The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEAN WILSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

HUUUGE, INC., a Delaware corporation,

Defendant.

No. 18-cv-5276-RSL

CLASS COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND ISSUANCE OF INCENTIVE AWARDS

Noting Date: January 15, 2021

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INTRODUCTION

After years of hard-fought litigation, including securing a landmark victory before the Ninth Circuit on a "question of first impression" pertaining to terms of service within mobile apps,[1] Class Counsel[2] negotiated a non-reversionary $6.5 million common fund Settlement that, if finally approved, will completely resolve this case. The Agreement, as part of a trio of settlements in the social casino space, represents a watershed moment for consumers who have long alleged that social casino games constitute unlawful gambling. It is also an exceptionally strong settlement, both in terms of its size as compared to the size of the sole Defendant and in terms of the individual cash relief it will afford to Class Members. For many, the settlement checks, set to be delivered in the midst of a pandemic-caused recession, will be life-changing: five- and six-figure credit card debts will be wiped out, home equity lines of credit will be paid off, and other debts caused by playing the Defendant's games will be erased overnight.

These would be strong results in a slam-dunk class action alleging well-trodden claims. What makes this and the other social casino settlements truly historic, though, is that the underlying claims represent Class Counsel's novel and previously untested interpretation of state gambling laws—and that Class Counsel pressed forward with that theory for years, in the face of extraordinary risk and repeated setbacks across various courts and other fora, until finally reaching these landmark settlements. When a federal court accuses plaintiffs' attorneys pursuing a novel theory of "shoveling smoke" by making "hollow claims lacking allegations of real-world harms or injuries,"[3] most firms would call it a day. When five more courts dismiss the claims on the pleadings, it is the rare firm that perseveres, prevails before the Court of Appeals, redoubles its efforts to take on an entire industry, defeats an onslaught of motion practice from a Who's Who of powerful defense firms, and ultimately recovers hundreds of millions of dollars for consumers in a wave of settlements. Yet that is what Class Counsel did, and the Settlement now

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[1] *See Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1213 (9th Cir. 2019).

[2] All capitalized terms herein are defined in the Class Action Settlement Agreement (Dkt. 99-1).

[3] *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 469 n.20 (D. Md. 2015), *aff'd*, 851 F.3d 315 (4th Cir. 2017).

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before the Court was only made possible by Class Counsel's unwavering determination to achieve justice for the Class.

Notwithstanding these exceptional results, Class Counsel seek only the "benchmark" fee award of 25% of the Settlement Fund (substantially less than the 30% they are permitted to seek under the Settlement), in addition to reimbursement of their reasonably incurred litigation expenses as well as incentive awards for the Class Representatives. As explained further below, and in the attached expert declarations of Professors William B. Rubenstein and Charles M. Silver, the requested award would fairly compensate Class Counsel for the result they achieved and should be granted.

BACKGROUND

For the Court's convenience, the following "Background" section is included both in this motion and in the contemporaneously filed motion for final approval.

In 2014, Class Counsel began investigating the burgeoning social casino industry. *See* Declaration of Todd Logan ("Logan Decl.") ¶ 3. The results of that investigation were startling: multinational gambling corporations like Churchill Downs, International Game Technology, and Scientific Games had found a way to smuggle slot machines onto consumers' smart phones without complying with any federal or state gambling laws. *Id.* ¶ 4. By 2015, social casino games were capturing more than $3 billion in annual revenues.[4] Those revenues, just like those of Vegas casinos, were disproportionately derived from gambling addicts who just couldn't stop themselves from buying chips and spinning the slots. Moreover, those revenues—at least in Class Counsel's judgment—were entirely ill-gotten gains under a variety of state gambling laws. *See id*.

Based on that investigation, in 2015 Class Counsel initiated a nationwide, multi-forum campaign against the social casino industry. *See id.* ¶ 5. As Professor William B. Rubenstein, the sole author of NEWBERG ON CLASS ACTIONS, summarizes that campaign (and its results):

[4] *See* Dean Takahashi, *13 predictions for the future of the $3.4B social casino games market*, GAMESBEAT (Oct. 19, 2015), *available at* https://bit.ly/2W83Yu3.

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> Prior to entering academia, I was a lawyer at the national office of the American Civil Liberties Union (ACLU) for nearly a decade, during which time I pursued civil rights campaigns on behalf of minority groups. Based on that experience, it strikes me that what Class Counsel have pursued here is closer in form to a civil rights litigation campaign than it is to a series of discrete class action settlements. Class Counsel saw an injustice – a thinly disguised form of gambling preying on those most vulnerable to addictive gambling – and they sought to fix it. Their goal was not to win a case but to reform an entire industry, much like a civil rights campaign might aim to reform a particular type of discriminatory practice across an entire employment sector. To accomplish this end, Class Counsel went far beyond what lawyers pursuing a simple class action case would normally do. Class Counsel pursued multiple cases. Class Counsel pursued multiple defendants. Class Counsel filed actions in multiple forums. Class Counsel tested various state laws. Class Counsel built websites to help app users avoid forced arbitration clauses, lobbied legislators and regulators, and took their efforts to the media. When Class Counsel lost, they did not give up, but changed tactics or forums and kept going. And they did all of this with their own funds, risking millions of dollars of their own money to end this practice. What they have achieved so far, with these initial settlements, is an astounding accomplishment that begins to chip away at the pernicious underlying social casinos.

Declaration of Professor William B. Rubenstein ("Rubenstein Decl.") ¶ 2.

Because the extraordinary Settlement here is but a part of Class Counsel's efforts carrying the banner nationwide for victims of the social casino industry, a summary of Class Counsel's efforts both before this Court and otherwise is provided below.

I. Class Counsel's 2015 Social Casino Lawsuits.

Having concluded that social casinos constitute gambling, between April and October of 2015, Class Counsel filed five (5) proposed class action lawsuits, in four (4) different courts, alleging class claims under five (5) different sets of state gambling laws. *See* **(1)** *Mason v. Mach. Zone, Inc*., No. 15-cv-01107 (D. Md. Apr. 17, 2015) (alleging claims under California and Illinois gambling laws); **(2)** *Kater v. Churchill Downs Inc.*, No. 15-cv-612 (W.D. Wash. Apr. 17, 2015) (alleging claims under Washington gambling law); **(3)** *Dupee v. Playtika Santa Monica, et al.*, No. 15-cv-01021 (N.D. Ohio May 21, 2015) (alleging claims under Ohio and Nevada gambling laws); **(4)** *Phillips v. Double Down Interactive LLC*, No. 15-cv-04301 (N.D. Ill.) (removed May 14, 2015) (alleging claims under Illinois gambling laws); **(5)** *Ristic v. Mach. Zone*, *Inc.*, No. 15-cv-08996 (N.D. Ill. Oct. 9, 2015) (alleging claims under Illinois gambling

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laws).

Each federal district court initially presented with Class Counsel's theory of these cases—*i.e.*, that social casinos are illegal gambling and consequently must return to consumers their ill-gotten gains—squarely rejected it. *See Mason*, 851 F.3d at 316; *Kater v. Churchill Downs Inc.*, No. 15-cv-612 MJP, 2015 WL 9839755, at *3 (W.D. Wash. Nov. 19, 2015), *rev'd*, 886 F.3d 784 (9th Cir. 2018); *Dupee v. Playtika Santa Monica*, No. 15-cv-1201, 2016 WL 795857, at *1 (N.D. Ohio Mar. 1, 2016); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016); *Ristic v. Mach. Zone, Inc.*, No. 15-cv-8996, 2016 WL 4987943, at *4 (N.D. Ill. Sept. 19, 2016). In representative fashion, Judge Pechman's dismissal order in *Kater* concluded that "Big Fish Casino does not award something of value satisfying the requisite prize element, and therefore the game is not 'illegal gambling' under Washington law." *Kater*, 2015 WL 9839755, at *4.

