

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

SCOTT PEARLSTONE, individually and on)
behalf of similarly situated individuals,)

Plaintiff,)

v.)

COSTCO WHOLESALE CORPORATION,)

Defendant.)

Case No. 4:18-cv-00630-SRC

Hon. Stephen R. Clark

**PLAINTIFF’S MOTION & INCORPORATED
MEMORANDUM OF LAW IN SUPPORT OF APPROVAL
OF ATTORNEYS’ FEES, EXPENSES AND INCENTIVE AWARD**

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I. INTRODUCTION

The Court preliminarily approved the Parties' class action Settlement¹ on July 27, 2020, bringing to a close more than two years of contentious litigation. (Dkt. 108.) In advance of the upcoming final approval hearing scheduled for December 15, 2020, Plaintiff submits this Motion in support of an award of reasonable attorneys' fees and reimbursable litigation expenses for Class Counsel, as well as an incentive award for Plaintiff in recognition of his service as Class Representative.

Plaintiff is pleased to report that the Notice Plan was implemented successfully following preliminary approval, and the Settlement has been met with enthusiastic support from the Settlement Class Members. As of the date of this filing, the Settlement Administrator has sent direct notice by email and U.S. Mail to tens of thousands of potential Settlement Class Members, the Settlement Website has garnered almost 2,000 hits and 7,500 pageviews,² and many claims have already been submitted with the claims deadline still weeks away. Most importantly, Class Counsel and the Settlement Administrator have not received *any* objections to the Settlement or Class Counsel's allowable fee award—not even any informal complaints. (Declaration of Paul T. Geske, hereinafter "Geske Decl.," ¶ 17, attached hereto as Exhibit B.)

The Settlement Class Members' positive response to the Settlement is not unexpected, because the Settlement that Class Counsel achieved in this case is an exceptional result. Under the Settlement, Settlement Class Members can claim substantial monetary relief. Defendant Costco Wholesale Corporation ("Costco" or "Defendant") has agreed to establish a Settlement Fund of up to \$525,000; and Settlement Class Members who timely submit a valid claim can choose between

¹ Unless stated otherwise, capitalized terms that are not defined in this Motion are intended to have the meanings assigned to them in the Parties' Settlement Agreement, a true and accurate copy of which is attached as Exhibit A.

² A pageview is an instance of a webpage being loaded or reloaded in a web browser.

two Settlement Benefits: either (A) a free one-year Costco membership valued at \$60.00; or (B) an individual cash payment of \$15.00 to be paid from the Settlement Fund. (Exh. A ¶ 35(a).) Based on the claims submitted to date, both options have been very popular, showing that the Settlement Class Members appreciate Class Counsel's decision to structure this Settlement in a way that allows individuals to choose what form of compensation works best for them.

With this Motion, Plaintiff requests a fee award of \$175,000, which is inclusive of costs and litigation expenses, and a \$5,000 incentive award for Plaintiff's service as Class Representative. As explained in detail below, the requested awards are justified in light of the Settlement's exceptional monetary relief, consistent with awards granted in similar class action settlements within the Eighth Circuit, and reasonable given the significant time and effort that Class Counsel and Plaintiff have committed to litigating this matter for the benefit of the Settlement Class Members. Further, the lack of any opposition to the Settlement—including to the fee award and incentive award—strongly support the reasonableness and appropriateness of the requested awards in this case.

Both Plaintiff and Class Counsel have devoted substantial time and effort to prosecuting the Settlement Class Members' claims in the face of staunch defenses and an uncertain outcome. Those efforts have yielded very meaningful benefits for consumers nationwide. The requested fee award and incentive award are amply justified when taking into consideration Class Counsel's investment of time and effort, the risks of continued litigation, and the excellent results obtained for the Settlement Class Members. Accordingly, Plaintiff and Class Counsel respectfully request that the Court grant the agreed-upon fee award of \$175,000.00, as well as an incentive award of \$5,000 for Plaintiff as Class Representative.

II. BACKGROUND

A. **Factual Background.**

As explained in prior filings, the claims at issue in this case challenge Defendant's refund practices with respect to its executive membership program. (Class Action Complaint ¶ 1, hereinafter "Compl.," Dkt. 1.) Defendant is a members-only retailer, and consumers must purchase a 12-month membership in order to shop at Costco stores. (*Id.* ¶ 15.) There are multiple types of memberships, including a basic, entry-level membership for a \$60 annual fee and an executive membership for a \$120 annual fee. (*Id.* ¶ 17.) Defendant's memberships are governed by the terms of its Member Privileges and Conditions, which contain a "Risk-Free 100% Satisfaction Guarantee" promising customers that they may cancel their membership at any time if they are dissatisfied and receive a full refund of their membership. (*Id.* ¶¶ 22-24.)

