

THE HONORABLE KRISTIN RICHARDSON
Department 52
Noted for Consideration: Friday, April 15, 2022 at 11:00 a.m.
With oral argument

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

ANTHONY DEIEN, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

SEATTLE CITY LIGHT,

Defendant.

NO. 19-2-21999-8 SEA

**PLAINTIFF'S MOTION FOR ATTORNEYS'
FEES, COSTS, AND SERVICE AWARD**

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1 I. INTRODUCTION

2 Plaintiff Anthony Deien and his counsel request that the Court award Class Counsel
3 \$875,000 for attorneys’ fees and litigation costs and award the Class Representative a service
4 payment of \$2,500. Plaintiff and Class Counsel actively litigated this action for more than a year
5 before mediating with Defendant Seattle City Light, and ultimately achieved a favorable
6 settlement on behalf of the Settlement Class.¹ The settlement provides not only significant
7 monetary relief for the Class, but also comprehensive injunctive relief.

8 The settlement is an excellent outcome for the Class. In addition to establishing a
9 settlement fund of \$3,500,000, Defendant has agreed to establish a dedicated customer service
10 team to address issues regarding estimated bills that will have authority to investigate and
11 recalculate bills, write off charges, and authorize payment plans for customers who need
12 assistance paying their bills. SCL will post on its website an explanation of how it bills customers
13 for electricity and provide information to customers about its payment assistance programs.
14 Class Counsel seek an award of attorneys’ fees and costs equaling twenty-five percent of the
15 settlement fund. Class Counsel’s litigation costs include amounts that would be charged to a
16 paying client and are regularly paid from class settlement funds, including expert costs,
17 mediation fees, and filing fees. Finally, the Class Representative requests a modest service
18 award in line with amounts regularly approved by Washington courts.

19 II. STATEMENT OF FACTS

20 A. Class Counsel engaged in substantial discovery.

21 Class Counsel litigated this case extensively, but efficiently, for over a year before the
22 parties settled. Plaintiff served discovery requests on SCL and obtained records from the City
23 Auditor. Declaration of Beth E. Terrell in Support of Plaintiff’s Motion for Attorneys’ Fees, Costs,
24 and Service Award (“Terrell Decl.”) ¶ 10. SCL produced nearly 70,000 pages of documents. *Id.*

25 _____
26 ¹ Unless otherwise explicitly defined herein, all capitalized terms have the same meanings as
27 those set forth in the Parties’ Settlement Agreement (Ex. 1 to the Declaration of Beth Terrell in
support of Plaintiff’s motion for preliminary approval, Sub. Dkt. No. 48).

1 SCL also produced substantial discovery, including millions of billing data records, for purposes
2 of mediation. *Id.* SCL engaged an expert to conduct a complex analysis of bills involving
3 estimated reads. *Id.* ¶ 11. Plaintiff also engaged experts to analyze SCL’s billing and metering
4 systems and billing records to evaluate Plaintiff’s claims and damages. *Id.* SCL’s motion to
5 dismiss and discovery to Plaintiff were pending when the settlement was negotiated. *Id.* ¶ 12.

6 **B. Settlement negotiations.**

7 The parties mediated on November 5, 2020 and February 25, 2021, with the assistance
8 of Louis Peterson of Hillis Clark Martin & Peterson P.S., an experienced mediator of consumer
9 class action lawsuits. Terrell Decl. ¶ 13. The parties agreed to the basic terms and then
10 continued their adversarial, arm’s-length negotiations until September 15, 2021, when they
11 finalized the Settlement Agreement. *Id.*

12 **C. Class Counsel litigated the case with no guarantee of payment.**

13 Class Counsel are experienced class action litigators with expertise litigating complex
14 claims on behalf of consumers. Terrell Decl. ¶ 1-9.

