HON. BETH ANDRUS
Hearing Date: April 12, 2013 @ 9:00 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SANDY JUDD, TARA HERIVEL, and COLUMBIA LEGAL SERVICES, for themselves, and on behalf of all similarly situated persons, Plaintiffs, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY and T-NETIX, INC., Defendants.	NO. 00-2-17565-5 SEA CLASS ACTION CLASS COUNSEL'S MOTION FOR COMPENSATION, COSTS AND INCENTIVE AWARD RE: T-NETIX SETTLEMENT

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I. INTRODUCTION

With no assurance of payment, Class Counsel litigated this case for over twelve years, finally obtaining a settlement that ***exceeds*** T-Netix's maximum exposure by $170,000. This outstanding result did not arise without a massive outlay of attorney time, effort and expense on behalf of the class. Class Counsel, in connection with the final approval of the Settlement Agreement with T-Netix, now seeks compensation totaling 30% of the common fund ($423,750), cost reimbursement in the sum of $105,537.43, plus an incentive award for class representative Columbia Legal Services in the sum of $20,000.

If these amounts are approved by the Court, all claimants will still receive 100% of their statutory damages after the payment of the requested fees, costs, administrative expenses and case contribution award. Class Counsel's request is reasonable and should be approved.

In what follows, we will: (a) provide factual background relevant to this motion; (b) discuss the law governing fee awards in this common fund case; (c) discuss an appropriate percentage fee award in light of the results achieved (a 100% recovery for each claimant); and (d) explain, in light of any factors this Court may choose to consider other than "results achieved," that the fee we seek is fair and reasonable.

II. EVIDENCE RELIED UPON

The Class relies upon the Declarations of Chris R. Youtz Re: Motion for Compensation and Richard E. Spoonemore Re: Motion for Compensation.

III. FACTS

The Court is intimately familiar with the facts of this case. However, given that Class Members may review this motion, a short summary of facts is provided below. For more details on the Settlement Agreement and Allocation Plan, Class Members are directed to the "Local Call Class's Unopposed Motion for (1) Preliminarily Approval of

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Settlement Agreement, (2) Preliminary Approval of Plan of Allocation, (3) Directive to Send Notice, and Establishment of Final Approval Hearing" filed on November 5, 2012. This information, including the actual Settlement Agreement and Allocation Plan, may be obtained at www.ratedisclosure.com.

A. Overview of Case

Plaintiffs filed this class action on June 6, 2000. It arises from Washington's telephone rate disclosure laws. *See* RCW 80.36.510[1], 80.36.520[2], WAC 480-120-141 (1991) and WAC 480-120-141 (1999). Under those statutes and regulations, a telecommunications company operating as an "operator service provider" or "OSP" is

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[1] This statute provides that:

> The legislature finds that a growing number of companies provide, in a nonresidential setting, telecommunications services necessary to long distance service without disclosing the services provided or the rate, charge or fee. The legislature finds that provision of these services without disclosure to consumers is a deceptive trade practice.

RCW 80.36.510.

[2] This statute directs the Washington Utilities and Transportation Commission to promulgate specific disclosure regulations:

> The utilities and transportation commission shall by rule require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

RCW 80.36.520. Those regulations are set forth in WAC 480-120-141.

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required to provide consumers with verbal rate disclosures for collect calls. Failure to comply is a *per se* violation of Washington's Consumer Protection Act.[3]

During 1996-2000 inmates in Washington correctional facilities could only call families, friends, attorneys and others in the proposed class by calling collect. Inmates could only place these calls through a carrier who had an exclusive contract to handle the calls. Some companies took advantage of their monopoly over prisoner-initiated collect calls by charging rates that were much higher than rates normally charged for similar calls. These rates were charged to the recipients without providing the required rate disclosure or the opportunity to obtain information about the cost of the collect call. Thus, in June 2000, this action was brought on behalf of those consumers.

This action has proceeded for over twelve years. This case has been through multiple appeals and was referred to the WUTC to determine whether defendants AT&T and T-Netix were liable under the Commission's regulations. The WUTC entered a final order (1) setting forth a test to be applied to determine what entity is the OSP, finding AT&T as the OSP under that test for some call types (and deferring to the King County Court the issue of whether T-Netix could be an OSP under its test), and (2) finding that no proper disclosures had been made under its regulations. Youtz Decl., ¶¶ 3-7.

