UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

No. 5:15-cv-231

GARY and ANNE CHILDRESS, THOMAS and ADRIENNE BOLTON, STEVEN and MORGAN LUMBLEY, RAYMOND and JACKIE LOVE, HARRY and MARIANNE CHAMPAGNE, and RUSSELL and MARY BETH CHRISTE, *on behalf of themselves and others similarly situated*,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF COSTS, AND PAYMENT OF CLASS REPRESENTATIVE SERVICE AWARDS

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I. INTRODUCTION

The settlement of this matter—now preliminarily approved by the Court—resolves claims by over 120,000 military family customers who assert that defendant Bank of America, N.A. ("Bank of America") failed to properly apply reduced interest rates and other benefits to their accounts, though it was required to do so under the Servicemembers Civil Relief Act ("SCRA") and its own proprietary program.

The Court preliminarily approved the settlement reached by the parties in this matter on September 13, 2017. Plaintiffs, on behalf of the class, now present their unopposed motion for attorneys' fees, reimbursement of costs, and class representative service awards. As proposed in their Motion for Preliminary Approval and reflected in the Settlement Agreement, Plaintiffs request: (i) an award of 30% of the gross settlement for class counsel's attorney fees; (ii) reimbursement of reasonable expenses in the amount of $44,110.14 for the costs incurred by class counsel; and (iii) service awards in the amount of $10,000 (per family) for named Plaintiffs Raymond and Jackie Love, Harry and Marianne Champagne, and Russell and Mary Beth Christe, and $15,000 (per family) for named Plaintiffs Gary and Anne Childress, Thomas and Adrienne Bolton, and Steven and Morgan Lumbley.

Plaintiffs' application for fees, reimbursement of costs, and awards to class representatives is reasonable and fair given the circumstances of the litigation, the expertise and efficiency demonstrated by Plaintiffs' counsel throughout this litigation, and the results ultimately achieved for the class by class counsel and the named Plaintiffs. For the additional reasons argued below, Plaintiffs respectfully request that the Court grant this unopposed motion.

II. PRELIMINARY STATEMENT IN SUPPORT OF THE MOTION

On behalf of a large, nationwide class of military families, class counsel labored in earnest and achieved a truly extraordinary result.[1] The $41,920,374.06 gross settlement and injunctive relief agreed to by the parties will provide meaningful, direct compensation and relief to these families without the complication and uncertainty of a claims process and without affecting previous payments to many class members. This is no coupon settlement. And, remarkably, the settlement provides monetary relief to a class of military families stretching back to September 11, 2001.[2] Under the settlement, checks will be automatically mailed directly to every class member, as will a set of reminder notices and reissuances of checks to ensure that the settlement has the maximum benefit for servicemembers, veterans, and their families.[3]

This settlement represents real dollars in the pockets of tens of thousands of American veterans who have served and continue to serve our county, in addition to meaningful injunctive relief that will benefit them going forward.

This is a remarkable achievement especially given the significant obstacles faced by Plaintiffs in bringing and pursuing this litigation. Bank of America defended this case aggressively and brought jurisdictional and substantive legal challenges on several fronts, including arguing that any qualified class members were already paid in full. The daunting nature of this litigation is also evident from the fact that despite it being a purported nationwide class action case against a major financial institution, no other class action attorneys were willing

[1] For the sake of brevity, Plaintiffs incorporate by reference the factual presentation made in their Memorandum of Law in Support of Motion for Preliminary Approval of Settlement and Certification of a Settlement Class, Dkt. 107 ("Pls.' Prelim. Approval Memo.").

[2] *Id.*, Ex. A (Settlement Agreement) at 4 (Dkt. 107-1).

[3] *See id.*, Ex. A (Settlement Agreement) (Dkt. 107-1) and Ex. B (Distribution Plan) (Dkt. 107-2).

to take the risk of litigating this case against the bank. This left the three class counsel firms to litigate this matter to resolution, with those firms bearing all the risk and costs.

As this Court has witnessed, class counsel litigated this case skillfully and efficiently, fending off motions on the pleadings and supporting class certification. Class counsel also effectively targeted discovery to advance the litigation in a manner that ultimately led to successful mediation sessions in New York and California with prominent mediator and former federal judge Layn Philips. All of these efforts have been to the benefit of the military family class members.

