behalf of the Class Representatives for their time, efforts, and other litigation contributions. Class

Counsel respectfully requests their Fee Application be granted upon final approval of the Settlement.

APPLICATION

Class Counsel hereby requests attorneys' fees in the amount of $466,666.67—one-third (approximately 33.33%) of the settlement recovery. Class Counsel also requests all costs and expenses incurred in litigating this class action in an amount not to exceed $175,000.00, which is reasonably estimated to cover expenses already incurred by Class Counsel thus far and to be incurred in administration of the Settlement. These requested fees, costs, and expenses are consistent with the fee arrangement reached between the Class Representatives and Class Counsel at the outset of litigation and will be funded from the $1,400,000.00 common Settlement fund. On behalf of the Class Representatives, Jeff Beck, Amy Weinberg, Zac Weinberg, and Alta Views, LLC, Class Counsel requests $14,000.00 total in service awards—with $3,500.00 distributed to each. At maximum, the fees, costs, and service awards requested from the Settlement fund will total $655,666.67, which will leave at least $744,333.33 to be disbursed to the Settlement Class.[1] These requested fees, costs, and service awards are reasonable and result in an amount to

[1] To date, Class Counsel has incurred $140,039.69 in costs/expenses to litigate this action and administer Class notices. Class Counsel anticipates fairly minimal future costs in administering the Settlement upon final approval. The Settlement Class will retain more than $744,333.33 if costs total less than $175,000.00—which appears very likely.

be disbursed to the Settlement Class that provides a fair and adequate recovery for each member.

MEMORANDUM IN SUPPORT:

STANDARD

Attorneys' fees and costs may be awarded in a certified class action where so authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). Courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount. *See Staton v. Boeing Co.*, 327 F.3d 938, 963–64 (9th Cir. 2003); *Knisley v. Network Assoc.*, 312 F.3d 1123, 1125 (9th Cir. 2002); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328–29 & n. 20 (9th Cir. 1999). "The award of attorneys' fees in a class action settlement is often justified by the common fund or statutory fee-shifting exceptions to the American Rule, and sometimes by both." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

DISCUSSION

I. The requested attorneys' fees are fair and reasonable.

Under the "common fund" doctrine, "a litigant or 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). "Under regular common fund procedure, the parties settle

for the total amount of the common fund and shift the fund to the court's supervision." *Staton*, 327 F.3d at 969. "The plaintiffs' lawyers then apply to the court for a fee award from the fund." *Id.*

"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" in determining an award of reasonable attorneys' fees. *In re Bluetooth*, 654 F.3d at 942. "The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* at 941. "Because the benefit to the class is easily-quantified in common fund settlements," the Ninth Circuit alternatively allows "courts to award attorneys a percentage of the common fund in lieu of the more time-consuming task of calculating the lodestar." *Id.* at 942. In fact, in the Ninth Circuit, "use of the percentage method in common fund cases appears to be dominant." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2009). "There are significant benefits to the percentage approach, including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires."

Elliott v. Rolling Frito-Lay Sales, LP, No. SACV-11-01730-DOC(ANx), 2014 WL 2761316, at *9 (C.D. Cal June 12, 2014).

Courts typically calculate 25% of the fund as the "benchmark" for a reasonable percentage-of-recovery fee award, with 20% to 30% as the usual range approved. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). However, this percentage "should be adjusted . . . 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. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

Here, Class Counsel seeks a "percentage-of-recovery" fee in the amount of 33.33% of the $1,400,000.00 common fund settlement obtained on behalf of the Settlement Class. While this is greater than the "benchmark" percentage, it is supported by many of the factors the Ninth Circuit recognizes warrant an upward adjustment to determine a reasonable fee. The requested fees are further supported by using the lodestar method as a "cross-check" for reasonableness.

A. Given Class Counsel's burden and the results obtained on behalf of the Settlement Class, one-third of recovery constitutes a fair and reasonable fee.