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[3] The statute specifically provides:

> In addition to the penalties provided in this title, a violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 constitutes an unfair or deceptive act in trade or commerce in violation of chapter 19.86 RCW, the consumer protection act. Acts in violation of RCW 80.36.510, RCW 80.36.520, or RCW 80.36.524 are not reasonable in relation to the development and preservation of business, and constitute matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. It shall be presumed that damages to the consumer are equal to the cost of the service provided plus two hundred dollars. Additional damages must be proved.

RCW 80.36.530.

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AT&T appealed the WUTC's Order to Thurston County Superior Court under Washington's Administrative Procedure Act. The Thurston County Superior Court affirmed the WUTC's test for determining OSP status and its conclusion that AT&T was the OSP for some of the calls in the litigation. It remanded to the WUTC the question of whether the regulations were violated. The Court concluded that the defendants were not afforded a full opportunity to litigate that issue before the WUTC issued its decision.

AT&T then appealed the Thurston County Superior Court's affirmance of the OSP test. That appeal is still pending in Division II of the Washington State Court of Appeals. The issue of whether the regulations were violated was remanded to the WUTC.

After the WUTC's decision, the original litigation was reactivated in King County Superior Court. There, over the following two years, the following key events occurred:

- The original complaint was amended and Columbia Legal Services was named as an additional class representative.
- The action was certified as a class action, with one class certified to pursue claims against T-Netix, and two classes certified to pursue claims against AT&T.
- The King County Court revoked the referral to the WUTC on the issue of whether the regulations were violated.
- Extensive discovery took place on multiple issues in the case, including on the question of whether disclosures were made.
- Multiple motions on dispositive issues were made to the Court, which entered numerous orders on the key liability issues in the case, including (1) how damages would be calculated, (2) the requirements of the WUTC regulations, and (3) the types of calls implicated in the case as to each defendant.

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B. Overview of Settlement with T-Netix.

As a result of summary judgment motions, T-Netix was left with exposure arising from an alleged lack of disclosure on local calls made to five DOC facilities: Clallam Bay, Washington Correction Center for Women, Coyote Ridge Corrections Center, Olympic Corrections Center and Pine Lodge Work Pre-Release.

In an effort to resolve these claims, T-Netix and Class Counsel participated in a mediation in Boston on August 29, 2012. Although the case did not resolve at that point, Class Counsel had additional discussions with T-Netix, finally reaching a CR 2A agreement on October 15, 2012, which was then expanded in a final agreement on October 18, 2012. The key terms of the agreement are:

- ***Payment of $1,412,500***. T-Netix paid $1,412,500 into a settlement trust fund to resolve the claims brought by the Local Call Class. Agreement, ¶6.1.
- ***Release limited to Local Call Class.*** The Local Call Class will release T-Netix and AT&T for only the Local Call Class Claims.[4]
- ***Attorney fees, costs and costs of administration***. Attorney fees (up to one-third of the recovery) costs and costs of administration will be paid from the amount paid by T-Netix. Agreement, ¶10.
- ***Case contribution award***. The Agreement allows a case contribution award not to exceed $20,000 to be paid to Columbia Legal Services from the amount paid by T-Netix, subject to approval by the Court. Agreement, ¶10.
- ***The Plan of Allocation.*** Payments to Class Members would be made under an allocation plan.
- ***Excess Funds.*** Because it is anticipated the excess funds will remain even after the payment of claims at 100%, attorney fees, costs and

[4] "Local Call Class Claims" are defined as "claims for violations of the CPA alleged by the Local Call Class arising out of the receipt of a local call, or local calls, from Clallam Bay, Washington Correction Center for Women, Coyote Ridge Corrections Center, Olympic Corrections Center and Pine Lodge Work Pre-Release." Agreement, ¶1.9.

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> expenses, the Agreement provides that the excess funds will be distributed to the Legal Foundation of Washington and other organizations approved by the Court. *See* CR 23(f)(2); Plan of Allocation, ¶¶1, 7.

