

Honorable James L. Robart

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

VERIDIAN CREDIT UNION, on behalf of itself
and a class of similarly situated financial
institutions,

Plaintiff,

v.

EDDIE BAUER LLC,

Defendant.

No. 2:17-cv-00356-JLR

**PLAINTIFF'S MOTION FOR AN AWARD
OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

NOTE ON MOTION CALENDAR:

OCTOBER 25, 2019

1 **I. INTRODUCTION**

2 Plaintiff Veridian Credit Union (“Plaintiff” or “Veridian”) moves under Rules 23(h) and 54(d)(2)
3 of the Federal Rules of Civil Procedure for an award of attorneys’ fees, reimbursement of expenses, and
4 approval of a Service Fee for Veridian in conjunction with the proposed class action Settlement entered
5 into with Defendant Eddie Bauer LLC (“Defendant” or “Eddie Bauer”), which the Court preliminarily
6 approved on June 12, 2019. ECF No. 165.¹ Contemporaneously with this motion, Plaintiff is filing a
7 motion for Final Approval of the Settlement and certification of the Settlement Class under Rule 23(e).

8 Counsel for Plaintiff have not received any compensation for their prosecution of this Litigation,
9 which required more than two years of vigorous advocacy, including prevailing, in substantial part, on the
10 motion to dismiss and completing fact discovery through the review of nearly 200,000 pages of party and
11 third-party documents and depositions of 11 party and non-party witnesses and two Eddie Bauer corporate
12 representatives. The Settlement provides up to \$2.8 million in cash to Settlement Class Members; \$2
13 million to cover Claims Administration costs, attorneys’ fees and expenses, and a Service Award; and
14 injunctive relief that Eddie Bauer expects to spend \$5 million to implement and will protect Settlement
15 Class Members from future harm. This is a total value of \$9.8 million to Settlement Class Members. Class
16 Counsel² respectfully request, on behalf of all Plaintiff’s Counsel, that the Court approve an award of \$2
17 million, which would cover approximately \$54,000 in Claims Administration costs, \$1,738,528 as
18 attorneys’ fees, \$197,472 as reimbursement of litigation expenses, and \$10,000 as a Service Award for
19 Plaintiff. The requested attorneys’ fee of \$1,738,528 represents 17.7% of the total Settlement value – well
20 below the Ninth Circuit’s 25% “benchmark” for contingent fees. *See, e.g., In re Pac. Enters. Sec. Litig.*,
21 47 F.3d 373, 379 (9th Cir. 1995). The reasonableness of the requested fee is supported by the fact that the
22 fee award, if approved, will provide a significantly negative “multiplier” on Plaintiff’s Counsel’s lodestar.

23 As discussed below and in the Joint Declaration, it is respectfully submitted that the requested fee
24 is fair and reasonable when considered under the Ninth Circuit applicable standards, particularly in view

25 ¹ Unless otherwise defined herein, all capitalized terms have the same definitions as those set forth
26 in the Settlement Agreement and Release (“Agreement” or “SA”) (ECF No. 164-1).

27 ² Class Counsel was aided in this case by Tousley Brain Stephens PLLC, Lockridge Grindal Nauen,
28 P.L.L.P., Zimmerman Reed LLP, Chestnut Cambronne PA, and Murray Law Firm. Collectively, these
law firms are referred to herein as “Plaintiff’s Counsel.” No other law firms will share in the attorneys’
fees awarded by the Court.

1 of the substantial risks of pursuing this Litigation, considerable litigation efforts, and results achieved for
 2 the Settlement Class.³ Moreover, the expenses requested are reasonable in amount and were necessarily
 3 incurred for the successful prosecution of this Litigation. Finally, the requested Service Award is
 4 customary and warranted to compensate Veridian for its participation in the Litigation on behalf of the
 5 Settlement Class. Thus, Class Counsel respectfully request that the Court award \$2 million as payment for
 6 Claims Administration costs as well as the requested attorneys' fees, expenses, and Service Award.

