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Counsel for Plaintiffs and the Settlement Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

SEAN HARTRANFT, on behalf of himself and all others similarly situated,

Plaintiff,

v.

TVI, Inc. d/b/a SAVERS, INC., APOGEE RETAIL, LLC,

Defendants.

CASE NO. 8:15-cv-01081-CJC-DFM

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS, CLASS REPRESENTATIVE INCENTIVE AWARD, AND SETTLEMENT ADMINISTRATOR COSTS

Judge: Hon. Cormac J. Carney
Date: October 21, 2019
Time: 1:30 p.m.
Place: Courtroom 7C

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I. INTRODUCTION

The Court preliminarily approved the Settlement on April 18, 2019. (Dkt. 101.) In this motion, and subject to final approval of the Settlement, Class Counsel requests reasonable attorneys' fees and costs in the amount of $900,000.00, broken down into $885,665.00 for attorneys' fees and litigation expenses in the amount of $14,335.00. Plaintiff also seeks approval of an Incentive Payment of $5,000.00 for the Class Representative, to be paid separately by Defendant.[1] Settlement Class Members are satisfied with the results Class Counsel obtained. While it is about one month into the claims process and the deadline for objecting and opting out is still over a month away, as of the date of preparing this brief, here are zero objectors and only 45 Settlement Class Members out of 747,635 Class Members receiving the mailed notice have opted out of the Settlement.

In the Preliminary Approval Order, the Court concluded that "[t]he vouchers in this settlement more closely resemble the gift cards in *In re Online* than the e-credits in *In re HP*[,]" and "determine[d] that the instant settlement is not a 'coupon settlement' within the meaning of Section 1712 of the CAFA." (Dkt. 157 at 17-18.) [2] Plaintiff submits the attorneys' fees requested ($885,665) is reasonable whether based on the lodestar method, with a multiplier of 1.3, [3] or based on a percentage of the potential value of the settlement. The amount of the requested award is appropriate for the following reasons:

- Plaintiff achieved a substantial settlement value for the Class Members, despite the precarious financial position of Defendants, as detailed in the motion for Preliminary Approval, with the Defendants on the verge of

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[1] It should also be noted that Class Counsel's attorneys' fees and expenses do not come from benefits made available to the Settlement Class.

[2] For citations to other pleadings, Plaintiffs cite to the page numbers electronically generated at the top of each page by the ECF docket management system.

[3] $664,245.00 x 1.33334086 = $885,665

bankruptcy;

- The settlement process was long and tedious, and had to take into account the cash position and resources of Defendants, leading to a negotiated settlement whereby the claimants can choose to receive either a Certificate worth $75.00 worth of goods from Defendants' stores, or, at the claimant's option, $25.00 in cash;

- As detailed below, Class Counsel incurred substantial time and effort in litigating the case, including serving and responding to discovery, including confirmatory discovery, law and motion practice, mediation, and a lengthy negotiation once the mediator Judge Edward A. Infante (Ret.) was able to mediate a structure for the settlement;

- The fees here were contingent on the success of the case, and Class Counsel risked losing the fees incurred and the $14,335.00 of actual out-of-pocket expenses;

- Class Counsel have incurred a significant delay in obtaining any fee and were forced to forego other employment due to this litigation; and

- The requested fees and expenses were fully disclosed in the Court-approved Notice Package and to date no Settlement Class member has objected.

- Class Counsel also seek approval of the $421,000.00 in third-party administration costs for the administration of the Settlement provided by CPT Group pursuant to the Court's order.

Accordingly, based on relevant law and the complete record in this case, Plaintiff and Class Counsel request the Court to approve the following: (1) attorneys' fees and expenses in the amount of $900,000.00 payable by Defendants to

Class Counsel, including the reimbursement of litigation expenses in the amount of $14,335.00; approval of an award of an Incentive Award of $5,000.00 to Plaintiff, and $421,000 to CPT Group, Inc., both payable separately by Defendants. Defendants do not object to those amounts.