The specific risks faced in this litigation were significant, and included the ever-present possibility that Plaintiffs might fail to recover at all, either by denial of class certification, further motion practice, or at a jury trial. Facing stiff opposition from experienced defense counsel, class counsel litigated this case without hesitation with an eye toward trial preparation. The specific legal arguments faced by the Plaintiffs were many. Among other things, Bank of America has argued that payments it previously made to many class members (following federal government enforcement action)[4] made those members "whole" and precluded any further recovery. It also argued that most, if not all, class members' claims were barred by the applicable statutes of limitations. And Bank of America strongly challenged the propriety of class certification.[5]

The nearly $42,000,000 gross settlement amount achieved by Plaintiffs and class counsel is substantial in light of the above-stated risks and the real threat of dispositive, adverse rulings

[4] Ongoing federal oversight of Bank of America's SCRA compliance, and the United States Office of the Comptroller of the Currency's issuance of a consent order in May of 2015 requiring remediation to SCRA-eligible servicemembers, further demonstrates the extraordinary efforts by class counsel to secure this settlement and its guarantee of *additional* payments to a class of servicemembers stretching back to 2001. *See In re Bank of Am., N.A., Charlotte, N.C.*, No. AA-EC-2015-1 (Consent Order May 29, 2015), available at http://www.occ.gov/static/enforcement-actions/ea2015-046.pdf.

[5] Def.'s Br. in Opp'n to Class Certification (Dkt. 70), *passim*.

or a dramatic reduction in potential recovery. The settlement also includes an agreement by Bank of America to forgo the use of the interest subsidy method for interest benefits calculations for a five-year period.[6] This injunctive relief will provide a meaningful financial benefit to military families across the nation, including those who will choose to serve our country in future years, as explained further below and in Plaintiffs' expert report.[7]

In sum, the settlement reached here was hard-earned. Plaintiffs' unopposed request for attorneys' fees, reimbursement of costs, and service award payments to class representatives is reasonable and reflective of the efforts and success of the case.

III. ARGUMENT

A. The requested fee is reasonable as a percentage of the common fund.

The award of attorneys' fees is "within the judicial discretion of the trial judge"[8] and disturbed by the court of appeals only upon finding of an abuse of discretion.[9]

The United States Supreme Court has "recognized consistently 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."[10] It follows that a district court's "[j]urisdiction over the fund involved in the litigation allows a court to prevent [] inequity by

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[6] *See* Pls.' Prelim. Approval Memo., Ex. A (Settlement Agreement) at 18 (Dkt. 107-1).

[7] *See* Joint Declaration of Class Counsel in Support of Unopposed Motion for Award of Attorneys Fees, Reimbursement of Costs, and Payment of Class Representative Awards ("Joint Decl."), filed herewith, at Ex. B (Expert Report).

[8] *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (further citation omitted).

[9] *Berry v. Schulman*, 807 F.3d 600 (4th Cir. 2015).

[10] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs . . . .")

assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit."[11]

Where there is a common fund, or calculable monetary benefit to class members, the preferred method to determine appropriate attorneys' fees is to base the award on a percentage of the monetary benefit obtained.[12] Although "[t]he Fourth Circuit has neither announced a preferred method for determining the reasonableness of attorneys' fees in common fund class actions nor identified factors for district courts to apply when using the percentage method,"[13] "[w]ithin this Circuit, the percentage-of-recovery approach is not only permitted, but is the preferred approach to determine attorney's fees"[14] and "[d]istrict courts within the Fourth Circuit have consistently endorsed the percentage method."[15] The other circuit courts that have considered the propriety of the so-called percentage method have also endorsed its use.[16]

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[11] *Boeing Co.*, 444 U.S. at 478.

[12] *See, e.g., Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 758 (S.D. W. Va. 2009) ("The percentage method has overwhelming become the preferred method for calculating attorneys' fees in common fund cases.")

[13] *Kay Co. v. Equitable Prod. Co*., 749 F. Supp. 2d 455, 463 (S.D. W. Va. 2010).

[14] *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) *quoting Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 568 (D.S.C. 2015).

