IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT TOPEKA

JIN NAKAMURA,
individually and on behalf of all others similarly situated,

Plaintiff,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION d/b/a WELLS FARGO DEALER SERVICES, INC.,

Defendant.

Case No. 5:17-cv-04029-DDC-GEB

Fairness Hearing: **May 15, 2019 at 9 a.m.**

**MEMORANDUM IN SUPPORT OF CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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Class Representative Jin Nakamura moves the Court for final approval of the proposed class action settlement under Rule 23(e)(2) of the Federal Rules of Civil Procedure. Contemporaneously with the filing of this motion, Mr. Nakamura also moves the Court for approval of Class Counsel's attorneys' fees and reimbursement of litigation expenses. Mr. Nakamura files a separate Combined Index of Exhibits that includes the declarations and documents offered in support of both motions.

## I. ISSUE PRESENTED

Is the proposed class action settlement fair, reasonable, and adequate such that it warrants the Court's approval under Rule 23(e)(2) of the Federal Rules of Civil Procedure?

## II. BACKGROUND FACTS

Jin Nakamura, a Sergeant in the United States Army, filed this lawsuit on April 10, 2017, alleging that Defendant Wells Fargo Bank National Association, d/b/a Wells Fargo Dealer Services, Inc. ("Wells Fargo") repossessed his vehicle while he was in active-duty military service in violation of the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. § 3901, et seq., and state law. Complaint, Dkt. No. 1-1. On September 20, 2017, Mr. Nakamura filed a First Amended Complaint, wherein he sought to represent a putative class of servicemembers whose vehicles were allegedly repossessed while they were in active-duty military service. Dkt. No. 20. In the months following the addition of the class allegations, the parties waged discovery and motion battles before agreeing to mediate the case in early 2018. After full-day mediation session, several months of continued settlement efforts, a second full-day mediation session, and several more months of settlement negotiations, the parties reached a final agreement to settle this case in September 2018. *See* "Settlement Agreement", Dkt. No. 127-1.

On February 7, 2019, the Court issued an order preliminarily approving the Settlement, preliminarily certifying the Settlement Class, approving the form and plan of notice, approving the

form and content of the Distribution Plan, and setting a date of May 15, 2019, for the final Fairness Hearing. "Preliminary Approval Order," Dkt. No. 135.

## III. ARGUMENT AND AUTHORITIES

The procedure for review of a proposed class action settlement is a well-established, two-step process. First, the Court conducts a preliminary analysis to determine if the settlement should be preliminarily approved such that the class should be notified of the pendency of a proposed settlement. *See* William B. Rubenstein, 4 *Newberg on Class Actions* § 13:39 (5th ed. 2018). The Court already carried out this first step with its Preliminary Approval Order. Second, the class is notified and provided an opportunity to be heard at a fairness hearing before the settlement is finally approved. *Id.* Notice was effectuated pursuant to the terms of the Preliminary Approval Order. McCown Decl., ¶¶4 – 10. The Court may approve the Settlement upon finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Mr. Nakamura asks the Court, at the conclusion of the final Fairness Hearing, to make this finding and approve the Settlement for the following reasons.

### A. The Court Properly Certified the Settlement Class for Settlement Purposes and Should Confirm this Finding by Finally Certifying the Settlement Class Under Rule 23.

The Court already preliminarily certified the following Settlement Class for the purposes of this Settlement:

> All servicemembers who, before the servicemember entered military service, paid a deposit or installment on a motor vehicle loan originated, acquired, and/or serviced by Wells Fargo Bank, N.A., its predecessors, successors, subsidiaries, and assigns ("Wells Fargo"), and whose motor vehicle subject to the loan was repossessed by Wells Fargo while the servicemember was in active military service without a court order or a waiver pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. 3918, authorizing the repossession between January 1, 2006, and December 31, 2017, and have not already released their claims.

Dkt. No. 135 at ¶¶4–6. Class certification for the purposes of settlement was, and still is, proper under Rule 23(a) and (b)(3) for the reasons set forth in the Memorandum in Support of Plaintiff's Unopposed Motion for Certification of Settlement Class and Preliminary Approval of Class Settlement [Dkt. No. 127 at 2–12], which is respectfully incorporated by reference as if set forth fully herein.