As alleged in the Complaint, Plaintiff claims that Defendant often refuses to provide a full refund of membership fees to executive members who cancel or downgrade their membership. Specifically, Defendant has a practice of reducing a cancelling executive member's refund by the amount of certain rewards credit the member has accrued and redeemed. (*Id.*) Plaintiff asserts that this practice leaves cancelling members with only a partial cash refund and a corresponding store credit—but not a full cash refund as promised. (*Id.*) This practice, Plaintiff alleges, is contrary to the Risk-Free 100% Satisfaction Guarantee and thus a breach of the terms of its Member Privileges and Conditions. (*Id.* ¶¶ 26-28.)

After Plaintiff cancelled his executive membership and received only a partial cash refund, he filed this suit on behalf of a putative nationwide class, asserting claims under three counts for: (I) breach of contract, (II) unjust enrichment, and (III) violation of the Missouri Merchandising Practices Act ("MMPA"), Mo. Ann. Stat. 407.010 *et seq.*

B. Procedural History Leading To Settlement.

As the Court is aware, this litigation has been lengthy and contentious. Plaintiff initiated this lawsuit against Defendant more than two years ago, on April 19, 2018. (Dkt. 1.) The Parties then became embroiled in lengthy motion practice related to the pleadings. On July 23, 2018, Costco filed a Rule 12(b)(6) motion to dismiss (Dkt. 9.) Certain exhibits attached to the briefing led to additional motion practice and briefing. (*See* Dkts. 23-26, 28-29.) Following briefing, the Court issued an order on February 21, 2019 denying Costco's motion in its entirety. (Dkt. 30.)

On March 21, 2019, Defendant filed its Answer to Plaintiff's Complaint. (Dkt. 33.) On July 1, 2019, Defendant moved to amend its Answer. (Dkt. 43.) Defendant's request for leave to amend was contested and ultimately denied in part and granted in part on August 23, 2019. (Dkt. 59.) Defendant filed its Amended Answer on August 26, 2019. (Dkt. 61.)

In addition to motion practice, the Parties also engaged in extensive discovery over the course of the proceedings, including written discovery requests, review and production of hundreds of pages of documents, a Federal Rule 30(b)(6) deposition of Costco, and Plaintiff's production of expert witness disclosures. The Parties also litigated several discovery disputes. For example, Plaintiff filed a motion to compel on October 4, 2019 (Dkt. 65), which was briefed and later denied on October 17, 2019. (Dkt. 69.) And on January 8, 2020, Defendant moved to quash Plaintiff's notice of Rule 30(b)(6) deposition. (Dkt. 89.) That motion was briefed and denied as moot in light of Plaintiff's service of an amended notice of deposition. (Dkt. 92.)

In December 2019, the Court referred this case to alternative dispute resolution (Dkt. 79.) The Parties elected to attend mediation, and on December 26, 2019, the Parties designated retired Illinois Appellate Court Judge Stuart E. Palmer of JAMS Chicago as their agreed-upon mediator. (Dkt. 86.) On January 29, 2020, the Parties met in person at the JAMS offices in Chicago and

participated in a full-day mediation, which carried on late into the evening and culminated in an agreement in principle to resolve this case through a nationwide class settlement. (Dkt. 93.)

After the mediation, the Parties' negotiations continued for several months as they worked to finalize the specific terms and contours of the Settlement Agreement. The Parties expended significant time and effort to finalize the Settlement, including informally exchanging information concerning the Settlement Class and multiple drafts of the Settlement Agreement and its exhibits. Once the Settlement Agreement was executed, Plaintiff filed his motion for preliminary approval on May 18, 2020, and the Parties appeared before the Court for a hearing on the motion on July 23, 2020. The Court subsequently granted preliminary approval on July 27, 2020.

C. Class Counsel's Continuing Efforts Since Preliminary Approval.

Class Counsel has continued to invest significant time and effort in this action following preliminary approval. (Geske Decl. ¶¶ 14-18.) The Parties selected Kurtzman Carson Consultants, LLC ("KCC") as Settlement Administrator, and Class Counsel have been actively involved in supervising and managing all aspects of KCC's administration of the notice program and claims process. (*Id.* ¶ 15.) Class Counsel have regularly communicated with the Settlement Administrator to ensure a smooth notice process following preliminary approval. (*Id.* ¶¶ 15-17.) To that end, Class Counsel have reviewed the language and content of the Settlement Website, reviewed and edited the claim submission module to ensure that it is easy to understand, communicated with opposing counsel regarding notice issues, and monitored weekly reports from the Settlement Administrator. (*Id.*) Class Counsel will continue to devote their time and effort as the claims process continues, as well as appear at the upcoming final approval hearing, respond to inquiries from Settlement Class Members, and monitor the distribution of settlement payments by the Settlement Administrator. (*Id.* ¶ 23.)

III. THE SETTLEMENT APPROVED BY THE COURT

A. The Settlement Class.

In its Preliminary Approval Order, the Court certified the Settlement Class as defined as:

All individuals in the United States who, during the Class Period, purchased a Costco executive membership and subsequently cancelled their membership but were not refunded the full membership and upgrade fees they originally paid without any credit for a rewards certificate received prior to cancellation.