7 **II. ARGUMENT**

8 **A. Class Counsel's Request for Attorneys' Fees Is Reasonable**

9 It is well settled that attorneys who represent a class and whose efforts achieve a benefit for class
 10 members are "entitled to a reasonable attorney's fee from the fund as a whole" as compensation for their
 11 services. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Vincent v. Reser*, No. C 11-03572
 12 CRB, 2013 WL 621865, at *4 (N.D. Cal. Feb. 19, 2013). Rule 23 permits a court to award "reasonable
 13 attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). "[C]ourts
 14 have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if
 15 the parties have already agreed to an amount." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935,
 16 941 (9th Cir. 2011). The two methods courts may use to calculate a reasonable fee are the "lodestar
 17 method" and "percentage-of-recovery method." *Id.* at 941-42. Although a district court has discretion to
 18 award fees in common fund cases based on either the "lodestar method" or "percentage-of-the-fund
 19 method," the percentage method has become the prevailing method in this Circuit. *Vizcaino v. Microsoft*
 20 *Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d
 21 1291, 1295 (9th Cir. 1994) ("*WPPSS*"), *aff'd in part, Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d
 22 1306 (9th Cir. 1994); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1325 (W.D. Wash. 2009).

23 In determining the reasonableness of the attorneys' fee, courts in this District and Circuit have
 24 looked at the total value of the monetary and injunctive benefits provided in a settlement when analyzing
 25 a fee request. *See Bluetooth*, 654 F.3d at 943 ("If an agreement is reached on the amount of a settlement
 26

27 ³ All "Joint Declaration" or "Joint Decl." references are to the Joint Declaration of Gary F. Lynch
 28 and Joseph P. Guglielmo concurrently filed in support hereof and in support of Plaintiff's Motion for Final
 Approval of Class Action Settlement.

1 fund and a separate amount for attorney fees ... the sum of the two amounts ordinarily should be treated
 2 as a settlement fund for the benefit of the class.” (ellipsis in original)); *In re Ferrero Litig.*, 583 F. App’x
 3 665, 668 (9th Cir. 2014) (affirming district court’s approval of attorneys’ fees based, in part, on value of
 4 injunctive relief to the class); *Vizcaino v. Microsoft Corp.*, 142 F. Supp. 2d 1299, 1301 (W.D. Wash. 2001)
 5 (approving attorneys’ fees where calculation of settlement fund included cash and injunctive benefits); *In*
 6 *re Home Depot Inc.*, 931 F.3d 1065, 1080 (11th Cir. 2019) (noting that “constructive common fund”
 7 doctrine is applicable when defendant negotiates payments to the class and counsel as a “package deal”).

8 District courts also have discretion to determine what portion of the common fund is “for the benefit
 9 of the entire class[.]” *Bluetooth*, 654 F.3d at 942; see *Graham v. Capital One Bank (USA), N.A.*, No. SACV
 10 13-00743-JLS (JPRx), 2014 WL 12579806, at *3 (C.D. Cal. Dec. 8, 2014) (“The Settlement . . . must be
 11 viewed in the context of the entire benefit achieved for the Class in this action.”). Costs of providing notice
 12 to the class and other administrative costs and expenses may count as common benefits for purposes of
 13 calculating the percentage fund valuation when analyzing an attorney fee request. “Under the percentage-
 14 of-the-fund method, it is appropriate to base the percentage on the gross cash benefits available for class
 15 members to claim, plus the additional benefits conferred on the class by the Settling Defendants’ separate
 16 payment of attorneys’ fees and expenses, and the expenses of administration.” *Bendixen v. Sprint*
 17 *Comm’ns Co. L.P.*, No. 3:11-cv-5274-RBL, 2013 WL 2949569, at *2 (W.D. Wash. June 14, 2013); see
 18 also *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015).