First, Rule 23(a)(1)'s numerosity requirement is satisfied because the Settlement Class consists of 405 servicemembers, whose joinder would be impracticable. *See Trevizo v. Adams*, 455 F.3d 1155, 1161-62 (10th Cir. 2006) (citing Rule 23(a)(1)); Joint Counsel Decl. at ¶18.

Second, Rule 23(a)(2)'s commonality requirement is met because many common questions of law and fact exist that could be answered uniformly for the Settlement Class using the same evidence. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("[A] common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof" (internal quotation marks and citation omitted)); *see also Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) ("A finding of commonality requires only a single question of law or fact common to the entire class" (internal citations omitted)). The Settlement Class Members' claims would, if this matter were litigated to trial, be proven in large part by common evidence regarding Wells Fargo's policies and procedures with respect to the auto loan accounts of its military servicemember customers [Dkt. No. 127 at 4–5].

Third, Rule 23(a)(3)'s typicality requirement is satisfied because Plaintiff and the Settlement Class Members share the same legal theories. *See Menocal*, 882 F.3d at 914 (typicality is met "so long as the claims of the class representative and class members are based on the same legal or remedial theory") (citation omitted).

Fourth, Rule 23(a)(4)'s adequacy of representation requirement is satisfied because there are no conflicts between Class Representative and the other Settlement Class Members. *See Tennille v. Western Union Co.*, 785 F.3d 422, 430 (10th Cir. 2015) ("Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status" (internal citation omitted)); Nakamura Decl. at ¶3. Mr. Nakamura and Class Counsel have prosecuted this Litigation vigorously, and, as the Court recognized in preliminarily appointing Class Counsel [Dkt. No. 135 at ¶12], Class Counsel has demonstrated that they have the experience and resources to adequately represent the Settlement Class. *See* Joint Class Counsel Decl. at ¶¶2–28, 51–54. The adequacy of both Mr. Nakamura and Class Counsel in representing the Settlement Class also supports final approval of the Settlement. Fed. R. Civ. P. 23(e)(2)(A).

Rule 23(b)(3)'s predominance and superiority requirements are also satisfied here. *See Menocal*, 882 F.3d 905, 914-15 ("the predominance prong asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues" (citations omitted)); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014); *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014). The Settlement Class members allege that Wells Fargo's practices and policies with respect to repossession of its military servicemember customers' vehicles caused their injuries. Thus, this litigation "involves a great many common questions, including all issues regarding [Wells Fargo's] conduct and the effects of that conduct." *In re: Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 5371856, at *5 (D. Kan. Sept. 26, 2016) (certifying class action). The common questions under the shared legal theories predominate over and are more important than any potential individual issues that theoretically could arise if this case were tried. *See In re: Syngenta AG MIR 162 Corn Litig.*, 2016 WL 5371856, at *5 ("'Class-wide proof is not required

for all issues' for predominance under Rule 23(b)(3).") (quoting *In re Urethane Antitrust Litig.*, 768 F.3d at 1268-69).

And, as for superiority, class treatment is important here because it fulfills the purpose of the SCRA "to provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation." 50 U.S.C. § 3902(1); *see Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718–19 (9th Cir. 2010) (the court's superiority assessment should be consistent with the policies advanced by the underlying statute). At the same time, the Settlement allows Wells Fargo to close the door on this chapter of its history and make good on its renewed commitment to its military customers.

The Court properly preliminarily certified the Settlement Class and, because Mr. Nakamura has shown that each of the requirements for certification under Rule 23(a) and (b)(3) remain satisfied, this finding should be confirmed with the final certification of the Settlement Class under Rule 23.

### B. The Notice Method Used was the Best Practicable Under the Circumstances and Should be Approved.

The Court should approve the Notice given to the Settlement Class. Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B). Also, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1). To satisfy due process, a settlement notice need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Fager v. CenturyLink Comm'ns, LLC*, 854 F.3d 1167, 1171 (10th Cir. 2016).

