Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
Roger N. Heller (State Bar No. 215348)
rheller@lchb.com
Avery S. Halfon (admitted *pro hac vice*)
ahalfon@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3336
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Richard D. McCune (State Bar No. 132124)
rdm@mccunewright.com
Elaine S. Kusel (admitted *pro hac vice*)
esk@mccunewright.com
MCCUNE WRIGHT AREVALO, LLP
3281 E. Guasti Road, Suite 100
Ontario, CA 91761
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Settlement Class Counsel

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.; and DOES 1 through 10, inclusive,

Defendant.

Case No. 2:14-cv-01855-GW(GJSx)

NOTICE OF MOTION AND MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND FOR PLAINTIFF SERVICE AWARD

Date: August 10, 2020
Time: 8:30 a.m.
Judge: Hon. George H. Wu

TO THE ABOVE-NAMED COURT AND TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 10, 2020, at 8:30 a.m., at 350 West 1st Street, Los Angeles, CA, 90012, Courtroom 9D, 9th Floor, Plaintiff Donald M.

Lusnak ("Plaintiff") and Settlement Class Counsel[1] will and hereby do move the Court, under Federal Rule of Civil Procedure 23, for an Order: (a) awarding Settlement Class Counsel attorneys' fees in the amount of $8,511,043.66, plus reimbursement of litigation expenses in the amount of $238,956.34; and (b) awarding Plaintiff a service award of $10,000 for his commitment and effort on behalf of the Settlement Class, with such attorneys' fees, expenses, and service award to be paid from the $35 million common Settlement Consideration.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the Settlement Agreement (including all exhibits thereto), the papers filed in support of preliminary settlement approval, the Court's Preliminary Approval Order (Dkt. 117), the declarations of Donald M. Lusnak, Roger N. Heller, Richard D. McCune, and Cameron R. Azari, Epiq Class Action & Claims Solutions, Inc., filed herewith, the argument of counsel, all papers and records on file in this matter, and such other matters as the Court may consider.

As discussed in the accompanying memorandum of points and authorities, the amounts requested are reasonable and appropriate under applicable standards and are well justified under the circumstances of this case.

[1] Settlement Class Counsel are those counsel so appointed pursuant to the Court's Preliminary Approval Order (Dkt. 117, ¶ 9): McCune Wright Arevalo LLP (Richard D. McCune and Elaine Kusel) and Lieff Cabraser Heimann & Bernstein, LLP (Roger N. Heller and Michael W. Sobol).

Dated: May 19, 2020

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: /s/ *Roger N. Heller*
Roger N. Heller

Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
Roger N. Heller (State Bar No. 215348)
rheller@lchb.com
Avery S. Halfon (admitted pro hac vice)
ahalfon@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
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ahalfon@lchb.com
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Telephone: (415) 956-1000
Facsimile: (415) 956-1008

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND EXPENSES AND FOR PLAINTIFF SERVICE AWARD

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INTRODUCTION

Having taken on this novel and challenging case and prosecuted it vigorously for five years, and having achieved excellent relief for the hundreds of thousands of California consumers who comprise the Settlement Class, Settlement Class Counsel respectfully move the Court for an award of attorneys' fees of $8,511,043.66 and reimbursement of $238,956.34 in litigation expenses.

As discussed herein, the requested fee is fair, reasonable, and appropriate under applicable standards. The requested fee is approximately 24.32% of the $35 million non-reversionary common settlement fund achieved—i.e., lower than the "benchmark" Ninth Circuit courts apply in common fund cases—and is well justified under the circumstances of this litigation, including the excellent result achieved.

The $35 million settlement amount represents approximately **80.7%** of the alleged class damages (i.e., the unpaid escrow interest), a very strong result. Moreover, Settlement Class Counsel's efforts in this case have also generated, and will continue to generate, substantial monetary benefits above and beyond the $35 million common settlement fund. Because of Plaintiff's success in the appeal in this case, Bank of America changed its policy regarding paying escrow interest in California, resulting in millions of dollars in *additional* escrow interest (not included in the $35 million) being paid each year (beginning last year, 2019) to the Settlement Class Members and other California Bank of America customers. Including those additional payments, the fee requested here would be less than 20% of the total benefits achieved.

Further supporting the requested fee is the fact that Settlement Class Counsel filed this case at a time when the Bank's anticipated federal preemption defense presented a daunting challenge. The preemption issue—arguably the core legal issue in the case—was entirely unsettled at the time. Settlement Class Counsel assumed great risks in taking on that defense and in prosecuting this case for years

on a purely contingency basis.

The result achieved here would not have been possible but for the hard work and dedication of Settlement Class Counsel. As the Court is aware, the Settlement here follows years of hard-fought litigation—including: Bank of America's motion to dismiss; Plaintiff's successful appeal to the Ninth Circuit; Bank of America's en banc petition (which was supported by the Office of the Comptroller of the Currency); Bank of America's certiorari petition; significant discovery and expert practice following remand to this Court; Bank of America's summary judgment motion and motion to stay; and Plaintiff's class certification motion, which was fully briefed and scheduled to be heard when the parties reached the Settlement.