II. Class Counsel Appeals The *Kater* Dismissal And The Ninth Circuit Reverses.

Following Judge Pechman's dismissal order in *Kater*, Class Counsel appealed. Merits briefing before the Ninth Circuit concluded in September 2016, and oral argument was held in February 2018. In March 2018, the Ninth Circuit reversed:

> In this appeal, we consider whether the virtual game platform "Big Fish Casino" constitutes illegal gambling under Washington law. Defendant-Appellee Churchill Downs, the game's owner and operator, has made millions of dollars off of Big Fish Casino. However, despite collecting millions in revenue, Churchill Downs, like Captain Renault in *Casablanca*, purports to be shocked—shocked!—to find that Big Fish Casino could constitute illegal gambling. We are not. We therefore reverse the district court and hold that because Big Fish Casino's virtual chips are a "thing of value," Big Fish Casino constitutes illegal gambling under Washington law.

Kater, 886 F.3d at 785 (9th Cir. 2018). In that opinion, the Ninth Circuit dispensed with a variety of the arguments that had persuaded district courts nationwide to initially dismiss the social casino cases. For example, the Court rejected the argument that social casino chips "do not extend gameplay, but only enhance it." *Id.* at 787. The Circuit also rejected Big Fish's argument that the Washington State Gambling Commission ("WSGC" or "Commission") had determined that social casino games aren't gambling, concluding that "these documents do not indicate that

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the Commission adopted a formal position on social gaming platforms." *Id.* at 788. And the Ninth Circuit explicitly rejected the "the reasoning of other federal courts that have held that certain 'free to play' games are not illegal gambling." *Id.*

III. Class Counsel's Litigation Conduct Before This Court.

Soon after remand in *Kater*, Class Counsel filed this proposed class action lawsuit on behalf of Plaintiff Sean Wilson, alleging that, like Big Fish Casino, Defendant's social casino games—including "Huuuge Casino," "Billionaire Casino," and "Stars Casino" (together, the "Applications")—constitute unlawful gambling under Washington's gambling laws. *See* Dkt. 1.

In July 2018, Huuuge moved to compel arbitration, arguing that Wilson agreed to Huuuge's Terms of Use when he downloaded its app and played its games, and thereby waived his right to pursue relief through a class action. *See* Dkt. 31. Wilson opposed the motion, arguing that Huuuge had not put him on notice of Huuuge's Terms and thus he could not be bound by them. *See* Dkt. 35. The Court sided with Wilson in a November 2018 opinion and denied Huuuge's motion to compel arbitration. *See Wilson v. Huuuge, Inc.*, 351 F. Supp. 3d 1308, 1315–17 (W.D. Wash. 2018). Huuuge timely appealed and successfully moved for a stay pending appeal. *See* Dkts. 47, 49.

In December 2019, the Ninth Circuit affirmed the denial of Huuuge's motion to compel arbitration. *See Wilson v. Huuuge, Inc.*, 944 F.3d at 1214. The "question of first impression," the Circuit explained, was "under what circumstances does the download or use of a mobile application ('app') by a smartphone user establish constructive notice of the app's terms and conditions." *Id.* at 1213. Class Counsel had argued in its briefs and at oral argument that Huuuge's terms "were not conspicuous when [plaintiff] downloaded the app or during gameplay," *id.* at 1219, and the Circuit agreed:

> When downloading the app, the Terms are not just submerged—they are buried twenty thousand leagues under the sea. Nowhere in the opening profile page is there a reference to the Terms. To find a reference, a user would need to click on an ambiguous button to see the app's full profile page and scroll through multiple screen-lengths of similar-looking paragraphs. Once the user unearths the paragraph referencing the Terms, the page does not even inform the user that he will be bound by those

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> terms. There is no box for the user to click to assent to the Terms. Instead, the user is urged to read the Terms—a plea undercut by Huuuge's failure to hyperlink the Terms. This is the equivalent to admonishing a child to "please eat your peas" only to then hide the peas. A reasonably prudent user cannot be expected to scrutinize the app's profile page with a fine-tooth comb for the Terms.

Id. at 1221. The Court also embraced Class Counsel's arguments that accessing the terms during gameplay was a "hide-the-ball" exercise and that Plaintiff's repeated use of the app had no bearing on the question of constructive notice. *Id.* Because "instead of requiring a user to affirmatively assent, Huuuge chose to gamble on whether its users would have notice of its Terms," the Ninth Circuit affirmed the district court's denial of Huuuge's motion to compel arbitration. *Id.*

Soon after remand, in March 2020—as the novel coronavirus tore through Washington state—Huuuge inserted a pop-up window into its Apps, preventing users from accessing their previously purchased chips unless they clicked a button purporting to indicate agreement to Huuuge's revised Terms of Use, including a "Governing Law and Binding Arbitration" ("GLBA") provision. *See* Dkt. 69. Wilson filed a motion for a temporary restraining order, seeking to have the pop-up window removed, *id.*, but the Court denied that motion, *see* Dkt. 82.

Separately, after unsuccessful negotiations regarding the scope of third-party discovery, Wilson subpoenaed Apple, Google, and Facebook in an effort to obtain information related to the proposed Class's virtual chip purchases. *See* Dkt. 85. Huuuge responded by filing a motion for a protective order, seeking to quash Wilson's third-party subpoenas. *See* Dkt. 88.

While that motion practice was pending, the Parties agreed in May 2020 to attend mediation with Judge Phillips (ret.) of Phillips ADR to attempt to resolve the case. The Parties began near-daily communication with each other and with the Phillips ADR team in order to narrow and crystallize the issues. During this period, Huuuge provided Wilson with detailed transactional data, the Parties exchanged substantive briefing on the core facts, legal issues, litigation risks, and potential settlement structures, and the Parties supplemented that briefing with extensive written and telephonic correspondence with each other and the Phillips ADR team to clarify each party's positions. After a full-day mediation session on June 15, 2020, Wilson

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made a "last, best, and final" demand set to expire the following day at noon. Huuuge accepted that demand on June 16, 2020.

But the negotiations did not end there. The Parties worked over the next two months to iron out the details of a final and binding class action settlement agreement. They exchanged several rounds of edits on a settlement document and supporting exhibits, met and conferred telephonically to discuss disputed provisions, and heavily negotiated the form and substance of a notice and administration plan. On August 21, 2020, the Parties completed execution of the Class Action Settlement Agreement. *See* Dkt. 99-1. Wilson moved for preliminary approval on August 23, 2020, *see* Dkt. 98, and the Court granted preliminary approval on August 31, 2020, *see* Dkt. 101.

IV. Class Counsel's Litigation-Adjacent Efforts On Behalf Of The Class.

As a necessary extension of the traditional litigation work necessitated by these cases, Class Counsel has for years undertaken all manner of litigation-adjacent work for the benefit of the Class. These efforts are organized into three categories and summarized below.

