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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SABER AHMED and JOHN MONTELEONE, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HSBC BANK USA, NATIONAL ASSOCIATION, and PHH MORTGAGE CORPORATION,

Defendants.

NO. 5:15-cv-2057-FMO-SPx

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND FOR INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES

Honorable Fernando M. Olguin

Complaint Filed: October 6, 2015

DATE: 12/12/2019
TIME: 10:00 a.m.
COURTROOM: First Street Federal Courthouse, 6th Fl., Courtroom 6D

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND FOR INCENTIVE AWARDS TO THE CLASS REPRESENTATIVES
CASE NO. 5:15-CV-2057-FMO-SP

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

I. INTRODUCTION

Plaintiffs and Class Counsel aggressively but efficiently litigated this nationwide class action under the Telephone Consumer Protection Act, 47 U.S.C § 227, *et seq*. ("TCPA"), engaged in mediation and extensive negotiations with PHH Mortgage Corporation ("PHH") and HSBC Mortgage Corporation (USA) ("Defendants"), and ultimately achieved a favorable settlement on behalf of the Settlement Class. The Settlement provides cash awards for Settlement Class members, despite significant hurdles to recovery had this litigation proceeded.

To compensate them for their efforts, Class Counsel request a fee award of $600,000, representing the benchmark in this circuit of 25% of the $2,400,000 Settlement Fund, reimbursement of $50,240.19 in litigation costs, and incentive awards for Plaintiffs Saber Ahmed and John Monteleone of $5,000 each for services they rendered to the Settlement Class by stepping forward to bring this case.

II. FACTS

A. Class Counsel's work.

Mr. Ahmed commenced this action on October 5, 2015, Dkt. No. 1, and was joined by Mr. Monteleone on March 17, 2017, Dkt. No. 27, who previously filed his own separate action against Defendants in the Northern District of Illinois in April of 2016. Plaintiffs allege that Defendants made calls to their cell phones without their consent and that the calls violated the TCPA, which prohibits calls made through the use of automatic telephone dialing system or prerecorded voice to a cellular telephone number. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

HSBC and PHH are separate legal entities. Dkt. No. 104-10, ¶ 9. HSBC is a national banking offering, among other things, personal mortgage loans. *See* Dkt.

No., 45 ¶¶ 3 and 9. PHH offers outsourcing services, such as collection calls, to large companies and banks, including HSBC. Dkt. No. 45, ¶ 101; Dkt. No. 46, ¶¶ 7 and 9; Dkt. No. 105-2, ¶ 21. HSBC transferred loan servicing of its mortgage accounts to PHH on May, 1, 2013. PHH began making debt collection calls for HSBC in May 2013. Dkt. No. 105-2, ¶ 23; *see also*, Dkt. No. 46, ¶¶ 7 and 9. PHH utilized telephone dialers offered by LiveVox, including the LiveVox HCI dialer, which Plaintiffs contend is an automatic telephone dialing system ("ATDS").

Class Counsel have worked for more than three years to prosecute this action and obtain a settlement for the benefit of the Settlement Class. Declaration of Beth E. Terrell in Support of Plaintiffs' Motion for Attorneys' Fees and Costs and for Incentive Awards ("Terrell Decl.") ¶ 2. The parties conducted considerable discovery shortly after filing. Plaintiffs served Defendants with nearly a dozen sets of written discovery. *Id*. ¶ 4. But obtaining discovery from Defendants was no easy feat. *Id*. ¶ 5. Defendants resisted any classwide discovery, including calling records and consent data contained in Defendants' systems and databases, as well as discovery relating to when and how Defendants tracked consent. *Id*. Even after Plaintiffs substantially prevailed in compelling this information, Dkt. No. 101, Defendants continued to resist production. The Magistrate Judge ordered additional briefing and conducted multiple, lengthy hearings to address the parties' ongoing discovery disputes. Dkt. Nos. 109, 119, 133-36, 141, 154, 168.

Defendants eventually produced discovery documents exceeding 80,000 pages. Terrell Decl. ¶ 4. Plaintiffs also deposed Defendants' representatives, Sheri Robinson, Michael Sgammato, and Denise Dickman. *Id*. Plaintiffs each responded to two sets of written discovery propounded by Defendants, and each sat for a deposition. *Id*. ¶ 5.