(Dkt. 108 at 2.) Expressly excluded from the Settlement Class are Costco and its affiliates and employees, officers, directors, along with any immediate family members of such officers, directors, or employees; any members of the judiciary assigned to preside over this Litigation, his or her spouse, and members of his or her staff; and any persons who elect to exclude themselves pursuant to and in compliance with the Settlement Agreement. (*Id.*) These exclusions are standard in class action settlements and do not materially affect the size of the Settlement Class or the fairness of the Settlement.

B. The Settlement Will Provide Settlement Class Members With Meaningful Monetary Relief Tailored To Their Individual Preferences.

Plaintiff's and Class Counsel's efforts have yielded a class Settlement that provides two forms of monetary relief to consumers. The Settlement makes available a Settlement Fund of up to \$525,000, and each Settlement Class Member who timely files a valid claim may elect to receive one of two forms of compensation: either (A) a free one-year Costco membership card usable for either a regular Costco membership (valued at \$60) or a one-year extension to their existing membership; or (B) an individual cash payment of \$15.00 to be paid out of the Settlement Fund. (Exh. A ¶ 35(a).)³

The claims submitted to-date have shown that the Settlement Class Members are

³ The individual cash payments will be subject to *pro rata* reduction in the event the Settlement Fund is exhausted. (Exh. A ¶ 35(a).)

enthusiastic about both benefit options, with approximately 60% of claimants choosing option A (the free membership) and the other 40% electing option B (the cash payment). The fact that Settlement Class Members are attracted to both benefit options speaks to the value of the Settlement—consumers appreciate choice, and Class Counsel had the Settlement Class Members’ best interests in mind when they structured the Settlement in a way that allows individuals to pick which benefit option they prefer and value most.

C. The Settlement’s Notice Plan Has Been Carried Out Successfully.

KCC, the agreed-upon Settlement Administrator, is responsible for effectuating notice of the Settlement, establishing the settlement website, receiving claims submitted by Settlement Class Members, and determining whether submitted claim information is complete and accurate. (Exh. A ¶¶ 44-47.) Following entry of the Court’s Preliminary Approval Order, (Dkt. 108), KCC began effectuating notice under Class Counsel’s supervision. To reach as many potential Settlement Class Members as possible, KCC carried out a two-part Notice Plan: (i) direct notice by email (or, where necessary, by U.S. mail), and (ii) publication notice through the Settlement Website, www.cwcexecfeerefundclassaction.com.

The format and language of the notices were carefully drafted in straightforward, easy-to-read language in order to apprise Settlement Class Members of all material aspects of the Settlement, such as the relief they are entitled to, their right to object to the Settlement or opt-out, and the amount of attorney’s fees that could be sought. (Exh. A ¶¶ 49-55.) The notices also invite Settlement Class Members to visit the Settlement Website, where they can submit a claim or review more detailed information. (*Id.* at Exhs. 2,3.)

The Settlement Website is presently still live and contains all of the important information related to the Settlement, including key dates and deadlines (e.g., claims deadline, objection

deadline, final approval hearing date and time, etc.), all relevant court documents (e.g., the Preliminary Approval Order, Settlement Agreement, and this Motion), contact information for Class Counsel, and most importantly, an easily accessible claims submission module that Settlement Class Members can use to submit their claim directly online. (Geske Decl. ¶¶ 17-18.) In addition, the Settlement Website gives detailed instructions for opting out or filing objections.

The Notice Plan commenced on August 26, 2020. (*Id.* ¶ 16.) To date, the Notice Plan has proved to be extremely successful at reaching potential Settlement Class Members and informing them of the Settlement. Upon implementation of the Notice Plan, the Settlement Administrator sent direct notice by email to tens of thousands of email addresses associated with potential settlement class members. If any emails were returned as undeliverable, or if no email address was associated with an individual, the Settlement Administrator sent notice by U.S. Mail. (Geske Decl. ¶ 16.) Although there are still two weeks left in the claims period, the Settlement Website has received nearly 2,000 hits and 7,500 pageviews, and numerous claims have been submitted.

D. The Settlement Class Members' Response To The Settlement Has Been Universally Positive To Date.

As of the date of this filing, there have been no objections or even any informal complaints received by the Settlement Administrator or Class Counsel, (Geske Decl. ¶ 17), and there have only been two opt-outs.⁴ The absence of any opposition to the Settlement, coupled with the near-universal preference to remain in the Settlement Class, demonstrates the Settlement Class Members' strong support for the Settlement.

⁴ One of the opt-outs was from an individual who identified as an employee of Costco. However, employees are already excluded from the Settlement Class under the Settlement Class's definition.

IV. DISCUSSION

Plaintiff seeks an award of attorneys' fees for Class Counsel in the amount of \$175,000, which includes their costs and reimbursable litigation expenses.⁵ This request is within the range of fees approved in other consumer class actions and is fair and reasonable in light of the benefits secured on behalf of the Settlement Class Members and the work performed by Class Counsel.

A. **Legal Standard.**

In a certified class action, a district court "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).⁶ Courts utilize two main approaches for determining the reasonableness of a fee award: the "percentage of the benefit" method, under which the award is "equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation," or the "lodestar" method, under which "the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action." *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-45 (8th Cir. 1996). Here, the requested fee award is reasonable under both methods.