Based on the circumstances of the present case, set forth in detail below, application of the 25% benchmark rate is inappropriate, and Class Counsel is entitled to a fair and reasonable fee of one-third of recovery. Indeed, "[t]he 25% benchmark

rate, although a starting point for analysis, may be inappropriate in some cases." *Vizcaino*, 290 F.3d at 1048. "Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Id.* In *Vizcaino*, the Ninth Circuit analyzed several non-exhaustive factors courts may consider in assessing a request for attorneys' fees calculated using the percentage-of-recovery method. 290 F.3d at 1047-50. These factors include the extent to which class counsel "achieved exceptional results for the class," the risks undertaken by class counsel in litigating the action, whether counsel's performance "generated benefits beyond the cash settlement fund," the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis. *Id.*

This Court has previously approved an attorneys' fee award of one-third of recovery, considering circumstances such as "the extraordinary results achieved on behalf of the Settlement Class, the risk to the Settlement Class of continued litigation, the skill and expertise demonstrated by Class Counsel, and . . . the absence of any objection after notice." *Hageman v. AT & T Mobility LLC*, No. CV-13-50-BLG-RWA, 2015 WL 9855925, at *4 (D. Mont. Feb. 11, 2015). Because analogous circumstances are present here, one-third of recovery is a fair and reasonable fee.

1. As a preliminary matter, weight should be given to the judgment of the parties as to fee reasonableness.

"A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Ideally, of course, litigants will settle the amount of the fee." *Id.* While the Court must perform its own evaluation to verify that the requested fee is reasonable and not the product of collusion, weight should be given to the judgment of the parties and their counsel where the fees were agreed to through arm's length negotiations. Consequently, with the City and FCS Group agreeing not to oppose Class Counsel's fee request, the request should be considered presumptively reasonable.

2. Class Counsel achieved exceptional results.

"Exceptional results"—such as those achieved here—"are a relevant circumstance." *Id.* In *Vizcaino*, the district court awarded an attorneys' fee from a class settlement in excess of the 25% benchmark based, in part, on its finding that counsel achieved exceptional results for the class. *Id.* Particularly, "counsel pursued [the] case in the absence of supporting precedents, in the face of agreements signed by the class members forsaking benefits . . . and against [the defendant's] vigorous opposition throughout the litigation." *Id.*; *see also Six (6) Mexican Workers*, 904 F.2d at 1311 (noting that class counsel "obtained substantial success" in litigation that "involved complicated legal and factual issues").

Here, in the face of vigorous opposition from the City and FCS Group, Class Counsel achieved exceptional results on behalf of the Settlement Class in a challenging case that presented complex legal and factual issues. Class Counsel creatively applied takings law jurisprudence and Montana law in a unique way to formulate a facial challenge to impact fees and, with little in terms of supporting precedent, achieved class certification and, ultimately, a substantial recovery on behalf of each Settlement Class member. Even with Class Counsel's requested fees and costs coming from the Settlement fund, the Settlement amount is sufficient to not only correct the City's fixture unit error, ensuring that refunds go to the property owners that paid the fees,[2] but also provide substantial additional compensation for all impacted fee payers.

The prosecution of this case required skill, expertise, and hard work. The outcome reflects Class Counsel's effective advocacy and dedication to achieving fairness for the Settlement Class, despite the complex and novel issues involved. Considering the exceptional results achieved, Class Counsel's fee request is fair and reasonable.

[2] Originally, the City was going to "refund" the current property owners for its fixture unit error—not necessarily the owner who had paid the fee. The City was also requiring owners submit to an inspection of their properties to remain eligible for payment. As a result, many Settlement Class members were never eligible for a fixture unit refund or signed waivers, forsaking payment, instead of submitting to an inspection. However, those members will receive recovery under the terms of the Settlement.