The parties additionally engaged in substantial motion practice. Plaintiffs successfully struck several of Defendants' affirmative defenses. Dkt. No. 117. Additionally, Defendants moved to strike the class allegations, which Plaintiffs opposed. Dkt. Nos. 76, 77. The Court had not yet ruled on Defendants' motion at the time the Magistrate Judge compelled classwide discovery. As a result, following the Magistrate Judge's ruling, Defendants filed an Ex Parte Application to Stay Rulings, Dkt. No. 104, a motion to Modify Scheduling Order, Dkt. No. 105, and a Motion for Reconsideration re: Order on Motion to Compel, Dkt. No. 106. On November 6, 2017, the Court denied Defendants' Motion to Strike Class Allegations and denied the Discovery Motions as moot. Dkt. No. 118. On November 13, 2017, Defendants moved for reconsideration of the Court's denial of the Discovery Motions and, alternatively, requested "that the Court facilitate an application for interlocutory appeal," pursuant to 28 U.S.C. § 1292(b). Dkt. No. 121, pp. 3-5. The motion was denied by the Court. Dkt. No. 139.

Following the denial of Defendants' motions, the parties agreed to mediation. The Hon. Jay C. Gandhi (Ret.) conducted two full day mediations, the first on April 20, 2018, and the second on December 5, 2018. Terrell Decl. ¶ 7. During the second mediation, the parties reached an agreement on all material terms. *Id*.

B. The Settlement.

Class Counsel achieved an excellent result for the Settlement Class. The proposed settlement requires Defendants to pay $2,400,000 into a Settlement Fund. Settlement Agreement ("Agr."), § 2.35, Dkt. No. 181-3. Subject to Court approval, the Settlement Fund will be used to make payments to all Settlement Class Members who submit timely and valid claims; pay the Settlement Administrator

the costs of notice and Settlement Administration Expenses in an amount not to exceed $210,000; pay Incentive Awards in the amount of $5,000 to each Class Representative; pay Class Counsel's attorneys' fees in an amount not to exceed $600,000; and actual litigation costs, which total $50,240.19.

After payment of Court-approved administrative expenses, attorneys' fees and expenses, and incentive awards, the Settlement Fund will be distributed equally to Settlement Class Members who submit timely and valid claims. *See* Agr. §§ 2.2 and 2.34. To participate, Settlement Class Members need only submit a claim form with his or her name, contact information, and cellular telephone number to which Settlement Class Members received allegedly unlawful calls. *See* Dkt. Nos. 185-1 and 188.

To date, 14,632 Settlement Class Members have submitted claims, there have been no objections, and just six requests for exclusion. Terrell Decl. ¶ 29. There are 39 days left for Settlement Class Members to submit claims, object, or opt out by the November 4, 2019 deadline. If 15% of the approximately 158,881 Settlement Class Members who have been identified from the calling records submit claims, the individual awards to Settlement Class Members will be approximately $60.00. *See* Dkt. No. 181-1 at p. 23.

III. ARGUMENT

A. The percentage-of-the-fund method is the appropriate method for determining a reasonable attorneys' fee in this case.

"In a certified class action, the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties agreement." Fed. R. Civ. P. 23(h).

The common fund doctrine is an equitable exception to the American rule that litigation must bear their own attorneys' fees. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). It is well settled that "a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorney's fee from the fund as a whole." *Id.* The "common fund" doctrine "rests on the principle that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Id.* A court with jurisdiction over the fund can "prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* "Ninth Circuit jurisprudence . . . permits the application of common fund principles where—as in the present case—the class of beneficiaries is identifiable and the benefits can be traced in order to allocate the fees to the class." *Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 457 (9th Cir. 2009). In such cases, "the common fund doctrine ensures that each member of the wining party contributes proportionately to the payment of attorneys' fees." *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003); *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("those who benefit in the creation of a fund should share the wealth with the lawyers who skill and effort helped create it").

Courts in the Ninth Circuit have discretion to award attorneys' fees using either the percentage-of-the-fund method or the lodestar method when settlement of a class action creates a common fund. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). The method a district court chooses to use, and its application of that method, must achieve a reasonable result. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Though courts

have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result."). As the Ninth Circuit has instructed, "[r]easonableness is the goal, and a mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997).