⁵ Although Class Counsel's lodestar and expenses actually exceed the requested amount, they have agreed as part of the Settlement to cap their request for a fee award to no more than \$175,000.

⁶ Public policy also strongly supports rewarding firms for bringing successful litigation in order to provide talented counsel with incentive to bring actions and help deter future wrongdoing. *See In re Charter Comm'ns, Inc. Sec. Litig.*, 2005 WL 4045741, at *19 (E.D. Mo. June 30, 2005). ("[P]ublic policy favors the granting of [attorneys'] fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions[.]").

B. Plaintiff’s Requested Fee Award For Class Counsel Is Reasonable And Well-Earned Given The Excellent Result Obtained For The Settlement Class Members.

i. Under the percentage-of-the-benefit method for awarding attorneys’ fees—the preferred method in consumer class actions like this case—the amount of Class Counsel’s requested Fee Award is reasonable.

Plaintiff’s requested fee award, when measured as a percentage of the total relief obtained for the Settlement Class, is reasonable and well below the benchmark of 33% regularly used by courts in in this Circuit in calculating fee awards.

The percentage-of-the-benefit doctrine stems from the equitable principle that “a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). By awarding fees in this way, courts can fairly and adequately compensate class counsel for services rendered while “spreading fees proportionately among those benefited by the suit.” *Id.*; *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *In re Charter Comm’ns*, 2005 WL 4045741, at *13.

There are several advantages to the percentage-of-the-benefit method that make it the preferred approach for calculating fee awards in cases like this one. **First**, the percentage-of-the-benefit method “most closely aligns the interests of the lawyers with the class, since the more recovered for the class, the more the attorneys stand to be paid.” *In re Charter Comm’ns*, 2005 WL 4045741, at *13 (citing *Johnston*, 83 F.3d at 244). **Second**, this method promotes early resolution, as it disincentivizes protracted litigation driven solely by counsel’s efforts to increase their lodestar. In other words, class counsel are encouraged to seek the greatest amount of relief possible for the class rather than simply expending the greatest possible amount of attorney time. And **third**, the percentage-based approach approximates “arrangements in the market place for

contingency cases, where the individual client generally agrees to a fee based on amount recovered.” *Id.*; see *Blum v. Stenson*, 465 U.S. 886, 903 (1984).

For these reasons, use of the percent-of-the-benefit method is preferred and “well-established” in this Circuit. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (“It is well established in this circuit that a district court may use the ‘percentage of the fund’ methodology to evaluate attorneys fees in a common-fund settlement.”); see also *Shackleford v. Cargill Meat Solutions, Inc.*, 2013 WL 937550, at *1 (W.D. Mo. Mar. 8, 2013) (holding that “[t]he Eighth Circuit, as well as this Court, has held that in ‘common fund’ cases, where attorney fees and class members’ benefits are distributed from one fund a percentage of the benefit method may be preferable to the lodestar method”) (citation omitted); *In re Xcel Energy, Inc., Sec., Derivative & “ERISA” Litig.*, 364 F. Supp. 2d 980, 991-92 (D. Minn. 2005) (“There are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method.”)

While award percentages vary from case-to-case, “a one-third fee is a common benchmark in private contingency fee cases,” and courts in this Circuit and this District have “frequently awarded attorney fees of 33 1/3%–36% of a common fund.” *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (affirming award of “36% to class counsel who obtained significant monetary relief on behalf of the class”); *Caligiuri v. Symantec Corp.*, 855 F.3d 860 at 866 (D. Minn. 1997) (affirming award of attorney’s fees amounting to one-third of the settlement fund); *Martinez v. Mediacredit, Inc.*, 2018 WL 2223681, at *4 (E.D. Mo. May 15, 2018) (awarding class counsel one-third of settlement fund as attorneys’ fees and finding that amount to be fair and reasonable); *Prater v. Mediacredit, Inc.*, 2015 WL 8331602, at *4 (E.D. Mo. Dec. 7, 2015) (same); *Cromeans v. Morgan Keegan & Co., Inc.*, 2015 WL 5785576, at *4 (W.D. Mo. Sept. 16, 2015) (same); *Airline Ticket*

Comm'n Antitrust Litig., 953 F. Supp. 280, 286 (D. Minn. 1997) (same); *Carlson v. C.H. Robinson Worldwide, Inc.*, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (awarding 35.5% of the settlement fund).

Here, Plaintiff's requested fee award amounts to one-third of the \$525,000 cash settlement fund.⁷ This percentage is well-within the "33 1/3%–36%" range that is "frequently awarded" in class cases. *Tussey*, 2019 WL 3859763, at *4. However, this calculation does not take into account the additional value that the free memberships will provide to claimants who elect to receive benefit option A. Those free memberships have a face value of \$60. While Plaintiff acknowledges that a \$60 membership does not necessarily equate to \$60 in cash, the memberships do have significant value to consumers, as demonstrated by the many claimants who have already submitted claims electing to receive a free membership. Indeed, approximately 60% of those who have submitted claims to-date have chosen the free membership option.