First, Class Counsel went to great lengths to protect this litigation from collateral administrative attacks. Just two weeks after the Ninth Circuit's mandate issued in *Kater*, Defendant's industry peers dispatched their litigation attorneys to the WSGC's session in Tacoma to present a "Petition for a Declaratory Order" asking the Commission to declare that other social casino games "do not constitute gambling within the meaning of the Washington Gambling Act, RCW 9.46.0237." *Kater*, No. 15-cv-612, Dkt. 79-5 at 10. At each of the three public hearings that followed—in July 2018 (in Tacoma) (a hearing in which Huuuge's counsel from Davis Wright Tremaine appeared on behalf of another social casino company), August 2018 (in Pasco), and October 2018 (in Olympia)—Class Counsel appeared before the Commission, and Class Counsel presented live argument at both the Tacoma and Pasco hearings. *See* Logan Decl. ¶ 10. Class Counsel supplemented these appearances with a formal letter to the Commission (ahead of the Tacoma hearing) and, on the Commission's request, with an eighteen-page comment for the Commission's consideration (between the Tacoma and Pasco hearings).

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Id. The WSGC ultimately declined to enter a Declaratory Order. *See Kater*, No. 15-cv-612, Dkt. 74-1. And even after the initial declaratory order proceedings, Class Counsel continued to represent the interests of the consumers in additional flare-ups before the WSGC, including in similar declaratory order proceedings initiated by The Stars Group. *See* Logan Decl. ¶ 11.

Second, Class Counsel has been the frontline opposition to the social casino industry's attempt to change Washington's gambling laws. Starting in early 2019, the International Social Gaming Association ("ISGA") provided legislators draft legislation that would amend Washington's gambling statutes with the effect (and specific intent) of gutting these lawsuits. *See id.* ¶ 12. Over time, these efforts gained steam, with Senators Mark Mullet and John Braun, as well as Representatives Zack Hudgins, Brandon Vick, Bill Jenkin and Brian Blake, collectively sponsoring four (4) bills threatening to kill these cases by "clarifying" that players who lose money playing social casino games cannot recover under Washington's "Return of Money Lost at Gambling" statute ("RMLGA"). H.B. 2720, 66th Leg., Reg. Sess. (Wash. 2020); S.B. 6568, 66th Leg., Reg. Sess. (Wash. 2020); H.B. 2041, 66th Leg., Reg Sess. (Wash. 2019); S.B. 5886, 66th Leg., Reg. Sess. (Wash. 2019). Local and national media covered these efforts and left no doubt as to what the ISGA hoped to accomplish. *See, e.g.*, Phillip Conneller, *Washington State Social Gaming Legislation Could Rescue Big Fish Casino From Legal Trouble*, CASINO.ORG (Jan. 29, 2020), *available at* https://bit.ly/39dKtWM.

In response, Class Counsel engaged the lobbying firm Peggen & Mara Political Consulting LLP—experts in Washington tribal and gambling laws—to help Class Counsel (i) stay on top of all administrative and legislative developments in the Washington gaming industry; (ii) understand the intricacies of Washington's specific legislative process, including the nuances of—and procedures for—bill drafting; (iii) understand who the relevant lawmakers and stakeholders in Washington's gaming industry were, what those lawmakers and stakeholders cared about, and how Class Counsel could educate those lawmakers and stakeholders about social casinos; and (iv) work with legislative groups, task forces, and other interested parties in Washington's gaming industry, including the Washington Indian Gaming Association

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("WIGA"). *See* Logan Decl. ¶ 13.

Class Counsel then used this information and expertise to amplify the Class's interests and concerns. Class Counsel drafted memos and prepared handouts for a variety of stakeholders, including State Senators and Representatives, the WIGA, the Washington Trial Attorneys' Association, the Public Interest Research Group, and other organizations dedicated to remedying problem gambling. *See id.* ¶ 14.

Class Counsel also personally met with lawmakers in the Washington Senate and House, met with officials in the Executive branch, and provided in-person testimony to the Washington Legislature. *See id.* ¶ 15. For example, in January 2019—after Class Counsel got wind that the ISGA was planning to gut Washington's gambling statutes (in what would become the failed H.B. 2041 and S.B. 5886)—Class Counsel met in-person with Representative Shelley Kloba, then-Representative (and now Senator) Derek Stanford, Lieutenant Governor Cyrus Habib, and several other government officials. *See id.* ¶ 16. On January 28, 2020, Class Counsel met with Senator Stanford at the State Capital—following Class Counsel's written and in-person testimony before the House Civil Rights & Judiciary Committee in (successful) opposition to H.B. 2720. *See id.* ¶ 17.

Class Counsel's efforts went beyond in-person testimony and meetings with legislative and executive officials. On March 21, 2019, Class Counsel sent formal correspondence to Senator Mark Mullet ahead of a planned work session before the Senate and Financial Institutions, Economic and Trade Committee about social casinos—to which Defendant's industry peers had been invited, but Class Counsel had not. *See id.* ¶ 18. In August 2019, Class Counsel travelled to Anacortes—on Swinomish Tribe land—to speak at a monthly WIGA meeting, in opposition to the ISGA-backed bills. *See id.* ¶ 19. And in early 2020, Class Counsel coordinated the submission of more than 200 letters to Washington State Representatives from social casino players across the country and spoke with local press about the ISGA's renewed efforts to gut these lawsuits. *See id.* ¶ 20; *see also* Melissa Santos, *'Free' casino apps prey on addiction, users say, and WA lawmakers are considering a crackdown*, CROSSCUT (Feb. 7,

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2020), *available at* https://bit.ly/3hfFxDl. These efforts held the line. Each bill introduced over the past two years has stalled.

Third, beyond Class Counsel's work on legislative and administrative fronts, Class Counsel also helped its clients sound the alarm on social casinos to the public at large by helping clients share their stories with local and national media, including in the following pieces:

- *Harpooned by Facebook*, REVEAL (Aug. 3, 2019), *available at* https://bit.ly/39NIdri (featuring radio interview with Class Counsel's client)
- Nate Halverson, *How social casinos leverage Facebook user data to target vulnerable gamblers*, PBS NEWSHOUR (Aug. 13, 2019), *available at* https://to.pbs.org/3lPRd1m (featuring television interview with Class Counsel's client)
- Melissa Santos, *'Free' casino apps prey on addiction, users say, and WA lawmakers are considering a crackdown*, CROSSCUT (Feb. 7, 2020), *available at* https://bit.ly/3qBBd6M (featuring Class Counsel's clients and Class Counsel Alexander Tievsky)
- Cyrus Farivar, *Addicted to losing: How casino-like apps have drained people of millions*, NBC NEWS (Sept. 14, 2020), *available at* https://nbcnews.to/39Lo1X1

V. The Settlement Now Before The Court.

Following all of these efforts, and with the assistance of the mediator, Judge Phillips, Class Counsel reached a settlement with Huuuge that provides a non-reversionary cash recovery of $6.5 million from which every Class Member who has ever lost money playing Huuuge's social casino games is entitled to recover a substantial portion of their losses back. *See* Dkt. 99-1 § 1.32 (the "Agreement"). As described in the Plan of Allocation, attached to the Agreement as Exhibit E, the amount of each Settlement Class Member's payment will depend first on whether or not the Settlement Class Member is "potentially subject to Huuuge's Governing Law and Binding Arbitration provision." *Id.* §§ 1.36, 2.1(c), (d); *id.* at ECF No. 55-56 (Exhibit E). Class Members with higher levels of losses are entitled to recover increasingly higher percentages of their losses, and the upper echelons of "VIP" players stand to recover more than half of their

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losses. *See id.* § 1.36; *id.* § 2.1(c) ("The Settlement Payments for Non-GLBA and GLBA Claims are each paid according to escalating marginal recovery percentages."). The Settlement also requires Huuuge to implement meaningful prospective relief, including by providing addiction-related resources within its social casino games and by creating and honoring a self-exclusion policy akin to what one might expect to soon see at the Emerald Queen or the Muckleshoot casinos. *See id.* § 2.2.