The Ninth Circuit and district courts in this circuit have recognized that the percentage-of-the-fund method is the appropriate method for calculating fees when counsel's effort has created a common fund. *See, e.g.*, *In re Bluetooth*, 654 F.3d at 942 ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar."); *In re Omnivision Techs., Inc.*, 559 F. Supp. 1036, 1046 (N.D. Cal. 2008) (observing that "use of the percentage method in common fund cases appears to be dominant" and discussing its advantages over the lodestar method); *see also Zubia v. Shamrock Foods Co.*, CV 16-08459 AB (AGRx), 2017 WL 10541431, at *6-7 (C.D. Cal. Dec. 21, 2017).

The lodestar method, by contrast, is typically used when the value of the class's recovery is difficult to determine. *See In re Bluetooth*, 654 F.3d at 941 (courts use the lodestar method when the relief is "primarily injunctive in nature and thus not easily monetized"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (noting that courts use the lodestar method when "there is no way to gauge the net value of the settlement or any percentage thereof"); *In re Nucoa Real Margarine Litig.*, No. CV 10-00927 MMM (AJWx), 2012 WL 12854896, at *23 (C.D. Cal. June 12, 2012) (allowing the lodestar method because some of the

benefit of the settlement was not easily monetized). Courts also use the lodestar method to determine a reasonable fee in cases involving a fee-shifting statute, "such as federal civil rights, securities, antitrust, copyright, and patent acts." *In re Bluetooth,* 654 F.3d at 941. The lodestar method, however, has been criticized as encouraging lawyers to prolong the litigation and discourage early settlements that would benefit the class. *See Vizcaino*, 290 F.3d 1050 n.5 ("[I]t is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement").

The percentage-of-the-fund method is the appropriate method for determining a reasonable fee in this case. The benefit to the Settlement Class is easily quantified. Class Counsel's efforts resulted in a $2,400,000 common fund, which will be distributed to the Settlement Class after settlement expenses, including administration expenses, Court-approved fees and costs, and Court-approved incentive awards are deducted. Using the percentage-of-the-fund method in this case will recognize Class Counsel's efficiency and their efforts to achieve the highest possible recovery for the Settlement Class.

1. A fee award at the Ninth Circuit benchmark of 25% of the Settlement Fund will fairly compensate Class Counsel for their work on behalf of the Settlement Class.

The Ninth Circuit has instructed that 25% is "a proper benchmark figure," with common fund fees typically ranging from 20% to 30%. *In re Coordinated Pretrial*, 109 F.3d at 607 (citation omitted); *see also In re Bluetooth*, 654 F.3d at 942 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying the departure."). The 25% benchmark is the starting point

for the analysis, and the percentage may be adjusted up or down based on the court's consideration of "all the circumstances in the case." *Vizcaino*, 290 F.3d at 1048. The relevant circumstances include (1) the results achieved for the class, (2) the risk counsel assumed, (3) the skill required and the quality of the work, (4) the contingent nature of the fee, (5) whether the fee is above or below the market rate, and (6) awards in similar cases. *Id.* at 1048-50.

Consideration of the circumstances of the case supports a fee award of 25% of the Settlement Fund, or $600,000.

a. *Class Counsel achieved an excellent settlement for the Settlement Class.*

The $2,400,000 settlement reflects the success Class Counsel achieved throughout the contentious litigation, while recognizing the challenges ahead, including whether Plaintiffs could have prevailed on a motion for class certification, and whether the Court would agree with Plaintiffs that the LiveVox HCI dialer used by Defendants meets the definition of ATDS. If Defendants prevailed on either issue, Settlement Class Members may not have recovered anything. If fifteen percent of Settlement Class Members submit claims, Class Counsel estimate they will receive individual awards of approximately $60.00. Dkt. No. 181-1 at p. 23.

