DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac St. Centennial, CO 80112	
Plaintiff/Counterdefendant: Echelon Property Group, LLC v. **Defendant/Counterplaintiff**: Bobby Salandy	▲ **COURT USE ONLY** ▲
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CLASS COUNSEL'S MOTION FOR AN AWARD OF REASONABLE ATTORNEY'S FEES AND FOR REIMBURSEMENT OF EXPENSES AND FOR APPROVAL OF CLASS REPRESENTATIVE INCENTIVE AWARD

CERTIFICATE OF CONFERRAL

Undersigned counsel certifies that they conferred with opposing counsel concerning the relief requested in this Motion in negotiating the Settlement Agreement preliminarily approved by the Court through its Preliminary Approval Order dated January 21, 2022. As memorialized in the Settlement Agreement, Echelon does not oppose the requested relief.

I. INTRODUCTION

The class action Settlement Agreement reached in this case of first impression challenging Echelon's charging of Late Fees, Notice Posting Fees, and Eviction Legal Fees (the "Challenged Fees") is an outstanding result for the Settlement Class. The Settlement Agreement provides both meaningful prospective relief as well as the opportunity to receive significant monetary benefits. Under its terms, Echelon must establish a Settlement Fund totaling three million four-hundred fifty-thousand dollars ($3,450,000.00 USD) consisting of $2.25 million in debt forgiveness and $1.2 million in cash. Settlement Class Members don't need to file claim forms. Rather, class members entitled to cash will have checks automatically sent to their last known address and those eligible for debt relief—class members who are in active collections—will have their outstanding balances automatically reduced, in some cases by thousands of dollars.

Additionally, the Settlement secures meaningful prospective relief that requires Echelon to not oppose motions by class members to suppress eviction actions, to cease negative credit reporting, and to use a lease that does not contain such unlawful penalties.

Notice detailing the terms of the Settlement Agreement has been sent to over 87% of the Class (and notices returned as undeliverable continue to be re-mailed) and the response has been positive. (*See* Declaration of Attorney Steven Woodrow ("Woodrow Decl.") ¶ 34, a true and accurate copy of which is attached hereto as Exhibit 1.). As of the date of this filing, there have been no objections submitted or requests to be excluded. (Woodrow Decl. ¶ 36.)

These impressive results are the direct result of meaningful time, effort, and energy devoted to the litigation and settlement by Class Counsel and the Class Representative. Indeed, the Settlement Agreement and its favorable terms were only made possible by Class Counsels' work investigating and prosecuting the case, engaging in significant discovery and motion practice,

negotiating the agreement through two formal mediation sessions with well-respected mediators Joe Epstein and Chad Atkins of Conflict Resolution Services, and expending hundreds of hours (and thousands of dollars in out-of-pocket costs) on the lawsuit.

In recognition of this work, the Settlement Agreement allows Class Counsel to request approval from the Court for an attorneys' fee award of 30% of the Settlement Fund. Though such an amount would be reasonable here, Class Counsel instead seeks 28% of the $3.45 million Settlement Fund, or $966,000. Class Counsel also seeks reimbursement of out-of-pocket expenses of $8,902.83. Additionally, the Settlement Agreement calls for the Class Representative, Bobby Salandy, to receive an incentive award of $10,000 in recognition of his time, effort, and service to the Class over the last three years.

As such, and as explained in further detail below, the Court should approve the requested award of fees and expenses and incentive award to Class Representative Salandy.

II. FACTUAL AND PROCEDURAL BACKGROUND

Echelon's Form Lease and Imposition of the Challenged Fees

This case challenges Late Fees, Notice Posting Fees, and Eviction Legal Fees that Echelon, a large Colorado landlord, imposed on its residential tenants, including Settlement Class Representative Salandy.[1] That is, when tenants are unable to pay their rent on time, Echelon

[1] Under Colorado law, a contract clause that specifies the damages in case of a breach—like the Challenged Fees at issue in this case—represents *either* lawful liquidated damages *or* unlawful penalties, but not both. As the Colorado Supreme Court has explained:

> A liquidated damages provision is valid and enforceable if three elements are met: (1) "the parties intended to liquidate damages"; (2) "the amount of liquidated damages, when viewed as of the time the contract was made, was a reasonable estimate of the presumed actual damages that the breach would cause"; and (3) "when viewed again as of the date of the contract, it was difficult to ascertain the amount of actual damages that would result from a breach." *Klinger v. Adams Cty. Sch. Dist. No. 50*, 130 P.3d 1027, 1034 (Colo. 2006) (quoting *Rohauer v. Little*, 736

assesses a Late Fee of $75.00 on the fourth day followed by $10 per day thereafter. Also on the fourth day, Echelon causes a statutory notice to be affixed to the delinquent tenant's door and charges $20 for the posting. On the ninth day that rent remains unpaid, Echelon commences eviction proceedings and charges the tenant $295.00 in legal fees for the filing. Echelon charged every tenant the Challenged Fees pursuant to paragraph 9 of its form lease. The fees are generally assessed automatically via a computer program without human intervention. Woodrow Decl. ¶ 4.

