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17 **IN THE UNITED STATES DISTRICT COURT**  
18 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

19 LISA SILVEIRA, *on behalf of herself*  
20 *and all others similarly situated,*

21 Plaintiff,

22 v.

23 M&T BANK,

24 Defendant.

25 Case No. 2:19-cv-06958-ODW-KS

26 **NOTICE OF MOTION AND**  
27 **MOTION FOR FEES, COSTS,**  
**AND SERVICE AWARD;**  
**MEMORANDUM IN SUPPORT**

Courtroom: 5D  
Judge: Hon. Otis Wright, II

Date Filed: August 9, 2019  
Trial Date: None set

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1 **I. INTRODUCTION**

2 Plaintiff Lisa Silveira (“Ms. Silveira” or “Class Representative”), by and through  
3 Class Counsel, respectfully submits this memorandum in support of Plaintiff’s Motion for  
4 Fees, Costs, and Service Awards (“Motion”). Ms. Silveira brings this Motion because the  
5 time and effort spent by her and Class Counsel resulted in a \$3,325,000 Common Fund and  
6 resolution of Ms. Silveira’s and the Settlement Class’s claims deriving from Defendant  
7 M&T Bank’s (“M&T”) practice of charging fees for making mortgage payments over the  
8 phone (“Pay-to-Pay Fees”). During the Class Period, there were a total of 110,871 loans  
9 on which Pay to Pay Fees were paid, totaling \$9,581,409.20. Thus, the Common Fund  
10 represents approximately 34.7% of damages and will provide automatic cash payments to  
11 Settlement Class Members, pay Administrative Costs to provide notice and administer the  
12 settlement, and, if approved by the court, pay Fees and Expenses and Service awards that  
13 are the subject of this Motion. Moreover, as a result of this litigation, M&T ceased charging  
14 Pay-to-Pay Fees as of March 2020. This changed practice has already saved class members  
15 an estimated \$2.6 million and could save them approximately \$2 million a year going  
16 forward. Declaration of Hassan A. Zavareei (“Zavareei Decl.”) ¶ 5.

17 Ms. Silveira seeks a total of \$831,250 for her Counsel for reasonable fees, and an  
18 additional \$25,922.03 and reimbursable costs. That requested amount is in line with the  
19 Ninth Circuit’s standard approach in common fund cases, whereby attorneys receive 25%  
20 of the value provided to the class, plus costs. Here, the fees sought are 25% of the common  
21 fund, but when factoring in the benefit to the class of changed practices, is significantly  
22 less. Indeed, in the Ninth Circuit, courts should take into account the value of these changed  
23 practices when assessing fairness. *See Williams v. MGMPathe Commc’ns Co.*, 129 F.3d  
24 1026 (9th Cir. 1997) (finding “district court abused its discretion in basing attorney fee  
25 award on actual distribution to class” instead of amount being made available). And when  
26 factoring in only the \$2.6 million in estimated cost savings from the last fifteen months,  
27



1 Class Counsel's requested fee is only 14% of the value of the benefits received by the  
2 Class. Zavareei Decl. ¶ 5. This further supports a finding of fairness of the fee award.

3 Additionally, while this fee award is higher than Class Counsel's lodestar, the  
4 modest multiplier, estimated to be 1.93 by the time the matter is complete, is on the lower  
5 side of the acceptable range in the Ninth Circuit. *See Tom v. Com Dev USA, LLC*, No.  
6 16CV1363PSGGJSX, 2017 WL 10378629, at \*8 (C.D. Cal. Dec. 4, 2017) (noting that the  
7 accepted range of multipliers has ranged from 2 and 4, or even higher). Given the risks  
8 inherent in this litigation, the efficient way in which Class Counsel was able to negotiate  
9 early resolution to this matter, and the value of the changed practices, such an award is  
10 appropriate.

11 Notably, the requested fee award, along with the settlement as a whole avoids any  
12 of the pitfalls flagged by the Ninth Circuit in *Briseno v. Henderson*, 998 F.3d 1014, 1026-  
13 28 (9th Cir. 2021). Here, the parties did not discuss any award of attorneys' fees during  
14 their negotiations and there is no clear sailing provision that prevents Defendant from  
15 challenging the fee award. Indeed, the fee award still leaves adequate compensation of the  
16 class, maximizes redemption by automatically paying class members instead of requiring  
17 them to submit claims, provides for changed practices, the value of which can be reliably  
18 estimated, and provides that no portion of the settlement fund will revert to M&T.