In all, Settlement Class Counsel have devoted more than 3,123.4 hours to the investigation, discovery, prosecution, and settlement of this litigation, for a total combined lodestar to date of more than $2,147,742.00, with significant work still to be done in connection with obtaining final settlement approval and implementing the Settlement should the Court approve it. Under a lodestar-multiplier cross-check, the requested fee represents a multiplier of approximately 3.963 (and falling, as more work is performed). That is within the normal range in this Circuit. And while it is towards the higher end of the most typical range, it is well justified under the unique circumstances here—including: the difficult odds Settlement Class Counsel faced from the outset and the substantial effort they expended over the years in being the first to take on and defeat the Bank's NBA preemption defense (setting precedent affecting hundreds of thousands of mortgage customers if not more); the particularly strong result achieved (a more than 80% recovery); the millions of dollars in *additional* escrow interest (on top of the settlement payments) that customers have received and will receive annually because of Settlement Class Counsel's efforts and the resulting practice change; and the fact that Settlement Class Counsel's particular experience litigating National Bank Act preemption

issues made them uniquely suited to litigate the challenging NBA preemption defense and related challenging issues in this case.

For the foregoing reasons and the others detailed below, Settlement Class Counsel respectfully request that the Court grant their motion for attorneys' fees and expenses, and grant Plaintiff a service award in the amount of $10,000, to compensate him for his commitment and effort on behalf of the Settlement Class.

BACKGROUND

I. The Settlement Represents a Very Strong Result for the Settlement Class

A. $35 Million Non-Reversionary Common Settlement Fund

Under the Settlement, Bank of America will pay thirty-five million dollars ($35 million) to establish a non-reversionary common settlement fund (the "Settlement Consideration"), which will be used to pay the settlement payments to Settlement Class Members, the costs of notice and other costs of the Settlement Administrator, and any attorneys' fees and expenses and any Plaintiff service award granted by the Court.

The $35 million settlement amount represents approximately **80.7%** of the total potential class damages (i.e., the unpaid escrow interest) for the class period (July 1, 2008 through December 31, 2018).[2] (Settlement, § 3.2)

B. Direct Payments to Settlement Class Members

The entirety of the Net Settlement Amount—i.e., the $35 million Settlement Consideration, less: notice and administration costs, Court-awarded attorneys' fees and expenses, and any Plaintiff service award—will be distributed to the Settlement

[2] Plaintiff's preliminary approval motion estimated that the $35 million was about 76.1% of an estimated $46 million in damages for the class period. As explained therein, Plaintiff's expert, Arthur Olsen, had calculated class damages for the 2010 through 2018 time period, but had not yet received data for the first 18 months of the class period (i.e., for July 1, 2008 through December 31, 2009). That remaining data has now been produced by the Bank and analyzed by Mr. Olsen, resulting in a total class damages calculation (for the entire class period) of approximately $43.37 million (i.e., the damages for the first 18 months were $2-3 million lower than had been estimated). $35 million is about 80.7% of that figure.

Class Members directly, via mailed checks, without the need for Settlement Class Members to submit claims.

The Net Settlement Amount will be divided among the mortgage loans in the Settlement Class in amounts based on the unpaid escrow interest each of them is allegedly owed for the settlement class period, July 1, 2008 through December 31, 2018. Specifically, each loan in the Settlement Class will receive: (a) a minimum payment of $5.00; plus (b) a portion of the remaining settlement payment funds—i.e., most of the funds (the Net Settlement Amount minus the minimum payments)—which will be allocated among the loans in the Settlement Class (on top of the minimum payment) in amounts directly proportionate to the alleged unpaid escrow interest for each loan.[3] (Settlement, § 3.4)

Within 45 days after the Effective Date (following the payment amount calculations and Bank of America's provision of updated mailing address information for current customers), the Settlement Administrator will mail the settlement payments to the Settlement Class Members. The settlement checks will be valid for 180 days. For any checks that are returned undeliverable with forwarding address information, the Settlement Administrator will re-mail the check to the new address indicated. For any checks that are returned undeliverable without forwarding address information, the Settlement Administrator will conduct a skip-trace to try to identify an updated address and will re-mail the check if an updated address is identified. (Settlement, §§ 3.4, 3.5)

For any checks that remain uncashed or are deemed undeliverable by the Settlement Administrator one year after the checks are initially mailed, such residual funds will be treated as unclaimed property of the corresponding Settlement Class Members (i.e., of those who have not negotiated their checks),

[3] There are 837,372 loans within the Settlement Class. The average settlement payment is expected to be approximately $30, based on the administrative cost estimate (Azari Decl., filed herewith, ¶ 25) and assuming the Court awards attorneys' fees, expenses, and a service award in the amounts requested.

subject to applicable state unclaimed property procedures, pursuant to which the funds will remain available for the Settlement Class Members in question to claim. (Settlement, § 3.5(c))

C. Bank of America's Change in Practice

In addition to the $35 million common settlement fund, because of Plaintiff's success in the appeal in this case, Bank of America changed its policy and practice regarding the payment of escrow interest. Specifically, whereas Bank of America had previously paid escrow interest only for some California loans, beginning in 2019 and going forward, Bank of America now pays escrow interest for *all* residential mortgage escrow accounts in California. (Settlement, Recitals ¶ 5) This has resulted, and will result, in millions of dollars in *additional* escrow interest being paid each year to Settlement Class Members who continue to have active escrow accounts and other California Bank of America customers.

D. Class Notice Plan

The Settlement also provides for a robust notice plan, which has been approved by the Court and is being implemented by the Settlement Administrator and the parties, and includes direct notice to Settlement Class Members, publication notice, and the establishment of a dedicated settlement website and toll-free number where Settlement Class Members can get additional information. Settlement, § 4.2; *see also generally* Azari Decl., filed herewith.

II. Settlement Class Counsel Expended Considerable Time and Resources, and Overcame Substantial Risks and Challenges, in Achieving the Result Here.

Settlement Class Counsel are extremely proud of the result achieved for the Settlement Class in this case, and of the impact this case has had and will have for Bank of America's California mortgage customers going forward (and of the clarification of the law they achieved, which will benefit other mortgage customers). The path to get there was not an easy one, to say the least.