[15] *Deem v. Ames True Temper, Inc.*, 2013 WL 2285972, at *4 (S.D. W. Va. May 23, 2013) (citations omitted); *see also Teague v. Bakker*, 213 F. Supp. 2d 571, 583 (W.D.N.C. 2002); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 438 (D. Md. 1998); *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 502 (E.D. Va. 1995).

[16] *See, e.g., Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998); *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Pub. Power Supply Sys. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1268–71 (D.C. Cir. 1993) (requiring use of the percentage-of-recovery method); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992); *In re Cont'l Ill. Sec. Litig*., 962 F.2d 566 (7th Cir. 1992); *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 773–74 (11th Cir. 1991) (requiring use of the percentage-of-recovery method); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co*., 838 F.2d

Further, "[c]ourts within the Fourth Circuit have cautioned against the lodestar approach in determining attorneys' fees in common fund cases such as this,"[17] recognizing that, by contrast, the percentage method encourages efficiency and is the "more equitable" approach to determining fees.[18] Among other things, "the percentage method better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended by the attorneys."[19]

451, 454, 456 (10th Cir. 1988); *Bebchick v. Wash. Metro. Area Transit Comm'n*, 805 F.2d 396, 406–07 (D.C. Cir. 1986).

[17] *Kruger*, 2016 WL 6769066, at *3. Courts have recognized, *inter alia*, three significant drawbacks to use of the lodestar method in common fund cases: (1) it bears no relation to the success of the case and benefits to the class; (2) it discourages efficiency in litigation, including efforts toward early settlement of cases; and (3) it wastes limited court resources by requiring judges to sift through voluminous timekeeping records. *See, e.g.*, *Strang v. JHM Mortg. Sec. Ltd. P'Ship*, 890 F. Supp. 499, 503 (E.D. Va. 1995) ("[T]he percentage method is more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases."); Manual for Complex Litigation (Third) § 24.121 (1995) ("the lodestar method [has] proved difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation to reach a predetermined result. Accordingly, it has been criticized by courts, commentators, and members of the bar.")

[18] *Archbold v. Wells Fargo Bank, N.A.*, 2015 WL 4276295, at *4 (S.D. W. Va. July 14, 2015) (stating a "clear consensus among the federal and state courts . . . that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery" because "the percentage of fund approach is the better-reasoned and more equitable method of determining attorneys' fees in such cases."); *accord DeWitt v. Darlington Cty.*, 2013 WL 6408371, at *6 (D.S.C. Dec. 6, 2013) ("The percentage-of-the-fund approach rewards counsel for efficiently and effectively bringing a class action case to a resolution, rather than prolonging the case in the hopes of artificially increasing the number of hours worked on the case to inflate the amount of attorney's fees on an hourly basis."); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (stating the lodestar method "create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits" (alterations in original) (citations and internal quotations omitted)).

[19] *Jones*, 601 F. Supp. 2d at 760.

Attorneys' fees in common fund cases typically reflect "around one-third of the recovery,"[20] though many courts have "awarded percentages exceeding 30%."[21] The 30% attorneys' fee requested here is in the main of common fund cases, and in fact less than the one-third of the gross settlement (or common fund) that itself "would be consistent with that awarded in other cases"[22] by courts in this circuit.[23] Here, the 30% fee request is less than the 33-1/3% contingency fee that the named Plaintiffs agreed to in their retention agreements with class counsel.

[20] *See* 5 NEWBERG ON CLASS ACTIONS § 15:73 (5th ed. 2016) (noting that a "33% figure provides some anchoring for the discussion of class action awards [to counsel]" and that "many courts have stated that … fee award in class actions average around one-third of the recovery."); *accord* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award 30–33% of the common fund).

[21] *Thomas v. FTS USA, LLC*, 2017 WL 1148283, at *5 (E.D. Va. Jan. 9, 2017) (citing *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (reviewing 289 class action settlements and finding an "average attorney's fees percentage [of] 31.31%" and a median of roughly one-third of the common fund)); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 2003 WL 22037741, at *7 (D.D.C. June 16, 2003) (noting the well-established practice that "fee awards in common fund cases may range from fifteen to forty-five percent [.]"