19 The value of injunctive relief may also be included in this calculation. See, e.g., *Miller v.*
 20 *Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015)
 21 (“courts consider both the monetary and nonmonetary benefits that the settlement confers”); see also
 22 *Rainbow Bus. Sols. v. MBF Leasing LLC*, No. 10-cv-01993-CW, 2017 WL 6017844, at *1 (N.D. Cal. Dec.
 23 5, 2017) (fund from which fee percentage is calculated includes “the total benefit made available to the
 24 settlement class, including costs, fees, and injunctive relief”); *Pokorny v. Quixtar, Inc.*, No. C 07-0201 SC,
 25 2013 WL 3790896, *1 (N.D. Cal. July 18, 2013) (“The court may properly consider the value of injunctive
 26 relief obtained as a result of settlement in determining the appropriate fee.”); *In re Netflix Privacy Litig.*,
 27 No. 5:11-CV-00379 EDJ, 2013 WL 1120801, at *7 (N.D. Cal. Mar. 18, 2013) (settlement value “includes
 28 the size of the cash distribution, the *cy pres* method of distribution, and the injunctive relief”). For

1 nonmonetary relief to count “as part of the value of a common fund for purposes of applying the percentage
 2 method of determining fees[,]” the value of the nonmonetary relief to class members must be “accurately
 3 ascertained.” *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003). If the value cannot be accurately
 4 ascertained, the Court may nonetheless consider the value of this nonmonetary relief “as a ‘relevant
 5 circumstance’ in determining what percentage of the common fund class counsel should receive as
 6 attorneys’ fees, rather than as part of the fund itself.” *Id.*

7 The Settlement provides relief to the Settlement Class in three ways: (1) guaranteed cash payments
 8 to claiming Settlement Class Members, up to \$2.8 million; (2) substantial injunctive relief that will cost
 9 Eddie Bauer approximately \$5 million to implement and maintain for at least two years, and which will
 10 inure to the benefit of the Settlement Class by ensuring improved payment card security in Eddie Bauer’s
 11 cardholder data environment; and (3) a fund of \$2 million to cover the costs of Claims Administration,
 12 attorneys’ fees and expenses, and any approved Service Award to Veridian. In light of the significant value
 13 provided to Settlement Class Members, the Court should include each of these three categories of benefits
 14 in calculating to the total value of the Settlement, which is \$9.8 million. The amount being requested as
 15 attorneys’ fees is \$1,738,528 – that is, \$2 million minus: (a) Claims Administration costs, which are
 16 estimated at \$54,000;⁴ (b) Plaintiff’s Counsel’s expenses, which are \$197,472; and (c) Plaintiff’s Service
 17 Award, which, if approved, is \$10,000. Joint Decl. ¶25. The requested fee – which is 17.7% of the
 18 settlement fund, or a negative multiplier of 0.59 on Plaintiff’s Counsel’s total lodestar (*Id.*) – is reasonable
 19 under both the percentage-of-the-fund method and lodestar approach, as discussed below.

20 **B. Analysis of the *Vizcaino* Factors Justifies the Requested Fee Award**

21 In evaluating whether a requested fee is reasonable, courts within the Ninth Circuit apply the five
 22 factors identified by the court in *Vizcaino*: (1) the result achieved; (2) the risk of litigation; (3) the skill
 23 required and quality of the work; (4) awards made in similar cases; and (5) the contingent nature of the fee
 24 and financial burden carried by counsel. *See Vizcaino*, 290 F.3d at 1048-50. Counsel’s “lodestar may
 25 [also] provide a useful perspective on the reasonableness of a given percentage award.” *Id.* at 1050. The
 26 Ninth Circuit has explained that these factors should not be used as a rigid checklist or weighed

27
 28 ⁴ The Court previously approved payment of the Costs of Settlement Administration from the
 allotted \$2 million when it preliminarily approved the Settlement. *See* ECF No. 165 ¶9.

1 individually, but, rather, should be evaluated in light of the totality of the circumstances. *Id.* at 1048-50.