This was a risky case from the start. While other escrow interest cases have

now been filed against a variety of national banks *after* the Ninth Circuit's 2018 no-preemption ruling in this case, the landscape was very different when this case was filed back in March 2014. At that time, Bank of America and several other national banks were adamant that the National Bank Act preempted application of state laws like Cal. Civ. Code § 2954.8(a), even after the passage of the Dodd-Frank Act,[4] and no court had held otherwise. It was thus very much uncertain (quite arguably, a long shot) that this case would ever be successful or generate any fee at all. Nevertheless, Settlement Class Counsel agreed to represent Plaintiff and to prosecute this case on behalf of the class entirely on a contingency basis.

Against this backdrop, and to be in a position to file this case, Settlement Class Counsel conducted an extensive investigation into the factual and legal issues involved, including analyzing Bank of America's relevant practices regarding the establishment and maintenance of escrow accounts and the payment of escrow interest, investigating the impact of the Dodd-Frank Act on such practices and on the practices of other lenders in California, identifying potential fact witnesses, and speaking with borrowers about their experiences. Settlement Class Counsel also thoroughly researched and analyzed the legal issues raised by the claims pled and Bank of America's defenses and potential defenses, including but not limited to conducting extensive research throughout the course of the proceedings on issues related to federal preemption. Heller Decl., ¶¶ 5-10.

Moreover, as the Court is aware, there has been extensive litigation in this case, requiring very substantial commitments of time and resources from Settlement Class Counsel. That litigation has included, *inter alia*: Bank of America's motion

[4] Several national banks still adhere to that view and decline to pay escrow interest on that basis. Bank of America itself continues to argue, in cases in New York and Maryland that were filed after the Ninth Circuit's opinion in this case, that NBA preemption applies, though following the Ninth Circuit's ruling Bank of America changed its practice in California and began paying escrow interest for all California escrow accounts beginning in 2019. (Settlement, Recitals, ¶ 5)

to dismiss; Plaintiff's successful appeal to the Ninth Circuit; Bank of America's petition for en banc review (which was supported by the Office of Comptroller of the Currency and certain industry trade groups); Bank of America's motion to stay the mandate; Bank of America's petition for Supreme Court certiorari review; Bank of America's motion for summary judgment; Bank of America's motion to stay; and Plaintiff's motion for class certification, which was fully briefed and scheduled to be heard when the parties reached the Settlement. The parties' respective filings in connection with the class certification, summary judgment, and stay motions, alone, were voluminous and included numerous declarations, deposition excerpts, and supporting documents. Moreover, each party designated experts and submitted expert reports from their respective experts (and, for Plaintiff's expert, a supplemental report), both of whom were deposed. Heller Decl., ¶¶ 5-10, 13.

Briefing federal preemption and related issues—in this Court, in the Ninth Circuit, and in opposing Bank of America's certiorari petition—in addition to the other issues raised by the parties' various motions and on appeal, required exhaustive research and analysis of complex subjects such as the history and scope of National Bank Act preemption, the history of regulation in the banking industry; the history and purposes of the Dodd-Frank Act; and the Dodd Frank Act's impact on regulation in the area, on deference given to the regulators, and on preemption analysis and standards. Heller Decl., ¶¶ 7-10.

In addition, Settlement Class Counsel conducted extensive formal discovery. Among other things, Settlement Class Counsel deposed three pertinent Bank of America employee witnesses about the issues in this case (including two Rule 30(b)(6) corporate designees), reviewed and analyzed approximately 25,000 pages of pertinent documents and data produced by Bank of America,[5] and propounded

[5] Some of the files were produced by Bank of America in native format. If those native files had been produced in pdf format, the total number of pages produced would have been significantly greater than 25,000 pages.

and responded to numerous written discovery requests. The Bank's production included, *inter alia*, internal documents and voluminous historical loan and transactional data for Bank of America's California mortgage customers (consisting of millions or records), the contours of which were negotiated by counsel. This information was key to identifying the class members and demonstrating the ability to measure class damages using the data. Moreover, Plaintiff was deposed by Bank of America's counsel (Settlement Class Counsel defended the deposition), and the parties deposed each other's designated experts. Further, counsel for the parties held multiple meet and confer sessions regarding, *inter alia*, the scope and details of Bank of America's electronic document search, the nature and scope of the class member loan and transactional data to be produced by Bank of America, and to resolve various discovery disputes and potential disputes without the need for Court intervention. Heller Decl., ¶ 12.

Moreover, Settlement Class Counsel worked hard on negotiating and documenting the Settlement that is before the Court for its consideration. As previously reported, the Settlement here is the product of hard-fought, arms-length negotiations. On October 28, 2019, with Plaintiff's class certification motion fully briefed and the hearing on that motion scheduled to occur on November 14, 2019, the parties participated in a full-day mediation session with Eric Green of Resolutions LLC. Through arms-length negotiations, facilitated by Prof. Green, the parties reached an agreement in principle on the terms of a settlement.[6]

After reaching an agreement in principle, Settlement Class Counsel worked diligently, along with Bank of America's counsel, in drafting the written settlement agreement and exhibits and selecting a proposed Settlement Administrator, and worked on the preliminary approval papers. Following preliminary approval, they

[6] The parties did not discuss the issue of Settlement Class Counsel's attorneys' fees and expenses as part of the negotiations (other than that any amount awarded would be paid from the common settlement fund). Heller Decl., ¶ 14.

have worked with the Settlement Administrator, Calculation Advisor, and Bank of America's counsel on implementing the class notice plan, have continued to speak with Settlement Class Members (following dissemination of the class notice), and have worked on drafting final settlement approval papers. Heller Decl., ¶¶ 15-16.