"The Supreme Court has consistently endorsed notice by first-class mail" and confirmed that "a fully descriptive notice…sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process." *Id.* at 1173.

In its Preliminary Approval Order, the Court preliminarily approved the form and manner of the Notice, attached as Exhibit A to the Settlement Agreement. Dkt. No. 135 at ¶7. The Court found the "proposed notice campaign, including all forms of proposed notice, substantially meets the requirements of Rule 23 and due process, is the best notice practicable under the circumstances, and will constitute due and sufficient notice to all persons entitled to that notice." *Id.* The Court directed the Settlement Administrator to commence the Notice Plan in accordance with the schedule set forth in the Preliminary Approval Order. *Id.* at ¶8.

On February 28, 2019, Notice was mailed via first-class mail to 405 Settlement Class Members and full versions of the Settlement Agreement and Preliminary Approval Order, along with other documents germane to the Settlement, were published on a public website created for and dedicated to this Action, www.WellsFargoMilitarySettlement.com. McCown Decl. at ¶¶7–9.[1] This website is maintained by the Settlement Administrator, where additional information regarding the Settlement can be found. *Id.* at ¶9.

The Notice Documents fully informed Settlement Class Members about the Action, the Settlement, and the facts needed to make informed decisions about their rights. *See* Preliminary Approval Order, Dkt. No. 135, at ¶¶3–6. The Notice of Settlement also provided Class Members with a URL address for the dedicated Settlement website where Class Members could obtain further information regarding the Settlement, as well as their rights and options as they relate to

[1] The notice-mailing campaign reached addresses for 396 of the 405 potential Settlement Class Members, or 97.8%. McCown Decl. at ¶8.

the Settlement. *See* McCown Decl., at ¶¶7–9; *see also*, Exhibit 1, which is the Notice approved by the Court and mailed to the Settlement Class Members.

In sum, the form, manner, and content of the Notice of Settlement were the best practicable notice. Their contents were reasonably calculated to, and did, apprise Class Members of the pendency and nature of the Settlement and afford them an opportunity to opt out or object. Therefore, the Court should grant final approval of the Notice given to the Settlement Class here.

### C. The Settlement Should be Approved because it is Fair, Reasonable, and Adequate.

Under Federal Rule of Civil Procedure 23(e), any "settlement, compromise or dismissal of certified class claims" requires court approval. *Freebird, Inc. v. Merit Energy Co.*, No. 10-1154-KHV, 2012 WL 6085135, at *4 (D. Kan. 6, 2012). The court may approve a settlement if it finds that the settlement is "fair, reasonable, and adequate." *Id.*; *see also* Fed. R. Civ. P. 23(e)(2).

To determine whether a proposed settlement is fair, reasonable, and adequate, the Court considers the factors enumerated in Rule 23(e)(2). Fed. R. Civ. P. 23(e)(2). Courts in the Tenth Circuit also consider whether, in the parties' judgment, the settlement is fair and reasonable. *See Rutter & Wilbanks Corp. v. Shell Oil Co*., 314 F.3d 1180, 1188 (10th Cir. 2002); *Jones v. Nuclear Pharmacy, Inc.*,741 F.2d 322, 324 (10th Cir. 1984).[2] Those factors weigh in favor of approval of the Settlement.

[2] Rule 23, as amended effective December 1, 2018, essentially codifies three of the four factors traditionally considered by courts in the Tenth Circuit when deciding whether to finally approve a class action settlement. Those factors include: 1) whether the proposed settlement was fairly and honestly negotiated; 2) whether serious question of law and fact exist, placing the ultimate outcome of the litigation in doubt; and 3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation. *See Rutter*, 314 F.3d at 1188; *Jones*, 741 F.2d at 324. These factors are addressed to the extent they differ from or expand upon the corresponding Rule 23(e)(2) factor.