2 **1. The Fee Request Is Justified by the Results Achieved**

3 The Settlement provides substantial relief to the Settlement Class and is in line with the per-card
4 amounts obtained for financial institution class members in approved settlements in two other similar cases.
5 Class Members who submit claims will receive no less than \$2.00 per-Alerted on Payment Card. SA ¶33a.
6 This relief compares favorably with settlements negotiated by financial institution plaintiffs in the *Target*
7 and *Home Depot* data breach class actions. Those settlements – both of which received final approval –
8 provided financial institutions with \$1.50 and \$2.00 fixed per-card recovery, respectively, without
9 documentation of loss (with an option to obtain a percentage of documented losses). *See In re: Target*
10 *Corp. Customer Data Sec. Breach Litig.*, No. 0:14-md-02522, ECF No. 747-1, Ex. A at 4-5 (D. Minn. Apr.
11 11, 2016); *In re: The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-md-02583, ECF No.
12 336-1 at 25 (N.D. Ga. Aug. 23, 2017). In light of the 36% claims rate (Amundson Decl. ¶12⁵), the favorable
13 reaction of the Settlement Class supports that the Settlement represents an excellent result.

14 In addition, Eddie Bauer has agreed to implement certain security enhancements for at least two
15 years, which Eddie Bauer has spent or will spend approximately \$5 million to implement and which will
16 benefit Class Members by reducing the risk of a similar security breach in the future. SA ¶¶41-43. The
17 direct beneficiaries of the injunctive relief – improved security measures in Eddie Bauer’s cardholder data
18 environment – are card-issuing financial institutions, *i.e.*, Settlement Class Members. The payment-card-
19 using customers of Settlement Class Members are likely to continue using their payment cards at Eddie
20 Bauer, which is a well-known retailer with a national footprint and approximately 370 retail locations in
21 the United States and Canada. Amended Class Action Complaint (“AC”) (ECF No. 36) ¶1. As Plaintiff
22 alleged, financial institutions are the primary victims of payment card data breaches because they must
23 reimburse their customers for fraudulent card charges and incur significant administrative and overhead
24 charges in order to reissue new cards to replace the compromised ones. *Id.* ¶97. Thus, the injunctive relief
25 agreed to by Eddie Bauer, which it projects will cost \$5 million to implement, should be treated as a
26 Settlement Class benefit for purposes of calculating a reasonable percentage-of-the-fund to award as

27 ⁵ All “Amundson Decl.” references are to the Declaration of Christopher D. Amundson filed in
28 support hereof.

1 attorneys' fees. This factor favors approval of the requested fee.

2 **2. The Significant Risk of Litigation Supports that the Requested Fee Is**
 3 **Reasonable**

4 The risk of further litigation is also an important factor in determining a fair fee award. *See*
 5 *Vizcaino*, 290 F.3d at 1048 (noting “[r]isk is a relevant circumstance” in awarding attorneys’ fees); *Pacific*
 6 *Enterprises*, 47 F.3d at 379 (finding that “attorneys’ fees [were] justified because of the complexity of the
 7 issues and the risks”). As set forth in detail in the Joint Declaration, there is no question that Plaintiff
 8 faced, and Class Counsel resisted, vociferous defenses to liability and damages as well as numerous
 9 discovery challenges. Joint Decl. ¶¶4-12. Although Plaintiff prevailed at the motion to dismiss stage,
 10 Eddie Bauer continues to vehemently deny liability and there was no assurance that Plaintiff’s forthcoming
 11 motion for class certification would have been granted. Recent precedents in similar cases have had mixed
 12 outcomes for plaintiff financial institutions. As mentioned in Plaintiff’s motion for final approval, some
 13 similar cases have ended in settlements, such as *Target*, *Home Depot*, and *Wendy’s*,⁶ but others have been
 14 dismissed in whole or substantial part, e.g., *Cnty. Bank of Trenton v. Schnuck Mkts., Inc.*, 887 F.3d 803,
 15 817-18 (7th Cir. 2018); *SELCO Cnty. Credit Union v. Noodles & Co.*, 267 F. Supp. 3d 1288 (D. Colo.
 16 2017), and class certification has been denied in others. E.g., *In re TJX Cos. Retail Sec. Breach Litig.*, 246
 17 F.R.D. 389 (D. Mass. 2007) (denying class certification because necessity of individualized inquiries
 18 regarding causation, comparative negligence, and damages precluded a finding of predominance).
 19 Plaintiff’s Counsel worked diligently to achieve a significant result for the Settlement Class in the face of
 20 very real litigation risks. As a result, the requested fee is reasonable.