3. Class Counsel faced risk and carried significant burden in litigating this action on a contingency basis.

"Risk is a relevant circumstance." *Vizcaino*, 290 F.3d at 1048. So too is the burden carried by class counsel in funding and litigating a complex class action without certainty of payment. *Id.* at 1050. The Ninth Circuit has approved a fee award of one-third due, in part, to "the complexity of the issues and the risks" faced by counsel. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). Similarly, in approving the fee request in *Vizcaino*, the Ninth Circuit considered that class counsel's representation of the class on a contingency basis "entailed hundreds of thousands of dollars of expense[]and required counsel to forgo significant other work." 290 F.3d at 1050; *see also Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (considering counsel's bearing the financial burden of the case).

Here, Class Counsel undertook this case on a pure contingency basis. As such, Class Counsel took on high risk, not only due to the uncertain result of the case but also the amount of time and money that was needed to obtain a result. In the face of the City and FCS Group's vigorous opposition, to reach this point, Class Counsel invested over 1,000 total work hours and incurred over $100,000.00 in expense.[3]

[3] Most of this expense was to compensate experts for their work in formulating opinions about complex factual issues involving the City's impact fees and was incurred before Class Counsel had even achieved class certification.

With hours and resources necessarily limited, Class Counsel was required to defer or decline other work to properly prosecute this case.

With the result still uncertain, Class Counsel skillfully negotiated a Settlement that provides for substantial compensation to each Settlement Class member which would be otherwise unavailable if Plaintiffs lost or were even only partially successful. Had this case been lost, Class Counsel would have received no compensation for their significant investment of time, effort, and resources—a risk and burden it was willing to take on behalf of the Class. Now, because Class Counsel's time, effort, and financial resources resulted in a very favorable result for the Settlement Class, its one-third contingency fee request is reasonable and should be awarded.

4. Fee awards in similar cases confirm Class Counsel's request is reasonable.

An oft-cited empirical study of attorneys' fees in common fund cases found that fees awarded average 32% of the recovery fund, and 34.74% when accounting for costs. Reagan W. Silber & Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 534 (1998). Silber and Goodrich recommend a one-third percentage-of-recovery fee award in common fund cases because "the attorneys will receive the best fee when the attorneys obtain the best recovery for the class." *Id.* "Hence, under the percentage approach, the class members and the class counsel have the same

interest—maximizing the recovery of the class." *Id.*; *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming one-third of fund fee award); *In re Pac. Enters.*, 47 F.3d at 379 (same). This is consistent with the traditional contingency fee arrangement and recovery in an individual suit of the same nature. *See Blum v. Stenson*, 465 U.S. 886, 904 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.").

The fees requested here are in line with similar awards in other class action cases. *See, e.g., Hageman*, 2015 WL 9855925, at *4 (awarding one-third of the common fund plus costs); *Mont. Land & Mineral Owners Ass'n, Inc. v. Devon Energy Corp.*, No. CV-05-30-H-RKS, 2007 WL 9710237, at *3-4 (D. Mont. Aug. 24, 2007) (same); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 450-51 (E.D. Cal. 2013) (same); *Heid v. CyraCom Int'l, Inc.*, No. 22-CV-1445-MMA, 2024 WL 4008650, at *9-13 (S.D. Cal. Aug. 30, 2024) (same); *Perkins v. Singh*, No. 3:19-CV-01157-AC, 2021 WL 5085119, at *2-3 (D. Or. Nov. 2, 2021) (same); *In re Atossa Genetics, Inc. Sec. Litig.*, No. 13-CV-01836-RSM, 2018 WL 3546176, at *1 (W.D. Wash. July 20, 2018) (same). These past awards demonstrate Class Counsel's request is likewise reasonable.

5. As of filing, no Settlement Class member has objected to the Settlement or Class Counsel's fee request.

Notice of the proposed Settlement has been disseminated to the Settlement Class. In the Notice, Class Counsel advised, in clear and concise plain language,

that it would be seeking the fees, costs, and service awards requested herein from the Settlement fund and explained how Settlement Class members could object to any aspect of the Settlement. (Doc. 213-1 at 27-28). With Notice, Class Counsel provided each Settlement Class member an estimate of their potential recovery when the fees, service awards, and the absolute maximum in costs requested are deducted from the Settlement fund. As of Class Counsel's filing of this Fee Application, no Settlement Class member has submitted an objection to the Settlement or Class Counsel's fee request.[4] Moreover, the ultimate recovery of each Settlement Class member will almost certainly be higher than the estimates provided, as Class Counsel anticipates their total costs will be lower than the $175,000.00 on which the estimates were based.