Class Representative Salandy was one of thousands of Echelon tenants who repeatedly incurred such fees when he fell behind in rent. As more of his paycheck went to fees, he was unable to pay the next month's rent on time—thus incurring more fees. Salandy actually paid Echelon more than a year's-worth of base rent yet was repeatedly named as a defendant in eviction proceedings. Woodrow Decl. ¶ 6. Salandy connected with Class Counsel in early 2019 to discuss his experience with Echelon and his legal rights. Woodrow Decl. ¶ 7.

Echelon Files and FED Action, Salandy Files His Class Action Counterclaims, and the Case is Transferred to District Court

Salandy agreed to file suit. Prior to the filing of the draft complaint, however, Echelon filed another FED action against him on April 16, 2019, styled, *Echelon Property Group*, *LLC v. Bobby Salandy*, Case No. 2019C37058 in the County Court for Arapahoe County—its fourth eviction action against him. Woodrow Decl. ¶ 7. On April 25, 2019, Salandy filed an Answer, Class Action Counterclaims, and a Jury Demand challenging the fees. Woodrow Decl. ¶ 8. On April 30, 2019,

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> P.2d 403, 410 (Colo. 1987)). If any one of the elements is not met, the provision is an invalid penalty. *Id.* A penalty differs from a liquidated damages clause because "a penalty is designed to punish for a breach of contract[,] whereas liquidated damages are intended as fair compensation for the breach." 25A C.J.S. Damages § 200 (2016).

Ravenstar, LLC v. One Ski Hill Place, LLC, 2017 CO 83, ¶ 10, 401 P.3d 552, 555; *see also Kirkland v. Allen*, 678 P.2d 568, 571 (Colo. App. 1984).

Salandy filed an Amended Answer and Class Action Counterclaims and a motion to transfer to the District Court for Arapahoe County. Woodrow Decl. ¶ 8. On April 30, 2019, the case was transferred and assigned Case No. 2019CV112. Woodrow Decl. ¶ 9.

Following transfer, the Parties proceeded to vigorously litigate the case. Woodrow Dec. ¶ 10. Echelon filed a motion seeking possession of the unit, and the Parties engaged in significant briefing related to the availability of certain affirmative defenses, claims, and other matters related to the pleadings. Woodrow Dec. ¶ 11. Following Salandy's agreement to vacate, the Parties engaged in additional extensive briefing related to the pleadings. Woodrow Dec. ¶ 12.

Ultimately, several of Salandy's claims survived, and the Parties proceeded to engage in discovery focused on Echelon's policies and procedures related to the assessment of the Challenged Fees and the ability to certify a class of harmed tenants. Woodrow Dec. ¶ 13, 14. This included rounds of written discovery (multiple sets of interrogatories and requests to produce), as well as deposition testimony, including the examination of Echelon's two Rule 30(b)(6) designees and the defense of Mr. Salandy's Deposition. Woodrow Dec. ¶ 15. Discovery also included numerous conferences between counsel and with the Court during which Salandy sought and ultimately obtained necessary information as well as third-party subpoenas to Echelon's eviction law firm and debt collection agency, both of which provided critical data regarding class membership and damages.

Salandy defeats Echelon's Motion for Summary Judgment.

On July 28, 2020, Echelon moved for summary judgment on the grounds that the voluntary payment doctrine barred Salandy's individual claims as a matter of law. Woodrow Decl. ¶ 16. The Parties briefed the issue, including supplemental filings regarding Echelon's factual assertions. Woodrow Decl. ¶ 16. On November 12, 2020, the Court denied Echelon's Motion for Summary

Judgment finding the voluntary payment doctrine inapplicable to the claims set forth in Salandy's Amended Complaint and that Salandy's claims for prospective relief remained viable. Woodrow Decl. ¶ 17.

Salandy Moves for Certification of the First Mediation Session

The Parties continued to litigate and finalize discovery related to class certification following the Court's ruling on summary judgment. Woodrow Decl. ¶ 19. It was also at this time that the Parties, through counsel, began to discuss the potential for resolution. Woodrow Decl. ¶ 18. This included the preparation of a detailed settlement proposal that would ultimately form the basis for the negotiated Settlement. Woodrow Decl. ¶ 18. Notwithstanding these early talks, the Parties continued to litigate issues related to discovery and the scope of the proposed class.

On February 5, 2021, Salandy filed his Motion for Class Certification. Woodrow Decl. ¶ 20. Rather than file a response, Echelon agreed to engage in a formal mediation session with Joe Epstein and Chad Atkins of Conflict Resolution Services, well-respected third-party neutrals based in the Denver Area. Woodrow Decl. ¶ 20. On April 28, 2021, counsel for the Parties and the mediators engaged in a virtual session. Woodrow Decl. ¶ 21. Counsel for the Parties discussed the claims at issue in the case as well as proposed settlement frameworks. Woodrow Decl. ¶ 21. Despite these talks, the Parties were unable to reach a resolution at the mediation and instead returned to the lawsuit and briefing on the issue of class certification. Woodrow Decl. ¶ 21.