The Settlement Agreement and Allocation Plan were presented to the Court, who preliminarily approved the Agreement and Plan and established a process under which Class Members could comment on, or object to, the Agreement and Plan. Part of that process required Class Counsel to move for fees, costs, expenses and an incentive award in advance of the final approval hearing.

IV. LAW AND ARGUMENT

A. In Washington, Class Action Fees Are Awarded As A Percentage Of The Recovery / Benefit, And Are Not Based On Hours Expended.

Courts have historically used one of two different methods to determine attorneys' fees in class actions. One method—the "lodestar approach"—is based upon the number of hours expended by class counsel. *See Bowles v. Department of Retirement Sys.*, 121 Wn.2d 52, 72, 847 P.2d 440, 450 (1993). These hours are then multiplied by "a reasonable hourly compensation, [before] adjusting this amount upward or downward based on additional factors." *Id.* In contrast, the "percentage of the recovery approach" is not determined by reference to the hours spent by counsel on a matter. *Id.* Instead, this approach focuses on the results that counsel was able to obtain for the class. Attorney fees are set "by calculating the total recovery secured by the attorneys and awarding them a reasonable percentage of that recovery ...." *Id.*

Following the lead of a majority of jurisdictions, the Washington Supreme Court rejected the hours-based lodestar approach in favor of the result-based percentage of recovery method. *See Bowles*, 121 Wn.2d at 72 ("the percentage of recovery approach is used in calculating fees under the common fund doctrine"); *Lyzanchuk v. Yakima Ranches Owners Assoc.*, 73 Wash. App. 1, 9, 866 P.2d 695, 699 (1994) ("The 'percentage of the recovery' approach is used to calculate fees under the common fund doctrine ..."");

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Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1047 (9th Cir. 2002) ("Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases."). As Judge Coughenour succinctly observed:

> The Washington Supreme Court has held that the percentage-of-recovery approach is used in determining attorneys' fees in a common fund class action. The Washington Supreme Court rejected the lodestar method for determining attorneys' fees in a common fund action.

Vizcaino v. Microsoft Corp., 142 F. Supp. 2d 1299, 1032 (W.D. Wash. 2001), *aff'd*, 290 F.3d 1043 (9th Cir. 2002) (citation to *Bowles* omitted).

The Settlement Agreement, ¶ 10, provides that "pursuant to the common fund doctrine, Class Counsel shall petition the Court prior to the Fairness Hearing for an award of attorney fees not to exceed one-third of the Settlement Amount…." The parties' agreement reflects the law in this state—that the amount of fees should be determined as a percentage of the common fund obtained for the class.

The primary consideration in setting the fee in a common fund/common benefit action is the magnitude of benefit conferred on class members because "[i]n a common fund case, the size of the recovery constitutes a suitable measure of the attorneys' performance." *Bowles,* 121 Wn.2d at 72. *See also id.*, p. 75 ("Under the percentage of recovery approach, the attorneys are to be compensated according to the size of the judgment recovered, not the actual hours expended."); *Vizcaino,* 142 F. Supp. 2d at 1302. *Accord,* MANUAL FOR COMPLEX LITIGATION (4TH), § 14.121 ("[T]he factor given the greatest emphasis is the size of the fund created, because 'a common fund is itself the measure of success … [and] represents the benchmark from which a reasonable fee will be awarded.'") (hereinafter "MANUAL"); 4 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2002) (same) (hereafter "NEWBERG ON CLASS

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ACTIONS"); *Shaw v. Toshiba Am. Information Sys*., 91 F. Supp. 2d 942, 963-64 (E.D. Tex. 2000).