[22] *Thomas*, 2017 WL 1148283, at *5; *see also Braun v. Culp, Inc.*, 1985 WL 5857, at*3 (M.D.N.C. Apr. 26, 1985) ("in matters in which fees are contingent upon recovery, the fee is sometimes expressed as a percentage of the recovery and ranges from 25% to 40%").

[23] *See, e.g.*, *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, 2012 WL 2370523, at *7–9 (D.S.C. June 22, 2012) (approving class counsel's request for attorneys' fees in the amount of one-third of the common fund and observing that "[a] total fee of one-third of the class settlement for all work performed and to be performed in this case is well within the range of what is customarily awarded in settlement class actions. An award of fees in this range for work performed in the creation of a settlement fund has been held to be reasonable by many federal courts."); *Anselmo v. W. Paces Hotel Grp., LLC*, 2012 WL 5868887, at *3 (D.S.C. Nov. 19, 2012) (finding that "[t]he approximate 33% for fees provided here is reasonable in light of all pertinent factors, including precedent and beneficial results obtained."); *Kindrik v. ABC Television & Appliance Rental, Inc.*, 1999 WL 1027050, at *2 (N.D. W. Va. May 12, 1999) (observing that awards of 30%, 35%, and even 50% have been held reasonable).

B. Application of commonly used factors to determine the reasonableness of Plaintiffs' fee application weigh in favor of the requested attorney fee award.

Many courts in this circuit look to common factors in determining the reasonableness of an attorney fee application in a common fund case.[24] Consideration of each of these factors supports the fee application made by Plaintiffs here.

1. Class counsel achieved extraordinary results for the class of over 120,000 military families.

As the Supreme Court has held and the Fourth Circuit has discussed, the most critical factor in determining the reasonableness of an attorney fee award is "the degree of success obtained."[25] The nearly $42,000,000 settlement benefitting the class of military families here, plus the meaningful injunctive relief provided for those who maintain accounts with Bank of America, reflects an enormous success given the circumstances of this case. The size of the fund and the number of persons benefitting from the settlement also weigh in favor of the reasonableness of the 30% attorneys' fee requested by Plaintiffs. The result here is all the more extraordinary in light of the very real litigation risks faced by Plaintiffs in this action, as described above and in Plaintiffs' prior motion for preliminary approval.

[24] *See, e.g.*, *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 261 (E.D. Va. 2009); *Muhammed v. Nat'l City Mortg., Inc.*, 2008 WL 5377783, at *8 (S.D. W. Va. Dec. 19, 2008). These factors are: (1) the results obtained for the class; (2) objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the quality, skill, and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) public policy; and (7) awards in similar cases. *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261. Because objections to the settlement are not due until December 12, 2017, the matter of objections by class members, *vel non*, cannot be fully addressed—as of November 28, 2017, counsel are informed that there have been no objections by members of the class to the preliminarily approved settlement, including the attorney fee amount requested.

[25] *McDonnell v. Miller Oil Co.*, 134 F.3d 638, 641 (4th Cir. 1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

2. The class is represented by nationally recognized and highly experienced class counsel who resolved this matter with skill and efficiency.

As previously argued in Plaintiffs' Motion for Preliminary Approval, class counsel have vast experience with class action and other complex civil litigation, including litigation against Bank of America and other large financial institutions, and including some of the largest and most successful class action cases in U.S. history.[26]

Leading the team locally has been Kieran Shanahan from the Shanahan McDougal law firm, formerly Shanahan Law Group, one of Raleigh's most respected firms. This firm is well suited to represent this class of soldiers and veterans as Mr. Shanahan himself is from a military family and his wife serves as an Admiral in the United States Navy. In addition to Shanahan McDougal's complex litigation and business practice, the firm has also participated in a number of nationwide and regional class-action lawsuits, and has been crucial to their successful resolution.[27]

Providing national litigation support to the team is Hagens Berman Sobol Shapiro LLP. Founded in 1993, Hagens Berman is one of the largest and most successful plaintiffs' class action firms in the country, routinely recognized as among the very top tier of a handful of plaintiff-side class action law firms, having litigated and settled many of the largest class action cases in history.[28] This firm routinely litigates consumer class action cases in nearly all federal courts, and dozens of state courts across the country against many of the largest corporations in the world, including many cases against the largest commercial and investment banks in the

[26] *See* Pls.' Prelim. Approval Memo., Ex. C (Lowney Decl.) (Dkt. 107-3), Ex. E (Berman Decl.) (Dkt. 107-5), Ex. F (Shanahan Aff.) (Dkt. 107-6).