*1. The Settlement is the product of extensive arm's-length negotiations.*

Under Rule 23(e)(2)(B), the Court considers whether "the proposal was negotiated at arm's length." Here there can be little doubt that it was. The Settlement was achieved only after two full-day mediation sessions and months of continuing settlement efforts and negotiations. Joint Counsel Decl. at ¶¶10–15. The use of a formal settlement process supports the conclusion the Settlement was fairly and honestly negotiated. *See, e.g.*, *Ashley v. Reg'l Transp. Dist.*, No. 05-CV-01567-WYD-BNB, 2008 WL 384579, at *6 (D. Colo. Feb. 11, 2008) (finding settlement fairly and honestly negotiated where the parties engaged in formal mediation conference and negotiations over four months). Former United States District Judge Layn R. Phillips oversaw the entire mediation process and attests that it was conducted in good faith and, further, that the Settlement is the product of arm's-length negotiations. Declaration of Layn R. Phillips ("Phillips Decl."), Dkt. No. 129 at ¶12. Likewise, Mr. Nakamura, who participated in both mediations and was involved throughout the settlement process, vouches for the adversarial, non-collusive nature of the settlement process. Nakamura Decl., at ¶¶12–14; Joint Counsel Decl. at ¶55.

*2. The substantial, immediate monetary relief provided for the Settlement Class is adequate and treats all Settlement Class Members equitably.*

Under Rule 23(e)(2)(C), the Court is to consider the adequacy of the relief provided for the class considering: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class; (iii) the terms of any proposed award of attorney's fees, including the timing of the payment; and (iv) any agreement made in connection with the settlement proposal. Those factors weigh heavily in favor of approval here.

Under the Settlement, Wells Fargo has agreed to pay: (1) $5.125 million in damages to the Servicemember Class (the "Gross Settlement Fund"); (2) the Class's Attorneys' Fees of up to 33%

of the Gross Settlement Fund, i.e. $1,691,250;[3] (3) reasonable litigation expenses of $78,209.59.[4] Adding up everything that Wells Fargo has agreed to pay equals $6,894,459.59, which is the "total recovery" of the Settlement. Not included in this value, however, are additional benefits that are not easily quantified: (a) Wells Fargo agreed to pay the Notice and Administrative Costs of the Settlement, in whatever amount is required; and, (b) Wells Fargo has agreed to continue fulfilling its obligations under the settlement with the Department of Justice, including, most critically, cleaning up the credit of Class Members adversely affected by the repossessions.[5]

If the Court approves the Settlement, Wells Fargo will transfer the Settlement Amount of $5,125,000 (the "Gross Settlement Fund") to the Settlement Administrator within 10 days of the Effective Date [Dkt. No. 127-1 at 12, ¶IV.A]. The Gross Settlement Fund will be used to pay an Incentive Award to Mr. Nakamura, as awarded by the Court. *Id.* As noted below, none of the Gross Settlement Fund pays Class Counsel's attorneys' fees and expenses or Notice and Administrative Costs—those will be paid by Wells Fargo, separate and apart from the Gross Settlement Fund, as set forth in the Settlement Agreement. *Id.*[6] The Settlement Agreement contains all agreements made in connection with the Settlement; there are no other agreements between the parties or their counsel. Joint Counsel Decl. at ¶15; Dkt. No. 127-1 at ¶X.L; Fed. R. Civ. P. 23(e)(2)(C)(iv).

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[3] Ordinarily attorneys' fees would be paid from the gross settlement fund established for the class, thereby reducing the amount distributed to the class members. Wells Fargo's agreement to pay the Class Counsel's Attorneys' Fees separate from the Gross Settlement effectively increases the overall recovery to the Settlement Class.

[4] Like Wells Fargo's agreement to pay the Class's Attorneys' Fees, *supra,* Wells Fargo's agreement to pay the Class's Litigation Expenses also increases overall recovery to the Class.

[5] The timing suggests that this Action prompted the identification of the additional 450 servicemembers to whom Wells Fargo agreed to pay $5.4 million under its prior settlement with the DOJ. *See* Joint Counsel Decl. at ¶¶5 -6. But, without further discovery, which would serve no purpose at this point, Plaintiff could not prove the connection definitively.

[6] Wells Fargo is to pay the Fee and Expense Award within the same 10-day period after the Effective Date. *Id.* at 12, ¶IV.A. Class Counsel is not paid earlier than the Class, and it is not paid anything unless the Settlement Class is paid.