21 **3. This Risk of Litigation Required Attorney Skill and High-Quality Work**

22 Courts have recognized that the “prosecution and management of a complex national class action
 23 requires unique legal skills and abilities.” *In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005
 24 WL 1594389, at *12 (C.D. Cal. June 10, 2005); *see also Vizcaino*, 290 F.3d at 1048. Plaintiff’s Counsel
 25 have extensive and significant experience in the specialized field of data breach class action litigation. The
 26 favorable Settlement is attributable in large part to the diligence, determination, hard work, and skill of

27 ⁶ *See In re: Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 14-2522(PAM), 2016 WL
 28 2757692 (D. Minn. May 12, 2019); *In re: The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No.
 1:14-md-02583-TWT, 2016 WL 6902351 (N.D. Ga. Aug. 23, 2016); *First Choice Fed. Credit Union v.*
Wendy’s Co., No. 2:16-cv-00506-NBF-MPK, 2019 WL 948400 (W.D. Pa. Feb. 26, 2019).

1 Plaintiff's Counsel, who developed, litigated, and successfully settled this Litigation. As set forth in the
 2 Joint Declaration, as well as the individual declarations of the additional counsel, Plaintiff's Counsel are
 3 highly experienced attorneys in this type of litigation and have a strong track record of leading these
 4 relatively unique cases and obtaining favorable results for financial institutions. Joint Decl. ¶18; Lynch
 5 Decl., Ex. C; Scott Decl., Ex. D; Riebel Decl., Ex. C; Bleichner Decl., Ex. C; Gudmundson Decl., Ex. C;
 6 Murray Decl., Ex. C; Stephens Decl. ¶7 & Ex. C.⁷ These skills were put to the test in this Litigation, as it
 7 involved novel issues and a defense team led by equally skilled and experienced attorneys. In short, this
 8 was not a simple, familiar type of case with a clear path to liability and judgment. This factor therefore
 9 supports approval of the attorney fee request.

10 **4. The Fee Request Falls Below the 25% Benchmark and Is Comparable to**
 11 **Similar Cases**

12 “In the Ninth Circuit, the benchmark for a fee award in common fund cases is 25% of the recovery
 13 obtained.” *Tawfilis v. Allergan, Inc.*, No. 8:15-cv-00307-JLS-JCG, 2018 WL 4849716, at *4 (C.D. Cal.
 14 Aug. 27, 2018) (citing *Bluetooth*, 654 F.3d at 942). District courts may depart (upward or downward) from
 15 the 25% benchmark rate and courts within this Circuit can and do award fees above the benchmark. *See*
 16 *Bluetooth*, 654 F.3d at 942. In each case, “the exact percentage varies depending on the facts of the case,
 17 and in ‘most common fund cases, the award exceeds [the] benchmark’” of 25% set by the Ninth Circuit in
 18 *Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268, 272 (9th Cir. 1989). *See also In re Atossa Genetics,*
 19 *Inc. Sec. Litig.*, No. 13-cv-01836-RSM, 2018 WL 3546176, at *1 (W.D. Wash. July 20, 2018) (approving
 20 fee award of 33% of fund); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010)
 21 (same) (citing *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367 (N.D. Cal. Feb. 2,
 22 2009)); *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 448-55 (E.D. Cal. 2013) (holding “[t]he
 23 typical range of acceptable attorneys’ fees in the Ninth Circuit is 20 percent to 33.3 percent of the total
 24 settlement value,” and approving fee award of 33% of fund) (citing cases); *Singer v. Becton Dickinson &*
 25 *Co.*, No. 08-CV-821-IEG (BLM), 2010 WL 2196104, *8 (S.D. Cal. Jun. 1, 2010) (approving an attorneys’

26 ⁷ All “Lynch Decl.,” “Scott Decl.,” “Riebel Decl.,” “Bleichner Decl.,” “Gudmundson Decl.,”
 27 “Murray Decl.,” “Stephens Decl.,” and “Slessor Decl.” references are to the Declarations of Gary F.
 28 Lynch, Daryl F. Scott, Karen H. Riebel, Bryan L. Bleichner, Brian C. Gudmundson, Arthur Murray, Kim
 D. Stephens, and Gregory Slessor, respectively, which are concurrently filed in support hereof and in
 support of Plaintiff's Motion for Final Approval of Class Action Settlement.