ARGUMENT

I. The Requested Fee is Reasonable and Appropriate Under Applicable Standards and is Well Justified Under the Circumstances of this Case.

"[L]awyer[s] who recover[] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). In deciding whether a requested fee is appropriate, the Court's task is to determine whether such amount is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294-95 n.2 (9th Cir. 1994) (overriding principle is that the fee award be "reasonable under the circumstances").

In common fund cases, courts in this Circuit may use the "percentage-of-the-fund" or the "lodestar-multiplier" method. *See Wash. Pub. Power*, 19 F.3d at 1296. Use of the percentage-of-the-fund method in common fund cases, however, is dominant. *Jasper v. C.R. England, Inc.*, No. CV 08-5266-GW(CWX), 2014 WL 12577426, at *7 (C.D. Cal. Nov. 3, 2014) ("Despite this discretion, use of the percentage method in common fund cases appears to be dominant.") (citing cases). Indeed, the fairest way to calculate a reasonable fee where, as here, contingency fee litigation has produced common monetary benefits is by awarding class counsel a percentage of the total funds achieved. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The percentage method comports with the legal marketplace, where counsel's success is frequently measured in terms of the

results counsel has achieved. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993). By assessing the amount of the fee in terms of the amount of the benefit conferred on the class, the percentage method "more accurately reflects the economics of litigation practice" which, "given the uncertainties and hazards of litigation, must necessarily be result-oriented." *Id*. Moreover, the percentage method most effectively aligns the incentives of the class members and their counsel, encouraging counsel to focus on maximizing the relief available to the class. *Vizcaino*, 290 F.3d at 1050 n.5.

A. The Requested Fee is Less Than the Ninth Circuit "Benchmark" and is Reasonable Under the Circumstances

In the Ninth Circuit, the "benchmark" for a fee award in a common fund case is 25 percent of the fund achieved. *Vizcaino*, 290 F.3d at 1048-1050. Courts may stray from the benchmark, in either direction, if warranted by the particular circumstances of the case. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011). The fee requested here ($8,511,043.66) represents approximately 24.32% of the $35 million non-reversionary common settlement fund, which is less than the Ninth Circuit benchmark and is well justified under the circumstances of this case.

Courts in the Ninth Circuit consider a number of factors to determine the appropriate percentage to apply under the percentage-of-the-fund method, including: (1) the results achieved; (2) whether there are benefits to the class beyond the generation of a cash fund; (3) the contingent nature of the fee; and (4) the complexity of the case and skill required of class counsel. *Vizcaino*, 290 F.3d at 1048-1050. All of these factors support granting the requested fee here.

1. Settlement Class Counsel Achieved a Very Strong Monetary Result for the Settlement Class.

The benefit secured for the class is generally considered the most important factor in evaluating the reasonableness of a requested fee. *In re Bluetooth*, 654 F.3d at 942; *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008);

see also Federal Judicial Center, Manual for Complex Litigation, § 27.71, p. 336 (4th ed. 2004) (the "fundamental focus is on the result actually achieved for class members").

The $35 million settlement amount here represents approximately **80.7%** of the potential class damages (i.e., the alleged unpaid escrow interest) for the class period (July 1, 2008 through December 31, 2018). That is a very strong result for the Settlement Class, particularly given the risks and delay of continued litigation. This factor weighs heavily in favor of approving the requested fee. *See Bautista v. Harvest Mgmt. Sub LLC*, No. CV1210004FMOCWX, 2014 WL 12579822, at *12 (C.D. Cal. July 14, 2014) (awarding 30% fee where class recovery was approximately 30% of potential damages).

2. Settlement Class Counsel Also Achieved a Practice Change, Generating Millions of Dollars in Additional Class Benefits On Top of the Settlement Fund.

The Ninth Circuit has repeatedly recognized that where class counsel achieves significant benefits that are not accounted for in the dollar value of the common settlement fund, the court "should consider the value of [such] relief as a relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees." *Staton*, 327 F.3d at 974; *see also, e.g.*, *Vizcaino*, 290 F.3d at 1049 (affirming 28% fee award where "counsel's performance generated benefits beyond the cash settlement fund," including practice changes that would provide additional monetary benefits to class members and other employees of defendant, and helped clarify the law in the area); *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1121 (C.D. Cal. 2008) (approving 25% fee where "independently of the monetary settlement" the litigation resulted in a ruling that the practices at issue were unconstitutional and the County stopped them").

Here, as a direct result of this case—and, in particular because of Plaintiff's success in the appeal to the Ninth Circuit—Bank of America changed its escrow

interest policy in California. Whereas Bank of America had previously paid escrow interest for only some California loans, starting in 2019 and going forward, Bank of America now pays 2% interest for *all* California mortgage escrow account balances. (Settlement Recitals, ¶ 5). This practice change has already resulted in, and will continue to result in, millions of dollars of additional interest *each year* being received by Settlement Class Members and other Bank of America California customers. But for Settlement Class Counsel's efforts in vigorously pursuing this case and their persistence in challenging the Bank's preemption defense, these additional interest payments simply would not happen.[7] This additional interest is not accounted for in the $35 million common settlement fund amount.