Courts typically award fees in the range of 20% to 50% of the common fund created by counsel's efforts. NEWBERG ON CLASS ACTIONS, § 14.6. *See also* MANUAL FOR COMPLEX LITIGATION, § 24.121 ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund."). In Washington, 20% to 30% of the total benefit conferred on the class is awarded in the typical case, with 25% considered the benchmark. *Bowles,* 121 Wn.2d at 72-73; *Vizcaino,* 290 F.3d at 1047-48 (20%-30% is the "usual" range under both Washington law and Ninth Circuit authority); *Vizcaino*, 142 F.Supp.2d at 1032 ("The [Washington Supreme] Court defined the 'benchmark' percentage of recovery fee as 25% of the recovery obtained, including future benefits, with 20 to 30% as the usual range of common fund fees."). The "usual range" is not a cap or ceiling on fees. When supported by "the complexity of the issues and the risks" a court may depart from that range. *See, e.g., In re Pacific Enterprises Securities Lit*., 47 F.3d 373, 379 (9th Cir. 1995) (approving 33% award); *Morris v. Lifescan, Inc*., 54 Fed. Appx. 663, 664 (9th Cir. 2003) (approving 33% award).

In fact, empirical evidence and studies of actual fee awards in class litigation indicates that the normal range of fees awards is actually slightly higher, at one-third of the recovery:

> [B]ased on the opinions of other courts and the available studies of class action attorneys' fees awards (such as the NERA study), this Court concludes that attorneys' fees in the range from twenty-five percent (25%) to thirty-three and thirty-four one-hundredths percent (33.34%) have been routinely awarded in class actions. ***Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.***

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Shaw, 91 F.Supp.2d at 972 (emphasis added).[5]

A. Class Counsel's Request for 30% Should Be Approved.

While the usual range is "a starting point for analysis," the fee award must be supported by findings that "take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048. The Ninth Circuit has identified six factors that may be relevant in determining if a fee request is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent

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[5] Awards of one-third (or slightly more) are commonplace. *See e.g. Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 421 (E.D. Pa. 2010) *(*"Recently, another court in this District took note of a study of class action fee awards within the Third Circuit Court of Appeals, and determined that the average attorney's fees percentage in such cases was 31.71% and that the median fee award was 33.3%."); *Bradburn v. 3M,* 513 F.Supp.2d 322, 341-42 (E.D. Penn. 2007) (35% award); *In re Corel Corp. Inc. Sec. Litig.,* 293 F.Supp.2d 484, 497 (E.D. Pa. 2003) ("[T]he 33 ⅓% fee request in this complex case is within the reasonable range."); *In re Gen. Instrument Sec. Litig.,* 209 F.Supp.2d 423, 439 (E.D. Pa. 2001) (awarding attorneys' fees of one-third of settlement as "fair and reasonable," plus reimbursement of expenses); *In re Eng'g Animation Sec. Litig.,* 203 F.R.D. 417, 423–24 (S.D. Iowa 2001) (awarding one third of common fund, plus expenses); *In re Safety Components Int'l, Inc. Sec. Litig.,* 166 F.Supp.2d 72, 101–102 (D. N.J. 2001) (approving fee request of one-third of $4.5 million settlement); *Cullen v. Whitman Medical Corp.*, 197 F.R.D. 136, 150 (E.D. Penn. 2000) ("I conclude that an award of one-third of the settlement fund is reasonable in consideration of other courts' awards."); *Neuberger v. Shapiro,* 110 F.Supp.2d 373, 386 (E.D. Pa. 2000) (approving one third of $4.325 million settlement fund); *Kogan v. AIMCO Fox Chase, L.P.,* 193 F.R.D. 496, 503 (E.D. Mich. 2000) (awarding attorneys' fees of one-third of common fund); *Gaskill v. Gordon,* 942 F. Supp. 382, 387–88 (N.D. Ill. 1996) (awarding 38% of the settlement fund), *aff'd,* 160 F.3d 361 (7th Cir. 1998); *Muehler v. Land O'Lakes, Inc.,* 617 F. Supp. 1370, 1380–81 (D. Minn. 1985) (awarding attorneys' fees of 35 percent of settlement recovery); *In re Ampicillin Antitrust Litig.,* 526 F. Supp. 494, 500 (D. D.C. 1981) (awarding attorneys' fees of 45% of settlement recovery); *Bredbenner v. Liberty Travel, Inc.*, 2011 WL 1344745, *21 (D. N.J. 2011) (collecting recent cases in approving 32.6% of the settlement fund as "clearly fall[ing] within this range"); *Moore v. Comcast Corp.*, 2011 WL 238821, *5 (E.D. Penn. 2011) ("Furthermore, we note that in similar cases our Court of Appeals has approved awards of counsel fees that range from 19% to 45%. The fee represents 33% of the monetary value of the settlement and in this case is comparable to the average fee customary in this circuit.") (citation omitted); *In re Ravisent Techs., Inc. Sec. Litig.,* 2005 WL 906361, at *15 (E.D. Pa. Apr. 18, 2005) (awarding attorneys' fees of one-third of $7 million settlement); *Faircloth v. Certified Fin. Inc.,* 2001 WL 527489, at *12 (E.D. La. May 16, 2001) (awarding attorneys' fees of 35% of settlement plus interest and reimbursement of expenses); *In re Unisys Corp. Sec. Litig.,* 2001 WL 1563721, at *3–4 (E.D. Pa. Dec. 6, 2001) (approving one-third fee sought by plaintiffs' counsel as fair and reasonable); *In re Neoware Sys., Inc. Sec. Litig.,* 2000 WL 1100871, at *3–4 (E.D. Pa. July 27, 2000) (awarding counsel fees of approximately one-third of each of two settlement funds, plus a proportionate share of interest accrued and reimbursement of expenses); *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, *7 (N.D. Cal. 1997) ("Courts in this district have consistently approved attorneys' fees which amount to approximately one-third of the relief procured for the class.").