After payment of the Incentive Award, the Net Settlement Fund will be disbursed to the 405 Settlement Class Members on a pro rata basis—meaning each Settlement Class Member will get a check for $12,464.50.[7] This immediate, substantial monetary relief is adequate under the Rule 23(e)(2)(C) factors.

*3. The value of the immediate recovery outweighs the costs, risks, and delay of trial and appeal.*

The costs, risks, and likely duration of further litigation support approval of the proposed Settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). The immediate value of the Gross Settlement Fund alone outweighs the costs of litigating the case to a verdict. The parties did not negotiate an aggregate settlement amount, but rather negotiated an amount of recovery to each Settlement Class Member that Mr. Nakamura believed was fair and just. Nakamura Decl. at ¶¶ 12–16; s*ee* Phillips Decl., Dkt. No. 129 at ¶15 ("This approach allowed meaningful input from Mr. Nakamura as to the fairness, reasonableness, and adequacy of the settlement amount…").

To preserve the parties' efforts to arrive at a fair, reasonable, and adequate amount of recovery for each Settlement Class Member, the parties agreed that Class Counsel's attorneys' fees and its reasonable expenses, as awarded by the Court, would be paid and reimbursed by Wells Fargo, separate and apart from the Gross Settlement Fund. Dkt. No. 127-1 at 14, ¶¶V.IA. & B. This unique feature of the Settlement makes the immediate recovery to the Class even more valuable.

Successfully litigating a class action case against a well-funded, sophisticated opponent through contested class certification proceedings, a potential Rule 23(f) appeal, a merits trial, and a potential appeal of final judgment generally requires class counsel to devote a substantial amount

[7] This figure assumes that the Court will grant Mr. Nakamura's request for an Incentive Award as set forth below.

of its time, labor, and own money. Absent the Settlement, there is little guarantee that such fees and expenses would be paid by Wells Fargo rather than from the recovery, if any, obtained for the class, as is common practice in class action cases. Therefore, even if a class were certified and ultimately obtained a favorable judgment, in light of the potential for the costs of litigating the case to significantly reduce the recovery payable to the class, the Settlement Class is quite likely "better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted." *McNeely v. Nat'l Mobile Health Care, LLC*, No. 07-CV-933-M, 2008 WL 4816510, at *13 (W.D. Okla. Oct. 27, 2008).

Furthermore, while Class Counsel is confident in their ability to prove the claims asserted, they also recognize that liability is far from certain and many potential obstacles to obtaining a final, favorable verdict exist. The parties disagree on many issues of liability under the SCRA, including serious questions of law regarding the retroactivity of the statute, the applicable statute of limitations, and the scope and enforceability of the releases obtained as a result of DOJ settlement. These unresolved questions place the ultimate outcome of the litigation in doubt. *See Rutter*, 314 F.3d at 1188; *Jones*, 741 F.2d at 324. Such doubt "tips the balance in favor of settlement because settlement creates a certainty of some recovery and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *McNeely*, 2008 WL 4816510, at *13 (internal citations omitted). Compounding the uncertainty of future recovery is the fact that the SCRA has only been interpreted by a handful of courts across countries. *See* John S. Odom, Jr., Legal Kevlar for Servicemembers, Trial, June 2014, at 22-28 ("Parties settle the vast majority of these cases before trial, leaving no judicial footprint in their wake.").[8] The dearth of judicial

[8] 50-JUN JTLATRIAL 22

guidance creates inherent risk in litigating the case to trial and, under Rule 23(e)(2)(C)(iii), adds to the value of the immediate recovery the Settlement provides.