As previously reported,[8] from 2010 to 2018 the average annual unpaid interest for Bank of America California escrow accounts was approximately $4.51 million per year. While the yearly figure increased some during the class period, even conservatively assuming a steady $4.51 million per year in 2019 and beyond, and even if Settlement Class Counsel were given credit for just two years (2019 and 2020) of this additional interest (even though the additional interest will likely extend well beyond that), that would drive the total amount achieved by Settlement Class Counsel in this case to over $44 million. While a 24.32% fee is well justified here for all of the reasons discussed herein, it bears noting that including just two years of the additional interest in the denominator here would make the would-be fee percentage requested here about 19.3%, substantially lower than the Ninth

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[7] As discussed above, the Bank's position in California prior to the Ninth Circuit's ruling in this case was that NBA preemption applied. And Bank of America still asserts that NBA preemption applies in follow-on cases filed against Bank of America (after the Ninth Circuit's ruling) under New York and Maryland state escrow interest laws. *Hymes v. Bank of America, N.A*, E.D.N.Y. Case No. 2:18-cv-02352-RRM-ARL; *Cantero v. Bank Of America, N.A.*, E.D.N.Y. Case No. 1:18-cv-04157-RRM-ARL; *Clark v. Bank of America, N.A.*, D. Md. Case No. 1:18-cv-03672-SAG.

[8] Dkt. 111 at 16, n.9

Circuit benchmark.[9]

In all events, these additional benefits provide further strong support for the fee that is requested. As does the fact that the no-preemption ruling achieved clarified the law in this area to the benefit of other mortgage borrowers.

3. Settlement Class Counsel Assumed Significant Risk in Prosecuting This Case on a Contingency Basis

Courts have long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk that they might be paid nothing at all for their work. *Wash. Pub. Power*, 19 F.3d at 1299 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *Vizcaino,* 290 F.3d at 1051 (courts reward successful class counsel in contingency case "by paying them a premium over their normal hourly rates"); *see also In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWX), 2014 WL 12591624, at *5 (C.D. Cal. Jan. 10, 2014) ("The financial burden carried by Plaintiffs' counsel in pursuing this complex case without any assurances of payment militates in favor of awarding the sought fees. In addition, while Plaintiffs' counsel seek the standard 25% of the fund, that percentage is also less than the typically agreed-upon percentages in private contingency fee arrangements.").

Settlement Class Counsel prosecuted this matter on a purely contingency basis, agreeing to advance all necessary expenses and that they would only receive

[9] Most of this additional interest, certainly for 2019 and 2020, has been and will be paid to Settlement Class Members (those who continue to have active escrow accounts), though some of it will also be paid to newer California Bank of America customers whose mortgage escrow balances start after the end of the class period here (i.e., after December 31, 2018).

a fee if there was a recovery.[10] Their outlay of resources has been significant, and they expended these resources despite the very real risk that they may never be compensated at all.

Indeed, the risk assumed was significantly magnified in this case. The federal preemption issue, alone, presented a very serious hurdle from the start and for much, if not all, of the five plus years this case has been pending. As discussed above, when Settlement Class Counsel agreed to take this case on in 2014, Bank of America and several other national banks were adamant that the NBA preempted state escrow interest laws like Cal. Civ. Code § 2954.8(a) (even after the Dodd-Frank Act), and no court had held otherwise. In fact, Bank of America continues to take that position in other states now (despite changing its practice in California following the Ninth Circuit's ruling). In order to overcome this defense, Settlement Class Counsel had to litigate this very complex issue in this Court, on appeal in the Ninth Circuit, and in opposing Bank of America's Supreme Court certiorari petition. In doing so, they had to contend not only with the Bank and its highly skilled and experienced counsel, but also with the Office of the Comptroller of the Currency and various industry trade groups, which filed amicus briefs in support of Bank of America's preemption position.

Even after the Supreme Court's denial of certiorari review, Plaintiff and Settlement Class Counsel continued to face multiple formidable defenses and challenges, including contending with the arguments raised in Bank of America's opposition to certifying a litigation class for trial and in the Bank's motion for summary judgment. Also, Settlement Class Counsel had to demonstrate that they could use the Bank's historical records to identify the consumers who were affected and the amount of their unpaid escrow interest.

Settlement Class Counsel's "substantial outlay, when there is a risk that that

[10] Heller Decl., ¶ 29; McCune Decl., ¶ 27._

none of it will be recovered, further supports the award of the requested fees" here. *Omnivision*, 559 F. Supp. 2d at 1047; *Cheng Jiangchen v. Rentech, Inc.*, No. CV 17-1490-GW(FFMX), 2019 WL 5173771, at *10 (C.D. Cal. Oct. 10, 2019) ("Lead Counsel have invested 1,898.89 hours of work with no compensation [and they did] so while facing the real possibility of no recovery. This factor also supports the requested fees.").[11]

4. Successfully Prosecuting This Matter Required Significant Skill and Effort on the Part of Settlement Class Counsel.

The "prosecution and management of a complex…class action requires unique legal skills and abilities" that are to be considered when determining a reasonable fee. *In re Omnivision*, 559 F. Supp. 2d at 1047 (citation omitted); *see also Vizcaino*, 290 F.3d at 1048 (the complexity of the issues involved and skill and effort displayed by class counsel are additional factors used in determining the proper fee under the percentage-of-the-fund approach).

Settlement Class Counsel here are experienced litigators who have successfully prosecuted numerous large consumer class actions and other complex matters. Of particular relevance to this case, their experience includes litigating numerous cases against financial institutions including multiple cases that involved National Bank Act preemption defenses.[12] Their relevant experience and skill were very important to achieving a strong result for the Settlement Class in this matter.

Moreover, investigating, prosecuting, and resolving this action, over more than five years, required considerable commitments of time and resources by Settlement Class Counsel. Among other important tasks, Settlement Class Counsel

[11] Settlement Class Counsel also had to turn down opportunities to work on other cases to devote the appropriate amount of time and resources to this matter. Heller Decl., ¶ 28; McCune Decl., ¶ 26 Their devotion to this matter in lieu of other opportunities further supports the requested fee award here. *See Vizcaino*, 290 F.3d at 1050; *In re Heritage Bond Litig.*, No. 02-ML-1475 DT, 2005 WL 1594403, at *21 (C.D. Cal. Jun. 10, 2005).