19 Class Counsel's work in this case led to the settlement that the Court preliminarily  
20 approved on May 6, 2021. The settlement obtained compares favorably to other settlements  
21 obtained in similar cases against major mortgage loan services. *See App'x A*. From  
22 inception to now, Class Counsel has expended time and resources by, among other things,  
23 investigating the factual and legal bases for this suit, meeting with Ms. Silveira, researching  
24 novel legal theories to draft a class action complaint, staying abreast of legal developments  
25 in a variety of related cases, conducting extensive discussions with many class members,  
26 exchanging mediation memoranda and reviewing class data, participating in an all-day  
27 mediation with a mediator and several other settlement discussions, negotiating, drafting,

1 and finalizing the Settlement Agreement and associated paperwork, and addressing this  
2 Court's concerns regarding the Settlement Agreement.

3 Counsel has undertaken the costs and time of this litigation on a pure contingency  
4 basis and therefore has paid out-of-pocket for expenses and has not received payment for  
5 their work to-date. Counsel took on these risks fully aware that M&T denied all charges  
6 and intended to fully defend this case every step of the way. Recovery was therefore far  
7 from certain, and even if secured, certain to be delayed for many years.

8 Ms. Silveira also seeks reasonable service awards for the time she spent and the risks  
9 she took in bringing and participating in this litigation. Ms. Silveira provided critical  
10 assistance to counsel, including by participating in meetings with counsel to provide factual  
11 information for the complaint, sharing confidential and sensitive information, such as  
12 mortgage paperwork and bank statements, and reviewing pleadings and settlement papers.  
13 Indeed, Ms. Silveira did so at great personal risk to herself, not only to her reputation, but  
14 because M&T owned the servicing rights to her home loans. And Ms. Silveira also made  
15 substantial personal sacrifices because she often had to take time away from work or  
16 caretaking responsibilities to meet with counsel and litigate this case on behalf of the entire  
17 Class. Ms. Silveira seeks a service award of \$5,000, an amount consistent with reasonable  
18 and just service awards in the Ninth Circuit. *See In re Mego Financial Corp. Sec. Litig.*,  
19 213 F.3d 454, 463 (9th Cir. 2000) (upholding award to named plaintiff \$5,000 in case with  
20 \$1.725 million total recovery); *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015  
21 WL 3863625, at \*8 (N.D. Cal. June 22, 2015) (“Many courts in the Ninth Circuit have also  
22 held that a \$5,000 incentive award is “presumptively reasonable.”) (citations omitted).

23 Ms. Silveira submits that her requested fees, costs, and service awards are especially  
24 appropriate because Plaintiff and her Counsel achieved outstanding relief as to the primary  
25 allegation in their complaint. Plaintiffs alleged that M&T had a practice of charging and  
26 collecting illegal processing fees from borrowers paying their monthly mortgage by phone.  
27 With the settlement, M&T has agreed to a settlement amount that represents 34.7% of the

1 total \$9,581,409.20 Pay-to-Pay Fees collected across the country by M&T from the class  
2 during the class period, which is in line with other court-approved class action settlements  
3 involving Pay-to-Pay Fees. *See* App’x A. Moreover, as a result of the litigation, M&T  
4 ceased charging such Pay-to-Pay Fees. The Settlement Class Members do not have to  
5 submit claims or take any other affirmative steps to receive benefits under the Settlement.  
6 Each Settlement Class Member who paid at least one Pay-to-Pay Fee during the Class  
7 Period shall be entitled to receive a *pro rata* share of the Settlement Fund. *See* Settlement  
8 Agreement §§ 5.1-5.7, ECF No. 21-1 (“SA”). For each loan on which a Settlement Class  
9 Member has paid Pay-to-Pay Fees, the Settlement Administrator shall allocate the amount  
10 of the Net Settlement Fund that represents the proportional amount of Pay-to-Pay Fees  
11 charged by M&T within the Class Period on that loan. *Id.*

12 Finally, if the amount of remaining funds following a secondary distribution is  
13 impracticable or infeasible, the remaining funds will be distributed, pursuant to the *cy pres*  
14 doctrine to a 501(c)(3) charitable organization.

15 In sum, and as explained below, in light of the work performed by Class Counsel  
16 and the substantial time, effort, and personal sacrifice of the named Plaintiff, the fee, cost,  
17 and service awards sought in this Motion are reasonable. For all of the reasons set forth  
18 herein, Plaintiff respectfully request that the Court grant these awards.