15 Class Counsel took this case on a contingent basis with no guarantee of recovery. Terrell
16 Decl. ¶ 14. Class Counsel also agreed to advance all costs of this litigation. *Id.* Class Counsel
17 have worked on this matter for over two years without compensation or reimbursement for
18 their time and out-of-pocket expenses. *Id.* If Class Counsel were unable to successfully resolve
19 this matter (and as described below, this case was risky), Class Counsel would have been paid
20 nothing.

21 Although the parties settled this case in the pre-trial stage, Class Counsel have invested
22 a substantial amount of time (over 1300 hours to date) and resources investigating and
23 litigating this hotly contested action, including \$84,331.70 in out-of-pocket costs—mostly
24 expert costs. Terrell Decl. ¶¶ 15-19. Tasks performed by Class Counsel thus far include: (1)
25 investigating the claims; (2) researching and drafting the complaint; (3) propounding discovery
26 and reviewing Defendants’ responses; (4) reviewing document production and results of public
27 records requests; (5) conferring with plaintiff’s expert regarding data analysis; (6) attending two

1 all-day mediation sessions and preparing a robust mediation statement; (7) preparing the
2 settlement documents for approval; and (8) overseeing settlement administration and
3 responding to class member inquiries. Terrell Decl. ¶¶ 15-16.

4 But for these extensive efforts by Class Counsel, Class Members would have received no
5 recovery in this case.

6 **D. The Class Representative was actively involved in the case.**

7 Plaintiff Anthony Deien played a valuable role in bringing this litigation to a successful
8 conclusion. Mr. Deien assisted with Class Counsel’s investigation of the facts; provided
9 documents to Class Counsel; consulted with Class Counsel regarding the Settlement; reviewed
10 and approved the Settlement Agreement; and communicated regularly with Class Counsel and
11 provided input and answers to questions whenever needed. Terrell Decl. ¶ 20.

12 **E. The Settlement Agreement’s provisions for attorneys’ fees, costs, and service awards.**

13 The Settlement allows for Class Counsel to seek an award of up to twenty-five percent
14 of the settlement Cash Fund for attorneys’ fees and reimbursement of litigation expenses.
15 Settlement Agreement § III.H. Class Counsel included the amount of their anticipated request
16 for attorneys’ fees and costs in the postcard and email notices sent to the Class and file this
17 motion fifteen days after the Settlement Notice Date. Settlement Agreement § III.G.3. Class
18 Members have thirty days to review this motion and make any responses to it before the
19 deadline to exclude themselves or object to the settlement. Sub. No. 56.

20 The Settlement also allows Plaintiff to request a service award of \$2,500. Settlement
21 Agreement § III.I. Mr. Deien’s support of the Settlement is not conditioned on any service
22 award payment. Terrell Decl. ¶ 21. Any fees, costs, and service awards approved by the Court
23 will be deducted from the settlement Cash Fund before distributions are made to qualified
24 Class Members. Settlement Agreement § III.E.1. The settlement is not contingent on approval
25 of either the requested attorneys’ fees or service payment. *Id.* § III.F.

1 Service Award ¶ 19 (Yakima Cnty. Sup. Ct. Feb. 14, 2020) (awarding one-third of fund)); Ex. 2
2 (*Dougherty v. Barrett Business Servs., Inc.*, No. 17-2-05619-1, Final Approval Order and Entry of
3 Judgment ¶¶ 18-21 (Clark Cnty. Sup. Ct. Nov. 8, 2019) (“*BBSI Order*”) (awarding one-third of
4 fund)); Ex. 3 (*Terrell v. Costco Wholesale Corp.*, No. 16-2-19140-1 SEA, Order Approving Award
5 of Attorneys’ Fees and Costs (King Cnty. Sup. Ct. June 19, 2018) (“*Costco Order*”) (awarding
6 one-third of fund).

