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**SIXTH JUDICIAL DISTRICT, STATE OF IDAHO
BANNOCK COUNTY**

**Kyle Nelson, Michael Lewis, and Christie
Lewis**, *on behalf of themselves and all others similarly
situated*,

Plaintiffs,

v.

Idaho Central Credit Union,

Defendant.

Case No. CV03-20-00831
CV03-20-03221

**PLAINTIFFS' MOTION FOR
APPROVAL OF PLAINTIFFS' SERVICE
AWARDS AND ATTORNEYS' FEES
AND COSTS**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	i
INTRODUCTION	1
BACKGROUND AND PROCEDURAL HISTORY	1
LEGAL STANDARD	1
A. THE CLASS REPRESENTATIVES' REQUESTED SERVICE AWARDS SHOULD BE APPROVED	3
B. PLAINTIFFS' COUNSELS' APPLICATION FOR AN AWARD OF ATTORNEY FEES SHOULD BE APPROVED	4
1) The Time and Labor Required	5
2) The Novelty and Difficulty of the Questions of the Skill Requisite to Perform The Legal Service Properly	6
3) The Prevailing Charges for Like Work and Whether the Fee is Fixed or Contingent	6
4) The Time Limitation Imposed by the Client or the Circumstances Of the Case	7
5) The Amount Involved and the Results Obtained	7
6) The Undesirability of the Case	8
7) Awards in Similar Cases	9
C. PLAINTIFFS' REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES IS REASONABLE AND SHOULD BE APPROVED	9
CONCLUSION	9

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980)	4
<i>Gerstein v. Micron Tech., Inc.</i> , Civil No: 89-1262, 1993 U.S. Dist. LEXIS 21215, (D. Idaho Sep. 10, 1993)	6
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	4
<i>Hutton v. Nat’l Bd. of Examiners in Optometry, Inc.</i> , No. 1:16-cv-03025-JKB (D. Md.)	8
<i>In re Brooktree Sec. Litig.</i> , 915 F. Supp. 193 (S.D. Cal. 1996)	5
<i>In re: Citrix Data Breach Litigation</i> , No. 0:19-cv-61350-RKA (S.D. Fla.)	8
<i>In re Heritage Bond Litig.</i> , Nos. 02-ML-1475 DT, CV 01-5752 DT (RCx), et al., 2005 U.S. Dist. LEXIS (C.D. Cal. June 10, 2005)	6
<i>In re Lorazepam & Chlorazepate Antitrust Litig.</i> , 205 F.R.D. 369 (D.D.C. 2002)	3
<i>In re McKesson HBOC, Inc. ERISA Litig.</i> , 391 F. Supp. 2d 844 (N.D. Cal. 2005)	3
<i>In re Mego Fin. Corp. Sec. Litig.</i> , 213 F.3d 454 (9th Cir. 2000)	3
<i>In re Online DVD-Rental Antitrust Litig.</i> , 779 F. 3d 934 (9 th Cir. 2015)	3, 5
<i>In re Sorbates Direct Purchaser Antitrust Litig.</i> , No. 99-1358MMC, 2002 U.S. Dist. LEXIS 234683, at *11 (N.D. Cal. Nov. 15, 2002)	4
<i>In re TFT-LCD (Flat Panel) Antitrust Litig.</i> , MDL 3:07-md-1827 SI, 2011 LEXIS 154287, (N.D. Cal. Dec. 27, 2011)	6
<i>In re Wash. Pub. Power Supply Sys. Sec. Litig.</i> , 19 F.3d 1291 (9th Cir. 1994)	4
<i>Lawrence Warehouse Co. v. Rudio Lumber Co.</i> , 89 Idaho 389 (Id. Sup. Ct. 1965)	2
<i>Presley v. Carter Hawley Hale Profit Sharing Plan</i> , No. C9704316SC, 2000 WL 16437 (N.D. Cal. 2000)	3
<i>Rodriguez v. West Publ’g Corp.</i> , 563 F.3d 948 (9th Cir. 2009)	3

