

THE HONORABLE ANDREA DARVAS  
Department 23  
Note for Hearing: May 5, 2023, at 9:00 a.m.  
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

JENIFER K. DEMARRE & RYAN A. DEMARRE,

Plaintiffs,

vs.

MUTUAL OF ENUMCLAW INSURANCE  
COMPANY,

Defendant.

NO. 21-2-10304-5 SEA

**PLAINTIFFS' MOTION FOR ATTORNEYS'  
FEES, COSTS, AND SERVICE AWARDS**

**I. INTRODUCTION**

Plaintiffs request that the Court award Class Counsel \$165,000 in attorneys' fees and \$4,857 in litigation costs, and grant each plaintiff a \$7,500 service award. Plaintiffs and Class Counsel actively litigated this action for over a year before achieving a favorable settlement on behalf of the Class.<sup>1</sup>

Class Counsel's requested attorneys' fee award is 30% of the common fund established for the benefit of the class. The requested award is less than Class Counsel's lodestar. The

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<sup>1</sup> Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as those set forth in the Parties' Settlement Agreement (Ex. 1 to the Declaration of Blythe Chandler in support of Plaintiff's motion for preliminary approval, Sub. No. 51).

requested awards are warranted given the time invested by both Class Counsel and Plaintiffs in order to obtain the \$550,000 settlement for the Class. The settlement is an excellent result for the Class that will pay Class members approximately 60% of their alleged damages in this case.

## II. STATEMENT OF FACTS

### A. Class Counsel developed a solid understanding of the facts and legal issues before the parties settled.

Plaintiffs filed this action in August 2021. But that time, Class Counsel had been working with the Plaintiffs and investigating their claims for over a year. Declaration of Samuel Leonard in support of motion for fees and costs (Leonard Decl.), Ex. 1 (investigation began in January 2020). After filing, the parties resolved issues related to the appropriate forum. *See* Sub. No. 2 (reflecting transfer to this Court from Pierce County Superior Court). The parties then took discovery including both written discovery and depositions. Sub. No. 51 ¶¶ 11-13. Plaintiffs obtained documents and data from third parties through subpoenas. *Id.*

The parties participated in a full day mediation with Retired Judge Erlick early in 2022. Sub. No. 51, Ex. 1 (Settlement Agreement) § I.6. While the mediation did not end with a resolution, it allowed the parties to discuss and assess the strengths and weaknesses of their respective cases. The parties ultimately settled as a result of direct, but arm's length, negotiations between counsel. Plaintiffs had filed their motion for class certification when the case settled. Sub. No. 38.

### B. Plaintiffs were actively involved in the litigation.

Plaintiffs committed significant time to this litigation. Before filing and early in the case they met regularly with counsel numerous times to discuss their claims and the factual allegations in the complaint. Ryan Demarre Decl. ¶¶ 3-6. Plaintiffs responded to written discovery requests. *Id.* ¶ 6. Both Plaintiffs prepared for and sat for depositions by MOE's counsel. *Id.* Plaintiffs took time off work for their depositions. *Id.* Plaintiffs understood that pursuing their claims against MOE on a classwide basis would likely increase the amount of time they would wait for resolution and might reduce their individual recovery amount, but

nonetheless chose to put themselves forward as proposed representative because they believed all the class members should receive relief. *Id.* ¶ 4.

### III. STATEMENT OF ISSUES

Should the Court approve the requested attorneys' fees, litigation costs, and service awards?

### IV. EVIDENCE RELIED UPON

Plaintiffs rely on the Declarations of Blythe H. Chandler, Sam Leonard, and Ryan Demarre, in support of this motion, and the exhibits attached thereto. Plaintiffs also rely on the documents filed with their Motion for Preliminary Approval (Sub. Nos. 49, 51, 52).

### V. ARGUMENT AND AUTHORITY

Class Counsel requests that the Court approve payments from the settlement fund of \$165,000 in attorneys' fees and \$4,857 for their documented out-of-pocket expenses. Class Counsel's request warrants approval. Class Counsel fully disclosed to the Class their intent to request fees and costs to be paid from the settlement fund in the Court-approved notice and will post this motion and the supporting documentation on the settlement website within one-business day of filing it with the Court. Sub. No. 51, Ex. 1 (Settlement Agreement) § IV.1; Chandler Decl. ¶ 13.

Where, as here, counsel in a class action seek fees from the common fund, courts have discretion to employ either the lodestar method or percentage-of-recovery method to calculate a reasonable fee. *Bowles v. Washington Dep't of Ret. Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993). When determining the appropriate fee from a common fund, the percentage-of-the-fund method is preferred. *Id.* As a matter of public policy, awarding fees from the common fund promotes "greater access to the judicial system" by making it easier for class action plaintiffs to obtain counsel. *Id.* Class Counsel's request is reasonable under either percentage-of-recovery or lodestar analysis.