19 **II. THE UNCONTESTED FEE, COST, AND SERVICE AWARD REQUESTS**  
20 **ARE FAIR, REASONABLE, AND APPROPRIATE.**

21 **A. THE CLASS REPRESENTATIVE’S SERVICE AWARDS SHOULD**  
22 **BE APPROVED.**

23 This Court should approve a \$5,000 Service Award to Ms. Silveira in just, fair, and  
24 reasonable recognition of her contributions on behalf of the Class. In deciding whether to  
25 approve such an award, a court should consider: “(1) the risk to the class representative in  
26 commencing suit, both financial and otherwise; (2) the notoriety and personal difficulty  
27 encountered by the class representative; (3) the amount of time and effort spent by the class

1 representative; (4) the duration of the litigation and; (5) the personal benefit (or lack  
2 thereof) enjoyed by the class representative as a result of the litigation.” *Van Vranken v.*  
3 *Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Further, as a matter of public  
4 policy, representative service awards are necessary to encourage consumers to take on the  
5 reputational risk to formally challenge unfair business practices. *See, e.g., Rodriguez v.*  
6 *West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (upholding award of service  
7 awards to class representatives as they “compensate class representatives for work done on  
8 behalf of the class, to make up for financial or reputational risk undertaken in bringing the  
9 action, and, sometimes, to recognize their willingness to act as a private attorney general”);  
10 *Wehlage v. Evergreen at Arvin LLC*, No. 4:10-CV-05839-CW, 2012 WL 4755371, at \*5  
11 (N.D. Cal. Oct. 4, 2012) (finding service award justified for plaintiffs “lending their names  
12 to this case, and thus subjecting themselves to public attention”); *Miletak v. Allstate Ins.*  
13 *Co.*, No. C 06-03778 JW, 2012 WL 12924933, at \*2 (N.D. Cal. July 12, 2012) (same); *In*  
14 *re CenturyLink Sales Pracs. & Sec. Litig.*, No. CV 17-2832, 2020 WL 7133805, at \*13 (D.  
15 Minn. Dec. 4, 2020) (awarding service award because “Class Representatives participated  
16 and willingly took on the responsibility of prosecuting the case and publicly lending  
17 their names to this lawsuit, opening themselves up to scrutiny and attention from both  
18 the public and media”).

19 Ms. Silveira took on a substantial risk by bringing claims against the company that  
20 currently serviced her home loans, and undertook reputational risk, as her association with  
21 these lawsuits is publicly available. Zavareei Decl. ¶ 15. Ms. Silveira also worked with  
22 counsel to provide information regarding her experiences and claims to enable her to join  
23 this case and represent a class throughout the litigation. *Id.* Ms. Silveira conducted searches  
24 of her personal records and shared sensitive information, including bank records and  
25 mortgage documents. *Id.* And Ms. Silveira remained actively involved in the litigation after  
26 the Settlement was reached. *Id.*

1           These personal risks and sacrifices, substantial time invested into the matter, and  
2 critical contributions to the outstanding results for the Class, along with her release of  
3 claims against Defendant, all support approval of a \$5,000 service award. Service awards  
4 of \$5,000 are well within the range of reasonableness. *See, e.g., Mego*, 213 F.3d at 463;  
5 *Willner*, 2015 WL 3863625, at \*8; *Wolf v. Permanente Med. Grp., Inc.*, No. 3:17-CV-  
6 05345-VC, 2018 WL 5619801, at \*1 (N.D. Cal. Sept. 14, 2018) (approving service award  
7 in the amount of \$7,500 to named plaintiff and \$2,500 to opt-in Plaintiff); *Jabbari v. Wells*  
8 *Fargo & Co.*, No. 15-CV-02159-VC, 2018 WL 11024841, at \*6 (N.D. Cal. June 14, 2018)  
9 (finding proposed service award of \$5,000 to each named plaintiff fair and reasonable);  
10 *Guilbaud v. Sprint Nextel Corp.*, No. 3:13-CV-04357-VC, 2016 WL 7826649, at \*4 (N.D.  
11 Cal. Apr. 15, 2016) (approving service award of \$10,000 for each of the four named  
12 Plaintiffs); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936, 2015 WL 758094 at \*7  
13 (N.D. Cal. Feb 20, 2015) (awarding \$5,000 to named plaintiffs); *Smith v. CRST Van*  
14 *Expedited, Inc.*, 2013 WL 163293, \*6 (S.D. Cal. Jan. 14, 2013) (finding \$15,000 incentive  
15 payments for three Class representatives well within the range awarded in similar cases);  
16 *Dorsette v. TA Operating LLC*, No. EDCV091350PARZX, 2010 WL 11583002, at \*8  
17 (C.D. Cal. July 26, 2010) (finding \$5,000 service award reasonable). *See also* Theodore  
18 Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical*  
19 *Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical study of incentive awards to  
20 class action plaintiffs has determined that the average aggregate incentive award within a  
21 consumer class action case is \$29,055.20, and that the average individual award is  
22 \$6,358.80). Consistent with these cases, and in recognition of the time, effort, and  
23 substantial personal risk taken on behalf of the Class, Ms. Silveira requests that the Court  
24 award the requested service awards.