ARGUMENT

Class Counsel seek an award of 25% (or $1,625,000) of the $6.5 million, all-cash, non-reversionary common fund they have secured for the Class. In addition, Class Counsel seek reimbursement of their reasonably incurred costs and expenses. In evaluating these requests, the Court must "assume the role of fiduciary for the class plaintiffs," and "[r]ubber-stamp approval, even in the absence of objections, is improper." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). The Court's scrutiny is welcome here. A close look at the fee request, particularly in the context of the analyses provided by two leading scholars on class action fee awards, demonstrates that the requested fee is reasonable given the outstanding result and the high degree of risk faced by counsel. Similarly, Class Counsel's expenses were necessary to prosecute this nationwide class action and consequently should be reimbursed.

I. The Court Should Award Class Counsel 25% Of The $6.5 Million Common Fund.

Because Washington law governs the claims in this case, it also governs the award of fees. *Id.* at 1047. Under Washington law, the percentage-of-recovery approach is generally used to calculate fees in common fund cases, and 25% is considered the "benchmark" with 20%-30% the usual range. *Bowles v. Dep't of Ret. Sys.*, 121 Wash.2d 52, 72, 847 P.2d 440 (1993) (observing that the lodestar method is generally reserved for statutory fee cases); *see also Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1302 (W.D. Wash. 2001), *aff'd*, 290 F.3d at 1043 ("The Washington Supreme Court rejected the lodestar method for determining attorneys fees in a common fund action.").

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Washington courts look to federal law for guidance on determining an appropriate fee percentage, *see, e.g.*, *id.*, and the Ninth Circuit considers 25% the "benchmark" fee award in common fund cases, *Vizcaino*, 290 F.3d at 1047. When Ninth Circuit courts consider a request for attorneys' fees based on the percentage method, they typically consider some combination of the following non-exhaustive list of factors: "(1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; (6) and whether the case was handled on a contingency basis." *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020).

Here, Class Counsel request a fee award of $1,625,000, or 25% of the Settlement Fund, in addition to reimbursement of their reasonably incurred expenses. This percentage would properly compensate Class Counsel for achieving an exceptional result in extraordinarily risky, novel litigation.

A. Class Counsel Obtained an Unprecedented Result for the Class.

When determining an award of attorneys' fees in a class action, "[t]he most important factor is the results achieved for the class." *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 *3 (N.D. Cal. Dec. 6, 2017), *aff'd*, 768 F. App'x 651 (9th Cir. 2019). Typically, courts "aim to tether the value of an attorneys' fees award to the value of the class recovery." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013). In a common fund case in which class counsel seek an award as a percentage of the fund, "this task is fairly effortless. The district court can assess the relative value of the attorneys' fees and the class relief simply by comparing the amount of cash paid to the attorneys with the amount of cash paid to the class. The more valuable the class recovery, the greater the fees award." *Id.*

Here, the result is unprecedented. Though the social casino industry has been a multi-billion-dollar business for the better part of a decade, no social casino company has ever before

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paid a dime to settle class allegations that social casino games are illegal gambling. Yet here, Huuuge has agreed to pay $6,500,000, in cash, to settle the Settlement Class' claims. Even at the top end of the Settlement Administrator's projected claims rate ranges, participating Class Members stand to recover substantial portions of their losses to the Applications, with Settlement Class Members in the highest category of Lifetime Spending Amounts slated to recover the majority—*i.e.*, more than half—of their losses. *See* Declaration of Steven Weisbrot, Dkt. 100 ¶¶ 48-50. More specifically, the Settlement Administrator projects that Class Members with Lifetime Spend Amounts of $100 would likely recover $15-$30; Class Members with Lifetime Spend Amounts of $1,000 would likely recover $150-$390; Class Members with Lifetime Spend Amounts of $10,000 would likely recover $2,200-$5,900; and Class Members with Lifetime Spend Amounts of $100,000 would likely recover more than $50,000. *See* Weisbrot Decl. ¶ 41.

It is difficult to overstate what a triumph this Settlement is for the Settlement Class, particularly given the federal judiciary's initial reception to these cases and the fact that no defendant has ever before paid a penny to settle class action claims pertaining to social casinos. Professor Rubenstein describes the recovery, under the circumstances, as an "astounding accomplishment" and calls the relief provided "historic." Rubenstein Decl. ¶¶ 1-2. It is also difficult to compare this settlement to other settlements, given that it has no true peers to be reasonably measured against. On the facts, the closest comparator is almost certainly *In re Apple In-App Purchase Litigation*, in which the class alleged that certain apps offered within Apple's App Store were "highly addictive, designed deliberately so, and tend to compel children playing them to purchase large quantities" of in-game currency, "amounting to as much as $100 *per purchase* or more." No. 5:11-cv-01758 EJD, 2013 WL 1856713, at *1 (N.D. Cal. May 2, 2013) (emphasis added). But there, the settlement established no common fund at all, the default recovery for participating class members was five dollars (yes, $5), and with adequate proof some claiming class members could claim refunds for a single 45-day period of purchases. *Id.* at *5. Similarly, in *Kim v. Tinder, Inc.*, the class alleged unfair pricing with regard to in-app purchases in a popular dating app. No. 18-cv-3093-JFW(ASX), 2019 WL 2576367, at *2 (C.D.

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Cal. June 19, 2019). The settlement established no common fund at all, and participating class members received 50 free "Super Likes" (*i.e.*, coupons) in addition to an option to select a $25 cash payment (as an alternative to other coupon offers). *Id.* Without meaning to punch down, there is just no comparison between the settlements that have ever previously been reached in factually similar cases and the Settlement currently before the Court.

Perhaps the better measuring stick for this settlement are class action settlements in the consumer privacy space, given that those settlements often resolve large (statutory) damages claims and are premised on novel interpretations of law as applied to allegations of internet-based misconduct. Consumer privacy settlements, too, are notorious for failing to provide consumers with real-world relief for the damages they have suffered. For example, in *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737, 740 (9th Cir. 2017), *vacated on other grounds by Frank v. Gaos*, 139 S. Ct. 1041 (2019), the Ninth Circuit affirmed a 25% award of attorneys' fees in a case where consumers did not see a single penny. All of the money was to go to *cy pres*, with no cash relief for the class at all. *Gaos*, 139 S. Ct. at 1045.

And even in consumer privacy settlements that do provide monetary relief and have been adjudged to be fair and reasonable by district courts, the relief is often primarily in-kind. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 324 (N.D. Cal. 2018) (explaining that less than 10% of the "fund" was available for cash payments, with the rest being reserved to purchase credit monitoring services); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-md-02752-LHK, 2020 WL 4212811, at *22 (N.D. Cal. July 22, 2020) (cash relief made available only to class members with existing credit monitoring, out-of-pocket losses, and who paid Yahoo! for premium services).

Given that the benefits of the Settlement far outshine those in any other remotely comparable class action settlement, Class Counsel respectfully submits that it is reasonable to award a benchmark fee of 25% of the Settlement Fund. *Cf. HP*, 716 F.3d at 1178 (discussing the benefits of tying counsel's compensation to class members' recovery). The results achieved here are extraordinary, and the requested fee is in line with what courts regularly award in

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Washington, in the Ninth Circuit, and nationwide. *See* Rubenstein Decl. ¶ 17; *accord* Declaration of Professor Charles Silver ("Silver Decl.") ¶¶ 70-71. Consequently, Plaintiff respectfully submits that awarding 25% of the common fund is appropriate, and that there is no reason for a downward departure from the requested "benchmark" award.