<i>Vincent v. Hughes Air West, Inc.</i> , 557 F.2d 759 (9th Cir. 1977)	9
<i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043 (9th Cir. 2002)	5
<i>Williams v. Costco Wholesale Corp.</i> , 2010 U.S. Dist. LEXIS 67731 (S.D. Cal. July 7, 2010)	4
<i>Young v. Safelite Fulfillment, Inc.</i> , No. 2:19-CV-01027-JLR, 2020 U.S. Dist. LEXIS 227277, (W.D. Wash. Dec. 3, 2020)	6

Statutes

Page(s)

Idaho Consumer Protection Act. I.C. § 48-601, <i>et seq</i> (“ICPA”)	6
Principles of the Law of Aggregate Litigation, § 3.13(b) (American Law Institute, 2010)	8

Rules

Pages(s)

Idaho R. Civ. P. 77(h)	<i>passim</i>
Idaho R. Civ. P. 54 (e)(3)	<i>passim</i>

INTRODUCTION

Plaintiffs Michael Lewis, Christie Lewis, and Kyle Nelson (“Plaintiffs”) individually and on behalf of the preliminarily certified Settlement Class,¹ seek approval of their proposed service awards, and payment of attorneys’ fees and costs, which were negotiated as part of a Settlement of claims against defendant Idaho Central Credit Union (“ICCU”).

The Settlement Agreement is the product of the initiative, investigation, and hard work of skilled counsel. The Settlement Agreement and the January 19, 2021 Order Granting Preliminary Approval and Certifying Settlement Class (“Preliminary Approval Order”) provide for this filing, which seeks a service award for each named Plaintiff in the amount of \$5,000 each, reasonable attorneys’ costs, and a reasonable attorneys’ fee of not more than one-third of the total settlement value. Through this Motion, Plaintiffs and Class Counsel seek the full \$5,000 service award, a reimbursement of \$15,405.58 in reasonably incurred litigation costs, and an award of attorneys’ fees of approximately 30% (\$1,000,000) of the \$3,333,100 settlement value – an amount less than provided for by the Settlement Agreement and Preliminary Approval Order, based on the judgment of Class Counsel and the consideration of IDAHO R. CIV. P. 54 and 77.

BACKGROUND AND PROCEDURAL HISTORY

The background and procedural history of this matter are set forth in Plaintiffs’ Motion for Preliminary Approval and the Preliminary Approval Order. As such, Plaintiffs will not repeat the same here.

LEGAL STANDARD

Idaho’s Rule 77(h) provides:

(h) Attorney’s Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement. The following procedures apply:

¹ Unless otherwise specifically defined herein, all capitalized terms have the same meanings as those set forth in the parties’ Settlement Agreement, attached as Exhibit 1 to the Declaration of Benjamin A. Schwartzman (“Schwartzman Decl.”).

- 1) a claim for an award must be made by motion under Rule 54, subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner;
- 2) a class member, or a party from whom payment is sought, may object to the motion;
- 3) the court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a);
- 4) the court may refer issues related to the amount of the award to a special master.

IDAHO. R. CIV. P. 77(h).

In addition to Rule 77, the Court should also consider the factors enumerated by Rule 54(e), which support Class Counsels' fee request here.² The Rule 54(e) factors include:

- (A) the time and labor required;
- (B) the novelty and difficulty of the questions;
- (C) the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law;
- (D) the prevailing charges for like work;
- (E) whether the fee is fixed or contingent;
- (F) the time limitations imposed by the client or the circumstances of the case;
- (G) the amount involved and the results obtained;
- (H) the undesirability of the case;
- (I) the nature and length of the professional relationship with the client;
- (J) awards in similar cases;

² In interpreting the Idaho Rules of Civil Procedure the Court may also consider the Federal Rules of Civil Procedure because the Idaho and Federal Rules of Civil Procedure are parallel. *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 395-96, (Id. Sup. Ct. 1965). Here, Idaho R. Civ. P. 77 is identical to Fed. R. Civ. P. 23 and as such this Court may considered federal decisions interpreting federal Rule 23 as persuasive.

(K) the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case;

(L) any other factor which the court deems appropriate in the particular case.

See IDAHO R. CIV. P. 54(e)(3). These elements are congruent with Rule 77(h)'s "reasonableness" standard on any attorney fee award. *Id.* 77(h).