These awards are in line with many other TCPA settlements in this circuit and around the county, including a long list of cases approved by this district court and other district courts in California. *See Adams v. AllianceOne Receivables Mgt., Inc.*, No. 3:08-cv-00248, Dkt. Nos. 137, 116 at 7, & 109 at 10–11 (S.D. Cal.) (approving $40-per-claimant settlement); *Lushe v. Verengo, Inc.*, No. CV 13-07632-AB (PJWx), Dkt. No. 137 at 3 (C.D. Cal.) ($40 to $80 per claimant);

Couser v. Comenity Bank, 125 F. Supp. 3d 1034, 1043 (S.D. Cal. 2015) (approximately $13.75 per claimant); *Franklin v. Wells Fargo Bank, N.A.*, No. 14CV2349-MMA (BGS), 2016 WL 402249, at *3 (S.D. Cal. Jan. 29, 2016) ($71.16 per claimant); *Malta v. Freddie Mac & Wells Fargo Home Mtg.*, 2013 WL 5467425 (S.D. Cal. June 21, 2013) ($84.82 per claimant); *Sarabri v. Weltman, Weinberg & Reis Co.*, L.P.A. No. 3:10-cv-01777-AJB-NLS, Dkt. No. 31-1 at 3 (S.D. Cal.) ($48.67 per claimants); *Steinfeld v. Discover Fin. Servs.*, No. 3:12-cv-01118-JSW, 2014 WL 1309352, at *6 (N.D. Cal. Mar. 10, 2014) (payments estimated to be between $20 and $40); *Rose v. Bank of Am. Corp.*, 12 Civ. 04009, 2014 WL 4273358, at *10 (N.D. Cal. Aug. 29, 2014) (discussing range of acceptable TCPA settlements and approving $20.00 to $40.00 per claimant).

This factor weighs in favor of Class Counsel's fee request.

b. *Class Counsel assumed a significant risk of no recovery.*

Class Counsel's fee request also reflects that the case was risky and handled on a contingency basis. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015); *Vizcaino*, 290 F.3d at 1048; *see also Jenson v. First Tr. Corp.*, No. CV 05-3124 ABC, 2008 WL 11338161, at *12 (C.D. Cal. June 9, 2008) ("Uncertainty that *any* recovery ultimately would be obtained is a highly relevant consideration. Indeed, the risks assumed by Counsel, particularly the risk of non-payment or reimbursement of expenses, [are] important to determining a proper fee award." (internal citation omitted)). In granting preliminary approval of the proposed Settlement, the Court noted "the substantial litigation risks in this case." Dkt. No. 186, p. 16, ln. 15.

Class Counsel represented Plaintiffs and the proposed class entirely on a contingent basis and faced the very real risk they would not recovery any fees and

costs. "The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *Omnivision*, 559 F. Supp. at 1046-47. Defendants vigorously contested the claims asserted by Plaintiffs in this action, contending that Plaintiffs provided them with consent to call and that they obtained consent from customers on a case-by-case basis in a variety of ways. Defendants believe that consent is an individualized issue that precluded class certification. Additionally, Plaintiffs risked that the Court would determine the LiveVox HCI dialer used by Defendants does not meet the definition of an ATDS, especially considering the D.C. Circuit's decision in *ACA Int'l v. Federal Communications Commission*, 85 F.3d 687 (D.C. Cir. 2018), and rulings from other courts concluding that the LiveVox HCI dialer is not an ATDS. *See, e.g., Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 WL 1567852, at *4-6 (D. Nev. Mar. 30, 2018).

These risks weigh in favor of Class Counsel's fee request.

c. *Class Counsel's skill and quality of work delivered a recovery for the Settlement Class.*

The "prosecution and management of a complex national class action requires unique legal skills and abilities." *Omnivision*, 559 F. Supp. 2d at 1047 (internal quotation marks and citation omitted). Class Counsel were able to litigate this case efficiently because of their experience litigating nationwide TCPA class actions. Class Counsel have successfully litigated dozens of TCPA cases. *See* Terrell Decl. ¶ 10; Declaration of Alexander H. Burke ("Burke Decl.") ¶ 6; Declaration of Abbas Kazerounian ("Kazerounian Decl.") ¶ 26; Declaration of Matthew R. Mendelsohn ("Mendelsohn Decl.") ¶ 8; Declaration of Todd M. Friedman ("Friedman Decl.") ¶ 7. Their depth of experience with TCPA class

actions allowed Class Counsel to clear several procedural hurdles, including Defendants' resistance to discovery, and to negotiate a settlement that capitalized on the claims' strengths, while taking into account the risks of continued litigation.

