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Attorneys for Plaintiffs

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

RICKY G. & LOGAN D ROBINSON
HILL-VIEW MOBILE HOME PARKS, on
behalf of itself and all others similarly
situated, ED QUINN, on behalf of himself
and all others similarly situated,

Plaintiffs,

vs.

CITY OF POCA TELLO, an Idaho
municipality,

Defendant.

Case No.: CV-2014-1520-OC

PLAINTIFFS' MOTION FOR AN
AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF LITIGATION
EXPENSES

The Plaintiffs respectfully move this Court pursuant to Rule 77(h) of the Idaho Rules of Civil Procedure for an Order awarding attorneys' fees and reimbursement of litigation expenses to be paid out of the Settlement Amount as set forth in the Memorandum in Support of this Motion submitted contemporaneously herewith.

DATED: June 27, 2019.

/s/ Michael D. Gaffney
Michael D. Gaffney
Of Beard St. Clair Gaffney PA
Attorneys for the Plaintiffs

/s/ Nathan M. Olsen
Nathan M. Olsen
Of Peterson Moss Hall & Olsen
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I certify that I am an attorney licensed in the State of Idaho and on June 27, 2019, I served a true and correct copy of the *Plaintiffs' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses* upon the following as indicated below:

Blake G. Hall
Sam L. Angell
Hall Angell & Associates
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iCourt Services

/s/ Michael D. Gaffney
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PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR AN
AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF LITIGATION
EXPENSES

I. INTRODUCTION

Pursuant to Rule 77 of the Idaho Rules of Civil Procedure, the Plaintiffs, who are Class Representatives, through Class Counsel, respectfully move for an award of attorneys' fees and reimbursement of litigation expenses from the Settlement Agreement with

Defendants. The Agreement provides for, *inter alia*, \$4.5 million in monetary relief to the Settlement Class, which will be deposited into a separate, joint account.

The success of the Settlement is the product of the initiative, investigation and hard work of skilled counsel over the course of more than five years. In light of the substantial benefit conferred on members of the Settlement Class through Plaintiffs' counsels' diligence, Plaintiffs and Plaintiffs' counsel respectfully move for an award from the Settlement Fund of attorneys' fees in the amount of 40% of the Settlement Fund, totaling \$1,800,000, for work undertaken from inception of the case, when Plaintiffs filed in 2013, through June 2019 and reimbursement of all accrued litigation expenses in the amount of \$3,217.94 incurred over that period. Because of the complexity and duration of this litigation requiring substantial investment of time and effort by Class Counsel, which involved appealing this matter to the Idaho Supreme Court, the requested attorneys' fees are reasonable in light of the circumstances.

II. LEGAL STANDARD

Idaho's Rule 77(h) provides as follows:

(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) 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) (2018).

III. PLAINTIFFS' COUNSELS' APPLICATION FOR AN AWARD OF FEES AND REIMBURSEMENT OF EXPENSES 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.

In Idaho, when determining the amount of attorneys' fees to be awarded, the Court looks to the following factors enumerated in Rule 54(e):

- (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;
- (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 imposition of a "reasonableness" standard on any attorney fee award. *Id.* 77(h). Each of the foregoing elements of Rule 54(e) warrant an award consistent with the contingency fee agreement.

A. The requested fee award is reasonable under the percentage-of-the-fund method.

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). *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) ("*Online DVD*") (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).

In Idaho, the amount of attorneys' fees awarded in cases is to be a reasonable amount. *See* IDAHO R. CIV. P. 77(h). The reasonableness of the fee is based on the Rule 54(e) factors. *Id.* 54(e).

i. The Time and Labor Required.

This case has been pending for over five years. It has been on appeal already and has required a substantial amount of effort and work to litigate. Counsel for the defense has ably defended the case and has asserted many defenses to the claim. It has involved novel issues of law that required the highest court in the state to adjudicate in order to bring the parties to the stage where they find themselves at the current moment. 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. This factor weighs heavily in favor of awarding Class Counsel the amount requested from the Settlement Fund.

ii. The Novelty and Difficulty of the Questions.