While the actual cash value of the free \$60 membership may vary from person-to-person depending on how and to what extent they intend to use their membership, research conducted in connection with other consumer class actions indicates that the value for a gift voucher is typically about 80% of its face value. *See, e.g., True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010); *Fernandez v. Victoria Secret Stores, LLC*, 2008 WL 8150856 (C.D. Cal. July

⁷ When following the percentage-of-the-benefit approach, the percentage is applied to the gross monetary relief being made available, even if not all of that relief is actually claimed (e.g. because some claimants will opt to receive the free membership instead of a cash payment). *West v. PSS World Med. Inc.*, 2014 WL 1648741, at *1 (E.D. Mo. April 24, 2014) ("It is appropriate to apply a reasonable percentage to the gross settlement fund . . . because '[t]he available settlement funds are an appropriate measure of the benefit accrued by the class members, regardless of whether the full measure of that sum is actually claimed'") (quoting *Ramsey v. Sprint Commc'ns Co.*, 2012 WL 6018154, at *4 & n. 1 (D.Neb. Dec. 3, 2012)); *see also Caligiuri*, 855 F.3d at 865 ("[T]he rule in this circuit is that a district court may include fund administration costs as part of the benefit when calculating the percentage-of-the-benefit fee amount.") (quoting *In re Life Time Fitness, Inc. Telephone Consumer Protection Act (TCPA) Litig.*, 847 F.3d 619, 623 (8th Cir. 2017)) (internal quotation marks omitted).

21, 2008); *Young v. Polo Retail, LLC*, 2007 WL 951821 (N.D. Cal. Oct. 25, 2006)). This supports a finding here that the free \$60 membership has a cash value of approximately \$48. And as a result, the total benefits being made available to the Settlement Class actually exceed the \$525,000 Settlement Fund.

Accordingly, Plaintiff's requested fee award—measured as a percentage of the total benefit being made available—is well below the established benchmark of 33%. Therefore, even though the relief being made available is not a true common fund, Plaintiff's requested fee award is eminently reasonable when compared against the overall classwide relief.

ii. Class Counsel's requested Fee Award is also reasonable and appropriate under the lodestar method.

Plaintiff's requested fee award is also reasonable when cross-checked against Class Counsel's documented lodestar. Even where district courts apply the percent-of-the-benefit method, they may “verif[y] the reasonableness of the fee award by calculating the fee under a ‘lodestar’ approach.” *Petrovic*, 200 F.3d at 1157. Under the lodestar method, “the hours expended by an attorney are multiplied by a reasonable hourly rate of compensation so as to produce a fee amount which can be adjusted, up or down, to reflect the individualized characteristics of a given action.” *Johnston*, 83 F.3d at 244; see *Jorstad v. IDS Realty Trust*, 643 F.3 1305, 1312-14 (8th Cir. 1981).

In this case, the Parties were only able to reach a settlement after more than two years of contentious litigation with extensive discovery and motion practice. Class Counsel's lodestar is a result of performing high-quality work on a complex case, and it amply justifies the requested fee award. As detailed in the attached declaration from Class Counsel, Class Counsel's lodestar, derived by multiplying the hours spent by each attorney by their current hourly rates, is presently

\$240,601.00.⁸ (Geske Decl. ¶ 22.) Class Counsel’s rates are comparable to those charged by attorneys with similar backgrounds and experience, are commensurate with judicially approved rates, and are also justified by their experience and expertise in litigating class actions. (*Id.*) Additionally, the fact that many other courts have approved Class Counsel’s hourly rates further supports the rates’ reasonableness. (Geske Decl. ¶ 21.)

The number of hours Class Counsel worked is also reasonable given the length of this litigation, the complexity of the claims and defenses, and the substantial relief recovered for the Settlement Class Members. (*Id.* ¶ 12.) As stated in Class Counsel’s declaration, Class Counsel have logged 563.40 hours in uncompensated time in order to achieve the Settlement in this case, and to-date have incurred \$8,782.38 in costs. (*Id.* ¶¶ 22-25.) Further, Class Counsel anticipate expending additional time and effort through final approval to respond to inquiries from Settlement Class Members, respond to any potential objectors, prepare the final approval papers, review claims, and advocate on behalf of the Settlement Class Members in the event a claim is wrongfully denied. (*Id.* ¶ 23.)

Because Class Counsel have devoted a substantial amount of time to prosecuting this case for the benefit of the Settlement Class Members, no multiplier or adjustment to Class Counsel’s base lodestar is required to meet the requested fee award.⁹ Even so, it is worth noting that in complex contingent litigation such as this case, lodestar multipliers between two and five are

⁸ Courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure, rather than using hourly rates at the time the work was performed. *In re Charter Comm’ns*, 2005 WL 4045741, at *17 (“[U]se of current rates is proper, since such rates compensate for inflation and the loss of use of funds[.]”); *Hughes v. Furniture on Consignment, Inc.*, 2005 WL 3132345, at *1 (D. Neb. Nov. 22, 2005) (courts may “compensate for any delay in payment (time value of money) by calculating the lodestar in current dollars (the current hourly rate rather than the historical rate)”).