1 fees award of 33.33% of a common fund, noting that “the request for attorneys’ fees in the amount of
2 33.33% of the common fund falls within the typical range of 20% to 50% awarded in similar cases”).

3 Where the total Settlement value is \$9.8 million, Plaintiff’s Counsel’s fee request of \$1,738,528 is
4 17.7% of the total settlement fund. This request clearly falls below the Ninth Circuit’s “benchmark” of
5 25%. *See* Newberg on Class Actions §15:78. Given the significant recovery for the Settlement Class,
6 challenges and risks facing Class Counsel, and substantial amount of effort necessary to litigate this action,
7 Class Counsel respectfully submit that an award of \$1,738,528, representing 17.7% of the total settlement
8 fund, would be appropriate and that courts in this Circuit have granted such awards in similar
9 circumstances. *See, e.g., In re Amgen Inc. Sec. Litig.*, No. CV 7-2536 PSG (PLAx), 2016 WL 10571773,
10 at *9-10 (C.D. Cal. Oct. 25, 2016) (awarding 25% of \$95 million settlement, plus expenses); *In re MGM*
11 *Mirage Sec. Litig.*, No. 2:09-cv-01558, slip op. at 1 (D. Nev. Mar. 1, 2016), *aff’d*, 708 F. App’x 894 (9th
12 Cir. 2017) (awarding 25% of \$75 million settlement, plus expenses). As a result, the requested fee is
13 reasonable under the Ninth Circuit precedent and when compared to empirical measurements of approved
14 fees in the Circuit.

15 **5. The Contingent Nature of the Fee and Financial Burden Carried by Class** 16 **Counsel Supports the Reasonableness of the Requested Fee**

17 A determination of a fair fee must include consideration of the contingent nature of the fee. It is an
18 established practice in the private legal market to reward attorneys for taking the risk of nonpayment by
19 paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard Posner,
20 *Economic Analysis of Law* §21.9 (5th ed. 1998). Contingent fees that may exceed the market value of the
21 services, if they had been rendered on a non-contingent basis, are accepted in the legal profession as a
22 legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly
23 basis. *See WPPSS*, 19 F.3d at 1299. “Courts have long recognized that the public interest is served by
24 rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate
25 them for the risk that they might be paid nothing at all for their work.” *Garner v. State Farm Mut. Auto.*
26 *Ins. Co.*, No. CV 08 1365 CW, 2010 WL 1687829, *2 (N.D. Cal. Apr. 22, 2010). There have been numerous
27 class actions in which plaintiffs’ counsel took the risks of a case, expended thousands of hours for their
28 clients and absent class members, and yet received no remuneration whatsoever despite their diligence and

1 expertise. *See, e.g., In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501 (2d Cir. 2010) (affirming grant of
2 summary judgment in favor of defendants on loss causation grounds after several years of litigation).

3 Plaintiff's Counsel have received no compensation for their efforts during the course of this
4 Litigation for more than two years and risked non-payment of \$197,472 in out-of-pocket expenses and for
5 the 5,300+ hours they worked in this Litigation, knowing that if their efforts were not successful, no fee
6 would be paid. Joint Decl. ¶¶24, 26. The financial risk to Plaintiff's Counsel was significant. As a result,
7 Plaintiff's Counsel should be compensated for the effort and financial burden they have carried. *See*
8 *WPPSS*, 19 F.3d at 1300-01.