**A. Percentage-of-recovery analysis supports Class Counsel’s fee request.**

Under the “percentage of recovery” method attorneys are awarded a reasonable percentage of the total recovery, “often in the range of 20 to 30 percent.” *Bowles*, 121 Wn.2d at 72; see also *City of Seattle v. Okeson*, 137 Wn. App. 1051, 2007 WL 884827 at \*7 (2007) (unpublished) (“Twenty to thirty percent of the recovery is a typical benchmark used in awarding attorney fees under the common fund doctrine, but that figure can be adjusted based on the circumstances of the case.”). However, courts in this state can and do award more than 30 percent. See *A.M. v. Moda Health Plan, Inc.*, C 14-1191 TSZ, 2015 WL 9839771, at \*3 (W.D. Wash. Nov. 3, 2015) (awarding fee of 35% of settlement fund). Here, Class Counsel seek 30% of the common fund, a lower percentage than that approved by Washington Superior Courts over recent years. See *Long v. First Resolution Investment Corp.*, No. 19-2-11281-6 SEA, Final Approval Order and Judgment ¶ 21 (King Cnty. Sup. Ct. Aug. 28, 2020) (attached to Chandler Decl. as Ex. 2); *Strong v. Numerica Credit Union*, No. 17-2-01406-39, Order Granting Plaintiff’s Unopposed Motion for Final Approval of Class Action Settlement and Award of Attorneys’ Fees, Costs and Service Award ¶ 19 (Yakima Cnty. Sup. Ct. Feb. 14, 2020) (attached to Chandler Decl. as Ex. 3); *Dougherty v. Barrett Business Servs., Inc.*, No. 17-2-05619-1, Final Approval Order and Entry of Judgment ¶¶ 18-21 (Clark Cnty. Sup. Ct. Nov. 8, 2019) (attached to Chandler Decl. as Ex. 4) (“BBSI Order”); *Terrell v. Costco Wholesale Corp.*, No. 16-2-19140-1 SEA, Order Approving Award of Attorneys’ Fees and Costs (King Cnty. Sup. Ct. June 19, 2018) (attached to Chandler Decl. as Ex. 5) (“Costco Order”). Class Counsel’s request here is consistent with the 30% benchmark established in *Bowles*.

Class Counsel’s request is warranted given the significant value to the Class provided by the Settlement. Class members will receive approximately 60% of their alleged damages. The recovery is particularly impressive given that the claims in this case were far from risk-free. Class certification is always a hard-fought motion that presents some challenges in this case because MOE would likely have argued that to prove each class member was injured, Plaintiffs would have to present individualized evidence on the fair market value of each class member’s

vehicle before it was totaled. Federal courts have recently issued orders finding similar claims ill-suited to class certification on those grounds. *See, e.g. Lara v. First Nat. Ins. Co. of Am.*, 25 F.4th 1134 (9th Cir. 2022). While Plaintiffs articulated a number of reasons why those cases would not control in their motion for class certification, *see* Sub. No. 34 at 12–13, class counsel considered the risks those cases created in negotiating the settlement. If the Court denied Plaintiffs’ motion for class certification, the other Settlement Class Members would be left without relief.

If Plaintiffs prevailed on class certification, they would likely face a summary judgment motion as Defendants dispute the merits of Plaintiffs’ claims. Class Counsel also considered the risks inherent in any trial. Defendants would have the option to appeal if Plaintiffs won at trial, which creates additional delay and risk. The Settlement avoids those risks and delays while paying Settlement Class Members a significant percentage of their alleged damages.

**B. Class Counsel’s fee request is far less than their lodestar in the case and consistent with the ethics guidance on reasonableness of fees.**

While the percentage approach provides an independent ground for granting the fee request, a “cross-check” under the lodestar method also demonstrates that counsel’s request is reasonable. *See Manual for Complex Litigation (Fourth) (“MCL 4th”) § 14.121* (noting “[a] number of courts favor the lodestar as a backup or cross-check on the percentage method when the fees might be excessive”). “Under the lodestar/multiplier method, the district court first calculates the ‘lodestar’ by multiplying the reasonable hours expended by a reasonable hourly rate. *See generally Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597–99, 675 P.2d 193, 203–04 (1983). The court may then enhance the lodestar with a ‘multiplier,’ if necessary, to arrive at a reasonable fee.” *Id.*

Here, Class Counsel have devoted over 515 hours to the investigation, development, litigation, and resolution of this case, incurring over \$234,000 in fees. Chandler Decl. ¶ 11, Ex. 1; Leonard Decl., Ex. 1. This total does not include professional staff time written off by the Terrell Marshall Law Group through exercise of billing judgment. Chandler Decl. ¶ 11. Class Counsel

spent considerable time investigating the claims of the Class members, researching and analyzing legal issues, briefing class certification, participating in mediation, taking written discovery, third party discovery, and depositions. Class Counsel's work was essential to ensure the successful prosecution and settlement of this complex action.