"The quality of opposing counsel is also relevant to the quality and skill that class counsel provided." *Destefano et al. v. Zynga, Inc., et al.*, Case No. 12-cv-04007-JSC, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016). HSBC and PHH's counsel indicated early in the litigation that they planned to aggressively challenge Plaintiffs' claims, as evidenced by the fifteen affirmative defenses Defendants asserted in their answer. Dkt. No. 19. Class Counsel's ability to negotiate a favorable settlement despite the opposition of HSBC and PHH supports the fee request. *See, e.g., Lofton v. Verizon Wireless (VAW) LLC*, No. C 13-05665 YGR, 2016 WL 7985253, at *1 (N.D. Cal. May 27, 2016) (the "risks of class litigation against an able defendant well able to defend itself vigorously" support an upward adjustment in the fee award).

d. *Awards in similar cases show that the requested fee is reasonable.*

Courts in this circuit have routinely awarded attorneys' fees at the 25% benchmark, or higher, in TCPA cases. *See, e.g., Cabiness v. Educ. Fin. Sols., LLC,* No. 16-CV-01109-JST, 2019 WL 1369929, at *7 (N.D. Cal. Mar. 26, 2019) (awarding 30% of the TCPA settlement fund); *Gergetz v. Telenav, Inc.*, No. 16-CV-04261-BLF, 2018 WL 4691169, at *7 (N.D. Cal. Sept. 27, 2018) (awarding 30% of the TCPA settlement fund); *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, No. 16-CV-00182-H-BLM, 2018 WL 1470198, at *7 (S.D. Cal. Mar. 26, 2018) (awarding 28.8% of the TCPA settlement fund); *Vandervort v. Balboa Capital Corp.,* 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of the TCPA

settlement fund); *Lo v. Oxnard European Motors, LLC,* No. 11CV1009 JLS, 2012 WL 1932283, at *3 (S.D. Cal. May 29, 2012) (awarding 25% fee request where TCPA class action settled two months after commencement of the lawsuit).

Thus, consideration of all relevant factors confirms the reasonableness of a benchmark fee award of 25% of the Settlement Fund.

2. A lodestar crosscheck confirms that the requested fee is reasonable.

In the Ninth Circuit, courts may use a rough calculation of the lodestar as a crosscheck to assess the reasonableness of an award based on the percentage method. *Vizcaino*, 290 F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."). "[I]t is well established that '[t]he lodestar cross-check calculation need entail neither mathematical precision nor bean counting... [courts] may rely on summaries submitted by the attorneys and need not review actual billing records.'" *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal. 2015) (quotation omitted).

Courts use a two-step process in applying the lodestar method. First, the court calculates the "lodestar figure" by multiplying the numbers of hours reasonably expended by a reasonable rate. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008). Once the lodestar is determined, the amount may be adjusted to account for several factors, such as the benefit obtained for the class, the risk of nonpayment, the complexity and novelty of the issues presented, and the awards in similar cases. *See In re Bluetooth*, 654 F.3d at 942. Foremost among the considerations is the benefit obtained for the class. *Id.*

a. *Class Counsel's rates are consistent with rates in the community for similar work performed by attorneys of comparable skill, experience, and reputation.*

Class Counsel's hourly rates are reasonable. In determining a reasonable rate, the court considers the "experience, skill and reputation of the attorney requesting fees." *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1996). Courts also consider the prevailing market rates in the relevant community, which is the forum in which the district court sits. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). Class Counsel are experienced, highly regarded members of the bar with extensive expertise in the area of class actions and complex litigation involving consumer claims like those at issue here. *See* Terrell Decl. ¶ 10. Class Counsel set their rates for attorneys and staff members based on a variety of factors, including: the experience, skill, and sophistication required for the types of legal services typically performed; the rates customarily charged in the markets where legal services are typically performed; and the experience, reputation, and ability of the attorneys and staff members. Terrell Decl. ¶ 24; Burke Decl. ¶ 16; Kazerouni Decl. ¶¶ 13-14; Mendelsohn Decl. ¶¶ 16-17; Declaration of Jason A. Ibey ("Ibey Decl.") ¶¶ 11-12; Declaration of Nicholas R. Barthel ("Barthel Decl.") ¶ 11; Friedman Decl. ¶¶ 9-12; Declaration of Joshua B. Swigart ("Swigart Decl.") ¶ 9. Together, Class Counsel charge rates for attorneys and paralegals in the range of $295 to $850. *Id.*