Salandy Obtains Class Certification and the Parties Revisit Mediation

Following the first mediation session, the Parties completed briefing on Salandy's Motion for Class Certification. On June 16, 2021, Echelon filed its Opposition to Salandy's Motion for Class Certification and Salandy filed his Reply on July 14, 2021. Woodrow Decl. ¶ 22. On July 21, 2021, the Court granted in part Salandy's Motion for Class Certification and certified a class

consisting of: "tenants who from April 2016, to the date of the order for possession against Salandy -August 5, 2019 - were charged the Fees and, like Salandy, had actions filed against them by Echelon for forcible entry and detainer." Woodrow Decl. ¶ 23. The Court also entered Orders (a) directing Class Counsel to disseminate notice to the class and (b) bifurcating the trial, with the issue of a declaration of rights under the lease to be adjudicated first. Woodrow Decl. ¶ 23.

In the wake of class certification Salandy sought data necessary to disseminate notice. Woodrow Decl. ¶ 24. Following significant back-and-forth, the Parties agreed to return to mediation for a second session with Messrs. Epstein and Atkins. Woodrow Decl. ¶ 25. Counsel for the Parties had several discussions in advance of the second mediation session regarding the nature of the claims, settlement frameworks, and related issues. Woodrow Decl. ¶ 25.

The Second Mediation Proves Unsuccessful, and the Parties Continue Preparing for Trial

On September 29, 2021, the Parties engaged in a second full-day mediation session. Woodrow Decl. ¶ 26. Salandy was present via Zoom. The session was productive and featured several rounds of negotiations. Woodrow Decl. ¶ 26. While the Parties made strides in exchanging information and fleshing out specific frameworks, they were unable to achieve a resolution of the Settlement's remaining terms. Woodrow Decl. ¶ 26. The Parties again agreed to return to litigating with an understanding that settlement talks should continue. Woodrow Decl. ¶ 27.

Litigation and Settlement Efforts Following the Second Mediation Session

Following the second mediation, the Parties filed cross-motions for summary judgment and motions in limine and otherwise began preparing for the trial set on Salandy's counterclaim for a declaration of rights under the lease. Woodrow Decl. ¶ 28. The Parties continued to discuss settlement while preparing for trial, which included seeking leave of court to complete the notice plan that was put on hold for the second mediation. Woodrow Decl. ¶ 29.

Significant sustained post-mediation talks eventually lead to an agreement in principle with respect to the relief to be made available to the certified class. Woodrow Decl. ¶ 31. Only after this phase of the negotiations was complete did the Parties discuss, negotiate and come to an agreement regarding reasonable attorneys' fees and an incentive award for Mr. Salandy. Woodrow Decl. ¶ 32. The result is a strong Settlement that provides real relief to the Class. Woodrow Decl. ¶ 33.

As set forth briefly below, the settlement terms are strong and, in addition to the work required to achieve the agreement, they support granting the requested attorneys' fees.

III. SUMMARY OF SETTLEMENT TERMS

First, Echelon has agreed to a Settlement Fund totaling three million four hundred fifty thousand dollars ($3,450,000) total ("Settlement Fund"). (Settlement Agrmt. *Id.* at §§ II.41 and III.1.a) The Settlement Fund features both a Cash Component ($1,200,000) and Debt Forgiveness ($2,250,000). *Id.* § II.41. Settlement Class Members who carry a balance with RD Fuller, Echelon's debt collection firm, qualify for Debt Forgiveness and will collectively see $2,250,000 forgiven. Settlement Agrmt., § III.1.h. The remaining Settlement Class Members will receive a cash payment from the Cash Component following deductions for Settlement Administration Expenses and any Incentive Award to the proposed Settlement Class Representative and any Fee Award to Class Counsel. There is no claims process—any Settlement Class Members who remain in the settlement by not opting out will automatically receive their debt forgiven or a cash payment. Any monies remaining in the Settlement Fund from checks that remain uncashed are to be donated to the *Cy Pres* recipient approved by the Court (the Parties have agreed to propose the Colorado Coalition for the Homeless). Settlement Agrmt., § II.13.

In addition to the $3,450,000 in monetary relief, the Settlement Agreement also requires that Echelon adopt certain prospective measures. For a period of twelve (12) months following the

Effective Date, Echelon agrees not to oppose any motion by a Certified Class Member whose balances are forgiven or were otherwise resolved to suppress an eviction or collection action filed against them by Echelon or any agent of Echelon, to cease negative credit reporting with respect to certain Certified Class Members, and to use a form lease that does not treat late fees and other fees as unlawful penalties. Settlement. Agrmt. § III.4.