Upon filing, this Fee Application will also be uploaded to the Notice website maintained by Class Counsel for Settlement Class members to review. Ultimately, consistent with the Court's preliminary approval Order and the Settlement Agreement, if any objections to the Settlement are submitted, they will be provided to the Court in advance of the final approval hearing. However, at this juncture, it appears the Settlement Class overwhelmingly supports the Settlement. This is

[4] Instead, since dissemination of the Settlement Notice, over 75 Claim Information Forms have been submitted by Settlement Class members to ensure Class Counsel has up-to-date contact and mailing information. This is in addition to the over 125 Claim Information Forms submitted after the Court originally certified the Class.

highly probative of the fairness and reasonableness of Class Counsel's 33.33% fee request.

B. A lodestar method "cross-check" confirms the requested fees are reasonable.

"Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award." *Vizcaino*, 290 F.3d at 1050. To date, Class Counsel has invested 199.5 hours of partner attorney time, 854.3 hours of associate attorney time, and 359.4 hours of legal intern/staff time into this case. *See* Class Counsel's "Fee Hours" spreadsheet attached hereto as Exhibit A. While Kovacich Snipes Johnson, PC only performs legal work on a contingency fee basis, Laird Cowley, PLLC bills for the majority of its work, typically at rates of $325.00/hour for partner attorney work, $275.00/hour for associate attorney work, and $150.00/hour for legal intern/staff work. Class Counsel believes these rates are commensurate with a reasonable hourly rate for the region and for the experience of the lawyers and staff. At these rates, Class Counsel lodestar totals $353,680.00. Ex. A.

While Class Counsel's lodestar is less than the $466,666.67 fee requested here, in common fund cases, district courts have the discretion to, and usually do, "apply a risk multiplier when using the lodestar approach." *Stanton*, 327 F.3d at 967. "A 'multiplier' is a number, such as 1.5 or 2, by which the base lodestar figure is multiplied in order to increase (or decrease) the award of attorneys' fees on the

basis of such factors as the risk involved and the length of the proceedings." *Id.* at 968. "Foremost among these considerations [in applying a multiplier] is the benefit obtained for the class." *In re Bluetooth*, 654 at 942 (citing *Hensley*, 461 U.S. at 434-36 and *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009)). "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*"). "This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051. In common fund cases, "attorneys whose compensation depends on their winning the case[]must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *WPPSS*, 19 F.3d at 1300-01.

Here, Class Counsel's fee request would result in a +1.32 multiplier of its lodestar fee. Ex. A. This is less than the "1.5 to 2" multiplier suggested in *Staton*, 327 F.3d at 968, and is well within the range of multipliers for common fund cases surveyed by the Ninth Circuit and listed in the appendix to the *Vizcaino* decision, 290 F.3d at 1052. A 1.32 multiplier appropriately reflects the risk Class Counsel faced of non-payment. Accordingly, a lodestar cross-check further confirms Class Counsel's fee request is fair and reasonable.

II. The requested service awards are fair and reasonable.

The Ninth Circuit recognizes service awards for representative plaintiffs in a class action are permissible and do not render a class settlement unreasonable or unfair. *See Staton*, 327 F.3d at 976-77 (providing examples of approved service awards and amounts). Past service awards of $5,000.00 per class representative have been approved at the Ninth Circuit. *See, e.g., In re Mego Fin. Corp.*, 214 F.3d at 463. Here, the Class Representatives spent numerous hours preparing discovery responses, being deposed, attending mediation, and otherwise assisting Class Counsel in litigating this case on behalf of a class of several hundred members. They each personally incurred travel and other expenses as part of the discovery process. As of filing, no Settlement Class member has objected to the requested service awards. Accordingly, it is fair and reasonable to award each Class Representative $3,500.00 for their time, effort, and other contributions in litigating and ultimately favorably resolving this class action on behalf of the Settlement Class.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests their Fee Application be granted upon final approval of the Settlement.