1           **B. CLASS COUNSEL’S FEE AND COST REQUEST IS REASONABLE.**

2                   **1. Legal Standard**

3           The Settlement Agreement provides for the payment of attorneys’ fees and expenses  
4 from the common fund. Having reached a common fund settlement, Plaintiff’s Counsel is  
5 entitled to seek an award of fees and expenses from the fund. *See Vizcaino v. Microsoft*  
6 *Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus*  
7 *Growers*, 904 F.2d 1301 (9th Cir. 1990). Under Ninth Circuit standards, it is appropriate  
8 for a district court to analyze an attorney’s fee request and issue an award either based on  
9 (1) the “lodestar” method or (2) by making an award as a percentage of the total benefit  
10 made available to the settlement class, including costs, fees, and injunctive relief. *See, e.g.,*  
11 *Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011); *Nwabueze v.*  
12 *AT&T, Inc.*, No. C 09-01529 SI, 2014 WL 324262, at \*2-3 (N.D. Cal. Jan. 29, 2014); *Lopez*  
13 *v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at \*11-12 (E.D. Cal. Sept.  
14 2, 2011).

15           Furthermore, in the Ninth Circuit, when assessing fairness of a fee award, courts  
16 consider the total value provided to the class, including injunctive relief. *See Young v. Polo*  
17 *Retail, LLC*, 2007 WL 951821, at \*9 (N.D. Cal. Mar. 28, 2007) (citing *Williams v.*  
18 *MGM Pathe Commc’ns Co.*, 129 F.3d 1026 (9th Cir. 1997) (finding “district court abused  
19 its discretion in basing attorney fee award on actual distribution to class” instead of amount  
20 being made available)). *See also* Principles of the Law of Aggregate Litigation, § 3.13(b)  
21 (American Law Institute, 2010) (“[A] percentage of the fund approach should be the  
22 method utilized in most common-fund cases, with the percentage being based on both the  
23 monetary and nonmonetary value of the judgment or settlement.”).

24           Here, Plaintiff requests the benchmark 25% percentage of the cash value of the  
25 settlement without taking into account the extra value of the changed practices. This fee  
26 represents a modest 1.93 multiplier to the lodestar (currently \$329,388.90 and estimated to  
27 be approximately \$430,000 by the time of completion) and costs of \$25,922.03 incurred



1 by Plaintiffs' counsel in the litigation of this matter.<sup>1</sup> In light of the valuable changed  
 2 practices that have already likely saved Class members at least \$2.6 million, the request is  
 3 especially reasonable and amounts to a fee of only 14% of the total benefits already  
 4 provided, without factoring in the roughly \$2 million a year in future savings. *See* Zavareei  
 5 Decl. ¶ 5.

6 **2. Plaintiff's Counsel's Requested Fee is a Reasonable Percentage of**  
**The Common Fund.**

7 Where a settlement involves a common fund, courts typically award attorneys' fees  
 8 based on a percentage of the total settlement. *See State of Fla. v. Dunne*, 915 F.2d 542, 545  
 9 (9th Cir. 1990). Indeed, the percentage method is the preferred approach in common fund  
 10 cases. *Vizcaino*, 290 F.3d at 1050 (noting "the primary basis of the fee award remains the  
 11 percentage method"). *See also, e.g., In re ECOTality, Inc. Secs. Litig.*, No. 13-cv-03791-  
 12 SC, 2015 WL 5117618, at \*3 (N.D. Cal. Aug. 28, 2015) (finding percentage approach to  
 13 be the "typical method of calculating class fund fees"); *Evans v. Linden Research, Inc.*,  
 14 No. C-11-01078 DMR, 2014 WL 1724891, at \*5 (N.D. Cal. Apr. 29, 2014) (same); *Taylor*  
 15 *v. Meadowbrook Meat Co., Inc.*, No. 3:15-CV-00132-LB, 2016 WL 4916955, at \*5 (N.D.  
 16 Cal. Sept. 15, 2016) ("Where the settlement involves a common fund, courts typically  
 17 award attorney's fees based on a percentage of the total settlement."); Principles of the Law  
 18 of Aggregate Litigation, § 3.13(b) (American Law Institute, 2010) ("[A] percentage of the  
 19

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20 <sup>1</sup> An attorney is entitled to "recover as part of the award of attorney's fees those out-of-  
 21 pocket that would normally be charged to a fee paying client." *Harris v. Marhoefer*, 24  
 22 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks omitted). To support an award of  
 23 costs, plaintiff should file an itemized list of their expenses by category, listing the total  
 24 amount advanced for each category, allowing the Court to assess whether the expenses are  
 25 reasonable. *See Wren v. RGIS Inventory Specialists*, No. 06-cv-05778-JCS, 2011 WL  
 26 1230826, at \*30 (C.D. Cal. Apr. 1, 2011).



1 fund approach should be the method utilized in most common-fund cases, with the  
2 percentage being based on both the monetary and nonmonetary value of the judgment or  
3 settlement.”).