⁹ Importantly, the \$175,000 Fee Award sought by Class Counsel is *inclusive* of reasonable out-of-pocket expenses such as filing fees, mediation fees, discovery costs, and expert costs. Such costs are normally recoverable in *addition* to a fee award. See *In re U.S. Bancorp Litig.*, 291 F.3d at 1038; *In re Charter Comm’ns*, 2005 WL 4045741 at 24.

commonly awarded in this Circuit. *See, e.g., In re Charter Comm'ns*, 2005 WL 4045741, at *22 (finding a 5.61 multiplier to be “within the range of multipliers awarded in comparable complex cases”); *In re St. Paul Travelers Sec. Litig.*, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (awarding fees representing a 3.9 multiplier); *Yarrington v. Solvay Pharmaceuticals, Inc.*, 697 F. Supp. 2d 1057, 1065 (D. Minn. 2010) (awarding fees representing a 2.26 multiplier); *In re Xcel*, 364 F. Supp. 2d at 999 (awarding fees representing a 4.7 multiplier). Accordingly, the work performed in this case together with Class Counsel’s lodestar demonstrates that the requested fee award is reasonable and well-earned.

As such, regardless of whether this Court uses the percentage-of-the-benefit method or the lodestar method, the fee award sought is reasonable and justified. The requested amount is consistent with the market rate and well within the range of attorneys’ fees awarded by numerous other state and federal courts, and should therefore be approved by the Court.

C. Other Relevant Factors Considered By Courts In This Circuit Support Class Counsel’s Requested Fee Award.

When determining the reasonableness of a fee award under either the percent-of-the-benefit method or the lodestar method, district courts may also consider other relevant factors. The Eighth Circuit has held that “courts may consider relevant factors from the twelve factors listed in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719-20 (5th Cir. 1974).” *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017). The twelve *Johnson* factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and

length of the professional relationship with the client; (12) awards in similar cases. 488 F.2d at 717-719.

However, courts need not consider or evaluate all twelve of these factors, because “rarely are all of the *Johnson* factors applicable[,] . . . particularly in a common fund situation.” *Keil*, 862 F.3d at 703 (citing *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993)). Because some of the *Johnson* factors have already been addressed in the analysis above, and others are inapposite, Plaintiff will focus only on the remaining relevant factors.

i. The difficulty and complexity of the legal issues here presented a significant risk of non-recovery.

Although this case arose out of a simple consumer transaction, the legal issues involved here were anything but simple and straightforward. This is especially true as to the arguments the Parties intended to raise at class certification. For example, Defendant has maintained that the terms of its Member Privileges and Conditions can be applied to foreclose Plaintiff’s and other customers’ claims. (*See* Dkt. 10.) In addition, Defendant has argued that no nationwide class can be certified in this matter due to jurisdictional issues and other unique defenses that bar claims by out-of-state class members. (*See* Dkt. 52.)

Indeed, throughout this litigation, Costco and its counsel have raised multiple defenses to Plaintiff’s claims on the merits and to his ability to represent a class of others subject to the allegedly unlawful refund practices at issue in this case. Had this case not settled, the Parties would have continued with extensive discovery, including targeted class discovery, and would have engaged in further motion practice on merits issues at the summary judgment stage. Costco would also have vigorously contested class certification. Given the financial resources at Costco’s disposal, any final decision favorable to Plaintiff would also have likely been appealed or challenged through post-judgment proceedings.

While Plaintiff believes he could have prevailed at class certification and on the merits, he acknowledges that Costco has firmly denied his material allegations and has presented a vigorous defense. Had Costco succeeded on any of its defenses, or in defeating class certification, Plaintiff and the Settlement Class Members would have received no payments and no relief whatsoever.

Acknowledging these complex and challenging issues, Class Counsel undertook significant risk in proceeding with this litigation. Defendant's liability to Plaintiff was unclear, and Class Counsel agreed to commence this litigation knowing they would assuredly face rigorous opposition from a party with significant financial resources. (Geske Decl. ¶ 11.) Even at the outset of this case, Defendant aggressively moved for dismissal under multiple different theories, and indicated that it would further challenge Plaintiff's claims on the merits and at the class certification stage. (*Id.* ¶ 13.)

This necessarily meant that Class Counsel would be required to sacrifice time that could have been spent handling other matters. (*Id.* ¶ 11.); *See Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017); *see also Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1083 (D. Minn. 2009) (awarding attorneys' fees based, in part, on the plaintiffs' counsel's assumption of risk in taking the matter). Even so, and in the face of the uncertainties regarding the outcome of the case, Class Counsel undertook this case on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of attorney time and a significant expenditure of litigation expenses with no guarantee of compensation. (Geske Decl. ¶ 11.) Indeed, "[t]here are numerous class actions in which plaintiffs' counsel expended thousands of hours and yet received no remuneration whatsoever despite their diligence and expertise." *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *32 (N.D. Tex. Nov. 8, 2005).