[27] *See id.*, Ex. F (Shanahan Aff.) (Dkt. 107-6).

[28] *See id.*, Ex. E (Berman Decl.) (Dkt. 107-5).

world.[29] Hagens Berman brought that high-level complex class action litigation experience and its substantial financial resources to bear in this complex class action litigation and, together with co-counsel, brought this case to a mediated settlement in the interests of the class.[30]

Rounding out the team is Smith and Lowney PLLC, which, together with lead Plaintiffs Gary and Anne Childress, uncovered Bank of America's unlawful practices. Since its founding in 1996, Smith & Lowney has participated in numerous nationwide class actions on behalf of consumers, including litigation against First USA Bank that culminated in a nationwide settlement of claims for a class of over ten million consumers, and several other nationwide consumer class actions in state and federal courts across the United States.[31] Through great effort, Smith & Lowney worked with military families across the country to vindicate their rights and develop this lawsuit for several months before it was filed. The firm took on the significant risk of developing and litigating a nationwide class action case against one of the largest corporations in the world on the other side of the country from its location in Seattle, Washington.

Together, the three class counsel law firms committed substantial time and resources to the litigation of this action. Plaintiffs' counsel have advanced all of the costs of bringing the case, and to date, have received no reimbursement or other compensation.[32] Over the past three years, Plaintiffs' counsel have analyzed and developed the various legal theories and causes of action, conducted discovery across the country, and engaged in robust motions practice.[33] Plaintiffs'

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[29] *Id.*

[30] *Id.*

[31] *See id.*, Ex. C (Lowney Decl.) at ¶ 4 (Dkt. 107-3).

[32] *Id.*

[33] *Id.*

counsel overcame a motion to dismiss and resolved several discovery disputes, reviewed large volumes of documents, developed additional legal theories, and routinely engaged affected class representatives.[34]

Though the parties brought only a few contested matters to the Court, the parties conducted extensive discovery and presented most of the highly contested factual and legal disputes in the context of a multi-part mediation before the mediator. Plaintiffs and Defendants amassed evidence, developed legal theories, and presented damages analyses for rigorous evaluation by the mediator and opposing counsel. Through this process the parties were able to evaluate the strengths and weaknesses of various claims and arrive at a hard-fought but fair resolution of this matter.

Even after nearly two years of work on the case, Plaintiffs' counsel spent months on additional research and analysis resulting in the addition of another cause of action and additional plaintiffs to the lawsuit. That additional effort was made as part of the mediation, and ultimate global settlement of this matter, to the betterment of the class.[35]

All told, class counsel skillfully and efficiently proceeded through discovery and motions practice until both parties recognized the wisdom of negotiating a settlement before the Court's ruling on class certification, resolving the litigation without needlessly spending months or years to reach the same result, or a worse result for the class.

3. Class counsel overcame several obstacles in this complex, multi-state class action litigation to reach the settlement with powerhouse defendant Bank of America.

In addition to the reasons detailed above, the experience and innovation of class counsel, coupled with a demonstrated willingness to litigate this case through trial if necessary, allowed

[34] *Id.*

[35] *Id.* at ¶ 15.

Plaintiffs to overcome many of the obstacles faced in complex, multi-state class action litigation. In tandem with a focused approach to discovery designed to establish the distinct categories of class members so as to accurately determine actual damages for each class member, class counsel used a novel grouping of class members and an innovative payment schedule to ensure the maximum possible payments to military families.

The plan for distribution of net proceeds to the nationwide class reflects an iterative process designed to maximize class member recovery.[36] Class counsel has also ensured that the settlement created a non-reversionary net settlement fund for the class that would be drawn on through successive attempts to maximize these recoveries.

This approach will provide significant economic benefits to the class. As discussed previously, payments begin with a direct payment of over $15,000,000 in checks to military families who did not receive or successfully deposit previous payments, as had the majority of the Class.[37] Because Bank of America has records of these families, the settlement here requires direct notice and payment without any need for cumbersome and imperfect published or other notices to the class. These class members will be given both sufficient time to cash their checks and also reminder mailings.