7 Class Counsel’s request is warranted given the significant value to the Class provided by
8 the Settlement. Defendants will create a common fund of \$3,500,000 in cash and retail bill
9 credits. Settlement Agreement § III.E.1. After deducting Court-approved settlement
10 administration expenses, attorney’s fees and costs, and a service award to Plaintiff, the Net
11 Settlement Amount will be distributed to Settlement Class Members who submit a valid claim
12 form online or by mail. *Id.* § III.G.7.

13 The Net Settlement Amount will be allocated 75% to an Elevated Bill Fund, used to
14 compensate Settlement Class Members who Plaintiff’s expert identified as having received a bill
15 in which the average kilowatt hours was at least 400% more than the average for a comparable
16 billing period, and 25% to a True Up Fund, used to compensate the remaining Settlement Class
17 Members who received at least one estimated bill followed by an actual consumption bill. *Id.*
18 The Elevated Bill Fund will be distributed *pro rata* based on each claimant’s damages as
19 calculated by Plaintiff’s expert and the True Up Fund will be distributed to the remaining
20 claimants in equal amounts. *Id.* Current SCL customers will receive a retail bill credit and former
21 customers will be issued checks. *Id.* Any funds leftover after the date for cashing checks has
22 passed will be transferred to SCL’s Emergency Low Income Assistance Program. *Id.* The ELIA
23 program provides low-income households with grants to pay up to \$200 of their electric bill.

24 The Settlement also provides significant injunctive relief. Beginning with the Effective
25 Date of the Settlement Agreement, SCL will implement: (1) enhanced communication on its
26 website to help residential customers better understand its billing practices and procedures,
27 information on contacting the Specialized Customer Care Team, and information on all available

1 bill-relief programs; (2) a standardized customer support checklist (based on Exhibit A to the
2 Settlement Agreement) for customer service staff to use in addressing estimated billing issues;
3 (3) a Specialized Customer Care Team dedicated to resolving estimated billing issues; (4) an
4 investigative process to resolve disputes regarding the accuracy of meter readings and billing
5 recalculations and adjustments using a table based on the average electricity consumption of
6 an SCL residential customer when the investigation determines that an estimated bill or bill
7 following an estimated bill is not attributable to Customer Conduct; (5) billing collection write-
8 offs upon request for customers with debt more than 36 months old based on billing
9 corrections associated with estimated bills; and (6) extended payment arrangements for
10 customers who request additional time to pay a True Up bill. Settlement Agreement § III.E.2.

11 These measures are intended to last for one year from the Effective Date but the
12 substance of the provisions (except billing correction write-offs) are intended to continue,
13 subject to SCL's modifications and adjustments. Settlement Agreement § III.E.2. At the end of
14 the one-year period, SCL will itemize all modifications with a brief description of the reasons in
15 a report to Plaintiff's Counsel and made available on its website. *Id.*

16 The recovery is more impressive given that the claims in this case were far from risk-
17 free. Plaintiff is confident in the strength of his case but also aware of the risk created by
18 Defendant's defenses. When the parties settled, Defendant had filed a motion to dismiss
19 Plaintiff's claims on numerous grounds including that municipal corporations, such as public
20 utility districts, are not subject to liability under the Washington Consumer Protection Act; that
21 Plaintiff does not have standing to seek penalties under RCW 80.04 or civil fines and forfeitures
22 under SMC 21.49.140; that Defendant is not subject to the requirements of WAC 480-100; and
23 that Plaintiff's breach of contract claim fails. Further, obtaining class certification and
24 maintaining certification through trial is always risky.

25 Continued litigation would also be expensive and time-consuming. The parties would
26 have had to complete briefing on the motion to dismiss, class certification and motions for
27 summary judgment and Plaintiffs would have had to prevail on those motions, at trial, and in

1 any appeal before they or the other members of the class would have recovered anything. *See*
2 *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188–89, 35 P.3d 351 (2001)
3 (discussing factors relevant to determining reasonableness of class settlement, including future
4 expense and likely duration of litigation).