[12] Heller Decl., ¶¶ 2-4; McCune Decl., ¶¶ 2-17.

have done the following:

- Conducted extensive factual investigation and legal research;
- Opposed Bank of America's motion to dismiss;
- Briefed and argued Plaintiff's successful appeal to the Ninth Circuit;
- Opposed Bank of America's certiorari petition and the amicus briefs;[13]
- Conducted extensive formal discovery;
- Engaged in significant expert practice;
- Briefed Plaintiff's class certification motion, which was fully briefed and scheduled for hearing when the case resolved;
- Opposed the Bank's motion for summary judgment and motion to stay;
- Prepared for and participated in a full-day mediation session;
- Negotiated the Settlement and drafted the settlement papers and exhibits together with Bank of America's counsel;
- Worked with the Settlement Administrator, Calculation Advisor, and Bank of America on implementation of the class notice and Settlement (ongoing); and
- Prepared settlement approval papers and argued for approval (ongoing).

Settlement Class Counsel's relevant skills and hard work in this case were critical to the result achieved.

Moreover, the quality of the opposition they faced should also be considered. *See Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (C.D. Cal. 2013) ("The quality of opposing counsel is important in evaluating the quality of Class Counsel's work."). As the Court is aware, Bank of America was represented in this case by superb counsel, which deployed a very formidable team of highly skilled lawyers with significant experience litigating large class actions involving financial institutions, preemption issues, and other issues. This factor further supports the reasonableness of the requested fee.

B. A Lodestar-Multiplier Cross-Check Confirms The Reasonableness of the Fee Requested.

A court applying the percentage-of-the-fund method may, but is not required

[13] For the Supreme Court briefing, Settlement Class Counsel further enlisted, at their expense, the assistance of Prof. Samuel Issacharoff, NYU School of Law. Heller Decl., ¶ 10.

to, use the lodestar-multiplier method as a "cross-check on the reasonableness of a percentage figure." *Vizcaino*, 290 F.3d at 1050 & n.5 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award.").[14] A lodestar-multiplier cross-check confirms that the requested fee here is reasonable.

1. Settlement Class Counsel's Hourly Rates are Reasonable.

The accompanying Settlement Class Counsel declarations set forth the billing rates used to calculate their lodestars, and summarize the experience of the attorney timekeepers who worked on this litigation.[15] In assessing the reasonableness of an attorney's hourly rate, courts consider whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984). It is appropriate to apply each biller's current rates for all hours, regardless of when the work was performed, as a means of compensating for the delay in payment. *Wash. Pub. Power*, 19 F.3d at 1305; *Fischel v. Equitable Life Assur. Soc'y of U.S.*, 307 F.3d 997, 1010 (9th Cir. 2002).

Settlement Class Counsel here are experienced, highly regarded members of the bar. They have brought to this case extensive experience in the area of consumer class actions and complex litigation, including specific experience litigating and settling cases regarding financial institutions (including cases

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[14] *See also In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09 MDL 2007-GW(PJWX), 2014 WL 12591624, at *6 (C.D. Cal. Jan. 10, 2014) ("[U]nder Ninth Circuit precedent—considering the Court finds the 25% award otherwise adequately supported by the record—the Court need not necessarily engage in such a cross-check to reach its conclusion that the sought fees are reasonable under the circumstances.") (citing cases); *Craft*, 624 F. Supp. 2d at 1122 ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point."); *Aichele v. City of Los Angeles*, No. CV-12-10863-DMG, 2015 WL 5286028, at *6 (C.D. Cal. Sept. 9, 2015) (same).

[15] Heller Decl., ¶¶ 2-4, Exs. A-B; McCune Decl., ¶¶ 2-17, 30.

involving federal preemption issues).[16] Their customary rates, which were used in calculating the lodestar here, are in line with prevailing rates in this District and have repeatedly been approved by Ninth Circuit courts and other courts.[17]

2. The Number of Hours That Settlement Class Counsel Worked is Reasonable.

The accompanying declarations also set forth the number of hours that Settlement Class Counsel have worked and describe the work performed. As set forth therein, Settlement Class Counsel and their staffs have devoted a total of more than 3,123.4 hours to this litigation, and have a total unadjusted lodestar to date of $2,147,742.00. These amounts do not include the additional time that Settlement Class Counsel will have to spend going forward, *inter alia*, in obtaining final approval of and implementing the Settlement should it be approved.

The number of hours that Settlement Class Counsel have billed is reasonable. The numerous tasks that Settlement Class Counsel performed are described above and in the accompanying declarations.[18] The following chart summarizes the hours spent by Settlement Class Counsel for which reimbursement is sought, broken down by task category:

Task Category	**Hours** (both firms)
Factual Investigation & Legal Research	84.3
Complaints	87.6
Briefing (motions to dismiss)	110.7
Briefing (class certification)	707.3
Briefing (other)	348.9
Appeal and Certiorari Petition	386.0
Discovery (document review, written discovery)	286.6
Discovery (depositions)	420.4
Discovery (other)	22.2

[16] Heller Decl., ¶¶ 2-4; McCune Decl., ¶¶ 2-17.

[17] Heller Decl., ¶¶ 31-33; McCune Decl., ¶ 8.

[18] *See supra* Background § II; Heller Decl., ¶¶ 17-27; McCune Decl., ¶¶ 18-3.