These rates are consistent with those the courts in this district have found reasonable for law firms serving as plaintiffs' counsel in class actions. *See Roberti v. OSI Sys., Inc.*, No. CV 130917MWFMRW, 2015 WL 8329916, at *7 (C.D. Cal. Dec. 8, 2015) (finding attorney rates between $525 to $975 were reasonable based on experience); *Klee v. Nissan N. Am., Inc.*, No. CV 12-08238 AWT (PJWx), 2015

WL 4538426 (C.D. Cal. July 7, 2015) (supporting hourly rates for senior attorneys between $370-$695 in consumer class action); *Aarons v. BMW of N. Am., LLC*, No. CV 11-7667 PSG (CWx), 2014 WL 4090564 (C.D. Cal. Apr. 29, 2014) (supporting hourly rates for partners up to $775 in consumer class action); *Kearney v. Hyundai Motor Am.*, No. SACV 09–1298–JST (MLGx), 2013 WL 3287996, at *8 (C.D. Cal. June 28, 2013) (authorizing hourly rates for attorneys ranging from $650-$800 in consumer class action); *Parkinson v. Hyundai Motor Am.*, 796 F. Supp. 2d 1160, 1172 (C.D. Cal. 2010) (supporting hourly rates between $445-$675 in consumer class action); *Browne v. Am. Honda Motor Co.*, No. CV 09–06750 MMM (DTBx), 2010 WL 9499073, at *7 (C.D. Cal. Oct. 5, 2010) (authorizing hourly rates between $445-$675 for attorneys with experience ranging from seven to fifteen years of experience in consumer class actions); *Rutti v. Lojack Corp.*, No. SACV 06-350 DOC JCX, 2012 WL 3151077, at *11 (C.D. Cal. July 31, 2012) (approving hourly rates of $650 and $750).

b. *Class Counsel expended a reasonable number of hours litigating the case.*

Class Counsel's declarations describe how they spent their time on necessary tasks. Together, they have devoted approximately 2,302 hours to the investigation, litigation, and resolution of this complex case, thereby incurring more than $1,235,113 in lodestar. Class Counsel spent time analyzing factual and legal issues, briefing multiple motions, reviewing and analyzing documents and data, preparing for and taking depositions, attending mediation, and working with the claims administrator regarding notice. Terrell Decl. ¶¶ 2-7. Class Counsel estimate they will incur additional hours to see this case through to its final resolution. *Id*. ¶ 26.

The time Class Counsel devoted to this case is reasonable. Plaintiffs faced determined and sophisticated adversaries represented by experienced counsel. Class Counsel prosecuted the claims at issue efficiently and effectively, making every effort to prevent the duplication of work. Knowing it was possible they would never be paid for their work, Class Counsel had no incentive to act in a manner that was anything but economical. *See Moreno v. City of Sacramento*, 534 F.3d at 1112 ("[L]awyers are not likely to spend unnecessary time on contingency cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."). And still, Class Counsel took their role seriously and endeavored to represent the interests of the class members to the greatest extent possible.

For these reasons, Class Counsel's hourly rates and hours worked reflected in the lodestar are reasonable.

c. *Counsel's requested fee reflects a "negative" multiplier.*

A negative multiplier "strongly suggests the reasonableness of the negotiated fee." *Rosado v. Ebay Inc.*, No. 5:12-cv-04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016); *see also Gong-Chun v. Aetna*, No. 1:09-CV-01995-SKO, 2012 WL 2872788, at *23 (E.D. Cal. July 12, 2012) (holding that a negative multiplier of .79 suggests that the negotiated fee award is reasonable); *Chun-Hoon v. Mckee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (reasoning that a negative multiplier suggests a reasonable and fair valuation of the services provided by counsel); *Cabiness,* 2019 WL 1369929 at *7 (fee award "represents only 76 percent of Class Counsel's claimed lodestar").

Here, counsel seek an attorneys' fee of $600,000, which is substantially less than counsel's lodestar of $1,235,113. Therefore, the fee requested by Class

Counsel, which amounts to just 49 percent of their lodestar, already reflects a "negative" multiplier. Given the range of upward multipliers approved by courts within this Circuit, *see Vizcaino*, 290 F.3d at 1051 n.6 (finding that courts in the Ninth Circuit award multipliers ranging from 1.0 to 4.0), Class Counsel's fee request, reflecting a "negative" multiplier, is reasonable.