Any remaining money after distribution of these "Step One" payments will be combined with the balance of the net settlement proceeds to form an "award pool." There is no reversion of any funds to Bank of America, meaning that every dollar of the remaining funds will go to the class members. The award pool is distributed to all class members *pro rata* based upon which of four groups they fall into (and some class members will be part of multiple groups and receive

[36] *See* Pls.' Prelim. Approval Memo., Ex. B (Distribution Plan) (Dkt 107-2).

[37] *Id.*

multiple payments).[38] Class members are divided into these four groups based on account type, when the class member held the account(s), and the amount of refund payments that Bank of America previously paid to the servicemember (*e.g.*, whether he or she received any "refund" and, if so, whether he or she also received a "payment" in addition to the "refund").

The vast majority of the funds will be distributed to up to 120,000 class members through this second, classwide distribution. After that second distribution, class members will be provided reminder mailings and given approximately six months to cash their checks. The compensation of class members agreed to by the parties in the settlement of this matter is the most effective, flexible, and comprehensive method of payment available in class action cases. This method also cuts through the complexities of multi-state litigation, and ensures the maximum benefit for all class members.

Nor was class counsel's work even complete when the parties reached an agreement in principal through mediation. Class counsel still was required to spend months negotiating a complex settlement agreement with Bank of America, and has since been working with experts and settlement administrators to ensure that proper notice went out to the 120,000 members of the Class.

In addition, as a condition of the settlement, class counsel demanded that Bank of America provide post-settlement confirmatory discovery to verify the data relied upon in settlement negotiations, in addition to formal discovery previously provided. This post-settlement discovery includes depositions of several high-level Bank of America employees who have been instrumental in the Bank's SCRA compliance program.

[38] *Id.*

Finally, if the Court finally approves this settlement, class counsel will remain actively engaged throughout the first half of 2018 to ensure that the settlement is fully distributed according to the Order approved by this Court.

4. Class counsel faced a genuine risk of non-recovery in this action.

Plaintiffs and class counsel faced the genuine and ever-present risk of zero recovery in this case. First, just days prior to the filing of this lawsuit, the Department of the Treasury, Comptroller of the Currency entered into a consent order with Bank of America for its violations of the SCRA.[39] At the time the suit was filed, it was unknown whether, and to what extent, the Consent Decree or Bank of America's previous payments to certain class members would preclude further recovery.

In fact, Bank of America has maintained throughout this litigation that the Consent Order and previous payments to customers reflected the full extent of its obligations. Had the Court ultimately accepted such an argument, there would have been no recovery. Had the Court denied Plaintiffs' motion for class certification, or ruled adversely to Plaintiffs on further dispositive motions, there would have been no recovery. Were a jury to find that Plaintiffs and other servicemembers were entitled to no further compensation, there would have been no recovery in this case. And finally, the Fourth Circuit may have set aside, on various grounds, any recovery won for the class at trial. In each of these scenarios, class counsel would have borne the entire cost of litigation and military families would have received nothing from this case.

5. Public policy considerations weigh strongly in favor of the award requested here.

Plaintiffs in this matter exemplified the role of the private attorney general, vindicating the rights of over 120,000 military servicemembers and their families by holding one of the

[39] *See* Consent Order *supra* note 4.

nation's largest banks accountable for its failure to provide federally required benefits to the accounts held by these families. This action benefitted not just the 120,000 or so military families with credit card, mortgage, or other loan accounts with Bank of America, but other and future military personnel who will open or maintain accounts with other banks subject to the SCRA and their own proprietary military reduced benefit programs. Because of this litigation, those banks will be ever mindful that military families can and will bring legal action to vindicate their entitlement to the benefits that Congress intended them to receive in recognition of their service to our country. This will likely serve as a deterrent against other banks' violations of the SCRA.

6. The attorneys' fees requested here reflect the fee percentage common in other cases.

As discussed above, the attorneys' fee requested in this case falls well within the main of common fund attorney fee requests in this circuit and nationwide, and is in fact below the standard one-third recovery permitted in many class cases that achieve comparably valuable results for class members.