Court Appearances and Preparation (including appeal argument)	152.9
Case Strategy	16.5
Plaintiff and Class Member Communications	37.2
Experts	69.3
Mediation/Settlement	343.9
Miscellaneous	49.6
Total Hours	**3,123.4**

These tasks were performed for the benefit of the Settlement Class, and contributed to the success achieved.[19] Moreover, the time spent was reasonable. Further, counsel made every reasonable effort to prevent the duplication of work or inefficiencies.[20]

3. The Circumstances Here Justify the Would-Be "Multiplier."

Courts in this Circuit often approve fees awards that, under a lodestar "cross-check," represent a positive multiplier, particularly when certain factors are present. Among the factors considered are: (1) the results obtained; (2) whether the fee is fixed or contingent; (3) the complexity of the issues involved; (4) the preclusion of other employment due to acceptance of the case; and (5) the experience, reputation, and ability of the attorneys. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). The Ninth Circuit has also stated that a court "must apply a risk multiplier to the lodestar when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky." *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016).

[19] It is well established that in moving for fees, counsel is "not required to record in great detail how each minute of his time was expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983). Instead, counsel need only "identify the general subject matter of his time expenditures." *Id.* If the Court prefers to review Settlement Class Counsel's detailed time records, Settlement Class Counsel will make them available for *in camera* review.

[20] Heller Decl., ¶ 19; McCune Decl., ¶¶ 24-25.

The relevant factors justify approving the requested fee here. Settlement Class Counsel request a fee of $8,511,043.66, which would represent a multiplier of approximately 3.963 on their total lodestar to date ($2,147,742.00).[21] That is within the regular range that courts in the Ninth Circuit and elsewhere approve. *See* 3 *Newberg on Class Actions* § 14.03 (multipliers "ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied"); *see also, e.g., Vizcaino*, 290 F.3d at 1051 and Appendix (approving 28% fee representing a multiplier of 3.65, and citing cases with multipliers ranging from 0.6 to 19.6, with most of the cases ranging from 1.0 to 4.0); *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (multiplier of 3.6 was "well within the acceptable range for fee awards in complicated class action litigation"); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 4:14-MD-2541-CW, 2017 WL 6040065, at *1, *7-9 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019) (finding 3.66 multiplier under cross-check "well within the range of multipliers awarded in similar cases," and noting that "multipliers of 4.0 and above are frequently applied in granting fee awards from common funds"; compiling cases).[22]

While the would-be multiplier here is toward the higher end of the most typical range, the particular circumstances of this case absolutely justify such a result. As discussed above, when Settlement Class Counsel agreed to take this case on, it was a very risky proposition. Most national banks took the position (and still do) that the state law in question is preempted, and no court had held otherwise.

[21] The would-be multiplier will continue to decrease as Settlement Class Counsel continue to perform additional work.

[22] *See also, e.g., In re VeriFone Holdings, Inc. Sec. Litig.*, No. C-07-6140 EMC, 2014 WL 12646027, at *2 (N.D. Cal. Feb. 18, 2014) (finding 4.3 multiplier under cross-check reasonable "in light of the very substantial risks involved and Lead Plaintiff's risk and extensive work on the case."); *Craft*, 624 F. Supp. 2d. at 1125 (while 5.2 multiplier under cross-check was at the high end, there was "ample authority for such awards resulting in multipliers in this range or higher"; citing cases).

Settlement Class Counsel knew that prosecuting this case would almost certainly require a years-long battle—including appeals—against one of the largest financial institutions in the world, knew they would be required to devote very substantial time and resources just to give the class a chance, and knew that at the end of the day they might have nothing to show for any of it. These risks remained essentially throughout the case (quite arguably exacerbated on appeal by the fact that the OCC weighed in on Bank of America's behalf). Settlement Class Counsel's willingness to take on this risky case, and prosecute it on a purely contingency basis for several years, strongly supports the requested fee. *Vizcaino*, 290 F.3d at 1048 (approving 3.65 multiplier where case was "extremely risky for class counsel" as evidenced by (1) "counsel pursued this case in the absence of supporting precedents" and (2) "plaintiffs lost in the district court" and "counsel succeeded in reviving their case on appeal"); *Craft*, 624 F. Supp. 2d at 1117 (approving 25% fee representing 5.2 multiplier under a cross-check, finding "[a]t the time this lawsuit was filed, the law was not settled in the areas encompassed by the suit, and in some areas the law was very uncertain"); *Wash. Pub. Power*, 19 F.3d at 1300-1302 ("[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases."; multiplier should have been awarded where "case was fraught with risk and recovery was far from certain").

The requested fee is also strongly supported by the other *Kerr* factors, including the particularly strong result achieved. The $35 million non-reversionary common settlement fund equals approximately 80.7% of the total alleged class damages for the class period. *See In re NCAA.*, 2017 WL 6040065, at *7-9 (3.66 multiplier under a cross-check strongly supported by result achieved, where common fund equaled unusually high 66% of class damages). Moreover, the $35 million here does not account for millions of dollars in *additional* interest that Bank of America has paid and will pay to the class and other California customers each year because of the practice change this case caused. *Vizcaino*, 290 F.3d at 1049

(approving 28% fee representing 3.65 multiplier where counsel achieved benefits beyond the common settlement fund); *Craft*, 624 F. Supp. 2d at 1121, 1126 (25% fee representing 5.2 multiplier justified in part by practices changes caused by the case, on top of common fund).

Further supporting the requested fee is the significant complexity of the issues involved in this case—including highly complex NBA preemption issues and the interplay between the NBA, related federal regulations, and the Dodd-Frank Act, all of which required intensive research, analysis, and briefing in the District Court, in the Ninth Circuit, and in opposing the Bank's Supreme Court certiorari petition. Moreover, Settlement Class Counsel's devotion to this case to the exclusion of other potentially profitable work, and the overall quality of their representation also militate strongly in favor of awarding the requested fee.