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nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases. *Id.*, pp. 1048-50.[6]

While the usual range in Washington is between 20%-30%, this case is far from "typical" and "usual." Under each of the factors identified by the Ninth Circuit, the unusual and extraordinary nature of this case would support a request for an award higher than typical range, and in line with the empirical evidence of actual awards. However, Class Counsel only seeks an award of 30% of the T-Netix recovery, an amount which falls within the typical range.

1. The Results Obtained.

The Settlement Amount ***exceeds*** T-Netix's total exposure to statutory damages by $170,000. This fact alone makes this settlement extraordinary in the world of class action litigation where fractional settlements are commonplace. In an era of public suspicion over pennies-on-the-dollar class action settlements (or "coupon" settlements), the result in this case proves that the class action process, when aggressively pursued to the end, can provide full reimbursement for victims and advance important public policies.

The "usual" or "typical" range of 20%-30% contemplates compromise settlements – it does not contemplate a settlement where Class Counsel is able to obtain more than the defendant's total exposure. This important fact cannot be overlooked.

While the total size of the benefit is critical in common fund/common benefit fee analysis, from a Class Member's perspective the most critical consideration is the percentage of their loss that he or she will recover.

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[6] Washington law, which generally requires that the fee award be "reasonable" without setting forth the factors to consider, therefore looks to federal law for guidance in this area. *Bowles*, 121 Wn.2d at 72; *Vizcaino*, 290 F.3d at 1047.

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> In assessing "size of the settlement" factor and whether the settlement was favorable to the plaintiffs and class members, the district court may also want to determine what percentage of the plaintiffs' and class members' approximated actual damages that the settlement figure represents. This figure, when viewed in context of the risk of nonrecovery, may be helpful in determining how well the counsel did for their clients.

Conte, ATTORNEY FEE AWARDS § 2:8 (3d ed.). In this case, the settlement amount will ***fully pay all claimants*** even after payment of attorneys' fees and costs of litigation. A fee award of 30% of the total benefit ***will not result in a single claim being reduced***. This is an unusual achievement.

In the rare class actions where residual funds remains, those funds often revert back to the defendant after the claims process. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 477, 100 S. Ct. 745, 62 L.Ed.2d 676 (1980). Not here. Here, Class Members will further be benefited because any funds remaining after paying claims, fees and costs will be used to fund legal services and other projects designed to advance class interests.

This first factor would justify an award higher than the typical or usual range because of the atypical and unusual result. Counsel's request for 30%, within the typical range, should be approved.