Class Counsel's lodestar calculations also are based on reasonable hourly rates. In assessing the reasonableness of an attorney's hourly rate, courts consider "the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case." *Bowers*, 100 Wn.2d at 587. Class Counsel are experienced, highly regarded members of the bar with extensive expertise in the area of class actions and complex litigation involving claims like those at issue here. Similar or higher rates have been approved numerous times in class action cases. *See, e.g., Costco Order* (approving similar rates for Terrell Marshall); *Barnett v. Wal-Mart Stores, Inc.*, No. 01-2-24553-8 (King Cnty. Sup. Ct. July 20, 2009) (Judge Spector approving fee request based on rates ranging from \$100 to \$760); *Splater v. Thermal Ease Hydronic Systems, Inc.*, No. 03-2-33553-3 (King Cnty. Sup. Ct. July 31, 2009) (Judge Washington approving fee request based on rates ranging from \$100 to \$760); *Bowen v. CSO Financial, Inc., et al.*, No. 17-cv-00677, ECF No. 38, at 3 (W.D. Wash. July, 10, 2018) (approving Plaintiff's counsel's fee request based on rates similar as those requested here); *Carideo v. Dell, Inc.*, No. 06-cv-01772, ECF No. 162 (W.D. Wash. Dec. 17, 2010) (approving as reasonable a fee petition which included rates ranging from \$175 to \$600); *Hartman v. Comcast Business Communications, LLC*, No. 10-0413, ECF No. 106 (W.D. Wash. Dec. 8, 2011) (approving fee request based on rates ranging from \$180 to \$650).

Class Counsel's requested fee of \$165,000 is \$69,500 less than their lodestar in the case, even after counsel made reductions to reflect billing judgment. The lodestar cross-check thus confirms that the requested fees calculated as a percentage of the fund are reasonable.

Finally, the Washington Supreme Court has said that the factors set out in Rule of Professional Conduct 1.5(a) may also guide a court's analysis of the reasonableness of a fee

request. *See Mahler v. Szucs*, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998) (overruled on other grounds). Those factors include the novelty and difficulty of the question involved and the skill requisite to perform the legal services properly, whether the representation precludes other employment by the lawyer, the fee customarily charged in the locality for similar legal services, and the amount involved and the results obtained. Here, the case raised challenging legal and procedural questions, which demanded litigators with the skill and experience of Class Counsel, Class Counsel's work on this matter precluded work on other matters, a one-third fee in contingency cases is customary in this State, and Class Counsel obtained excellent results for the Class. *See BBSI Order; Costco Order* at ¶ 6.

**C. Class Counsel seeks litigation costs that would be charged to a paying client.**

Class Counsel have expended more than the \$4,857 in litigation costs that they request the Court award. They request only the \$4,857 in costs that they informed the class members they would seek in the postcard notice. Chandler Decl. ¶ 15. Class Counsel's litigation costs include filing and service fees, mediation fees, and court reporting and transcript production fees. Chandler Decl. ¶ 15. The costs incurred were reasonable, necessary to the successful conclusion of this litigation and are the types of costs normally charged to a paying client. *See Newberg on Class Actions* § 16.10 (explaining that class counsel can typically recover from a common fund costs that would "normally be charged to a paying client"); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (counsel should recover "those out-of-pocket expenses that would normally be charged to a fee paying client"); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-1178 (S.D. Cal. 2007) (finding that filing fees and mediation expenses necessary expenses in a class action litigation).

**D. The Class Representatives' requested service awards should be approved.**

"At the conclusion of a class action, the class representatives are eligible for a special payment in recognition of their service to the class." Rubenstein, William B., *Newberg on Class Actions* § 17:1 (5th ed. Dec. 2019). Courts approve service awards in most class suits and the awards average between ten and fifteen thousand dollars per class representative. *Id.* Service

payments “are intended to compensate class representatives for work undertaken on behalf of a class” and “are fairly typical in class action cases.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted); *see Probst v. State of Washington Dep’t of Ret. Sys.*, 150 Wn. App. 1062, 2009 WL 1863993, at \*6 (2009) (unpublished) (affirming payment of \$7,500 to named plaintiff). Such 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 attorneys general.

Plaintiffs each request a service award of \$7,500 in recognition of their efforts on behalf of the Class, which include assisting counsel with the investigation, litigation, and settlement of the case. Plaintiffs expended significant time and effort in this matter, consistently putting the Class members’ interests first. They provided information to their counsel during counsel’s investigation of the case, sat for deposition, and evaluated the settlement terms. They request reasonable awards in line with service awards approved in other cases. *See, e.g., Burnett v. Wal-Mart Stores*, No. 01-2-24553-8 SEA, 2009 WL 2194864 (King Cnty. Sup. Ct. July 20, 2009) (approve service awards of \$10,000 each to three class representatives); *Probst*, 150 Wn. App. at \*6 (affirming \$7,500 incentive award).

## VI. CONCLUSION

Plaintiffs and Class Counsel respectfully request that the Court approve the requested attorneys’ fees, costs, and service awards, because they are reasonable in light of the work required to achieve the settlement obtained for the Class.

## VII. LCR 7(b)(5)(B)(vi) CERTIFICATION

I certify that this motion contains 2,529 words in compliance with Local Civil Rules.

RESPECTFULLY SUBMITTED AND DATED this 20th day of January, 2023.

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