7. The fee request is even more reasonable because it seeks a percentage just of the cash value of the settlement, without seeking any percentage of the value of injunctive relief.

In addition to a percentage of the cash value of the common fund, courts routinely grant class counsel a fee based upon a percentage of the value of any injunctive relief achieved.[40] This is especially true where, as here, the injunctive relief will provide real and quantifiable financial benefits to the class. Even where the value of injunctive relief is too imprecise to be "added" to

[40] *See, e.g.*, *Tennille v. W. Union Co.*, 2013 WL 6920449, at *10 (D. Colo. Dec. 31, 2013).

the common fund for purposes of calculating an attorney fee percentage, injunctive relief may still be considered for a fee award in light of the value it adds to the settlement.[41]

As part of the settlement, Bank of America has agreed to not use the "Interest Subsidy Method" to provide military reduced interest rate benefits to mortgage customers for at least five years, with certain exceptions.[42] Plaintiffs' expert has evaluated the likely value to the settlement class from this injunctive relief by analyzing the mortgage account of an exemplar class member—specifically, class representatives Raymond and Jackie Love.[43] The expert determined that, had the injunctive relief been in force during the period in which Mr. Love was receiving SCRA benefits from Bank of America, the Loves would have received a benefit of $9,223.70, or 5.59% of the initial principal balance of their mortgage.[44] The analysis also concludes that these benefits would have compounded in subsequent years, leading to a total savings of $13,858.85, or 8.40% of the initial principal balance, had the Loves continued to make payments through November 2017.[45]

Plaintiffs' expert report notes the complexities of calculating the value of the injunctive relief to the entire class, which, according to Bank of America, contains 9,138 mortgage

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[41] *See, e.g.*, *McCoy v. Health Net, Inc.*, 569 F.Supp. 2d 448, 478 (D.N.J. 2008) (because "Class members will receive a very real and very important financial benefit from these aspects of the relief," the injunctive relief "is a highly relevant circumstance in determining what percentage of the common fund counsel should receive as attorney's fees."); *Fraley v. Facebook*, 2013 WL 4516806, at *3 (N.D. Cal. Aug. 26, 2013) (finding that the value of injunctive relief was too imprecise to include in common fund but that it supported an attorney's fees award at benchmark level and the reasonableness of the settlement.)

[42] *See* Pls.' Prelim. Approval Memo., Ex. A. (Settlement Agreement) at 19 (Dkt. 107-1).

[43] Joint Decl., Ex. B (Expert Report).

[44] *Id.*

[45] *Id.*

customers.[46] However, he has concluded that if these class members enjoy, on average, 20% of the benefit that the Loves would have received from the injunctive relief, then the total value of the relief to the class could range from approximately $16 million to $25 million, depending upon, *inter alia*, whether the servicemembers hold their mortgage in the long term and receive compounded benefits. This is, in Plaintiffs' estimation, a conservative estimate of the value of the injunctive relief.

To be clear, class counsel is not seeking a percentage of the value of this injunctive relief as attorney's fees, but this element of the settlement supports the overall reasonableness of the requested fee award.[47] By way of illustration, 30% of the *cash* component of the common fund—the amount sought in Plaintiffs' motion—would equate to approximately 22% or less of the *total* common fund if a conservative estimate of the value of the injunctive relief were added to the cash component.

C. The request for reimbursement of actual litigation expenses is modest and reasonable.

Federal courts, including courts within this circuit, routinely approve the reimbursement of attorney expenses "from the common fund," separate from and in addition to attorneys' fees, for reasonable costs incurred in obtaining the class recovery.[48]

Because this case was litigated with great efficiency by class counsel, with an effort to eliminate unnecessary discovery battles and time-consuming tangents, Plaintiffs were able to

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[46] *Id*. at 5.

[47] *See, e.g.*, *Pokorny v. Quixtar, Inc.*, 2013 WL 3790896, at *1 (N.D. Cal. July 18, 2013) (concluding that injunctive relief constitutes further support for the reasonableness of the fee award).