2. The Risks of Litigation.

Class Counsel decided to pursue this case after another Seattle firm rejected it. Youtz Decl., ¶ 2. The class largely consisted of prisoners' families and defense lawyers (and involved prisoners), groups of individuals which are not viewed sympathetically by jurors. It was brought against some of the largest corporations in the world, and defended by an army of defense lawyers from across the county. The case involved novel issues and questions of first impression, in a highly technical and specialized area of telecommunications. Every fact that could be contested was challenged, and

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every legal argument that could be made was advanced by the defendants. *See generally*, Youtz Decl., ¶¶ 2, 13.

The case was fraught with risk from its inception. Many of the original defendants escaped liability after the Washington State Supreme Court ruled that plaintiffs could not pursue defendants for violations of the disclosure statutes without showing a violation of a regulation as well. This case was killed in 2005, only to rise from the dead after the plaintiffs won on appeal. Even then, the plaintiffs had to run a gauntlet of dispositive motions advanced by the defendants. With respect to many of those motions, a loss would have again killed the action. Youtz Dec., ¶¶4-6.

3. The Skill Required and Quality of Work.

The Court, who devoted substantial judicial resources in this case, is in the best position to access the skill and qualify of legal work performed by Class Counsel. Class Counsel only notes that this case also involved highly technical issues relating to obscure telecommunications concepts, as well as issues related to the functioning of the complex P-III computer platform. Class Counsel's ability to navigate these waters was, in conjunction with the legal arguments, critical to the success of the action. Youtz Decl., ¶¶ 12-13.

4. Contingent Nature of the Fee.

Judge Coughenour's comment in *Vizcaino* is apt here:

> Class Counsel argue that due to a variety of factors, including the nature of the Defendant, the novel and complex issues presented, the risk and expense of litigating a class action, ***no rational private lawyer in the nation would have taken this case for less than one-third of any recovery. The Court agrees***.

Vizcaino, 142 F. Supp. 2d at 1304 (emphasis added). Class Counsel took this case on a fully continent basis. Not only were Class Counsel's fees contingent upon success, but

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costs were as well. *See* RPC 1.8(e)(2) ("[I]n matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter."). Class Counsel stood to lose not just over three million of dollars in time value, but $500,000 in firm income if the case was not successful. Youtz Dec., ¶17. Impacting firm revenue for over twelve years is a long time to wait for a return:

> The representation of a class for more than a decade on a contingent-fee basis is, of course, an extremely long time to represent a client without getting paid and without knowing when, and if you will ever get paid. Class Counsel also incurred hundreds of thousands of dollars in expenses in connection with the *Vizcaino* case, had to forgo significant other work to pursue the case, and the firm's annual income greatly declined as a consequence.

Vizcaino, 142 F. Supp. 2d at 1305.

5. The Awards in Similar Cases.

As noted above, the "typical" range in 20%-30%, with empirical data showing that one-third is the functional award. Class Counsel's request is within the "typical" range, and less than the actual percentage of empirical evidence of actual fee awards.

6. The Time, Effort and Burden Expended By Class Counsel.

After over twelve years of litigation, it would be an understatement to say that this was not a case that settled quickly. The litigation was active for over a decade, involving proceedings before this Court, the WUTC, Division I (twice), Division II (once) and the Washington State Supreme Court. Although "[u]nder Washington law, the percentage method, without a lodestar cross-check, should be used in common fund cases," *see Vizcaino,* 142 F.Supp.2d at 1302, it is significant that over ***7,000 billable hours***, with a time value of well over $3,000,000 was spent pursuing this action. Spoonemore Decl., ¶ 3; Youtz Decl., ¶ 18. In addition, over $500,000 in costs were advanced by Class Counsel. Spoonemore Decl., ¶ 4; Youtz Decl., ¶ 17. With between

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five and seven attorneys during this time period, the legal and financial resources necessary for this type of complex, protracted and continuous litigation made this a classic "bet your firm" case. *See* A. Conte, ATTORNEY FEE AWARDS, § 2.22 (3d ed. 2012) ("expenditure of time and money by a small firm" is factor to consider).

Counsel took reduced draws, funded the costs with earned firm income, and was forced to turn away hourly work and other attractive contingent fee matters because of the time and financial commitment demanded by this litigation. Youtz Decl., ¶ 18. These risks were far from typical, even for a contingent fee case. The extraordinary risk would justify an award outside of the usual range. Class Counsel's request for 30%, within the usual range, easily passes muster.