4 In the Ninth Circuit, the benchmark for an attorney fee is 25% of the total settlement  
5 value, including both monetary and non-monetary recovery. *See Six Mexican Workers*, 904  
6 F.2d at 1311; *see also Glass v. UBS Financial Services, Inc.*, No. C-06-4068 MMC, 2007  
7 WL 221862, \*14 (N.D. Cal. Jan. 26, 2007) (“The Ninth Circuit has repeatedly held that  
8 25% of the gross settlement amount is the benchmark for attorneys’ fees awarded under  
9 the percentage methods . . . .”). However, many cases have found that between 30% and  
10 50% of the common fund is an appropriate range when the settlement fund is less than ten  
11 million. *See Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 923 (9th Cir.) (“[T]he district  
12 court acted within its proper discretion when it found that the settlement contains  
13 significant benefits for Plaintiffs beyond the cash recovery, and thus that the award, at  
14 about a third of the lodestar amount, was reasonable.”), *vacated on other grounds*, 772 F.3d  
15 608 (9th Cir. 2014); *Galeener v. Source Refrigeration & HVAC, Inc.*, No. 3:13-CV-04960-  
16 VC, 2015 WL 12977077, at \*1 (N.D. Cal. Aug. 21, 2015) (“‘[I]n light of the many cases  
17 in this circuit that have granted fee awards of 30% or more’, it is ‘well within the usual  
18 range of percentages awarded.’”) (quoting *Vedachalam v. Tata Consultancy Servs., Ltd.*,  
19 No. C 06-0963 CW, 2013 WL 3941319, at \*2 (N.D. Cal. July 18, 2013) and collecting  
20 cases awarding 30% or more); *Van Vranken.*, 901 F. Supp. at 297-98 (collecting cases);  
21 *see also Johnson v. Gen. Mills, Inc.*, No. SACV 10-00061-CJC(ANx), 2013 WL 3213832,  
22 at \*6 (C.D. Cal. June 17, 2013) (awarding a fee award of 30% of the settlement fund).

23 Here, Plaintiff’s requested award of \$831,250 represents 25% of the \$3,325,000  
24 common fund, and thus is in line with the Ninth Circuit benchmark. And when taking into  
25 account the changed practices, the fee request is far below the 25% benchmark because  
26  
27

1 Plaintiff does not seek to be awarded off the total value provided to the class, which  
2 includes valuable changed practices, and only off of the cash benefits provided.<sup>2</sup>

3 Moreover, the risk in this litigation was high. The dispositive issue here is a  
4 straightforward question of law: whether Pay-to-Pay fees are prohibited by federal and  
5 state debt collection statutes. Fact discovery, while pertinent to class certification and some  
6 secondary issues, would not have informed the parties on this threshold question, and thus,  
7 the risk could be assessed early in the litigation. Indeed, at the time the Complaint was filed  
8 in 2019, the law was uncertain, and courts in this Circuit diverged on the applicability of  
9 the FDCPA and Rosenthal Act to Pay-to-Pay Fees. *Compare Flores v. Collection*  
10 *Consultants of California*, No. SACV140771DOCRNBX, 2015 WL 4254032 (C.D. Cal.  
11 Mar. 20, 2015) (dismissing similar claims) *with Simmet v. Collection Consultants of*  
12 *California*, No. CV 16-02273-BRO, 2016 WL 11002359 (C.D. Cal. 2016) (denying motion  
13 to dismiss similar claims). Despite that, Plaintiff was able to secure an excellent, early  
14 settlement without extensive litigation. Zavareei Decl. ¶ 17. Since that time, courts have  
15 continued to divide on this issue. *Compare Thomas-Lawson v. Carrington Mortg. Servs.,*  
16 *LLC*, No. 2:20-cv-07301-ODW-EX, 2021 WL 1253578 (C.D. Cal. Apr. 5, 2021)  
17 (dismissing claims); *Lish v. Amerihome Mortgage Company, LLC*, No. 2:20-cv07147,  
18 2020 WL 6688597 (C.D. Cal. Nov. 10, 2020) (same) *with Corona v. PNC Financial*  
19 *Services Group, Inc.*, No. 2:20-cv-06521-MCS, 2021 WL 1218258, \*2-\*8 (C.D. Cal. 2021)  
20 (allowing claims to proceed); *Lembeck v. Arvest Cent. Mortg. Co.*, 498 F. Supp. 3d 1134,  
21 1135 (N.D. Cal. 2020) (same); *Torliatt v. Ocwen Loan Servicing*, No. 19-cv-04303-WHO,  
22 2020 WL 1904596, at \*2 (N.D. Cal. Apr. 17, 2020) (same). While these issues are on  
23

24  
25 <sup>2</sup> As discussed in section II.B.4, *infra*, Plaintiff's counsel separately seeks an award of  
26 costs, and they are typically entitled to reimbursement of all reasonable out-of-pocket  
27 expenses and costs in prosecution of the claims and in obtaining a settlement. *See Vincent*  
*v. Hughes Air West*, 557 F.2d 759, 769 (9th Cir. 1977).