II. LITIGATION AND SETTLEMENT HISTORY

A. The Litigation Has Taken More Than Four Years

On July 8, 2015, Plaintiff filed suit against TVI, Inc. doing business as Savers, and Savers' subsidiary Apogee Retail, LLC (collectively, "Defendants"), alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by using an automatic telephone dialing system and/or an artificial or prerecorded voice to call cellular telephones in connection with seeking donations of cash and goods, without his prior express consent and that of putative class members (the "Complaint"). (Dkt. 1.) Plaintiff sought relief for himself as well as all persons and entities to which, between and including July 1, 2011, to September 30, 2015, Apogee made or attempted to make one or more telephone calls to their cellular telephones regarding donation solicitation on behalf of all charities called by Defendants (the "Settlement Class") (*Id.*), later narrowed in the Settlement Agreement to include only those persons Defendants called while soliciting donations on behalf of the Epilepsy Foundation of America. On August 5, 2015, Defendant Apogee Retail, and TVI, Inc. answered the Complaint.(Dkt. 17.) A Rule 26(f) Discovery Report was filed on September 23, 2015. (Dkt. 23.) Plaintiff served his discovery on October 2, 2015. On November 16, 2015, the Court granted Defendants' motion to stay the action pending the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540, 194 L.Ed. 635 (2016). After *Spokeo* had been decided by the Supreme Court, on October 12, 2016, the Parties filed competing motions to lift and continue the stay. (Dkt. 47 and 48). On November 30, 2016, the Court granted the motion to lift the stay and the case proceeded. (Dkt. 55). The Parties then met and conferred on the discovery issues.

Defendants then finally responded to Plaintiff's discovery on December 28, 2016, delayed due to the ligation stay. Defendants served discovery on Plaintiff on January 10, 2017, to which Plaintiff responded on February 9, 2017.

On January 31, 2017, a First Amended Complaint ("FAC") was filed pursuant to stipulation. (Dkt. 57, 58 & 61). Defendant TVI, Inc. then filed a motion to dismiss (Dkt. 62), while Defendant Apogee Retail, LLC filed an Answer to the FAC denying the allegations. (Dkt. 63). The motion to dismiss was denied March 9, 2017. (Dkt. 68). The parties then agreed to pursue mediation and the Court stayed the case pursuant to the Parties' stipulation on May 4, 2015. (Dkt. 72 and 73). Since that date, the parties worked on informal discovery procedures, attended mediation and negotiated the settlement details.

As can be gleaned from above, Defendants have retained experienced counsel, and defended vigorously throughout the case, from the pleading stage through discovery and settlement.

B. Class Counsel Conducted Sufficient Discovery

Class Counsel diligently investigated the Class claims against Defendants, the law applicable to the claims, and all applicable defenses. Class Counsel made initial disclosures and exchanged written discovery. (*See* Declaration of Douglas J. Campion In Support of Plaintiff's Motion for Attorneys' Fees, Expenses and Incentive Award ("Campion Decl.") ¶ 3.) Formal written discovery was propounded and responded to, as well the production and exchange of relevant documents. (*Id.*) The Parties met and conferred extensively regarding discovery responses and document productions, and finally resolved their discovery issues without Court intervention. Informal discovery also occurred to allow the mediation to proceed. (*Id.*)

C. Class Counsel Obtained Meaningful Benefits for the Class

During the mediation, the Parties did not reach a settlement, but negotiations continued thereafter, resulting in the Settlement. (*Id.* ¶ 4.) The Settlement was a

long, hard-fought process, negotiated at arms' length, and included a day-long mediation and several follow-up telephone conferences with the Hon. Edward A. Infante, (Ret.), a JAMS mediator well known for his experience in resolving many TCPA cases, as well as a multitude of other settlements. (*Id.*)

Class Counsel obtained meaningful relief for the Settlement Class. Any Settlement Class Member that files an approved claim shall receive a certificate from the Claims Administrator that is : 1) redeemable by the claimant for $75.00 in merchandise sold at any of Defendants' 145 U.S. Savers or Value Village stores; or 2) alternatively, at the sole discretion of the claimant, he or she may instead redeem the Certificate through the Claims Administrator for a check in the amount of $25.00, paid by Defendants. (*Id*., ¶ 6.)