In exchange for the settlement benefits, Echelon and affiliated entities will receive a release of any claims relating to the charging of Late Fees, Notice Posting Fees, and Eviction Legal Fees. (Settlement Agrmt. § V.) The Release includes unknown claims, though these are limited to claims that could have been brought in the litigation. The Settlement also calls for the dissemination of notice to the Settlement Class Members. This includes a comprehensive plan that features direct mail notice and the establishment of a Settlement Website. (Settlement Agrmt. § IV.3.)

Such terms are favorable to the Settlement Class and are the result of zealous advocacy by Class Counsel on behalf of the Class.

IV. ARGUMENT

As set forth below, the requested fees of 28% of the Settlement Fund are reasonable under both the percentage method and the lodestar method. Additionally, the Court should award Class Counsel $8,902.83 in out-of-pocket expenses and approve an incentive award to Mr. Salandy in the amount of $10,000.

A. The Requested Attorneys' Fees Are Reasonable When Analyzed as a Percentage of the Benefits Recovered on Behalf of the Class Under the Factors Set Forth in Rule of Professional Conduct 1.5 and *Johnson v. Georgia Highway Express, Inc.*

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 recover reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444

U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). When determining the reasonableness of attorney fee awards based on the common fund doctrine, courts across the country generally rely on the factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.1974). *See Brody v. Hellman*, 167 P.3d 192, 200 (Colo. App. 2007) (citing *Brown v. Phillips Petroleum Co.,* 838 F.2d 451, 454 (10th Cir.1988)). The *Johnson* factors dovetail with considerations set forth in Rule 1.5 of the Colorado Rules of Professional Conduct. *See Brody*, 167 P.3d at 200 (Colo. App. 2007) (citing *Law Offices of J.E. Losavio, Jr. v. Law Firm of Michael W. McDivitt, P.C.,* 865 P.2d 934, 936 (Colo.App.1993)). Indeed, like Rule 1.5, the *Johnson* factors require that the Court consider:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Johnson, supra, 488 F.2d at 717–19. As set forth more fully below, each of these factors weigh in favor of approving the fee request (or are at least neutral on the question).

1. The litigation and settlement involved significant time and labor.

The first *Johnson* factor looks at the time and labor expended by Class Counsel and unquestionably supports approving the fee request here. As set forth above, this case was heavily litigated. Far from a lawsuit where little activity occurred prior to settlement, this litigation featured protracted motion practice on the pleadings, extensive written and oral discovery, third party discovery, dispositive motions (multiple filings by Echelon), two mediation sessions, a contested motion for class certification, and thousands of emails, meetings, and conferences. Furthermore, the Settlement itself required substantial work to achieve and implement. Indeed, not only has

Class Counsel worked to reduce the agreement to writing and obtain preliminary approval from the Court, Class Counsel have overseen the dissemination of the Class Notice and have handled and processed numerous inquiries from Class Members.

The results obtained for the Class via the Settlement are undoubtedly strong, but they were not obtained by accident or happenstance. Rather, the results—which include defeating Echelon's first motion for summary judgment, securing class certification on an adversarial basis, and achieving a settlement that provides substantial monetary relief through cash payments and debt forgiveness as well as prospective relief designed to curb the abuses and ameliorate the harm alleged in the lawsuit—were attained through consistent and dedicated work by Class Counsel. This isn't altogether surprising: as set forth in Section IV.B, below, Class Counsel devoted over 1,100 hours to the prosecution of this case over the last three years against a seasoned defense firm. Consequently, the first factor supports the requested fees.

2. The novelty and difficulty of the questions and issues involved support the requested fee award.

The second factor, which assesses the novelty and difficulty of the questions at issue in the case, undoubtedly weighs in favor of the requested fees. This case is a matter of first impression: Colorado courts have not previously analyzed late fee provisions in residential rental agreements to determine whether they are lawful liquidated damages as opposed to unlawful penalties. The most on-point Colorado cases—including *Ravenstar, LLC v. One Ski Hill Place, LLC*, s, 555 (Colo. 2017) and *Kirkland v. Allen*, 678 P.2d 568, 571 (Colo. App. 1984)—were decided years (and, in some cases, decades) ago and applied to other penalty provisions. As such, the precise legal theory at the heart of this case is new and applies a doctrine of contract law that isn't routinely raised in Colorado

in this context.[2] The relative dearth of legal authority surrounding the claim required additional legal research by Class Counsel, including caselaw from sister jurisdictions. This extra work and the risk posed by relatively novel issues militates in favor of granting the fee request.

3. Prosecuting the litigation and achieving the settlement required substantial skill.

Litigating the claims and achieving the Settlement certainly took a level of skill that supports the fee request. Class actions are complex cases that require attention to detail and a solid understanding of both the underlying substantive law as well as class action procedure and jurisprudence. Such understanding is gained through years of litigation and settlement experience—knowledge that Class Counsel brought to bear for the benefit of the class in this case. Adding to the challenge, of course, is the fact that class action defense counsel are nearly always well-seasoned litigators with access to large-firm resources. This case was no exception, as Echelon retained the national law firm of Lewis Brisbois Bisgaard & Smith LLP, which devoted significant time and resources to the defense. Indeed, multiple mediation sessions were required given the complexity of the case and the nature of the relief obtained for the Class.