1 appeal in two Circuits and Plaintiff believes her claims would have ultimately be  
2 successful, there was no guarantee of recovery.

3 Success here was far from certain, and the fact that the Settlement Class here will be  
4 compensated quickly, without protracted litigation or appeals, notwithstanding this  
5 uncertainty further supports the fact that it is entirely appropriate to award the requested  
6 fee. Moreover, in light of this uncertainty, the changed practices are particularly valuable,  
7 as Class Members would likely have been charged an additional \$2.6 million were it not  
8 for this lawsuit. *Zavareei* ¶ 5. This excellent result in the face of this risk supports the fee  
9 award. *See Vizcaino*, 290 F.3d at 1050 (recognizing risk as a relevant circumstance for  
10 awarding fee above 25% benchmark).

### 11 **3. Plaintiffs' Counsel's Requested Fee Is Also Reasonable When** 12 **Measured Using the Lodestar Method.**

13 If the Court elects to award a fee based on a percentage of the common fund, it is  
14 not required to conduct a lodestar cross-check. *In re Google Referrer Header Privacy*  
15 *Litig.*, 869 F.3d 737 (9th Cir. 2017) (noting that district court was not required to do a  
16 lodestar method cross-check); *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547  
17 (9th Cir. 2016) (“[A] cross-check is entirely discretionary . . . .”). Indeed, “[i]n a common  
18 fund case, a lodestar method does not necessarily achieve the stated purposes of  
19 proportionality, predictability and protection of the class and can encouraged unjustified  
20 work and protracting the litigation.” *Bolton v. U.S. Nursing Corp.*, No. C 12-4466 LB, 2013  
21 WL 5700403, at \*5 (N.D. Cal. Oct. 18, 2013) (citing *In re Activision Securities Litigation*,  
22 723 F.Supp. 1373, 1378 (N.D. Cal. 1989)). However, should the Court elect to utilize a  
23 lodestar cross-check, Class Counsel’s fee here is likewise eminently reasonable. While a  
24 modest multiplier of 2.5 is needed, given the risks and result achieved, it is appropriate.  
25  
26  
27

1                   **a. Plaintiff’s lodestar is the result of swift and efficient**  
2                   **litigation.**

3                   Under the lodestar approach, “[t]he lodestar (or touchstone) is produced by  
4 multiplying the number of hours reasonably expended by counsel by a reasonable hourly  
5 rate.” *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 26 (2000). Here, because  
6 Class Counsel was able to secure a settlement shortly after filing the complaint, the benefit  
7 to Class Members was achieved efficiently, without the need for Class Counsel to spend  
8 hundreds of hours in discovery or litigating contested motions.

9                   Plaintiffs’ Counsel’s lodestar through July 16, 2021 (three business days before the  
10 date of this application) is approximately \$329,388.90. (Zavareei Decl. ¶ 20; Declaration  
11 of James L. Kauffman (“Kauffman Decl.:

) ¶ 10 (tables showing hours worked by  
12 timekeeper).) Plaintiffs’ Counsel’s efforts to date included, without limitation:

- 13                   • Pre-filing investigation;
- 14                   • Drafting and filing a class action complaint;
- 15                   • Preparing various routine filings;
- 16                   • Meeting-and-conferring with Defendant’s counsel regarding various case  
17 management matters;
- 18                   • Drafting a comprehensive mediation statement, and participating in a two all-  
19 day mediations;
- 20                   • Negotiating and drafting the Settlement Agreement along with corresponding  
21 documents, including claim forms, summary notice, and long-form notice;
- 22                   • Filing the motion for preliminary approval and supporting documents,  
23 including a proposed preliminary approval order and a proposed final  
24 judgment;
- 25                   • Responding to this Court’s concerns regarding the proposed settlement,  
26 including revising drafts of notice and obtaining additional information from  
27 the Settlement Administrator regarding the form of notice;

- 1 • Reviewing and responding to voluminous correspondence from Settlement
- 2 Class Members;<sup>3</sup>
- 3 • Supervising the work of the Claims Administrator; and
- 4 • Preparing this motion and supporting documentation.

5 Zavareei Decl. ¶¶ 7-9, 14; Kauffman Decl. ¶¶ 11-14, 16.

6 In addition, before the final approval hearing, Class Counsel’s efforts will also  
7 include, without limitation:

- 8 • Continued correspondence with Settlement Class Members and supervision
- 9 of the work of the Claims Administrator;
- 10 • Preparing a motion for final approval;
- 11 • Researching and drafting a reply memorandum to this motion;
- 12 • Opposing objections, if any; and
- 13 • Traveling to Los Angeles to appear for the hearing on the motion for final
- 14 approval;
- 15 • Attending to miscellaneous case management responsibilities, including any
- 16 status reports or post-settlement filings that this Court may order.