B. Class Counsel's Efforts Generated Non-Monetary Benefits.

The monetary component of this Settlement is the chief relief made available to the Settlement Class, and it is the only component of the Settlement that Class Counsel ask to be compensated for directly. That said, the non-monetary benefits that Class Counsel achieved for the Class in this groundbreaking litigation are significant, and they further justify the appropriateness of the requested fee award here.

First, and most obviously, there is the prospective relief that Huuuge agreed to. The Settlement requires Huuuge to implement meaningful prospective relief, including by providing addiction-related resources within its social casino games and by creating and honoring a meaningful self-exclusion policy. *See* Agreement § 2.2. Given the fervor with which Huuuge insisted that its games are not gambling, these in-game changes are a monumental achievement for the Settlement Class. They represent, in conjunction with the changes required by the settlements in two related cases, the first steps toward much-needed self-regulation within the social casino industry.

This litigation also spawned legislative and regulatory efforts, backed by well-funded industry groups including the ISGA, to defang Washington's gambling laws. *See* Logan Decl. ¶ 12. Had Class Counsel ignored these efforts, a change to Washington's gambling laws could have caused consumers to lose any opportunity to recover in this litigation and could have left them unprotected more generally. Instead, Class Counsel deployed significant resources in Olympia and elsewhere to educate legislators on the social casino industry, to coordinate efforts by other interested parties, and to generally ensure that Class Members' voices were heard. *See id.* ¶ 10. Absent these efforts, the loudest voices in Olympia and before the WSGC would have been the lawyers and lobbyists paid for by social casino companies and the trade organizations

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they helped bankroll. Simply put, Class Counsel's legislative and regulatory efforts were an integral part of successfully prosecuting this case and related cases, and Class Counsel's success in these areas created enormous benefits for the Class. *See id.*

Finally, it bears mentioning that while the Court should consider the additional attorneys' fees requests in the other settling social casino cases in conjunction with its consideration of the fee requested in this case, *see In re Optical Disk Drive*, 959 F.3d at 933, it should also consider that: (i) this case conferred substantial benefits upon many Class Members outside the confines of this specific settlement, and (ii) unlike in *Optical Disk Drive*, Class Counsel was not merely handed a leadership seat in a run-of-the-mill antitrust case and then allowed to harvest repeated fee awards, but instead litigated a *de facto* MDL, on its own accord and because of its perseverance helped many individual class members obtain multiple recoveries across multiple lawsuits.

C. Pursuing This Litigation on a Contingent Basis Was Extremely Risky for Class Counsel.

In determining the appropriateness of a fee award, the next step is to consider the flip side of the results—risk. That is, the amount of the fee depends in part on whether, and to what degree, "class counsel ran the risk of not being paid at all." *Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 782 & n.2 (9th Cir. 2007). Here, Class Counsel worked entirely on contingency, advancing both their time and required costs and expenses. Logan Decl. ¶ 21. If Defendants had won this case, through any number of avenues, Class Counsel would not have been compensated at all.

While that risk exists in all contingency litigation, it was substantially more acute here than in other cases. *See* Rubenstein Decl. ¶ 24 ("Eleven independent factors demonstrate the riskiness of these cases. . . ."). *Vizcaino*, 290 F.3d at 1048, illustrates that point well. In *Vizcaino*, one of the leading Ninth Circuit cases on awarding attorneys' fees in common fund class action settlements, the Ninth Circuit approved the district court's characterization of the case as "extremely risky[.]" The district court arrived at that conclusion because:

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> [T]here were no controlling precedents concerning their claims, only analogies involving various areas of law. In addition, Class Counsel's risk was even greater, and their work made more difficult, because Microsoft is one of the nation's largest and most formidable companies and it, and several law firms, defended the case vigorously for several years.

Vizcaino, 142 F. Supp. 2d at 1303.

Here, Class Counsel found themselves in much the same situation. Unlike other statutes that commonly form the basis for class actions (*e.g.*, the Telephone Consumer Protection Act; the Fair Credit Reporting Act; the Fair Debt Collections Practices Act; etc.), Washington's "Return of Money Lost at Gambling" statute ("RMLGA") had not been heavily litigated when Class Counsel filed its first cases against social casino companies in 2015. In fact, to Class Counsel's knowledge, prior to *Kater*, no class action had ever before alleged claims for recovery under the RMLGA. Logan Decl. ¶ 22. Certainly, no class action had ever before alleged claims under the RMLGA against social casino companies. *Id.* That means that all the elements of Plaintiff's claims were matters of first impression, as were many of the arbitration issues raised in the case. Indeed, as the Ninth Circuit expressly held, this case resolved a "question of first impression" in the Circuit as to "under what circumstances does the download or use of a mobile application ('app') by a smartphone user establish constructive notice of the app's terms and conditions." *Huuuge, Inc.*, 944 F.3d at 1213, 1221 (concluding that "[t]he odds are not in [Huuuge's] favor," and that plaintiff "did not have constructive notice of the Terms" and thus was "not bound by Huuuge's arbitration clause in the Terms.").

The factual landscape was similarly undeveloped. While some class actions follow on the heels of a government enforcement action in which a public agency has already identified and investigated a problem, this one did not. *See* Rubenstein Decl. ¶ 24 ("These cases were risky because they did not piggy-back on a government enforcement action. . . . [Here,] Class Counsel detected, investigated, theorized, and executed the entire litigation campaign from scratch"). The risks of litigating in a novel area were not merely hypothetical. In fact, five federal district courts initially presented with Class Counsel's novel theory of these cases rejected it—some emphatically so. A synopsis of those setbacks, which Class Counsel nevertheless persevered

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through, follows below.

1. ***Mason v. Mach. Zone, Inc.*, No. 15-cv-01107 (D. Md.).** In this District of Maryland case, the plaintiff alleged that a virtual slot machine in the video game violated California and Illinois gambling laws. On October 20, 2015, the district court dismissed the case with prejudice, calling plaintiff's complaint "a hodgepodge of hollow claims lacking allegations of real-world harms or injuries." *Mason*, 140 F. Supp. 3d at 459. In March 2017, after briefing and oral argument, the Fourth Circuit affirmed. *See Mason*, 851 F.3d at 316.

2. ***Kater v. Churchill Downs Inc.*, No. 15-cv-612 (W.D. Wash.).** *Kater* was filed in this District and raised claims that "Big Fish Casino" violated Washington's gambling laws. Plaintiff's core theory was that because users wagered virtual chips on virtual slot machines, those virtual chips were "things of value" that extended the privilege of continued gameplay. On November 19, 2015, the Honorable Marsha J. Pechman dismissed Kater's claims with prejudice. Judge Pechman reasoned that Big Fish Casino could not constitute illegal gambling in Washington because, *inter alia*, "there is never a possibility of receiving real cash or merchandise, no matter how many chips a user wins." *Kater*, 2015 WL 9839755, at *3.

3. ***Dupee v. Playtika Santa Monica, et al.* No. 15-cv-01021 (N.D. Ohio).** In this Northern District of Ohio case, the plaintiff alleged that Slotomania violated Ohio and Nevada gambling laws. On March 1, 2016, the district court dismissed. *See Dupee*, 2016 WL 795857, at *1.

4. ***Phillips v. Double Down Interactive LLC,* No. 15-cv-04301 (N.D. Ill.).** In this Northern District of Illinois case, the plaintiff claimed DoubleDown Casino violated Illinois gambling laws. On March 25, 2016, the court dismissed. *Phillips*, 173 F. Supp. 3d at 739.