In short, substantial skill was required to litigate and settle this case on such favorable terms. As such, this factor supports granting the requested fees.

4. Class counsel was precluded from engaging in other work due to the acceptance of this case.

This litigation undoubtedly required the time and effort of Class Counsel. Given this time commitment—which included investigating the claims, preparing for a hearing on possession,

[2] Notably, Echelon's Rule 30(b)6) designee, Brian Stern, characterized Echelon's late fee practices and policies as reflecting "industry standards", strongly suggesting that the liquidated damages analysis has been raised so seldomly by tenants that landlords on the whole in Colorado were, piror this lawsuit, generally unaware of the law. Woodrow. Decl. ¶ 15.

engaging in substantial motion practice, conducting thorough discovery including depositions and third-party discovery, settlement negotiations that spanned two formal mediation sessions, and consummating the settlement through approval—Class Counsel was necessarily prevented from taking on other matters, including billable work. As such, this factor supports the fee request.

5. The fees sought are consistent with customary fees in class actions.

The fifth factor looks at customary fees. As the District Court of Colorado recently observed, that amounts to one-third of the recovery:

> Courts in this district have recognized that "[t]he customary fee to class counsel in a common fund settlement is approximately one-third of the economic benefit bestowed on the class." *Anderson v. Merit Energy Co.*, No. 07-cv-00916-LTB-BNB, 2009 WL 3378526, at *3 (D. Colo. Oct. 20, 2009); see also *Shaw v. Interthinx, Inc.*, No. 13-cv-01229-REB-NYW, 2015 WL 1867861, at *6 (D. Colo. Apr. 22, 2015) (citing cases holding that fees within the 20-50% range are "presumptively reasonable"); *Brody v. Hellman*, 167 P.3d 192, 203 (Colo. App. 2007) (collecting cases approving percentage fees ranging from 24% to 36% of the common fund).

Rothe v. Battelle Mem'l Inst., No. 1:18-CV-03179-RBJ, 2021 WL 2588873, at *9 (D. Colo. June 24, 2021). The requested fees here represent 28% of the $3.45 million economic benefit achieved for the Class. This falls squarely within the customary range and should be approved.

6. No pre-arranged fee was negotiated here.

This factor doesn't suggest the requested fee is unreasonable in any way. No pre-arranged fee was negotiated in this case; rather, Class Counsel took this matter on contingency and faced a substantial risk of nonpayment had they been unsuccessful. This isn't a case where the named plaintiff or any other class member or person agreed to pay fees so as to eliminate the risk faced by Class Counsel. This factor supports approval of the request as a result.

7. Aspects of this litigation carried unique time limitations.

Generally speaking, this case carried the time limitations and pressures that regularly attend complex class action litigation: filing and discovery deadlines and adherence to the case schedule. Class Counsel worked hard to ensure that dates were not missed and that filings and deadlines were met. This matter, however, especially in its early stages, carried time limitations not typically present in class action litigation, particularly regarding the issue of possession.

In fact, Class Counsel had been preparing a separate complaint for filing when Salandy informed his attorneys that he had been served with yet another action in forcible entry and detainer by Echelon. This required Class Counsel to act quickly to modify the pleading that had been in the works so that it could be presented as a counterclaim together with a motion to transfer the case to the district court. Following the transfer, Echelon continued to pursue possession, which required expedited briefing and preparing for a hearing on the issue. Ultimately Salandy agreed to move but at a date months after the initial possession hearing had been scheduled and just a few weeks before his lease was set to expire (and after the Court had denied his request to present evidence as to the unlawfulness of the charges set forth in the lease). Thus, the posture of the case required that Class Counsel drop other work and act quickly to ensure Mr. Salandy's claims and the claims of the absent class members were properly preserved.

As a consequence, the Court should find that this factor also shows the reasonableness of the requested attorneys' fees.

8. The amount involved and the results obtained support the request.

The results obtained on behalf of the Class unequivocally support granting the requested attorney's fees. This is a strong Settlement that provides millions in relief to Class Members. Most Class Members who incurred the fees and had an eviction action filed against them likely incurred

damages of under $500 on an individual basis[3]. It is unclear what Class Members would've received had the case proceeded to trial and what monies in actual damages Echelon may have been able to attain in offsets.[4] Even though Class Counsel believed (and continues to believe) strongly in the merits of the case, there was risk in moving forward.