9 **6. The Lodestar Cross-Check Confirms the Fee Request Is Reasonable**

10 To determine the reasonableness of a fee award, courts may compare the percentage of the common
11 fund with counsel's lodestar calculations. *See Vizcaino*, 290 F.3d at 1050-51. It is well established,
12 however, that "[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean
13 counting ... [courts] may rely on summaries submitted by the attorneys and need not review actual billing
14 records." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) (alternations in
15 original). Where, as here, "the Court is not using the lodestar to determine the actual amount of fees to be
16 awarded, but rather merely as a cross-check to the percentage-of-the-fund amount sought[.]" it may accept
17 class counsel's explanation of fees as reasonable when supported by "sworn declarations . . . describing
18 each [counsel's] tasks[.]" *Id.*

19 Plaintiff's Counsel's combined "lodestar" is \$2,945,612 for work through August 31, 2019,
20 meaning that the requested fee, if awarded, would represent a significant negative "multiplier" of
21 approximately 0.59 of Plaintiff's Counsel's combined lodestar. Joint Decl. ¶¶24-25. The Ninth Circuit
22 has recognized that attorneys in common fund cases are frequently awarded a multiple of their lodestar,
23 rewarding them "for taking the risk of nonpayment by paying them a premium over their normal hourly
24 rates for winning contingency cases." *Vizcaino*, 290 F.3d at 1051. For example, the district court in
25 *Vizcaino* approved a fee that reflected a multiplier of 3.65 times counsel's lodestar. *Id.* The Ninth Circuit
26 affirmed, holding that the district court correctly considered the range of multipliers applied in common
27 fund cases and noting that a range of lodestar multipliers from 1.0 to 4.0 are frequently awarded. *Id.* at
28 1051 n.6; *see also Steiner v. Am. Broad. Co., Inc.*, 248 F. App'x 780, 783 (9th Cir. 2007) (6.85 multiplier

1 “falls well within the range of multipliers that courts have allowed”). Courts have also noted that a
 2 percentage fee that falls below counsel’s lodestar supports the reasonableness of the award. *See, e.g., In*
 3 *re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26,
 4 2007); *Amgen*, 2016 WL 10571773, at *9. Moreover, a negative multiplier, like the negative multiplier
 5 here, means “that Class Counsel is seeking payment for only a portion of the hours that they expended on
 6 the action.” *Amgen*, 2016 WL 10571773, at *9.

7 Plaintiff’s Counsel’s lodestar represents more than 5,300 hours of work at their current hourly
 8 rates.⁸ Joint Decl. ¶24. Plaintiff’s Counsel’s rates range from \$900 to \$425 for partners and \$600 to \$325
 9 for other attorneys, including staff attorneys. Lynch Decl., Ex. A; Scott Decl., Ex. A; Riebel Decl., Ex. A;
 10 Bleichner Decl., Ex. A; Gudmundson Decl., Ex. A; Murray Decl., Ex. A; Stephens Decl., Ex. A. These
 11 rates have been approved in other class action cases. *See, e.g., Morrow v. Ann, Inc.*, No. 1:16-cv-03340,
 12 ECF Nos. 70-71, 94 (S.D.N.Y.) (approving Carlson Lynch and Scott+Scott rates); Scott Decl. ¶6 (cases
 13 approving Scott+Scott rates); Stephens Decl. ¶10 (case approving Tousley Brain Stephens PLLC’s rates).
 14 Given Plaintiff’s Counsel’s experience, work, and the complex and relatively specialized nature of this
 15 Litigation, their rates are reasonable.