5 Despite these obstacles, Class Counsel was able to achieve a settlement that pays
6 Settlement Class Members a significant percentage of their alleged damages and provides
7 injunctive relief to Settlement Class Members.

8 **B. Class Counsel’s fee request is consistent with the ethics guidance on reasonableness of**
9 **fees.**

10 Class Counsel’s fee request would also be reasonable under a lodestar method of
11 calculation. “Under the lodestar/multiplier method, the district court first calculates the
12 ‘lodestar’ by multiplying the reasonable hours expended by a reasonable hourly rate. *See*
13 *generally Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597–99, 675 P.2d 193, 203–04
14 (1983). The court may then enhance the lodestar with a ‘multiplier,’ if necessary, to arrive at a
15 reasonable fee.” *Id.*

16 Here, Class Counsel have devoted over 1350 hours to the investigation, development,
17 litigation, and resolution of this case, incurring over \$600,000 in fees. Terrell Decl. ¶ 16. This
18 total does not include 19.9 hours of attorney and professional staff time written off by the
19 Terrell Marshall Law Group through exercise of billing judgment. *Id.* Class Counsel spent
20 considerable time investigating the claims of the proposed class members, researching and
21 analyzing legal issues, engaging in discovery, analyzing the expert’s data analysis and
22 calculations, and engaging in settlement negotiations. Class Counsel’s work was essential to
23 ensure the successful prosecution and settlement of this complex action.

24 Class Counsel’s lodestar calculations also are based on reasonable hourly rates.
25 In assessing the reasonableness of an attorney’s hourly rate, courts consider “the usual billing
26 rate, the court may consider the level of skill required by the litigation, time limitations imposed
27 on the litigation, the amount of the potential recovery, the attorney’s reputation, and the

1 undesirability of the case.” *Bowers*, 100 Wn.2d at 587. Class Counsel are experienced, highly
2 regarded members of the bar with extensive expertise in the area of class actions and complex
3 litigation involving claims like those at issue here, and Class Counsel’s hourly rates range from
4 \$200-\$600 for attorneys to \$125-\$175 for paralegal and support staff time. Similar or higher
5 rates have been approved numerous times in class action cases. *See, e.g., Costco Order*
6 (approving similar rates for Terrell Marshall); *Barnett v. Wal-Mart Stores, Inc.*, No. 01-2-24553-8
7 (King Cnty. Sup. Ct. July 20, 2009) (Judge Spector approving fee request based on rates ranging
8 from \$100 to \$760); *Splater v. Thermal Ease Hydronic Systems, Inc.*, No. 03-2-33553-3 (King
9 Cnty. Sup. Ct. July 31, 2009) (Judge Washington approving fee request based on rates ranging
10 from \$100 to \$760); *Bowen v. CSO Financial, Inc., et al.*, No. 17-cv-00677, ECF No. 38, at 3 (W.D.
11 Wash. July, 10, 2018) (approving Plaintiff’s counsel’s fee request based on rates of \$100-\$600);
12 *Carideo v. Dell, Inc.*, No. 06-cv-01772, ECF No. 162 (W.D. Wash. Dec. 17, 2010) (approving as
13 reasonable a fee petition which included rates ranging from \$175 to \$600); *Hartman v. Comcast*
14 *Business Communications, LLC*, No. 10-0413, ECF No. 106 (W.D. Wash. Dec. 8, 2011) (approving
15 fee request based on rates ranging from \$180 to \$650).

16 Twenty-five percent of the settlement fund is a particularly reasonable award because
17 Class Counsel is not seeking separate reimbursement for the significant out-of-pocket costs
18 they incurred prosecuting this case. To date, Class Counsel have expended \$ 84,331.70 in
19 litigation expenses related to the prosecution of this action, including filing and service
20 expenses, expert fees, postage, and mediation expenses. Terrell Decl. ¶ 19. All the costs
21 incurred were reasonable, necessary to the successful conclusion of this litigation and are the
22 types of costs normally charged to a paying client. *See Newberg on Class Actions* § 16.10
23 (explaining that class counsel can typically recover from a common fund costs that would
24 “normally be charged to a paying client”); *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)
25 (counsel should recover “those out-of-pocket expenses that would normally be charged to a fee
26 paying client”); *see also Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wash. App. 841, 848,
27 917 P.2d 1086, 1090 (1995) (online legal research fees recoverable as costs).