With respect to benefits, in terms of monetary relief individual Class Members will either receive a cash payment or, if they are currently in collections, debt forgiveness. Following de-duplication of the data, it now appears that there are 2,899 Settlement Class members. Approximately 900 are eligible to share in the $2,250,000 in debt forgiveness due to their balances with RD Fuller. This results in an average reduction of $2,500, and many Class Members will see their balances erased entirely.[5] The remaining approximately 2,000 Class Members will split the $1,200,000 in cash (after deducting the fees, costs, incentive award, and settlement administration expenses). If we were to assume that the Court approves the requested fees, costs, and incentive award, and that the Settlement and Administrative expenses total $35,000 (all of which together total around $1,019,000), then the Class Members entitled to cash relief will each receive checks

[3] Assuming arguendo that most of the Class Members had only one FED action filed against them after nine days of not paying rent, that would equal approximately $125 in Late Fees, $20 in a Notice Posting Fee, and $295 in Eviction Legal Fees for a total of $440.

[4] Notably, where a liquidated damages provision has been invalidated, "the amount of damages resulting from tenant's breach to which landlords are entitled must…reflect actual, as opposed to liquidated, damages." *Kirkland*, 678 P.2d at 571. It would be up to Echelon to prove its damages.

[5] Courts have found it "reasonable to include debt forgiveness in the total settlement value" when awarding fees. *Cullen v. Whitman Med. Corp*., 197 F.R.D. 136, 147 (E.D. Pa. 2000); *see also In re Lloyd's Am. Tr. Fund Litig*., No. 96 CIV.1262 RWS, 2002 WL 31663577, at *16 (S.D.N.Y. Nov. 26, 2002), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) (citations omitted) ("[C]ourts often approve class action settlements that employ debt forgiveness and other non-cash benefits as all or part of the settlement consideration."); *but see Curry v. Money One Fed. Credit Union*, No. CV DKC 19-3467, 2021 WL 5839432, at *4 (D. Md. Dec. 9, 2021) (explaining debt forgiveness may confer less benefit where, unlike here, "the defendant never would have attempted to collect.")

for approximately $90. That is a fair recovery[6], particularly when the prospective relief is considered. And again, no claim form needs to be submitted—checks will be automatically mailed (and balances at RD Fuller automatically reduced). This factor supports the requested fees as well.

9. Salandy's attorneys have demonstrated sufficient experience and competency.

Salandy's attorneys investigated and prosecuted the claims underlying the Settlement Agreement with sufficient skill and competency. Both the Cadiz Law Firm and Woodrow and Peluso, LLC have experience representing tenants in contested litigation. *See* "Firm Resumes of Class Counsel," true and accurate copies of which are attached as Exhibit A to the Woodrow Declaration. Furthermore, the firms have meaningful experience litigating complex class action allegations, including cases against large Colorado landlords, and the Woodrow & Peluso, LLC firm maintains a consumer-based class action practice. Finally, Class Counsel researched the claims, which, while firmly rooted in Colorado law, had not (at least prior to the instigation of this litigation) been previously pursued in the State. Indeed, they have vigorously pursued the case in the face of very capable and well-respected opponents and did so during an unprecedented time given the global pandemic.

As such, this factor weighs in favor of the fee award.

10. While the case was not "undesirable", the litigation raised novel issues and substantial risk.

This factor similarly suggests the fee request should be approved. This case was not undesirable—Class Counsel believes that they are fortunate to have the opportunity to represent tenants who seek to vindicate their legal rights, particularly where landlords have been heavy-

[6] *See e.g. Baker v. SeaWorld Ent., Inc.*, No. 14-CV-02129-MMA-AGS, 2020 WL 4260712, at *6 (S.D. Cal. July 24, 2020) ("Plaintiffs point to 'Cornerstone Research reporting that in 2019, the median securities class action settlement amount was 4.8% of estimated damages.'")

handed in their dealings. Nevertheless, and as discussed above with respect to the second factor, this case presents issues that are complex and novel. As a result, the case presented considerable risk of loss, in which case Class Counsel would receive nothing for their efforts (and costs). Because "[a] contingent fee 'is designed to be greater than the reasonable value of the services ... to reflect the fact that attorneys will realize no return for their investment of time and expenses in cases they lose,'" *LaFond v. Sweeney*, 2015 CO 3, ¶ 33, 343 P.3d 939, 948, this factor weighs in favor of approval as well.

11. The nature and length of the professional relationship with the client.

This factor also supports the requested attorneys' fees. Mr. Salandy is not a long-term client of either the Cadiz Law Firm or Woodrow & Peluso, LLC. Rather, he is a consumer of modest means (again, the litigation commenced when Echelon sought to evict Mr. Salandy) who was able to gain representation and vindication of his claims with the help of competent counsel specifically due to the contingency arrangement.

12. Awards in similar cases indicate the fee requested here is reasonable.

There is admittedly limited authority regarding fee awards in class action settlements challenging late fees and other charges in residential leases as being unlawful penalties. This is likely due to the fact that the claims at issue in this case are, as described above, quite novel. Having said that, awards in consumer class actions more broadly support the request here. Indeed, a fee award of one-third of the fund is consistent with awards approved in consumer class actions more generally. *In re Greenwich Pharm. Sec. Litig*., No. 92-3071, 1995 WL 251293 (E.D. Pa. Apr. 26, 1995) at *6–7 (awarding fee of 33.3%); *In re SmithKline Beckman Corp. Sec. Litig*., 751 F. Supp. 525, 533 (E.D. Pa. 1990) (noting range of fees from 19% to 45%); *see also Remijas v. Neiman Marcus Grp., LLC*, No. 14 C 1735, 2021 WL 4808618, at *1 (N.D. Ill. June 4, 2021)

(citing *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) ("In consumer class actions, where the percentage of class members who file claims is often quite low ... we suggest [ ] that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total[.]")).