16 Plaintiff’s Counsel in this Litigation have submitted summaries of the number of hours expended
 17 by attorneys and staff and descriptions of the type of work each firm performed. Lynch Decl. ¶4 & Ex. A;
 18 Scott Decl. ¶4 & Ex. A; Riebel Decl. ¶4 & Ex. A; Bleichner Decl. ¶4 & Ex. A; Gudmundson Decl. ¶4 &
 19 Ex. A; Murray Decl. ¶4 & Ex. A; Stephens Decl. ¶9 & Ex. A. The hours billed were spent drafting
 20 pleadings and briefs, litigating numerous discovery disputes, taking and defending depositions, responding
 21 to discovery requests and producing documents, reviewing document productions, working with experts,
 22 and negotiating the Settlement. *Id.*⁹ These tasks are typical in litigation and were necessary to the

23
 24 ⁸ The Supreme Court and other courts have held that the use of current rates is proper since such
 25 rates compensate for inflation and the loss of use of funds. *See Mo. v. Jenkins by Agyei*, 491 U.S. 274,
 283-84 (1989); *Rutti v. Lojack Corp., Inc.*, No. SACV 06-350 DOC (JCx), 2012 WL 3151077, at *11
 (C.D. Cal. July 31, 2012) (“it is well-established that counsel is entitled to current, not historic, hourly
 rates”) (citing *Jenkins*, 491 U.S. at 284).

26 ⁹ Moreover, additional work will be required of Class Counsel on an ongoing basis, including:
 27 correspondence with Settlement Class Members; preparation for, and participation in, the Final Approval
 28 Hearing; supervision of the Claims Administration process conducted by the Settlement Administrator;
 and supervision of the distribution of the settlement fund to Settlement Class Members who have
 submitted valid Claim Forms. However, Class Counsel will not seek payment for this additional work.

1 successful prosecution and resolution of the claims against Eddie Bauer.

2 The requested fees of \$1,738,528 represent a multiplier of 0.59 of Class Counsel's lodestar. Given
3 the quality of counsel's work and results achieved in these circumstances, the lodestar comparison supports
4 the reasonableness of the requested fee award.

5 **C. Plaintiff's Counsel's Request for Reimbursement of Expenses Is Reasonable**

6 "Attorneys who create a common fund are entitled to the reimbursement of expenses they advanced
7 for the benefit of the class." *Vincent*, 2013 WL 621865, at *5. In assessing whether counsel's expenses
8 are compensable in a common fund case, courts look to whether the particular costs are of the type typically
9 billed to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

10 Plaintiff's Counsel seek reimbursement of \$197,472 for the reasonable expenses incurred to
11 advance this litigation. Joint Decl. ¶¶24, 26. These expenses are outlined in Plaintiff's Counsel's
12 individual fee and expense declarations submitted concurrently herewith and are of the type that counsel
13 normally would charge a fee-paying client. Lynch Decl. ¶¶3, 8 & Ex. B; Scott Decl. ¶¶3, 8 & Ex. B; Riebel
14 Decl. ¶¶3, 8 & Ex. B; Bleichner Decl. ¶¶3, 8 & Ex. B; Gudmundson Decl. ¶¶3, 8 & Ex. B; Murray Decl.
15 ¶¶3, 8 & Ex. B; Stephens Decl. ¶¶8, 12 & Ex. B.

16 As explained in the Joint Declaration, a vast amount of fact discovery was taken in this Litigation
17 and experts were engaged in preparation for the filing of a motion for class certification that would have
18 been due in short order had the Litigation not settled. Joint Decl. ¶¶4-12. Thus, e-discovery vendor fees
19 represent approximately 20% of the expenses incurred, court reporting fees and transcript costs for 13
20 depositions represent approximately 16%, travel expenses to attend depositions represent approximately
21 16%, and expert fees represent approximately 17%. *Id.* ¶26. The remainder of the expenses include online
22 legal and factual research, the mediator's fee, the Special Master's fee, and costs related to duplicating
23 exhibits for 13 depositions. *Id.* In sum, all of Plaintiff's Counsel's expenses, in an aggregate amount of
24 \$197,472, are typical in litigation, were necessary to the successful prosecution and resolution of the claims
25 against Eddie Bauer, and should be approved.

26
27
28 Plaintiff's Counsel are able to provide itemized billing records setting forth time spent on particular tasks
if the Court so requests.

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED at Seattle, Washington, this 20th day of September, 2019.

By: /s/ Chase C. Alvord
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TOUSLEY BRAIN STEPHENS PLLC

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