5. ***Ristic v. Mach. Zone, Inc.*, No. 15-cv-08996 (N.D. Ill.)**. In this Northern District of Illinois case, the plaintiff alleged that the virtual slot machine in the videogame violated Illinois law. On September 19, 2016, the court dismissed, finding that, "while any type of addiction is unfortunate, this court . . . does not read [Illinois law] to protect [the plaintiff] from his own decision to play the Casino." *Ristic*, 2016 WL 4987943, at *4.

And even after the Ninth Circuit reversed the dismissal in *Kater*, these were extraordinarily risky cases. Like in *Vizcaino*, the Defendant here was extraordinarily well-funded. Huuuge was defended primarily by Davis Wright Tremaine LLP, one of the most prestigious firms in the Pacific Northwest, with over 500 lawyers and offices in eight U.S. cities. Like Microsoft's counsel in *Vizcaino*, Davis Wright Tremaine defended this case with vigor that exceeded standard litigation tactics. As just one example, in March 2020, as COVID-19 infections were spiking in Washington state, without notifying the Court or Plaintiff's counsel,

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Huuuge inserted a pop-up window in its Apps that prevented users from accessing their previously-purchased chips unless they clicked a button purporting to bind them to Huuuge's revised Terms of Use, including a GLBA provision that would require users to arbitrate any claims against Huuuge and would cut the relevant statute of limitations. *See* Dkt. 69 at 5-6. As Professor Rubenstein explains:

> [N]ot only did Class Counsel fight these cases in courts across the country, but as they did, proponents of these games attempted to . . . cram down new non-litigation dispute resolution rules on game users mid-case, and change existing gambling laws and regulations; these actions forced Class Counsel to defend their efforts in multiple arenas simultaneously, lest the entire endeavor be lost. Class Counsel shouldered all of this risk while litigating against large and rich corporations, with seemingly bottomless coffers, yet they did so in a lean fashion without enlisting dozens of law firms to share the risk.

Rubenstein Decl. ¶ 1.

Returning to *Vizcaino,* in that case Microsoft's powerful lobbying presence in Washington would not legitimately have been able to affect its liability to the class because the claims alleged were common-law contact claims. Here, on the other hand, industry groups like the ISGA used their lobbying influence in Olympia to attempt to gut the RMLGA and end these cases almost before they got off the ground. Logan Decl. ¶ 12. The ISGA likewise repeatedly attempted to convince the WSGC to issue a "Declaratory Order" effectively immunizing Defendants from any liability in this litigation. *Id.* ¶ 10. Class Counsel's quick organizing efforts and personal visits to Olympia and various locations for Commission hearings avoided that outcome, but it was—and remains—an extremely serious risk. Indeed, at least once during the pendency of this litigation, industry groups in another state successfully pressured state legislators to amend a gambling statute to immunize social casino companies. *See* Maine H.P. 35 – L.D. 34, 2019.

In sum, this case involved bringing claims under an untested statute against a rapidly growing social casino company, which then proceeded—alongside its industry peers and trade groups—to challenge nearly every issue in nearly every available forum. The risk of nonpayment

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here was extreme, and that should factor heavily in the Court's determination of a reasonable fee.

D. The Market Supports the Requested Fee.

Although the Ninth Circuit has not adopted the full market-mimicking approach of other circuits, "the market rate for the particular field of law" is still an important consideration. *Optical Disk Drive*, 959 F.3d at 930. Here, a market-based analysis supports both the reasonableness of using the percentage method to calculate the fee in this case and the specific percentage Class Counsel requests.

As Professor Charles Silver explains, the market for high-stakes, high-value, plaintiff's-side litigators is entirely driven by a percentage-of-the-recovery model. Silver Decl. ¶¶ 40-44. That is true across all kinds of plaintiff's firms, all kinds of litigation, and all kinds of claims. *Id.* Empirical studies of fee arrangements in these cases demonstrate that sophisticated clients almost always pick to incentivize their lawyers by agreeing to a fixed percentage of between 30% and 40% of the recovery. *Id.* ¶¶ 46-63. The relevant market comparison for the fee in this case, therefore, is the percentage of recovery.

In terms of the specific amount requested here, the private market would easily support a fee higher than the 25% that Class Counsel request. The Ninth Circuit has questioned the market-based approach where the sole point of comparison is other judicially approved fees. *See Vizcaino*, 290 F.3d at 1049. Accordingly, a good starting point for the market comparison is "commercial litigation where the fee is determined by application of the negotiated contingency percentage to the amount of the recovery." *Id.* Although no such market truly exists for class actions, *see id.*, there are meaningful comparisons to be had in other areas of law. For example, sophisticated business clients who serve as named plaintiffs in class actions commonly agree to pay fees of 33 percent or greater to their counsel. *See* Silver Decl. ¶ 50. Similar rates prevail in antitrust class actions in which businesses participate as plaintiffs. *Id.* ¶ 51. Ditto pharmaceutical cases, where a 33% fee award "heavily dominate[s]" the market. *Id.* ¶ 52. And in patent cases, where plaintiffs "have the option of paying lawyers to represent them on an hourly basis," they almost always "still prefer a contingency arrangement, even at 30-40 percent, to bearing the risks

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and costs of litigation themselves." *Id.* ¶ 56.

Comparison to judicially approved fees can also be useful, and that comparison supports Class Counsel's request here as well. Unsurprisingly, given the Ninth Circuit's benchmark, the mean percentage award of attorneys' fees in class actions in the Ninth Circuit is 24.5% of the fund and the mean percentage awarded in the Western District of Washington is 26.98%. *See* Rubenstein Decl. ¶ 14. In other words, Class Counsel's request for 25% of the Settlement Fund falls below the relevant market rate, meaning a market analysis supports the requested award.

E. The Court Should Not Conduct a Lodestar Cross-Check.

Class Counsel respectfully submit that consideration of lodestar in this case would not accurately account for the efforts Class Counsel contributed toward the Settlement it obtained for the Class, would not guard against a windfall, and would create perverse incentives for future class actions with regard to efficiency. For that reason, the Court should not—and certainly need not—conduct a lodestar cross-check. *See* Rubenstein Decl. ¶ 28 ("A lodestar cross-check is not a helpful tool by which to assess the reasonableness of counsel's proposed percentage award in the unique circumstances presented by these interrelated cases."); *accord* Silver Decl. ¶¶ 72-76.

It is true that some Ninth Circuit panels have encouraged district courts to employ a lodestar cross-check when using the percentage method to award fees based on a common fund. *See Farrell v. Bank of America Corp.*, 827 F. App'x 628, 635 (9th Cir. 2020). But to be clear, it is "settled" law that the Ninth Circuit *does not* require a lodestar cross-check. *Id.* at 630; *accord Campbell v. Facebook*, 951 F.3d 1106, 1126 (9th Cir. 2020); *In re Hyundai & Fuel Econ. Litig.*, 926 F.3d 539, 571 (9th Cir. 2019) (*en banc*); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011); *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738–39 (9th Cir. 2016); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

Rather, a district court may appropriately determine that the circumstances of a given case warrant a certain percentage of a fund—particularly if that percentage is around the 25% benchmark—without considering class counsel's lodestar. *See Farrell*, 827 F. App'x at 630;

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accord Rubenstein Decl. ¶ 20 (observing that the Ninth Circuit has found the lodestar crosscheck to be "inapplicable or unhelpful in certain specific situations" and identifying this case as one such situation). Courts in this district, including this Court, routinely do just that. *See, e.g.*, *In re HQ Sustainable Mar. Indus., Inc. Derivative Litig.*, No. 11-cv-910 RSL, 2013 WL 5421626, at *3 (W.D. Wash. Sept. 26, 2013) (Lasnik, J.) (closely scrutinizing the requested fee award but declining to conduct a lodestar cross-check, awarding class counsel 32% of the benefits conferred on the class in recognition of the complexity of the dispute, the expense or prosecuting related actions, and the difficult of reaching a settlement with many participants); *Ikuseghan v. Multicare Health Sys.*, No. 14-cv-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (Settle, J.) (collecting cases, awarding 33% of the fund and declining to conduct a lodestar cross-check).