Applying these principles here, the Settlement Agreement reached in this case granted Class Counsel the right to seek an award of up to 30% of the $3.45 million settlement benefits—a percentage that is below the 33% typically available. And Class Counsel does not seek the full 30%. Rather, Class Counsel has limited their request to $966,000, which represents only 28% of the monetary benefits[7] achieved for the class. Additionally, unlike certain consumer class action settlements where settlement class members are required to submit claims to obtain relief, in this case Class Counsel negotiated a settlement where checks/debt forgiveness will be automatically administered to all Settlement Class Members who remain in the Settlement by not submitting requests to be excluded. That is, nearly all impacted tenants will receive the benefits of the agreement—not simply those who decided to submit a claim form.

In sum, the final factor weighs in support of approval as well.

B. The Requested Fees Are Also Reasonable Under the Lodestar Method.

The other method for determining the reasonableness of the requested fee award is the lodestar method. "In the lodestar method, the court multiplies the number of hours the attorneys reasonably worked by the reasonable hourly rate for that work to determine the lodestar." *Brody*, 167 P.3d at 201 (explaining further that "[t]he court may then multiply the lodestar by a factor to compensate the attorneys for the risks they faced and any other special circumstances.") (citing *In*

[7] Indeed, although the Settlement's substantial non-monetary relief will help Class Member's financially by stopping negative credit reporting and allowing for records to be sealed, they are not included in the calculation of the Settlement Fund. As such, the percentage is based on a floor calculation of the benefits to the Class.

re Cendant Corp. Sec. Litig., 404 F.3d 173, 188 (3d Cir.2005)). "Typically, courts use the percentage method and then crosscheck the adequacy of the resulting fee by applying the lodestar method." *Brody*, 167 P.3d at 201[8] (citing *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 305 (3d Cir.2005); *In re Bristol–Myers Squibb Sec. Litig.,* 361 F.Supp.2d 229, 233 (S.D.N.Y.2005)).

As shown in the chart below, Class Counsel expended over 1,100 hours investigating the claims, litigating the case, and negotiating the Settlement Agreement for a current lodestar of $486,306.[9] Broken down by each lawyer, the hours spent per attorney are as follows:

Attorney Name/Firm	Position	Rate	Hours	Lodestar
Steven Woodrow/ Woodrow & Peluso	Partner	$520	581.3	$302,276
Patrick Peluso/ Woodrow & Peluso	Partner	$420	14	$5,880
Kevin Davenport/ Woodrow & Peluso	Clerk	$100	3.4	$340
Jason Legg/ Cadiz Law Firm	Partner	$300	576.5	$172,950
Scott Cadiz/ Cadiz Law Firm	Partner	$300	16.2	$4,860
INITIAL LODESTAR			1,190.9	$486,306

(Woodrow Decl. ¶ 38) The time spent is reasonable given the work that was needed to: (i) investigate the claims, (ii) draft all pleadings, (iii) research pertinent legal issues (including the

[8] The *Brody* court recognized that the more recent trend has been toward using the percentage method in common fund cases. 167 P.3d at 201 (citing *Gottlieb v. Barry,* 43 F.3d 474, 482 (10th Cir.1994)).

[9] Class Counsel's time records can be emailed or otherwise delivered to the Court upon request. Likewise, a copy of this Motion for Attorney's Fees is being posted to the Settlement Website (https://www.rg2claims.com/salandysettlement.html). The page containing a link to download this Motion will also indicate that Settlement Class Members can obtain copies of Class Counsel's billing records by emailing class counsel at swoodrow@woodrowpeluso.com, by calling (720) 213-0676, or by faxing a request to (303) 927-0809. All requests received prior to the final fairness hearing will be complied with promptly.

law of liquidated damages, unconscionability and form contracts of adhesion, Rule 30(b)(6) deposition practice, the voluntary payment doctrine, and related questions), (iv) brief numerous motions, including Echelon's motions related to bifurcation and first motion for summary judgment, Salandy's Motion for Class Certification, and motions and filings related to discovery, (v) engage in extensive written, oral, and third party discovery, (vi) participate in the mediation process, and (vii) negotiate and effectuate the Settlement. The time spent additionally includes work and research performed related to this Motion for Attorneys' Fees.

At this point, Class Counsel estimate that approximately $15,000 of additional attorneys' time will be required to finalize the Settlement, including preparing all final documents and advising Settlement Class Members with respect to their rights. (Woodrow Decl. ¶ 39.) As such, Class Counsel projects that the final lodestar will likely equal no less than $501,306.00.