**D. The Distribution Plan effectively and equitably distributes relief to the Settlement Class.**

In its Preliminary Approval Order, the Court "approve[d] the form and content of the Distribution Plan, attached as Exhibit A to the Settlement Agreement." Dkt. No. 135 at ¶10. The Distribution Plan, which remains unchanged from preliminary approval, is an effective and equitable method of distributing relief to the Settlement Class. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii) & (D). This is not a claims-made settlement, nor is it a settlement where a Settlement Class Member must take further action to participate. *See* Distribution Plan, Dkt. No. 127-1 at 30, ¶4. Instead, every servicemember who does not opt out of the Settlement will be mailed a check for his or her pro rata share of the Net Settlement Amount. *Id.* at ¶2.a. Furthermore, the Distribution Plan contains various measures to ensure that the Settlement Class Members receive their payments, including extensions of the original 90-day voiding period for reissued checks and reminder notice mailings, and it obligates the Settlement Administrator to continue to use reasonable efforts for 120 days after the original 90-day voiding-period expires to locate Settlement Class Members who have not cashed their checks, including contacting the closest office of the Veterans of Foreign Wars ("VFW") for the last known address of the Settlement Class Member. The Distribution Plan is specifically structured to the class of military servicemembers to "maximize[] the likelihood that Settlement payments are received and successfully deposited" [Dkt. No. 127-1 at 30, ¶4]. The Court should order the implementation of the Distribution Plan.

**E. Mr. Nakamura earned and deserves an exceptional incentive award.**

Mr. Nakamura respectfully requests an Incentive Award in the amount of $76,875, which represents 1.5% of the Settlement Amount ($76,875/$5,125,000) as set forth in the Settlement

Agreement, but only 1.1% of the "total recovery" in this case ($76,875/$6,894,459) which is the usual measuring stick. Mr. Nakamura and Class Counsel submit that this amount is reasonable and fair considering his time, labor, and personal sacrifice to achieve an exceptional recovery on behalf of the Settlement Class Members, especially in a case with serious merits defenses that threatened to wipe out the vast majority of the class members' claims. Mr. Nakamura carried this case from a single plaintiff case to a class action and then marched the case to victory and a significant settlement for hundreds of servicemembers. His service and personal sacrifice were extraordinary, and these both led directly to the extraordinary settlement the class obtained.

This Court has previously explained that "[a]n incentive award 'perform[s] the legitimate function of encouraging individuals to undertake the frequently onerous responsibility of [serving as the] named class representative.'" *Nieberding v. Barrette Outdoor Living, Inc*., 129 F. Supp. 3d 1236, 1251 (D. Kan. 2015) (quoting *Hershey v. ExxonMobil Oil Corp.*, No. 07–1300–JTM, 2012 WL 5306260, at *12 (D. Kan. Oct. 26, 2012)). Normally, the incentive award is a percentage of the total common recovery to the Class, in this case $6,894,459.[9] *See Freebird, Inc. v. Cimarex Energy Co.*, 46 Kan. App. 2d 631, 646, 264 P.3d 500, 511 (2001)) (affirming an incentive award of 1% to the class representative and finding alignment between the class representative's interest and the interests of the class as a whole). In this Circuit, and in Kansas state court, that incentive award is between 1-2%. *Id.* (and cases cited therein). *See also* Exhibit A-2, Declaration of Geoffrey P. Miller, *Chieftain Royalty Co. v. XTO Energy, Inc.*, No. CIV-11-29-KEW, 2018 WL 2296588, at *3 (Mar. 27, 2018) (citing six cases with case contribution awards of 1-5%).[10]

[9] Using this "total recovery" number, Mr. Nakamura only requests 1.1% ($76,875/$6,894,459); and Class Counsel only requests 24.5% fees ($1,691,250/$6,894,459). These percentage requests are more than reasonable.

[10] Note, in this district, plaintiffs have not requested the upper-end incentive awards, and this case is no exception. That was a conscience choice by the Class Representative and by Class

"In determining the appropriateness of an incentive award to a class representative, the Court should consider the following three factors: (1) the actions the class representative took to protect the interests of the class; (2) the level of benefit that the class received from the class representative's actions; and (3) the quantity of time and effort the class representative spent in pursuing the litigation." *Id.* (citing *Freebird, Inc. v. Cimarex Energy Co.*, 46 Kan. App. 2d 631, 646, 264 P.3d 500, 511 (2001) (finding "no reason to automatically deny incentive awards based upon a percentage of the common fund" and affirming an incentive award of 1%)).