Had Costco prevailed either on the merits or in defeating class certification, the Settlement Class Members would have received *nothing*. And if Plaintiff recovered nothing, Class Counsel would receive nothing. Notwithstanding the many risks of proceeding and staunch opposition from Costco, Class Counsel achieved an excellent result for the Settlement Class Members in obtaining a \$525,000 Settlement Fund along with an alternative form of relief. Class Counsel were able to achieve these results solely due to their experience and extensive efforts in prosecuting this litigation through developing Plaintiff's claims; fully briefing and defeating a dispositive motion; vigorously pursuing discovery; effectively engaging in settlement negotiations; preparing for class certification; and securing court approval of the Settlement Agreement. (Geske Decl. ¶ 14.) As such, a settlement providing for a significant cash benefit like the one here is an exceptional result. Given the challenges and significant efforts needed to secure the Settlement in this litigation, the fee award sought by Class Counsel is reasonable and justified.

ii. The nature of this case supports the requested fee award, as most Settlement Class Members would not have the means to pursue relief on their own absent a class action.

The small value of Plaintiff's and the other Settlement Class Members' individual claims makes it infeasible to proceed on an individual basis absent a class action. Plaintiff's individual damages were approximately \$23.87. (Compl. ¶ 33.) Even if Plaintiff had received the full amount of damages, his recovery would still be dwarfed by the costs of obtaining a judgment, let alone the costs trying this case. The same would be true if any of the putative class members attempted to bring an individual lawsuit. This small amount of damages would preclude many, if not all Settlement Class Members from seeking redress for their losses. Additionally, many Settlement Class Members may not have access to competent counsel willing to invest the time and resources necessary to bring a class action and to prosecute their claims. Because the class members have

little incentive to bring individual actions to recover the relatively minimal amount of damages at issue on an individual basis, it is unlikely that, absent a class action, the Settlement Class Members would be able to obtain relief if not for this suit.

Even so, Plaintiff and Class Counsel were able to overcome these obstacles and obtain meaningful relief for consumers across the country. It is fact patterns such as this that highlight the efficiencies of the class action model and the benefits for ordinary consumers. *Schoenbaum v. E.I. Dupont De Nemours and Co.*, 2009 WL 4782082, at *8 (E.D. Mo. 2009) (“[T]he argument in favor of class action treatment is most compelling where individual suits would in effect have negative value because litigation costs would outweigh any potential recovery.”).

iii. Both Parties were represented by experienced, capable counsel.

The quality of the representation provided by Class Counsel is also an important factor that supports the reasonableness of the requested fee. *See Charter Comm’ns*, 2005 WL 4045741, at *12. As demonstrated in the attached Class Counsel declaration and the MCGUIRE LAW, P.C. firm resume, Class Counsel are highly experienced in the field of class actions and consumer law in particular. (*See* Geske Decl. ¶ 10.) Class Counsel have developed a long track-record of success litigating such actions and other complex litigation both in courts across the country. (*Id.*) Class Counsel prosecuted this Action with great persistence, skill, and creativity, and they believe that the quality of the result obtained for the Settlement Class provides strong evidence of the quality of Class Counsel’s capable representation.

Courts have also recognized that “[t]he quality and vigor of opposing counsel is important in evaluating the services rendered by Lead Counsel.” *In re Charter Comm’ns*, 2005 WL 4045741, at *17; *Yarrington*, 697 F. Supp. 2d at 1063 (the fact that defendant’s attorneys “consist of multiple well-respected and capable defense firms” which “consistently challenged Plaintiffs throughout

the litigation” supported class counsel’s request for fees); *In re Adelpia Comm’ns Corp Sec. & Derivative Litig.*, 2009 WL 3378705, at *3 (S.D.N.Y. Nov. 26, 2006) (“The fact that the settlements were obtained from defendants represented by ‘formidable opposing counsel from some of the best defense firms in the country’ also evidences the high quality of lead counsel’s work”); *Teachers Ret. System Of Louisiana v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *7 (S.D.N.Y. May 14, 2004) (“The quality of opposing counsel is also relevant in evaluating the quality of services rendered by Plaintiffs’ Counsel.”).

Here, Costco has been represented throughout the Litigation by capable and well-respected defense counsel at two reputed national firms: THOMPSON COBURN LLP (withdrawn May 9, 2019, Dkt. 40), and SHOOK, HARDY & BACON LLP. There can be no doubt that these counsel represented their client skillfully and zealously throughout this Litigation. Notwithstanding formidable opposition with substantial resources, Class Counsel’s prosecution of this case for well over two years enabled them to achieve a favorable settlement for the benefit of the Settlement Class.

iv. The time and effort expended by Class Counsel support the requested Fee Award.