A. THE CLASS REPRESENTATIVES' REQUESTED SERVICE AWARDS SHOULD BE APPROVED.

Courts often approve awards to class representatives for their service to the Class. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) ("*Online DVD*") (approving awards of \$5,000 per class representative and noting that they were "relatively small, well within the usual norms of 'modest compensation' paid to class representatives for services performed in the class action"); *In re Lorazepam & Chlorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (approving awards of \$25,000 and \$10,000, a total of 0.3% of each class's recovery); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (affirming \$5,000 service awards to class representatives); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive awards are fairly typical in class action cases."). These service awards "are intended 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 . . . to recognize their willingness to act as private attorney[s] general." *Rodriguez*, 563 F.3d at 958–59.

The named Plaintiffs seek awards of \$5,000 per Class Representative for a total of \$15,000, which equates to approximately 0.45% of the total settlement value. These modest awards are well within the amounts routinely awarded as acceptable. *See, e.g., Online DVD*, 779 F.3d at 948 (approving service awards of \$5,000, amounting to 0.17% of settlement fund); *Presley v. Carter Hawley Hale Profit Sharing Plan*, No. C9704316SC, 2000 WL 16437, at *2 (N.D. Cal. 2000) (approving \$25,000 service awards); *In re McKesson HBOC, Inc. ERISA Litig.*, 391 F. Supp. 2d 844, 851 (N.D. Cal.

2005) (approving \$5,000 service awards); *In re Sorbates Direct Purchaser Antitrust Litig.*, No. 99-1358MMC, 2002 U.S. Dist. LEXIS 234683, at *11 (N.D. Cal. Nov. 15, 2002) (approving \$7,500 service award); *Williams v. Costco Wholesale Corp.*, 2010 U.S. Dist. LEXIS 67731, at *19-20 (S.D. Cal. July 7, 2010) (approving \$5,000 award in an case settling for \$440,000 (approximately 1.14% of the settlement)).

Here, the class representatives each expended time and effort as named Plaintiffs. Among other things, they spent time collecting and reviewing documents relevant to the prosecution of this matter and reviewing pleadings and papers filed with the Court on their behalf. Declaration of Benjamin A. Schwartzman (“Schwartzman Dec.”), ¶ 17. The named Plaintiffs also took on the burdens associated with this litigation, including litigating against his or her financial institution, which was a significant contribution to the recovery obtained for the Class. Considering the benefits conferred by the settlement reached in this case, the important role of the Class Representatives should be acknowledged with a reasonable service award.

B. PLAINTIFFS’ COUNSELS’ APPLICATION FOR AN AWARD OF ATTORNEYS’ FEES SHOULD BE APPROVED

Under the common-fund doctrine, counsel who produce a benefit for class members are entitled to compensation for reasonable attorneys’ fees and costs from the fund created as a result of those efforts. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The amount awarded is within the discretion of the district court. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994) (“WPPSS”). The common fund is predicated on equitable principles that those who profit from litigation should bear some of the costs of litigation. *Boeing Co.*, 444 U.S. 472 at 478. The criteria for applying the common fund are “satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf Although the full

value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.” *Id.* at 479.

The percentage of the fund method is viewed as the superior approach to compensating attorneys for their results rather than just the hours expended. *In re Brooktree Sec. Litig.*, 915 F. Supp. 193, 196 (S.D. Cal. 1996). It is also reasonable to apply the percentage to the entire fund (as opposed to the net fund after costs). *Online DVD*, 779 F.3d at 953 (applying percentage to the entire common fund). A court’s selection of the specific percentage to be applied “must ... take into account all of the circumstances of the case” including the results counsel achieved for the class, the risk of litigation, counsel’s performance, the contingent nature of the representation, and the financial burden of the litigation. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047, 1050-51 (9th Cir. 2002).

Here, the weight of the Rule 54(e) factors favors a finding that the requested fee of approximately 30%, or \$1,000,000, is reasonable and should be awarded.