DATED this 4th day of October, 2024.

LAIRD COWLEY, PLLC
and
KOVACICH SNIPES JOHNSON, PC

By: /s/ Caelan G. Brady

Class Counsel

TASK	HOURS		
	Partner	Associate	Legal Intern/Staff
Initial Case Review, Client Meetings, Conflict Checks, Background Research	40.4	19.6	70.2
Complaint	7.6	20.7	46.0
Initial Disclosures, Preliminary Pretrial Statement, Joint Discovery Plan, Stipulated Facts	0.4	1.4	6.2
Preliminary Pretrial Conference (Including Preparation, Travel)	8.3	3.5	3.1
First Set of Discovery Requests to City	0.5	8.8	6.4
Motion for Judgment on Pleadings: Brief in Opposition	6.1	38.4	2.7
City Requests for Inspection (Coordination, Travel)		29.4	4.6
Responses to City's First Set of Discovery Requests	0.8	12.0	1.0
Depositions - Own Clients, Witnesses (Preparation, Defense, Travel)	16.0	36.2	3.6
Motion for Class Certification: Brief in Support	3.0	53.1	7.8
Experts and Opinions (Liability, Damages, Rebuttal) (Compiling Permit Data) (Analyzing Opposition)	23.1	78.8	45.1
Second Set of Discovery Requests to City	0.5	6.7	1.4
Motion to Vacate and Stay: Brief in Opposition	1.0	13.9	1.2
Responses to City's Second Set of Discovery Requests	0.5	19.8	3.9
Rule 30(b)(6) Deposition of City	22.0	25.5	0.8
Third Set of Discovery Requests to City	0.2	3.8	0.6
Motion for Class Certification: Reply in Support	1.5	52.3	7.3
Motions to Amend Answer and Third-Party Answer: Brief in Opposition	0.5	11.3	5.6
Motion in limine (Campbell Trail Fees): Brief in Opposition	0.3	8.1	2.6
Responses to City's Third Set of Discovery Requests	0.5	11.0	4.6
Hearing on Class Certification (Preparation, Argument, Travel)	2.1	19.9	1.3
Petition for Permissive Appeal: Brief in Opposition	0.8	45.1	15.0
Class Notice Research, Motion, Dissemination (Initial and Settlement)	7.2	43.5	56.6
Pretrial Motions, Briefing (Affirmative Defenses, Fixture Count Waivers, Impact Fee Statute)	0.6	33.6	2.2
FCS Group Motion in limine (Campbell Opinions): Brief in Opposition	0.4	30.6	10.9
City Motion to Stay Pending *Sheetz* or Amend: Brief in Opposition	4.0	1.0	2.3
Pretrial Motions Reply Briefs	0.6	24.8	2.4
FCS Group/City Motions for Summary Judgment: Brief in Opposition	0.8	98.7	8.5
Mediation (Preparation, Brochure, Travel)	31.3	26.9	3.5
Settlement Negotiations, Settlement Agreement, Preliminary Approval Documents	6.4	36.7	0.8
Status, Scheduling Conferences	1.5	9.6	3.4
Client Communication	6.0	16.2	1.4
Developing Litigation Strategy	4.6	10.5	5.6
Scheduling, Calendaring Deadlines		0.3	8.7
Other Discovery Analysis		0.4	3.0
Settlement Notice		2.2	9.1
TOTAL	**199.5**	**854.3**	**359.4**
	x	x	x
Laird Cowley, PLLC Billable Rates ($/hour):	325.00	275.00	150.00
	$64,837.50	$234,932.50	$53,910.00

Fee Total with Laird Cowley Billable Rates: $ 353,680.00

Requested Fee: $ 466,666.67

Lodestar Multiplier: **1.32**

Exhibit A