Each of these factors, applied in this case to the service of Mr. Nakamura, support the requested award. Mr. Nakamura actively participated throughout the discovery process, gathering documents and information to respond to Wells Fargo's discovery requests, as well as reviewing documents and information produced by Wells Fargo, and conferring with Class Counsel. Nakamura Decl. at ¶5. He sat for deposition taken by Wells Fargo the day before he left the country for a two-year deployment. *Id.* at ¶6. He stayed up all night to participate in the first mediation session via Skype from his base in South Korea, and he travelled from South Korea to California to attend the second mediation session in person. *Id.* at ¶7-8. All told, he has spent approximately 200 hours working on this case so far, and he will spend more time travelling to Kansas City to attend the final Fairness Hearing to vouch for the Settlement. *Id.* at 9.

But the numbers alone do not tell the whole story. Mr. Nakamura was offered the chance to settle his individual claims on favorable terms early in the case, but he chose to pursue the claims on behalf of a putative class of servicemembers. *Id.* at 10. More importantly, Mr. Nakamura used his limited personal leave to attend the second mediation in person, and he intends to use additional

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Counsel in order to get the case resolved at mediation and present the Court with a smooth settlement process.

leave time to travel from South Korea to Kansas City to attend the final Fairness Hearing. *Id.* at 11. As an active-duty servicemember deployed overseas, Mr. Nakamura only gets limited leave to travel home to attend important events like weddings and funerals. *Id*. Class Counsel believes Mr. Nakamura's willingness to sacrifice his personal leave to this case exemplifies the dedication he has shown throughout this case and, especially in light of the nature of this case, supports his requested Incentive Award. *See* 50 U.S.C. § 3902(1) (the purpose of the SCRA "to provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation.")

Simply put, Mr. Nakamura's powerful credibility and commitment to serving as a class representative and plaintiff were, without question, a strong force in causing this class settlement. As an exceptional class representative who made exceptional sacrifices and provided exceptional service to the class, Mr. Nakamura should receive an exceptional award. Doing so will compensate Mr. Nakamura for his time, efforts, and sacrifice and will incentivize others to step forward and take on difficult cases like this one. It was because of Mr. Nakamura's service that this case settled for the amount it did.

## IV. CONCLUSION

The Settlement provides immediate and substantial monetary relief to hundreds of current and former military servicemembers. For all of the foregoing reasons, Class Representative and Class Counsel respectfully request that the Court enter an order granting: (1) final judgment; (2) final certification of the Settlement Class; (3) final approval of the Settlement as fair, reasonable, and adequate; (4) final approval of the Notice provided to the Settlement Class Members; (5) final appointment of Rex A. Sharp, Ryan C. Hudson, and Scott B. Goodger of Rex A. Sharp, P.A.,

Bryce B. Bell and Mark W. Schmitz of Bell Law Firm, LLC, and A. Scott Waddell of Waddell Law Firm, LLC, as Class Counsel; (6) $76,875 as an incentive award to the Class Representative; and (7) distribution of the Settlement Amount as set forth in the Settlement Agreement and Distribution Plan, attached thereto as Exhibit A.

Respectfully submitted,

REX A. SHARP, P.A.

/s/ Rex A. Sharp
Rex A. Sharp KS #12350
Ryan C. Hudson KS #22986
Scott B. Goodger KS #26480
5301 W. 75th Street
Prairie Village, KS 66208
T: 913-901-0505
F: 913-901-0419 Fax
rsharp@midwest-law.com
rhudson@midwest-law.com
sgoodger@midwest-law.com

Bryce B. Bell KS#20866
Mark W. Schmitz KS#27538
Bell Law, LLC
2600 Grand Blvd., Suite 580
Kansas City, Missouri 64108
T: 816-886-8206
F: 816-817-8500
Bryce@BellLawKC.com

A. Scott Waddell KS#20955
Waddell Law Firm LLC
2600 Grand Blvd., Suite 580
Kansas City, Missouri 64108
T: 816-914-5365
F: 816-817-8500
scott@aswlawfirm.com

***Class Counsel***

**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing was filed using the Court's CM/ECF filing system, which automatically sends notice of filing to all attorneys of record, on April 1, 2019.

*/s/ Rex Sharp*
Rex A. Sharp