B. Class Counsel's Costs and Expenses Should Be Reimbursed.

Class counsel's out-of-pocket costs in this case against both T-Netix and AT&T exceed $500,000. Spoonemore Decl., ¶ 3, *Exh. A* (invoices paid to date total $538,601.03, more expenses coming due). In order to allocate those costs, Class Counsel first identified costs which could fairly be allocated to one specific defendant – such as the costs of notice to each class. Expenses incurred after the settlement with T-Netix, or work done before the settlement which was directed primarily or exclusively at AT&T, were also allocated to the AT&T side of the litigation. All other expenses, such as experts who worked on behalf of both classes, were then split evenly between the two cases. Spoonemore Decl., ¶ 3. Using this allocation, Class Counsel seeks reimbursement of $105,537.43 in expenses advanced to date.[7] Counsel has been paying for all costs out of pocket, with no guarantee of ever being repaid if the action was lost. Thus, counsel had every incentive to be cautious in incurring costs.

[7] Additional expenses, such as those related to the claims process and administration will continue to be incurred by the Class. Class Counsel will continue to advance those funds, and will seek a supplemental award of costs at the time the excess funds will be distributed.

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Class counsel should be reimbursed for costs that have already been paid. Newberg, § 14.02, p. 14-2-3 (class counsel who "created that class recovery are entitled to be reimbursed from the common fund for their reasonable expenses"); Conte, § 2.08, p. 50 ("The prevailing view is that expenses are awarded in addition to the fee percentage."). Class counsel respectfully requests that the Court award $107,537.43 as reimbursement for costs expended on behalf of the class to date, with a supplemental award to be made at when the excess funds are distributed.

C. Columbia Legal Services Should be Awarded a Case Contribution Award.

Columbia has actively pursued this case for two years. They were not a passive class representative, despite the fact that Columbia's stake in the T-Netix class came down to one call ($200.90). John Midgley, Columbia's former director, attended numerous meetings with class counsel, assisted in drafting and obtaining declarations, and received and reviewed all substantive pleadings and orders in this case. Spoonemore Decl., ¶ 2. Mr. Midgley brought additional legal experience to this case and actively participated in numerous significant strategic decisions.

The litigation imposed numerous burdens on Columbia. Columbia employees were deposed, and its documents were subject to production. *Id*. Columbia's employees spent many hours working with Class Counsel on responding to discovery requests, searching for old phone records, and contacting former employees. Mr. Midgley accompanied Class Counsel to Boston for the mediation with T-Netix which would eventually lead to the settlement. *Id*.

Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation. *Cullen v. Whitman Medical Corp.,* 197 F.R.D. 136, 145 (E.D. Penn. 2000). These awards are "not uncommon in class action litigation and particularly where, as

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here, a common fund has been created for the benefit of the entire class." *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). Such awards are appropriate where the named plaintiff provided active assistance to class counsel. *Bradburn Parent Teacher Store, Inc. v. 3M,* 513 F.Supp.2d 322, 342 (E.D. Pa. 2007).

Awards to class representatives generally range from $10,000 to $50,000. *See, e.g., In re Remeron End–Payor Antitrust Litig.,* 2005 WL 2230314, *32–*33 (D. N.J. 2005) ($30,000); *In re Dun & Bradstreet Credit Services Customer Litig*., 130 F.R.D. at 374 (awards of $35,000 and $50,000); *Roberts v. Texaco, Inc*., 979 F. Supp. 185, 201 (S.D. N.Y. 1997) ("The reported cases … generally range from individual awards of $50,000…."). The $20,000 award sought here for Columbia is within this range and is warranted, particularly given ***that it will not, in any way, reduce the claim of any class member***.

V. CONCLUSION

Class Counsel seeks an award of $423,750 in attorney fees under the common fund doctrine, an interim award of costs in the sum of $105,537.43, and a case contribution award to Columbia Legal Services in the sum of $20,000.

DATED: March 25, 2013.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on March 25, 2013, I caused a copy of the foregoing document to be served on all counsel of record in the manner shown and at the addresses listed below:

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