(1) THE TIME AND LABOR REQUIRED

This case has been pending for over a year and has required a substantial amount of time and effort to litigate. Defendant has been well-defended through this matter and has indicated that – should this matter have not settled – it would have asserted many defenses to the claims asserted. This matter involves novel and rapidly developing issues of law. Counsel for the Plaintiffs have expended hundreds of hours working on this case all while not being paid due to the fact that it was being litigated on a contingency fee basis. Counsel investigated the potential claims against ICCU, interviewed potential plaintiffs and gathered information about the ICCU Data Breaches and their potential impact on customers, researched and developed the legal claims at issue, filed detailed complaints in two separate actions, coordinated amongst themselves in respect to consolidation and a proposed leadership structure, researched and drafted a detailed mediation brief, participated in

mediation before the Honorable Jay Ghandi, continued settlement negotiations over the course of several months, drafted a Settlement Agreement, and drafted and successfully argued a Motion for Preliminary Approval. Schwartzman Dec. ¶¶ 5-6. Accordingly, this factor weighs heavily in favor of awarding Class Counsel the amount requested from the Settlement Fund.

(2) THE NOVELTY AND DIFFICULTY OF THE QUESTIONS AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY

While not directly presented to the Court, both the factual and legal issues raised in correspondence and communication between Counsel for Defendant and Class Counsel are novel and are rapidly developing as data breaches continue to proliferate across the United States. While not exhaustive, some of the issues that would have been raised if the Parties did not resolve this matter include: standing to sue, causation, application of the economic loss doctrine, the proper measure of damages, whether there was an express or implied contract between the Parties, and whether Defendant is exempt from the Idaho Consumer Protection Act. I.C. § 48-601, *et seq* (“ICPA”). These substantial legal and fact issues required experienced counsel well versed in class action litigation, and in particular, data breach litigation. Therefore, the second and third Rule 54(e)(3) factors weigh in favor of allowing the requested fee.

(3) THE PREVAILING CHARGES FOR LIKE WORK AND WHETHER THE FEE IS FIXED OR CONTINGENT

Plaintiffs respectfully submit that the prevailing charges for like work, *i.e.*, representing plaintiffs in class action lawsuits, supports a fee award from the common fund. In class action matters, the percentage of the fund approach is the prevailing approach to compensating class counsel for the work performed.

Plaintiffs also submit that the requested percentage of the fund – 30% – is reasonable in light of the exceptional recovery obtained by Class Counsel. Schwartzman Dec., ¶ 16, *and compare In re Heritage Bond Litig.*, Nos. 02-ML-1475 DT, CV 01-5752 DT (RCx), et al., 2005 U.S. Dist. LEXIS

13555, at *74 (C.D. Cal. June 10, 2005) (awarding 33 1/3 % of 27,783,000.00 fund); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL 3:07-md-1827 SI, 2011 LEXIS 154287, at *1–3 (N.D. Cal. Dec. 27, 2011) (“LCD P”) (awarding 30% of fund as fees); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M07-1827 SI, 2013 LEXIS 6607, at *42-45 (N.D. Cal. Jan. 14, 2013) (“LCD IP”) (same); *Gerstein v. Micron Tech., Inc.*, Civil No: 89-1262, 1993 U.S. Dist. LEXIS 21215, at *16 (D. Idaho Sep. 10, 1993) (30% of the net settlement fund found reasonable); *Young v. Safelite Fulfillment, Inc.*, No. 2:19-CV-01027-JLR, 2020 U.S. Dist. LEXIS 227277, at *51 (W.D. Wash. Dec. 3, 2020) (recent decision preliminarily approving class action settlement with provision for 30% of the fund to be paid at attorneys’ fees).

Moreover, at the outset of this matter the named Plaintiffs entered into written contingency fee agreements allowing for at least 33.3% of any settlement as attorneys’ fees. Schwartzman Dec., ¶ 14. Prevailing caselaw commonly awards a higher percentage of the fund than requested here, and the named Plaintiffs themselves agreed to a higher contingency fee than requested. This speaks volumes for the reasonableness of the fee requested here, easily placing the third and fourth factors in favor of awarding the attorneys’ fees, as requested herein.