B. Class Counsel's litigation costs were necessarily and reasonably incurred.

"Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionately by those class members who benefit from the settlement." *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Class Counsel incurred out-of-pocket costs totaling $50,240.19, primarily to cover expenses related to filing fees, computerized legal research, travel, lodging, mediation fees, and administrative costs such as copying, mailing, and messenger expenses. Terrell Decl. ¶ 27; Burke Decl. ¶ 17; Kazerounian Decl. ¶ 17; Mendohlson Decl. ¶ 20; Swigart Decl. ¶ 11; Friedman Decl. ¶ 16; *see also*, Agr. § 15.1. Class Counsel put forward these out-of-pocket costs without assurance that they would ever be repaid. Terrell Decl. ¶ 21. These out-of-pocket costs were necessary to secure the resolution of this litigation, and should be recouped. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-1178 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs, computerized legal research fees, and mediation expenses are relevant and necessary expenses in class action litigation).

C. Plaintiffs request incentive awards of $5,000 each.

Class representatives are eligible for reasonable incentive awards. *Staton*, F.3d at 977. The Ninth Circuit has explained that incentive awards are "intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.'" *In re Online DVD-Rental*, 779 F.3d at 943 (quoting *Rodriquez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)). The awards recognize the effort class representatives expend and the financial or reputational risk they undertake in bringing the case, and to recognize their willingness to act as private attorneys general. *W. Publ'g Corp.*, 563 F.3d at 958-59. Incentive awards are appropriate when, as here, they are not the product of collusion and do not come at the expense of the remaining class members. *Louie v. Kaiser Found. Health Plan, Inc.*, No. 08CV0795 IEG RBB, 2008 WL 4473183, at *7 (S.D. Cal. Oct. 6, 2008) (approving incentive awards of $25,000 each).

Unlike unnamed Settlement Class Members, who are passive beneficiaries of the representatives' efforts on their behalf, named plaintiffs agree to be the subject of discovery, including making themselves available as witnesses at deposition and trial, and subject themselves to other obligations of named parties. Incentive awards, which serve as premiums in addition to any claims-based recovery from the settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits, and ensure that meritorious actions are prosecuted to completion. *Linney v. Cellular Alaska P'ship*, No. C-96-3008 DLJ, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997), *aff'd*, 151 F.3d 1234 (9th Cir. 1998) (approving incentive awards of $25,000 each).

In this case, Plaintiffs protected the interests of the Settlement Class for more than three years. Each actively assisted in the prosecution of this case by

searching and preserving personal records, responding to two sets of Defendants' discovery requests, and providing declarations. Terrell Decl. ¶ 28. Mr. Ahmed and Mr. Monteleone each sat for a full-day deposition as well. *Id*. Mr. Ahmed and Mr. Monteleone estimate they have spent at least 80 and 30 hours, respectively, in connection with the lawsuit. *Id.*

The requested incentive award of $5,000 to each Plaintiff is reasonable, particularly since it is in line with the Ninth Circuit's benchmark for incentive awards. *See In re Yahoo Mail Litig.*, No. 13-Cv-4980-LHK, 2016 WL 4474612, at *11 (N.D. Cal. Aug. 25, 2016) ("The Ninth Circuit has established $5,000.00 as a reasonable benchmark award for representative plaintiffs."); *Vandervort v. Balboa Capital Corp*., 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding $5,000 incentive awards to each of two TCPA plaintiffs); *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936, 2015 WL 758094, at *7 (N.D. Cal. Feb. 20, 2015) (awarding $5,000 incentive awards to plaintiffs who searched personal records, were deposed, responded to interrogatories and request for production, provided declarations, and attended or consulted during mediation); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (approving $7,500 incentive awards where the plaintiffs assisted class counsel, responded to discovery, and reviewed settlement terms, and collecting decisions approving incentive awards ranging from $5,000 to $40,000).

IV. CONCLUSION

Class Counsel request that the Court award attorneys' fees in the amount of $600,000, which is 25% of the settlement fund, reimburse $50,240.19 in actual litigation costs, and authorize incentive awards of $5,000 each in recognition of

Plaintiffs' representation of the Settlement Class. A copy of this motion will be promptly posted on the settlement website.

RESPECTFULLY SUBMITTED AND DATED this 26th day of September, 2019.

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I, Adrienne D. McEntee, hereby certify that on September 26, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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