1 Class Counsel's requested fee is reasonable under a lodestar method when applying a
2 conservative multiplier as well. Trial courts have discretion to adjust a lodestar upward to
3 compensate attorneys for the contingent nature of the recovery of fees. *Bowers*, 100 Wn.2d
4 581, 601 (affirming trial court's 50 percent increase of attorney's lodestar fees to reflect
5 "contingent nature of success" in the case). Class Counsel's lodestar is \$601,295. After
6 deducting the litigation costs from the requested amount of \$875,000, the remaining \$790,668
7 would represent a multiplier of 1.3.

8 Finally, the Washington Supreme Court has said that the factors set out in Rule of
9 Professional Conduct 1.5(a) may also guide a court's analysis of the reasonableness of a fee
10 request. *See Mahler v. Szucs*, 135 Wn.2d 398, 433 n.20, 957 P.2d 632 (1998) (overruled on
11 other grounds). Those factors include the novelty and difficulty of the question involved and
12 the skill requisite to perform the legal services properly, whether the representation precludes
13 other employment by the lawyer, the fee customarily charged in the locality for similar legal
14 services, and the amount involved, and the results obtained. Here, the case raised novel and
15 difficult questions of law, which demanded litigators with the skill and experience of Class
16 Counsel, Class Counsel's work on this matter precluded work on other matters, a 25 percent fee
17 in contingency cases is reasonable in this State, and Class Counsel obtained excellent results for
18 the Class. *See BBSI Order; Costco Order* at ¶ 6.

19 **C. The Class Representative's requested service awards should be approved.**

20 "At the conclusion of a class action, the class representatives are eligible for a special
21 payment in recognition of their service to the class." Rubenstein, William B., *Newberg on Class*
22 *Actions* § 17:1 (5th ed. Dec. 2019). Courts approve service awards in most class suits and the
23 awards average between ten and fifteen thousand dollars per class representative. *Id.* Service
24 payments "are intended to compensate class representatives for work undertaken on behalf of
25 a class" and "are fairly typical in class action cases." *In re Online DVD-Rental Antitrust Litig.*,
26 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted); *see Probst v. State of Washington Dep't of*
27 *Ret. Sys.*, 150 Wn. App. 1062, 2009 WL 1863993, at *6 (2009) (unpublished) (affirming payment

1 of \$7,500 to named plaintiff). Such awards are intended to compensate class representatives
2 for work done on behalf of the class, to make up for financial or reputational risk undertaken in
3 bringing the action, and to recognize their willingness to act as private attorneys general.

4 The Class Representative requests a service payment of \$2,500 in recognition of his
5 efforts on behalf of the Class, which included assisting counsel with the investigation, litigation
6 and settlement. The Class Representative expended significant time and effort in this matter,
7 consistently putting the Class Members' interests first. The Class Representatives' efforts and
8 willingness to pursue this action resulted in substantial benefits to the Settlement Class. And
9 they request a moderate relative to service awards approved in other cases. *See, e.g., Probst,*
10 *150 Wn. App. at *6 (affirming \$7,500 incentive award).*

11 VI. CONCLUSION

12 For the foregoing reasons, Class Counsel and the Class Representative respectfully
13 request that the Court grant their motion for attorneys' fees, litigation costs, and a service
14 award.

15 VII. LCR 7(b)(5)(vi) CERTIFICATION

16 I certify that this memorandum contains 3,303 words in compliance with the Local Civil
17 Rules.

18 RESPECTFULLY SUBMITTED AND DATED this 28th day of January, 2022.

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