As Professor Rubenstein explains, at least three unique circumstances specific to these cases render a cross-check unhelpful here:

- *First*, this settlement does not stand alone but is one of a group of current (and possibly future) settlements and/or judgments Class Counsel will achieve against social casinos. In this multiple case situation, it is often difficult to attribute lodestar to any one specific case, rendering application of a lodestar cross-check problematic . . .

- *Second*, Class Counsel's work in the social casino space not only encompasses a number of settlements, it also encompasses a number of unsuccessful matters. Contingent fee lawyers do not get paid for losing cases. But the question presented by the lodestar cross-check is not whether to *pay* class counsel, but what hours of work to recognize in checking the level of counsel's proposed fees in the cases that reach a settlement or judgment for the class . . . At the least, it is fair to acknowledge that the fact that a conventional cross-check might *not* account for these hours renders such a cross-check less than optimal on facts such as these . . .

- *Third*, this case does not involve solely litigation activities. Class Counsel were forced to work on behalf of the class in multiple forums, including legislative arenas and executive branch administrative proceedings, and across various states. Courts have not hesitated to award fees for such activities in appropriate circumstances, but including hours and rates for non-litigation work in a litigation-related lodestar cross-check risks an

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> uncomfortable level of imprecision even within that back-of-the-envelope endeavor.

See Rubenstein Decl. ¶ 21.

More broadly, Professor Silver argues lodestar cross-checks are undesirable for a variety of reasons: they have been uniformly rejected by the private market; they "penalize efficiency and reward delay"; and at bottom they weaken the alignment of incentives between client and counsel (with the effect of discouraging lawyers from taking risks that class members would rationally want them to accept). *See* Silver Decl. ¶¶ 73-76. Myriad class action scholars echo Professor Silver's criticism of lodestar cross-checks. Professors Myriam Gilles and Gary B. Friedman, for example, argue that using the lodestar cross-check effectively blunts the incentives for class counsel to achieve the largest possible award for the class, in turn reducing the deterrence effect of class action. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 150-55 (2006). Similarly, Professor Brian T. Fitzpatrick argues that a lodestar cross-check is simply a way to "sneak the lodestar method in the backdoor," which "sends a bad message to future class action lawyers: don't resolve cases too quickly; drag them out to beef up your lodestar so your fee percentage isn't cut." Brian T. Fitzpatrick, *The Conservative Case for Class Actions*, University of Chicago Press, Oct 30, 2019.

Consider, for example, *In re Volkswagen "Clean Diesel" Marketing Sales Practices, & Products. Liability Litigation*, No. 15-md-2672 CRB (JSC), 2017 WL 1047834 (N.D. Cal. Mar. 17, 2017). In *Volkswagen*, almost no adversarial litigation took place. The court expressly noted that "Volkswagen's liability [was] not contested" and commented on "the short time frame it took the parties to settle the . . . class action claims." *Id.* at *2. The parties reached a settlement by July 2016, which Judge Breyer approved in March 2017. *Id.* at *1. Nevertheless, class counsel in *Volkswagen* managed to expend approximately 98,000 hours litigating and settling the case, arriving at a lodestar of $63.5 million. *Id.* at *5. The court found the hours and lodestar reasonable and determined that "there is no indication that [c]lass [c]ounsel sought to artificially

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inflate their hours to justify the lodestar amount." *Id.*

In this litigation, Class Counsel have long known they could, like the attorneys in *Volkswagen*, have expended an almost unlimited number of billable hours. Yet, consistent with their principled approach to all cases they handle, Class Counsel staffed these cases leanly and worked efficiently. *See* Logan Decl. ¶ 23. Briefs were not drafted by committee, but instead assigned to a single attorney who took charge of drafting the arguments, soliciting feedback, and revising accordingly. *See id.* ¶ 24. Class Counsel declined to conduct a parade of minimally useful third-party depositions (or, moreover, to treat such depositions as conventions). *See id.* ¶ 25. Where appropriate, primary responsibility for tasks was assigned to more junior attorneys, with partners acting in a supervisory capacity. *See id.* ¶ 26. For example, the majority of the briefing was drafted by associate-level attorneys, not senior partners. *See id.* ¶ 27. And almost all day-to-day communications with opposing counsel—including settlement communications—was led by an associate. *See id.* ¶ 28.

That is not to say having fewer lawyers on the case slowed down Class Counsel. Class Counsel repeatedly opposed Defendants' efforts to stay or otherwise slow down this litigation. Nor is the point that Edelson's senior partners did not closely manage this case—they of course did. The point is that Class Counsel has worked diligently on this case, has not overstaffed it, and has not performed unnecessary tasks in an effort to pad its lodestar. Consequently, relying on a lodestar cross-check here would effectively penalize Class Counsel's choices and incentivize attorneys in similar situations in the future to delay and overstaff cases for the purpose of manufacturing thousands of unnecessary, additional hours for the sole purpose of inflating lodestars. The Court should not create those incentives with its fee decision in this case.

II. Class Counsel's Reasonably Incurred Expenses Should Be Reimbursed.

In common-fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring the fund can be reimbursed to counsel who has incurred the expense. *See Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Acosta v. Frito-Lay, Inc.*, No. 15-cv-02128-JSC, 2018 WL 646691, at *11 (N.D. Cal. Jan. 31, 2018) ("There is no doubt that an

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attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund.") (citation omitted). Expense awards comport with the notion that the district court may "spread the costs of the litigation among the recipients of the common benefit." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1121 (9th Cir. 2002).

Here, Class Counsel reasonably incurred and request reimbursement for **$69,284.48** in litigation expenses and costs.[5] Logan Decl. ¶ 29. The most significant line-item is $41,797.44 in costs from Class Counsel's internet advertising expenses related to identifying and engaging with Class Members and conducting a website-based "opt-out" campaign. *Id.* ¶ 30. Class Counsel also paid Phillips ADR $20,912.50 in connection with the mediation that ultimately led to a settlement in this case. *Id.* ¶ 31. The remaining $6,574.54 expenses are the sorts of routine litigation expenses incurred over 2.5 years of litigating a complex class action lawsuit: court filing fees, work-related transportation, lodging, and meal costs, and postage fees. *Id.* ¶ 32. These sorts of expenses are in line with those routinely approved in this District and affirmed by the Ninth Circuit. *See, e.g.*, *Dennings v. Clearwire Corp.*, No. 10-cv-1859-JLR, 2013 WL 1858797, at *10 (W.D. Wash. May 3, 2013), *aff'd* (Sept. 9, 2013).

III. The Court Should Give Sean Wilson An Incentive Award of $10,000 and Heidi Hammer An Incentive Award of $1,000.

The Court should also issue incentive awards to the Class Representatives in recognition of their service to the Class. "Incentive awards are fairly typical in class action cases [to] . . . compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). To determine the appropriate amount of an award, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class

[5] Class Counsel possess invoices, receipts, and/or other documentary evidence of all such expenses, and stand ready to submit them for the Court's review, preferably *in camera*, should the Court choose to review them. Logan Decl. ¶ 29.