With a total lodestar of at least $501,306, a multiplier of only 1.93 is needed to justify the requested fees of $966,000 (28% of the Settlement Fund). This multiplier is actually below the range of what courts routinely conclude is reasonable. *See Brody*, 167 P.3d at 203 (collecting cases demonstrating that multipliers typically range from 2.0 to 4.0).

As such, Class Counsel's lodestar also demonstrates the reasonableness of the fees.

C. Class Counsel Should Also be Awarded Their Reimbursable Expenses.

The Court should also award $8,902.83 in hard out-of-pocket costs that Class Counsel have expended pursuing this litigation. It is no secret that prosecuting a lawsuit can be an expensive and costly endeavor. In this case, among other expenses Class Counsel advanced litigation costs to cover depositions (including both of Echelon's Rule 30(b)(6) witnesses and to defend Mr. Salandy's examination), the expense of filing documents with the Court, service of subpoenas, and

two full-day mediation sessions with Conflict Resolution Services, Inc. *See* Ex. B to the Woodrow Declaration.

The Court should award the requested costs accordingly.

D. The Court should approve an incentive award to Salandy for his service.

As a final matter, the Court should approve an incentive award to Mr. Salandy of $10,000 for his service on behalf of the Class. Settl. Agrmt. XX. Under Colorado law:

> [w]hen considering whether to approve an incentive award, the Court should consider: (1) the actions the class representative took to protect the interests of the class; (2) the degree to which the class has benefitted from those actions; and (3) the amount of time and effort the class representative expended in pursuing the litigation.

Rothe v. Battelle Mem'l Inst., No. 1:18-CV-03179-RBJ, 2021 WL 2588873, at *12 (D. Colo. June 24, 2021)[10] (citing *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)); *see also Lucken Family Ltd. P'ship, LLLP v. Ultra Res., Inc.*, 2010 WL 5387559, at *6 (D. Colo. Dec. 22, 2010).

[10] As the Tenth Circuit has explained:

> [C]ourts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case. *See, e.g.*, *Cobell v. Salazar*, 679 F.3d 909, 922–23 (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff's "singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award"); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive awards ... are intended to compensate class representatives for work done on behalf of the class...."). These services typically include "monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant." Newberg § 17:3. The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (if the lead plaintiff's services are greater, her incentive award likely will be greater).

Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455, 468 (10th Cir. 2017).

Each of these factors supports an award to Mr. Salandy here. Salandy filed these claims knowing that Echelon could, as his then-current landlord, take retaliatory action against him. And indeed Echelon notified Class Counsel near the start of the case that Echelon would not be renewing Salandy's lease. Echelon also persisted in seeking an order of possession from Salandy despite the allegations that the supposed delinquent amounts being sought were unlawful. Salandy has endured a tarnished rental history caused by the eviction action filed against him by Echelon throughout the three years this case has been litigated (that could have been resolved sooner had he been more interested in simply benefitting himself). And the entire Class has benefited greatly from Mr. Salandy's efforts. Again, the Settlement not only provides monetary relief to the Class, it secures prospective relief designed to ensure that other Echelon tenants are not repeatedly bombarded with unlawful penalties when they are unable to remit the rent on time.

Finally, Mr. Salandy has been a devoted Class Representative for the past 3 years. He has stayed abreast of the litigation and has engaged in regular communication with Class Counsel about the lawsuit. He answered all written discovery and sat for a full-day deposition. Mr. Salandy also attended the second mediation session (as demanded by Echelon) where he was repeatedly offered an "individual settlement" that would have provided him personally with substantially more money in exchange for letting Echelon avoid a class-wide resolution. He stood firm and refused to be bought off—all for the benefit of the absent class members.

The Court should approve the requested award to Mr. Salandy as a result.

V. CONCLUSION

Class Counsel vigorously pursued the claims in this case and achieved an impressive class action Settlement. The requested attorneys' fees of $966,000 represent 28% of the common benefits obtained and are less than the fees Class Counsel could have requested under Section VI.1

of the Settlement Agreement. In light of the *Johnson* factors, as well as when viewed against Class Counsel's lodestar as a crosscheck, the requested fees are undoubtedly reasonable. Additionally, the Court should approve Class Counsel's documented expenses of $8,902.83 and the incentive award to Mr. Salandy in the amount of $10,000.

WHEREFORE, the Class Representative, on behalf of himself and the Class, respectfully requests an award of $966,000 in reasonable attorneys' fees, $8,902.83 in reimbursable expenses, and $10,000 as a class representative incentive award and for such additional relief as the Court deems necessary and just.

Dated: April 8, 2022

Respectfully Submitted,

BOBBY SALANDY, individually and on behalf of a class of similarly situated persons,

/s/ Jason Legg
One of Plaintiff's Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April 2022, a true and correct copy of the foregoing document was served on the following via ICCES, the Integrated Colorado Courts E-filing System, as follows:

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