[48] *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261 (citing *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 778, 791 (E.D. Va. 2001) ("There is no doubt that costs, if reasonable in nature and amount, may appropriately be reimbursed from the common fund.")); Fed. R. Civ. P. 23(h) (authorizing award of "nontaxable costs" in class action cases).

keep the out-of-pocket expenses of litigation under tight control. The costs borne by class counsel in this litigation are significantly less than those found in many cases that result in similar-sized settlements.

In addition, the costs incurred here were in connection with standard litigation practices, *inter alia*, "traveling to depositions, the review of documents . . . and attendance at mediation sessions and/or court hearing[s] . . . ."[49] Plaintiffs' request for reimbursement of actual costs in the amount of $44,110.14 for the reasonable expenses incurred in this litigation is warranted.

D. The class representative service award amounts requested are typical and justified.

As the Fourth Circuit recently observed, "[i]ncentive awards are 'intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.'"[50] Such awards "are routinely approved in class actions to encourage socially beneficial litigation by compensating named plaintiffs for their expenses on travel and other incidental costs, as well as their personal time spent advancing the litigation on behalf of the class and for any personal risk they undertook."[51]

Plaintiffs request class representative service awards for the named Plaintiffs in this case as modest compensation for their active participation in this litigation from its inception to the point of settlement. Specifically, Plaintiffs request that an award of $15,000 be paid (in total per family) to Gary and Anne Childress, Thomas and Adrienne Bolton, and Steven and Morgan

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[49] *In re Mills Corp. Sec. Litig.*, 265 F.R.D. at 261 (approving the reimbursement of $3,094,764.86 is costs to be paid from the common fund). *See* Joint Decl. Ex. A (detailing the reasonable costs borne by class counsel in this litigation).

[50] *Berry*, 807 F.3d at 612 (quoting *Rodriquez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009).

[51] *Domonoske v. Bank of Am., N.A.*, 790 F. Supp. 2d 466, 467–77 (W.D. Va. 2011) (further citations omitted).

Lumbley, and an award of $10,000 be paid (in total per family) to Raymond and Jackie Love, Harry and Marianne Champagne, and Russell and Mary Beth Christe.

These payment amounts reflect the respective levels of involvement for both groups of named Plaintiffs.[52] They have assisted class counsel by providing detailed, often cumbersome records of their military service, their applications for SCRA benefits, and their interactions with Bank of America related to their SCRA benefits and the refund checks they received, with regard to their sufficiency and their tax implications.[53] The named Plaintiffs here have also devoted their time by way of assisting with the drafting of complaints, helping prepare initial disclosures in discovery, consulting with class counsel during the course of this litigation, monitoring the course of this case, and consulting with counsel regarding the proposed terms of settlement.[54]

Courts commonly approve incentive awards similar to those requested in this case[55] and the requested service payments are typical of awards provided to class representatives.[56] The named representative military families in this action should be recognized for their meaningful, and ultimately successful, efforts to secure compensation for their fellow servicemember

[52] *See* Pls.' Prelim. Approval Memo., Ex. C (Lowney Decl.) (Dkt. 107-3).

[53] *Id.*

[54] *Id.*

[55] *See, e.g.*, *Kay Co.*, 749 F. Supp. 2d at 473 (noting the "burdensome task" of serving as a class representative and awarding $15,000 incentive awards to six class representatives notwithstanding the lack of depositions or other testimony from them); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, 2016 WL 1070819 (E.D. Va. Mar. 15, 2016) (awarding $10,000 to class representative); *Ryals, Jr. v. HireRight Sols., Inc.*, 2011 WL 10846113 (E.D. Va. Dec. 22, 2011) (awarding $10,000 service awards to each class representative).

[56] NEWBERG, § 17.8 (5th ed.) (average incentive awards per plaintiff range from $9,355 to $15,992).

families, and the modest sums requested here adequately recognize them for that service. As the court noted in *Kay*, "without class representatives, the entire class would receive nothing."[57]

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs, without objection from Defendant Bank of America, ask respectfully that the Court grant their motion for award of attorneys' fees, reimbursement of costs, and class representative service awards.

Submitted this 28th day of November, 2017.

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[57] *Kay Co.*, 749 F. Supp. 2d at 473.

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Local Rule 83.1 Counsel

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Award of Attorneys' Fees, Costs, and Payment of Class Representative Service Awards** was filed this 28th day of November, 2017, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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