The Court is well aware of the amount of time, effort, and briefing that has been involved in the case. The case has generated Supreme Court precedent that will have precedential value for other similarly situated lawsuits in Idaho. The issues involved in this case have been novel and complex, requiring meticulous research and briefing in order to fully present the issues to the Court.

iii. The Skill Requisite to Perform the Legal Service Properly and the Experience and Ability of the Attorney in the Particular Field of Law.

Plaintiffs' counsel respectfully submits that the Court has already considered the skill necessary to litigate this matter on behalf of the Plaintiffs when it appointed counsel as Class Counsel in this case. The Court noted that Mr. Olsen had unique familiarity with the facts involved in this case and did not question Mr. Gaffney's experience in litigating complex cases, noting his prior experience in class action litigation.

Consequently, Plaintiffs' counsel effectively managed the logistics of this complex class action and they successfully tackled many difficult legal and factual issues presented by this case. Defendants asserted numerous defenses and were successful in obtaining a dismissal of the case that led to the subsequent appeal. The issues faced in this case were novel, with limited precedent that could be construed as controlling, thereby increasing the risk of the case and the need for skilled counsel. *See Vizcaino*, 142 F. Supp. 2d at 1303. Equally important, the opinion issued by the Idaho Supreme Court resulting from the Plaintiffs' appeal, has significant precedential value to other similarly situated municipal utility users in Idaho.

Plaintiffs' also faced skilled and resourceful opposing counsel, favoring upward adjustment. *See Vizcaino*, 142 F. Supp. 2d at 1303; *In re King Res. Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Bd. of Trade*, 372 F. Supp. 1349, 1354 (N.D. Ill. 1974).

iv. The Prevailing Charges for Like Work.

The 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 federal court, the percentage of the fund approach is the prevailing approach to compensating class counsel for the work performed. *In re Brooktree Sec. Litig.*, 915 F.

Supp. 193, 196 (S.D. Cal. 1996). Thus, the prevailing charges of a percentage is reasonable.

Plaintiffs also submit that the percentage sought, 40%, is reasonable in light of the fact that the case had to be appealed in order for it to be brought to the point of settlement. Originally, the parties had entered into a 35% contingent fee agreement, which is within the range of reasonableness for this kind of work. (Gaffney Decl. ¶¶ 11, 13.) Once the case was dismissed and appealed, the class representative agreed to a forty 40% contingency. (Olsen Decl. Ex. B.) This 40% contingent fee was memorialized in a written agreement. (Olsen Decl. Ex. B.)

v. Whether the Fee is Fixed or Contingent.

As noted, *supra*, the fee in this case is contingent. This is within the scope of acceptable fee arrangements for class action work. Additionally, the contingent percentage is reasonable in light of all the circumstances of the case.

Plaintiffs' counsel took this case on contingency, without any assurance of recovery, litigating the case for nearly five years, investing substantial time and effort hours in its prosecution without compensation, and independently funding litigation costs. *WPPSS*, 19 F.3d at 1299 (noting appropriateness of compensating attorneys for accepting the risk of non-payment); *see also Vizcaino*, 290 F.3d at 1050; *Online DVD*, 779 F.3d at 955 & n.14. “[T]he risk of nonpayment in complex cases, such as this one, is very real.” *In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-01695, 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007). This risk undertaken by Plaintiffs' counsel was significant and such risk is highlighted by the fact that the case was, at one stage, dismissed by the Court. This necessitated an appeal to the Idaho Supreme Court in order to get the case reinstated. There

was never any guarantee that there would be any recovery in this matter and no suggestion that this case was “easy” could be considered a reasonable argument to make.

Consequently, the risk undertaken by counsel justifies the requested fee award from the settlement fund.

vi. The Time Limitations Imposed by the Client or the Circumstances of the Case.

No time limitations were imposed by the client.

vii. The Amount Involved and the Results Obtained.

Plaintiffs’ counsel achieved an excellent result for the class: \$4.5 million in cash. The Settlement thus provides significant benefits to the Class Members, justifying the award. This award was only achieved after a lengthy appeal that the Plaintiffs undertook all the while handling the matter on a contingency fee basis. Moreover, the monetary relief is substantial in light of the financial realities facing the Defendant with respect to its ability to actually pay any larger judgment that might have been achieved in the case at trial.