C. Settlement Class Counsel's Litigation Expenses are Reasonable and Should Be Reimbursed.

Under well-settled law, Settlement Class Counsel are entitled to reimbursement of the expenses they reasonably incurred investigating and prosecuting this matter. *See Staton*, 327 F.3d at 974; *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1995) (citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970)); *Mossberg v. IndyMac Fin., Inc.*, No. CV07-1635-GW(VBKX), 2013 WL 12324206, at *8 (C.D. Cal. Jan. 28, 2013) (granting reimbursement of expenses on top of 25% fee award).

To date, Settlement Class Counsel have incurred a total of $238,956.34 in out-of-pocket litigation expenses for which they seek reimbursement. As detailed in the accompanying declarations,[23] this amount includes expert and consultant costs, the fees of the Calculation Advisor,[24] mediation fees, transcript costs, and

[23] Heller Decl., ¶¶ 34-36; McCune Decl., ¶¶ 28-30.

[24] Under the Settlement, Settlement Class Counsel is responsible for paying the fees of the Calculation Advisor (i.e., Arthur Olsen, who is tasked with utilizing the Bank's data to identify the Settlement Class Members and calculate their settlement

Footnote continued on next page

costs for legal research, filing fees, document database expenses, postage, outside copy services, and travel. This amount does not include internal and other additional costs that Settlement Class Counsel incurred in this litigation but, in an exercise of discretion, do not seek to recover. The expenses for which Settlement Class Counsel seek reimbursement were reasonably necessary for the continued prosecution and resolution of this litigation, and were incurred for the benefit of the Settlement Class with no guarantee that they would be reimbursed. They are reasonable in amount and the Court should approve their reimbursement.

D. The Requested Service Award is Reasonable and Justified.

As the Ninth Circuit has recognized, "named plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable [service awards]." *Staton*, 327 F.3d at 977; *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (service awards "are fairly typical in class action cases"). Such awards are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." *Id.*; *Van Vranken*, 901 F. Supp. at 299-300.

The requested service award here ($10,000) is within the range regularly awarded by Ninth Circuit courts. *Jasper v. C.R. England, Inc.*, No. CV 08-5266-GW(CWX), 2014 WL 12577426, at *9 (C.D. Cal. Nov. 3, 2014) ("Courts in the Ninth Circuit have granted service awards in varying amounts up to and past $10,000.") (citing cases); *Wilson v. Gateway, Inc.*, No. CV 09-7560-GW(VBKX), 2014 WL 12704846, at *8 (C.D. Cal. Oct. 6, 2014) (finding $10,000 service award reasonable). Moreover, the requested amount is well justified under the specific circumstances here. In addition to lending his name to this case, and thus subjecting himself to public attention, Mr. Lusnak went above and beyond what is

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Footnote continued from previous page
payment amounts), subject to reimbursement of such costs pursuant to this motion. Settlement, § 1.2; Dkt. 117, ¶ 11.

typically required of class representatives. After moving to France years into this litigation, Mr. Lusnak traveled back from France to the United States to be deposed, continued to regularly communicate with counsel from overseas, and was prepared to travel back to the United States again for trial.[25] In addition, papers filed in this case included sensitive financial information about Mr. Lusnak. *See Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW EMC, 2010 WL 1687832, at *17 (N.D. Cal. Apr. 22, 2010) (granting $20,000 service award where plaintiff "was subjected to questioning regarding her personal financial affairs and other sensitive subjects"); *Huynh v. Hous. Auth. of Cty. of Santa Clara*, No. 14-CV-02367-LHK, 2017 WL 1050539, at *8 (N.D. Cal. Mar. 17, 2017) (granting $10,000 service awards where plaintiffs "disclosed potentially embarrassing details regarding physical and mental disabilities and financial status").

Further, Mr. Lusnak was actively engaged in the case. In addition to being deposed, he provided documents, responded to written interrogatories, provided information for use in the complaint and other filings, regularly and proactively communicated with counsel, and reviewed and approved the proposed Settlement.[26] His commitment is notable given the relatively modest size of his personal financial stake in this matter. *See Van Vranken*, 901 F. Supp. at 299 ("In exchange for his participation, Van Vranken will not receive great personal benefit. He owns a moderately sized truck stop and his claim makes up only a tiny fraction of the common fund.").

CONCLUSION

For the foregoing reasons, Plaintiff and Settlement Class Counsel respectfully request that the Court: (a) award Settlement Class Counsel attorneys' fees in the amount of $8,511,043.66, plus reimbursement of litigation expenses in the amount of $238,956.34; and (b) award Plaintiff a service award in the amount

[25] Lusnak Decl., filed herewith, ¶¶ 6-7.

[26] Lusnak Decl., ¶¶ 4-7.

of $10,000 for his commitment and effort on behalf of the Settlement Class, with such attorneys' fees, expenses, and service award to be paid from the $35 million common Settlement Consideration.

Dated: May 19, 2020

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: /s/ *Roger N. Heller*
Roger N. Heller

Michael W. Sobol (State Bar No. 194857)
msobol@lchb.com
Roger N. Heller (State Bar No. 215348)
rheller@lchb.com
Avery S. Halfon (admitted pro hac vice)
ahalfon@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3336
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

Richard D. McCune (State Bar No. 132124)
rdm@mccunewright.com
Elaine S. Kusel (admitted pro hac vice)
esk@mccunewright.com
MCCUNE WRIGHT AREVALO, LLP
3281 E. Guasti Road, Suite 100
Ontario, CA 91761
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Settlement Class Counsel