17 Zavareei Decl. ¶ 14; Kauffman Decl. ¶¶ 19, 27. Indeed, Class Counsel estimates that  
18 approximately 115 hours of work will be required to see this matter to completion, and that  
19 number assumes that no objections will be filed. Zavareei Decl. ¶ 25. These additional

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22 <sup>3</sup> Following the dissemination of notice, Class Counsel received ten or more phone calls a  
23 day from class members with inquiries about the Settlement. Kauffman Decl. ¶¶ 17-18.  
24 Class members questions mostly pertained to how they may receive their share of the  
25 settlement, their options under the settlement terms, whether M&T has stopped the  
26 practice of collecting the fees at issue, and when they may receive their share of the  
27 settlement. *Id.*

1 hours will almost certainly increase lodestar by at least \$100,000 and likely more. *Id.* Thus,  
2 it is likely that by the time this matter is closed, the total lodestar will be around \$430,000.

3 Of further note, Plaintiff's lodestar does not include activities by Class Counsel in  
4 related pay-to-pay litigation, which enabled Class Counsel to gain expertise and oversee  
5 developments in the case law more efficiently. Zavareei Decl., ¶ 6.

6 As attested to in Class Counsel's declarations, Class Counsel's rates are the  
7 prevailing rates in the appropriate legal markets, and are reasonable. Zavareei Decl., ¶ 21;  
8 Kauffman Decl. ¶¶ 24-25. To be conservative, Plaintiff's Counsel calculated their lodestar  
9 using the LSI Laffey Matrix, which provides market rates for attorneys and staff working  
10 in the Washington D.C. area. The Laffey Matrix "provides additional guidance and has  
11 been cited with approval by other courts in this Circuit." *Lakim Indus., Inc. v. Linzer Prod.*  
12 *Corp.*, No. 2:12-CV-04976 ODW, 2013 WL 1767799, at \*8 (C.D. Cal. Apr. 24, 2013); *see*  
13 *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM SHX, 2008 WL  
14 8150856, at \*14 (C.D. Cal. July 21, 2008) (accepting Laffey matrix to be used to  
15 approximate lodestar).

16 Bailey Glasser LLP and Tycko & Zavareei LLP both regularly use and obtain  
17 approval for the Laffey matrix billing rates. Zavareei Decl., ¶ 22; Kauffman Decl. ¶ 23.  
18 The rates charged by Class Counsel have been deemed reasonable in connection with the  
19 approval of their fee applications in other recent matters. *Kumar v. Salov North America*  
20 *Corp.*, No. 14-CV-2411-YGR, 2017 WL 2902898 (N.D. Cal. July 7, 2017) (approving  
21 Tycko & Zavareei rates as "reasonable and commensurate with those charged by attorneys  
22 with similar experience in the market"); *Stathakos v. Columbia Sportswear Co.*, No. 15-  
23 CV-04543-YGR, 2018 WL 1710075, at \*6 (N.D. Cal. Apr. 9, 2018); *Meta v. Target Corp.*,  
24 *et al.*, No. 14-cv-0832 (N.D. Ohio Aug. 7, 2018), Dkt. 179; *In re Think Finance, LLC, et*  
25 *al.*, No. 17-bk-33964 (Bankr. N.D. Tex.); *Brown v. Transurban USA, Inc.*, No. 1:15CV494  
26 (JCC/MSN), 2016 WL 6909683 (E.D. Va. Sept. 29, 2016); *Small v. BOKF, N.A.*, No. 1:13-  
27 cv-01125-REB-MJW (D. Colo.); *Soule v. Hilton Worldwide, Inc.*, No. CV 13-00652 ACK-



1 RLP, 2015 WL 12827769 (D. Haw. Aug. 25, 2015); *Beck v. Test Masters Educ. Servs.,*  
2 *Inc.*, 73 F. Supp. 3d 12 (D.D.C. 2014). Zavareei Decl. ¶ 22; Kauffman Decl. ¶ 23

3 Courts in other cases over the past several years have also approved similar fees  
4 charged by other firms. *See In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-md-  
5 2143-RS, 2016 WL 7364803, at \*8 (N.D. Cal. Dec. 19, 2016) (approving hourly rates of  
6 \$205 to \$950); *Civil Rights Educ. and Enforcement Ctr. v. Ashford Hospitality Trust, Inc.*,  
7 No. 15-cv-00216-DMR, 2016 WL 1177950 (N.D. Cal. Mar. 22, 2016) (finding that  
8 requested hourly rates of \$900, \$750, \$550, \$500, \$430, and \$360 for attorneys and \$225  
9 for paralegals were “in line with the market rates charged by attorneys and paralegals of  
10 similar experience, skill, and expertise practicing in the Northern District of California”);  
11 *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at \*5 (N.D. Cal. May 21, 2015)  
12 (approving hourly rates of \$475 to \$975); *Prison Legal News v. Schwarzenegger*, 608 F.3d  
13 446, 455 (9th Cir. 2012) (finding that the district court did not abuse its discretion by  
14 awarding hourly rates between \$425, \$700, and \$875).