Plaintiffs’ counsel respectfully submit that the work they have performed over the five years of this case has been of the highest quality and of great benefit not just to the class, but to other utility users throughout the state. The history set forth above and further detailed in the Gaffney Declaration provides an overview of the substantial work counsel undertook and their diligence in defeating dispositive motions, obtaining necessary discovery, briefing class certification, and resolving this case.

viii. The Undesirability of the Case.

The case was undesirable in light of the risk posed to the Plaintiffs and counsel and the potential reputational harm the Plaintiffs exposed themselves to within the community

where they reside. The Plaintiffs sued their own municipality at great reputational risk and still persevered.

ix. Awards in Similar Cases.

As noted, *supra*, awarding percentages of the fund occurs frequently in class action lawsuits. There is no reason for the Court to deviate from such an approach here.

B. The request for reimbursement of litigation expenses is reasonable.

Class Counsel also request reimbursement of litigation costs and expenses they incurred collectively and individually on behalf of the class in the amount of \$3,217.94. (Gaffney Decl. ¶ 15; Olsen Decl. ¶ 16.) 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*: those for document production, experts and consultants, depositions, notice and claim administration. *See, e.g.*, 1 Alba Conte, *Attorney Fee Awards* § 2.19 (3d ed. 2004). As detailed in the invoices attached to Messrs. Gaffney and Olsen’s declarations, Plaintiffs’ Counsel seek reimbursement of expenses incurred from commencement of the litigation through June 2019.

IV. CONCLUSION

As a result of the foregoing, the Court should grant the Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses.

DATED: June 27, 2019.

/s/ Michael D. Gaffney
Michael D. Gaffney
Of Beard St. Clair Gaffney PA
Attorneys for the Plaintiffs

/s/ Nathan M. Olsen
Nathan M. Olsen
Of Peterson Moss Hall & Olsen
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I certify that I am an attorney licensed in the State of Idaho and on June 27, 2019, I served a true and correct copy of the *Plaintiffs' Memorandum in Support of Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses* upon the following as indicated below:

Blake G. Hall
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/s/ Michael D. Gaffney
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Attorneys for Plaintiffs

DISTRICT COURT, SIXTH JUDICIAL DISTRICT, STATE OF IDAHO
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RICKY G. & LOGAN D ROBINSON
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Case No.: CV-2014-1520-OC

ORDER (1) GRANTING
PRELIMINARY APPROVAL OF
PROPOSED SETTLEMENT
AGREEMENT AND (2) APPROVING
THE NOTICE PLAN AND FORM OF
NOTICE AND DIRECTING NOTICE TO
THE CLASS

Based on the Court's review of the proposed Settlement Agreement between the parties and the Motion for Preliminary Approval of the Proposed Settlement Agreement and supporting papers, the Court finds as follows:

Order (1) Granting Preliminary Approval of the Proposed Settlement Agreement and (2) Approving the Notice Plan and Form of Notice and Directing Notice to the Class - 1

PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

1. The motion of the Plaintiffs for preliminary approval of the proposed settlement agreement with the Defendant, which the Defendant does not oppose, is hereby GRANTED.

2. The Court finds that the proposed settlement, as set forth in the Settlement Agreement, subject to final determination following implementation of the plan for notice described below and a fairness hearing, falls within the range of possible approval and is sufficiently fair, reasonable and adequate to the Settlement Class certified.

RATIFICATION OF STIPULATION REGARDING CLASS CERTIFICATION

3. On May 18, 2018, the Court granted the Plaintiffs' Motion for Class Certification subject to subsequent findings by the Court.

4. The Court ratifies and certifies the Class as set forth in the Stipulation and Settlement Agreement as follows:

- a. All persons and entities who, between April 14, 2012 and April 14, 2014, paid user fees to the City of Pocatello that contained a PILOT component.