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has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Bell v. Consumer Cellular, Inc.*, No. 15-cv-941, 2017 WL 2672073, at *8 (D. Or. June 21, 2017).

The Court should award Sean Wilson a $10,000 incentive award. As detailed more fully in his declaration, Wilson invested dozens of hours of his time making substantial contributions to the Class, including staying in regular communication with Class Counsel, reviewing and approving pleadings and other papers, and closely reviewing the Settlement Agreement before approving it. *See* Declaration of Sean Wilson ("Wilson Decl.") ¶ 5. Wilson has made substantial personal sacrifices for the benefit of the Class, including the fact that anyone who Googles his name now sees pages and pages of websites talking about his involvement in these lawsuits. *See id.* ¶ 4. For these efforts and sacrifices, the Court should issue a reasonable $10,000 incentive award. *See McClintic v. Lithia Motors, Inc.*, No. 11-cv-859 RAJ, 2011 WL 13127844, at *6 (W.D. Wash. Oct. 19, 2011) ($10,000 incentive award reasonable in $1.74 million settlement); *Chehalem Physical Therapy v. Coventry Health Care, Inc.*, No. 3:09-cv-00320-HU, 2014 WL 4373150, at *4 (D. Or. Sept. 3, 2014) ($10,000 incentive awards reasonable).

The Court should also award Heidi Hammer a $1,000 incentive award. Hammer reviewed the terms of the Settlement and ultimately stepped forward to share her approval of the Settlement with the public—helping demonstrate the Settlement's success. *See In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, No. 11-md-02295, 2017 WL 10777695, at *3 (S.D. Cal. Jan. 25, 2017) (incentive award appropriate where class representatives "were required to review documents" and "they will earn little for their efforts without [] incentive payments").

CONCLUSION

Plaintiff respectfully requests that the Court approve Class Counsel's fee request of 25% of the Settlement Fund, or $1.625 million; award Class Counsel costs and expenses in the amount of $69,284.48; award Sean Wilson an incentive award of $10,000; and award Heidi Hammer an incentive award of $1,000.

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DATED this 14th day of December, 2020.

Respectfully submitted,

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Plaintiff's Attorneys and Class Counsel
*Admitted *pro hac vice*

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEAN WILSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

HUUUGE, INC., a Delaware corporation,

Defendant.

No. 18-cv-5276-RSL

[PROPOSED] ORDER GRANTING CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES, COSTS, AND CLASS REPRESENTATIVE INCENTIVE AWARDS

Noting Date: January 15, 2021

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WHEREAS, Plaintiff has submitted authority and evidence supporting Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive Awards; and

WHEREAS, the Court, having considered the Motion and being fully advised, finds that good cause exists for entry of the Order below; therefore,

IT IS HEREBY FOUND, ORDERED, ADJUDGED, AND DECREED THAT:

1. Unless otherwise provided herein, all capitalized terms in this Order shall have the same meaning as set forth in Class Counsel's Motion for Award of Attorneys' Fees and Expenses and Issuance of Incentive Awards.

2. The Court confirms its appointment of Jay Edelson, Rafey S. Balabanian, Todd Logan, Alexander G. Tievsky, and Brandt Silver-Korn of Edelson PC as Class Counsel.

A. Attorneys' Fees

3. Class Counsel has requested the Court calculate their award using the percentage-of-the-fund method. Class Counsel requests the Court award 25% of the $6.5 million common fund as attorneys' fees.

4. These requested attorneys' fees, which reflect the "benchmark" fee award in common fund cases, are fair and reasonable. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). The Court reaches this conclusion after analyzing: (1) the extent to which class counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether counsel's performance generated benefits beyond the cash settlement fund; (4) the market rate for the particular field of law; (5) the burdens class counsel experienced while litigating the case; (6) and whether the case was handled on a contingency basis. In reaching this conclusion, the Court has also taken into account the settlements reached, and fee awards requested, in the *Kater v. Churchill Downs* and *Wilson v. Playtika* actions.

5. Class Counsel performed exceptional work and achieved an exceptional result for the Class. Class Members stand to recover substantial portions of their Lifetime Spending Amount on Defendant's Applications.

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6. Class Counsel further achieved exceptional non-monetary benefits for the Class. Among other things, Defendant has agreed to meaningful prospective relief for the Class, including providing addiction-related resources on the Applications and creating a robust self-exclusion policy within the Applications.

7. This litigation was extremely risky for Class Counsel. Class Counsel worked entirely on contingency, prosecuted a line of several class actions against well-funded corporations, and pursued an entirely novel legal theory: that Defendant's internet-based "social casinos" violated Washington's "Return of Money Lost at Gambling" statute (RCW 4.24.070). Class Counsel also defended the Class's interests before the Washington State Gambling Commission and the Washington State Legislature.

8. The market also supports Class Counsel's fee request. Contingency arrangements in high-stakes, high-value mass litigation typically fall in the range of 30-40%. *See* Declaration of Charles M. Silver ¶¶ 47-53. Further, the mean percentage award of attorneys' fees in class actions in the Ninth Circuit is 24.5% of the common fund, and the mean percentage award in this District is 26.98%. *See* Declaration of William B. Rubenstein ¶ 14.

9. The Court is not required to conduct a lodestar cross-check, *Farrell v. Bank of Am. Corp.*, N.A., 827 F. App'x 628, 630 (9th Cir. 2020), and declines to do so here. Given the unique circumstances presented by this litigation, the Court concludes that a lodestar cross-check would not be a valuable tool to help assess the reasonableness of Class Counsel's fee request. *See* Declaration of William B. Rubenstein ¶¶ 20-22; Declaration of Charles M. Silver ¶¶ 72-76.

10. The Court grants Class Counsel's request for a fee award of 25% of the common fund, or $1,625,000.

B. Costs and Expenses

11. In addition to the fee request, Class Counsel requests reimbursement of $69,284.48 in costs and expenses.

12. The Court finds these costs and expenses reasonable and appropriate. *See Dennings v. Clearwire Corp.*, No. 10-cv-1859-JLR, 2013 WL 1858797, at *10 (W.D. Wash.

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May 3, 2013), *aff'd* (Sept. 9, 2013). The Court consequently grants Class Counsel's motion for reimbursement of $69,284.48 in costs and expenses.

C. Incentive Awards

13. Class Counsel requests an incentive award of $10,000 Sean Wilson and an incentive award of $1,000 for Heidi Hammer.

14. The requested incentive awards are fair and reasonable. Wilson invested substantial time in this case, risked reputational harm, and otherwise made significant contributions to the Class. A $10,000 incentive award is reasonable for his services. *See McClintic v. Lithia Motors, Inc.*, No. 11-cv-859-RAJ, 2011 WL 13127844, at *6 (W.D. Wash. Oct. 19, 2011). Hammer reviewed the terms of the settlement and stepped forward to share her approval of the settlement with the public. A $1,000 incentive award is reasonable for her services. *See In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, No. 11-md-02295, 2017 WL 10777695, at *3 (S.D. Cal. Jan. 25, 2017) (incentive award appropriate where class representatives "were required to review documents" and "they will earn little for their efforts without [] incentive payments").

D. Conclusion

15. Based on the foregoing findings and analysis, the Court awards Class Counsel $1,625,000 in attorneys' fees; awards Class Counsel costs and expenses in the amount of $69,284.48; awards Sean Wilson an incentive award of $10,000; and awards Heidi Hammer an incentive award of $1,000.

IT IS SO ORDERED.

DATED this _____ day of _____, 2021.

_____
ROBERT S. LASNIK
UNITED STATES DISTRICT JUDGE

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