Plaintiff’s counsel has collectively expended hundreds of hours prosecuting this action. (Geske Decl. ¶ 22.) Class Counsel’s efforts included (1) conducting an extensive factual investigation into Costco’s business and refund practices; (2) drafting the Complaint; (3) successfully briefing and opposing Defendant’s Rule 12(b)(6) motion to dismiss; (4) successfully moving to strike an exhibit filed in support of Defendant’s Rule 12(b)(6) motion to dismiss; (5) successfully opposing and briefing an attempt by Defendant to amend its answer to assert defenses of lack personal jurisdiction and venue; (6) propounding written discovery requests, including interrogatories and requests for production; (7) conducting a Rule 30(b)(6) deposition of Defendant; (8) litigating multiple discovery disputes; (9) coordinating and conducting a mediation

session before retired Illinois Appellate Court Judge Stuart E. Palmer of JAMS Chicago; (10) engaging in weeks of continued communications, negotiations, and the exchange of settlement drafts with Costco's counsel; (11) preparing the final executed settlement agreement and related documents; and (12) drafting and presenting the filings in support of approval of the Settlement. (*Id.* ¶ 14.)

Throughout the litigation, Class Counsel staffed this matter efficiently and took steps to avoid duplication of effort. (*Id.* ¶ 22.) Class Counsel sought to prosecute this Litigation in the most cost-efficient manner possible, consistent with their obligation to vigorously represent the interests of the Class. (*Id.*) Class Counsel have had an economic incentive to litigate efficiently because they understood that their time and expenditures would only be reimbursed, if at all, at the conclusion of the Litigation by verdict or settlement. To that end, Class Counsel divided work among individual attorneys to minimize the time spent, including assigning specific responsibility for particular tasks and subject areas. (*Id.*) Whether the Court chooses to employ the lodestar method or simply a lodestar cross-check, the significant amount of time and effort devoted to this case by Class Counsel and the efficient and effective management of the litigation confirm that the fee request here is reasonable.

D. The Requested Incentive Award For Plaintiff's Service As Class Representative Is Also Reasonable And Should Be Approved.

The requested \$5,000 incentive award for Plaintiff is also well-earned and in line with other incentive awards granted to class representatives in similar class actions in the Eighth Circuit. "In a class action, the rationale for an incentive award to a class representative include compensating the class representative for his or her time and energy and the benefits they conveyed to the class, acknowledging the risk he or she took in pursuing the action, and offering an incentive to encourage people to step up and represent the class. *Schneider v. United States*, 2020 WL

1557905, at *2 (D. Neb. April 1, 2020) (citing *Tussey*, 850 F.3d at 962)). Indeed, courts often grant service awards to class representatives to “promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits.” *Caligiuri*, 855 F.3d at 867 (citing *Yarrington*, 697 F. Supp. 2d at 1068).

Here, the amount of the requested Incentive Award—\$5,000—is modest and eminently reasonable given that “courts in this circuit regularly grant service awards of \$10,000 or greater.” *Caligiuri*, 855 F.3d at 868; *Huyer v. Njema*, 847 F.3d 934, 941 (8th Cir. 2017) (affirming approval of settlement that included \$10,000 service awards to the named plaintiffs); *Zilhaver*, 646 F. Supp. 2d at 1085 (granting each of the named plaintiffs a \$15,000 to be paid from common fund).

Additionally, Plaintiff’s time, effort, and participation in the prosecution of this case justify the \$5,000 award sought. Even though no award of any sort was promised to Plaintiff prior to the commencement of the litigation or at any time afterward, Plaintiff nonetheless contributed his time and effort assisting with Class Counsel’s investigation, responding to discovery, participating in numerous conferences and meetings with Class Counsel, and attending the mediation—all of which demonstrate a willingness to participate and undertake the responsibilities and risks attendant with bringing a representative action. (Geske Decl. ¶¶ 26-29.)

Indeed, Plaintiff’s decision to contest Defendant’s allegedly unlawful refund practices was the primary catalyst for this litigation. Were it not for Plaintiff’s willingness to pursue this action on a classwide basis, his efforts and contributions to the litigation by assisting Class Counsel with their investigation and filing of this suit, and his continued participation and monitoring of the case up through settlement, the substantial benefits to the Settlement Class Members afforded under the Settlement Agreement would not exist.

Compensating Plaintiff for the risks and efforts he undertook to benefit the Settlement Class Members is reasonable under the circumstances of this case, especially in light of the exceptional results obtained. As shown above, courts have regularly approved incentive awards in similar class action litigation consistent with and far greater than the agreed-upon \$5,000 Incentive Award here. Moreover, no objection to the Incentive Award has been raised to date. Accordingly, an Incentive Award of \$5,000 to Plaintiff is reasonable, justified by Plaintiff's time and effort in this case, and should be approved.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order: (i) approving an award of attorneys' fees and expenses of \$175,000.00; (ii) approving an incentive award in the amount of \$5,000.00 to Plaintiff in recognition of his significant efforts on behalf of the Settlement Class Members; and (iii) granting such other and further relief as the Court deems reasonable and just.

Dated: November 10, 2020

Respectfully submitted,

SCOTT PEARLSTONE, individually and on behalf
of the Settlement Class

By: /s/ Brendan Duffner

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2020, a copy of the foregoing *Plaintiff's Motion & Incorporated Memorandum of Law in Support of Approval of Attorneys' Fees, Expenses and Incentive Award* was filed electronically with the Clerk of Court using the CM/ECF filing system. A copy of said document will be electronically transmitted to all counsel of record.

By: /s/ Brendan Duffner