(4) THE TIME LIMITATIONS IMPOSED BY THE CLIENT OR THE CIRCUMSTANCES OF THE CASE

There were no time limitations imposed by the Plaintiffs or the particular circumstances of this case. As such, this factor is neutral.

(5) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED

Class Counsel achieved a truly excellent result for the class here – a class action settlement that provides real relief to tens of thousands of Idaho residents without the typical years-long delay commonly associated with class action litigation.

The Benefits to the Settlement Class were discussed at length in Plaintiffs’ Preliminary Approval Motion. *See* Preliminary Approval Mot. at 5-8. In short, the Settlement Fund here,

considering both \$1,550,000 monetary relief, enhanced credit monitoring services, a \$1 million identity theft insurance policy, and identity restoration services has a value of, at a minimum, \$3,333,100 (it is likely much more). DECL. ¶¶ 11-12; Principles of the Law of Aggregate Litigation, § 3.13(b) (American Law Institute, 2010) (“[A] percentage of the fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement.”).

While the retail commercial value of the Credit Monitoring Services is at least \$100 per Settlement Class Member, the potential value to any Settlement Class Members who may have to rely on the significant benefits provided by the Credit Monitoring Services to repair his or her identity or restore his or her credit is much higher. As such, the requested fee is approximately 30% of the fund.

Considering the complex issues described above and other recent class action data breach settlements, this is a great result. *See, e.g., In re: Citrix Data Breach Litigation*, No. 0:19-cv-61350-RKA (S.D. Fla.) (\$2,275,000 common fund involving financial account information and Social Security Numbers and a putative class of 24,316 consumers); *Hutton v. Nat’l Bd. of Examiners in Optometry, Inc.*, No. 1:16-cv-03025-JKB (D. Md.) (\$3,250,000 settlement where names and Social Security Numbers of 61,000 class members were exposed). Accordingly, this factor weighs heavily in favor of approving the requested fee award.

(6) THE UNDESIRABILITY OF THE CASE

Certain aspects of this case made it somewhat undesirable. Some of these considerations include the significant risk posed to the Plaintiffs, the novel and difficult issues faced in class action cases and data breach cases, and the potential reputation harm the Plaintiffs exposed themselves to within the community. Plaintiffs sued a community credit union at great reputational risk and persevered. Class Counsel understood the risks of such high-stakes litigation, and was willing to take on the challenge, ultimately securing a great recovery for over 17,000 Idaho residents.

(7) AWARDS IN SIMILAR CASES

As noted, *supra*, awarding percentages of the fund occurs frequently in class action litigation, and fee awards of 30% of the fund are common. There is no reason for the Court to deviate from the percentage of the fund approach here, and Plaintiffs' requested fee of approximately 30% is reasonable when considering the factors of Rule 54(e)(3).

C. PLAINTIFFS' REQUEST FOR REIMBURSEMENT OF LITIGATION EXPENSES IS REASONABLE AND SHOULD BE APPROVED.

Class Counsel also request reimbursement of litigation costs and expenses they incurred collectively and individually on behalf of the class in the amount of \$15,405.58. Schwartzman Dec., ¶ 7. Attorneys who create a common fund for the benefit of a class are entitled to be reimbursed for their litigation expenses that are reasonable, necessary and directly related to the prosecution of the action. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *OmniVision*, 559 F. Supp. 2d at 1048 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters."). Reasonable litigation expenses include, *inter alia*: filing fees, service fees, mediation expenses claim administration. *See, e.g.*, 1 Alba Conte, Attorney Fee Awards § 2.19 (3d ed. 2004) ("[t]he prevailing view is that expenses are awarded in addition to the fee percentage."). As detailed in Declarations of Class Counsel, Class Counsels' request for reimbursement of reasonable litigation expenses incurred in the prosecution of this matter should be allowed.

CONCLUSION

For the reasons set forth herein, Plaintiff's and Class Counsel request payment of the service awards, reimbursement of Class Counsels' expenses, and payment of attorneys' fees agreed in the Settlement Agreement and requested herein.

Dated: March 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2021, a true and correct copy of the foregoing was served electronically on the following parties or counsel via the Idaho iCourt E-File system at the service addresses set forth below.

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