15 Class Counsel’s current rates are also appropriate given the deferred and contingent  
16 nature of counsel’s compensation. *See LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764  
17 (2nd Cir. 1998) (“[C]urrent rates, rather than historical rates, should be applied in order to  
18 compensate for the delay in payment . . .” (citing *Missouri v. Jenkins*, 491 U.S. 274, 283-  
19 84 (1989)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th  
20 Cir. 1994) (“The district court has discretion to compensate delay in payment in one of two  
21 ways: (1) by applying the attorneys’ current rates to all hours billed during the course of  
22 litigation; or (2) by using the attorneys’ historical rates and adding a prime rate  
23 enhancement.”). Using current rates, rather than historical rates, will fairly compensate  
24 counsel for the significant risk of nonpayment taken on in connection with this matter.  
25  
26  
27



**b. In performing the cross-check, a modest multiplier is appropriate.**

Courts in this Circuit routinely award multipliers *See, e.g., Vizcaino*, 290 F.3d at 1051-52 (approving of 3.65 multiplier and citing multipliers as high as 19.6); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 610 (N.D. Cal. 2015) (listing multipliers as high as 5.2 among “the range of acceptable lodestar multipliers”); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (“A 2.83 multiplier falls within the Ninth Circuit’s presumptively acceptable range of 1.0–4.0.”). Multipliers are particularly appropriate in cases where the legal issues are uncertain, and thus the risk is high. *Rodriguez v. Marshalls of CA, LLC*, No. EDCV181716MWFSPX, 2020 WL 7753300, at \*10 (C.D. Cal. July 31, 2020) (granting multiplier where risks to the litigation made an unfavorable outcome uncertain); *Roberts v. Marshalls of CA, LLC*, No. 13-CV-04731-MEJ, 2018 WL 510286, at \*16 (N.D. Cal. Jan. 23, 2018) (same); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at \*10 (N.D. Cal. Sept. 2, 2015) (granting multiplier where “the issues presented in the case were sufficiently complex and novel”); *Parkinson v. Freedom Fid. Mgmt., Inc.*, No. 10-CV-0345-TOR, 2012 WL 5194955, at \*5 (E.D. Wash. Oct. 19, 2012) (granting multiplier where success on claims was uncertain). Multipliers are also used to reward efficient and successful resolution of cases, which serves policy goals of settlement and avoiding wasteful litigation. *In re Bank of Am. Credit Prot. Mktg. & Sales Pracs. Litig.*, No. 11-MD-2269 TEH, 2013 WL 174056, at \*1 (N.D. Cal. Jan. 16, 2013) (“The multiplier of approximately 1.6 is justified by the risk Counsel undertook and the results they achieved for the Class in an efficient manner”).

Here, Class Counsel’s requested fee award of \$831,250 effectively produces a 1.93 multiplier when compared to the expected lodestar of \$430,000. This low number is reasonable, particularly in light of the risks taken on and the fact that such an excellent result was achieved without extensive litigation.

1                   **4. Plaintiffs’ Counsel Should Be Awarded Costs.**

2           As part of Plaintiffs’ Counsel’s \$831,250 fee request, Plaintiffs’ Counsel  
3 additionally requests that the Court grant its application for reimbursement of \$ 25,922.03  
4 in expenses incurred in connection with the prosecution of this Litigation. These expenses  
5 are itemized in the Zavareei and Kauffman Declarations. (Zavareei Decl., ¶ 26, Ex. 2;  
6 Kauffman Decl. ¶ 28) The costs reflect the fact that two mediations were needed to resolve  
7 this case, but no expensive experts or voluminous discovery were required. Moreover,  
8 while class Counsel will attend the hearing in Los Angeles, they do not seek reimbursement  
9 for those costs. Plaintiff’s Counsel is typically entitled to reimbursement of all reasonable  
10 out-of-pocket expenses and costs in prosecution of the claims and in obtaining a settlement.  
11 *See Harris*, 24 F.3d at 19; *Hughes Air West*, 557 F.2d at 769. Thus, the costs should be  
12 awarded.

13 **III. CONCLUSION**

14           For all of these reasons, Plaintiff respectfully requests that the Court approve her  
15 request for a service award of \$5,000 and for a fee award of \$831,250 and a cost award of  
16 \$25,922.03 for Class Counsel.

1 Dated: July 21, 2021

Respectfully submitted,

2  
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