5. The Court finds that the Class as set forth in the Stipulation and Settlement Agreement fully complies with the requirements of Idaho Rule of Civil Procedure 77. Specifically, the Court finds that the Class: (1) is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the Class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, for purposes of settlement, the Court finds that Idaho Rule of Civil Procedure 77 (b)(3) is also met and that there are questions of law or fact common to class members

which predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

NOTICE PLAN AND FORM OF NOTICE

6. The proposed plan for and manner of dissemination of Notice and the forms of Notice of the Settlement Agreement between the Plaintiffs and Defendant as set forth in the submissions, are hereby APPROVED:

- a. The Notice Plan proposed by the Plaintiffs and described herein, which includes Direct Mail Notice, Publication Notice, and information provided on the internet, constitutes the “best notice that is practicable under the circumstances” and is “reasonable” as required by Idaho Rule of Civil Procedure 77(c)(2)(B) and (e)(2).
- b. The Notices are clear, concise, and employ “plain, easily understood language,” and include all necessary information as required by Idaho Rule of Civil Procedure 77(c)(2)(B).

7. On or about July 27, 2019, the Defendant shall send notice to all individuals and entities who are not excluded from the Settlement and who currently receive utility services from the City of Pocatello (Direct Mail Notice). The notice shall be in substantially the same format and with substantially the same content as that attached as Exhibit E to the Gaffney Declaration.

8. On or about July 27, 2019, the City of Pocatello shall publish on its website the Notices and Settlement Agreement itself with other appropriate court documents relating to the Proposed Settlement (Internet Notice).

9. During the period from July 27, 2019 and August 27, 2019, the specific date of publication to be determined by the parties as publication schedules permit, the parties shall publish notice (Publication Notice) in substantially the same format as attached to Exhibit D of the Gaffney Declaration, in *The Idaho State Journal*.

10. The Plaintiffs shall insert the date for the Fairness Hearing set forth in this Order into the Notices identified above prior to issuance.

11. On or before September 9, 2019, the Plaintiffs and Defendant shall file an affidavit detailing the process engaged in to effectuate the Notice Plan, and confirm that the requirements regarding the Direct Mail Notice, the Publication Notice, and Internet Notice, have been carried out in accordance with this Order.

12. The Motion for Attorney's Fees and Costs shall be posted on the City of Pocatello's website, www.pocatello.us.

SIGNIFICANT DATES

The following deadlines apply:

13. **Requests for Exclusion from the Proposed Settlement:** Requests for exclusion from the Proposed Settlement must be sent to Plaintiffs' and Defendant's counsel via first-class mail postmarked or hand delivered on or before August 28, 2019.

14. **Objections to Proposed Settlement:** Objections to the Proposed Settlement must be sent to the Court, Class Counsel, and Counsel for the Defendant, as provided in the Notices, via first-class mail postmarked on or before September 3, 2019.

15. **Plaintiffs' Motion for Final Approval:** Plaintiffs shall file their Motion for Final Approval of the Settlement Agreement on or before September 3, 2019.

16. **Fairness Hearing:** The Court will hold a hearing regarding the fairness and adequacy of the Proposed Settlement Agreement scheduled for September 16, 2019 at 2:00 p.m., Bannock County Courthouse, State of Idaho, 624 E. Center, Pocatello, Idaho 83201. The date, time, and location of this hearing are subject to change, and Class members are advised to check www.pocatello.us for any updates.

17. **Plaintiffs' Motion for Attorney Fees and Costs:** The Court will hold a hearing regarding Plaintiffs' Motion for Attorney Fees and Costs scheduled for October 15, 2019 at 2:00 p.m. Bannock County Courthouse, State of Idaho, 624 E. Center, Pocatello, Idaho 83201. The date, time, and location of this hearing are subject to change, and Class members are advised to check www.pocatello.us for any updates.

SO ORDERED.

DATED: _____

Signed: 7/5/2019 06:07 PM



Hon. Stephen Dunn
District Judge

CLERK'S NOTICE OF ENTRY

I certify that on Signed: 7/8/2019 08:22 AM _____, I served a true and correct copy of the *Order*

(1) Granting Preliminary Approval of the Proposed Settlement Agreement and (2)

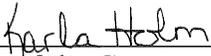
Approving the Notice Plan and Form of Notice and Directing Notice to the Class upon the

following through iCourt services:

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Clerk of the Court