D. Class Counsel Sought and Obtained Preliminary Approval of the Settlement

On March 11, 2019, Plaintiff filed his Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement ("Preliminary Approval Motion"). (Dkt. 99.) On April 18, 2019 the Court preliminary approved the Settlement. (Dkt. 100.)

III. CLASS COUNSEL'S REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE

A. This Is Not A Common Fund Settlement

This is necessarily not a common fund settlement, due to the difficult financial position of the Defendants as revealed at the mediation. Thus, the settlement did not result in a recovery of a certain and calculable fund on behalf of the Class. Instead, each Class Member will obtain a fixed sum as a recovery, either $25.00 in cash or $75.00 in goods and the total amount obtained for the Class will depend on the number of claims submitted.

However, the Court previously stated in the Preliminary Approval Order, "[a]ssuming that section 1712 does not apply, the Court will likely apply the

percentage-of-recovery method to determine any award of attorneys' fees." (Dkt. 135 at 3 fn. 1, citing *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997).) But here because of the lack of a common fund, and the very high potential range of value of the settlement if the number of potential claimants are multiplied by the potential dollar amounts of the claims, Class Counsel do not seek a fee based on a percentage of the potential recovery. Instead Class Counsel seek a fee based on their lodestar plus a multiplier. Therefore, Class Counsel will address the fee request under the lodestar method, followed by a brief percentage approach analysis based on the potential value available to the Settlement Class. Courts within the Ninth Circuit have discretion to use either 1) a percentage of the fund method, or 2) lodestar plus a risk multiplier. *Staton v. Boeing Co.*, 327 F.3d 938, 967-68 (9th Cir. 2003).

B. The Lodestar Method Confirms the Reasonableness of the Attorneys' Fees Sought

Under the lodestar method, a "lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *In re Bluetooth*, 654 F.3d at 941 (citing *Staton* 327 F.3d at 965). The district court may adjust this lodestar figure "upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors." *Id.* at 941–42.[4] Although "the lodestar figure is

[4] At the time of filing this motion well in advance of the hearing date, and with about two months left in the Claims Period, Class Counsel do not know the total number of claims that will be filed, but if they are few in number, that should not be a factor that reduces the fees requested. The Supreme Court has a rejected the argument that the fees must be proportional with the damages recovered. *City of Riverside v. Rivera*, 477 U.S. 561, 581, 106 S. Ct. 2686 (footnote omitted); *see also Johnson v. Eaton*, 80 F.3d 148 (5th Cir. 1996); *Carroll v. Wolpoff &Abramson*, 961 F.2d 459 (4th Cir. 1992), *cert. denied*, 505 U.S. 905(1992); *Beecher v. Able*, 441 F.Supp. 426 (S.D.N.Y. 1977).

'presumptively reasonable,' the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors." *Id*. at 941–42 (citation omitted). *See also Martino v. Denevi*, 182 Cal.App.3d 553, 559 (1986) ("Testimony of an attorney as to the number of hours worked on a particular case is sufficient evidence to support an award of attorney fees, even in the absence of detailed time records.").

The first step in the lodestar method is to multiply the number of hours counsel reasonably expended on the litigation by a reasonable hourly rate. *See Hanlon v. Chrysler Group*, 150 F.3d 1011, 1029 (9th Cir. 1998)Here, Class Counsel's total lodestar for the three firms is $664,245.[5] (Campion ¶ 9, Exh. 1.; Chase ¶ 14., Exh. 2; and Sousa ¶ 6. Exh. 1.) Using a multiplier of 1.3, the fees of $885,665 sought are reasonable.

1. Class Counsel's Lodestar is Reasonable

Class Counsel's combined total lodestar of $664,245 is reasonable. Class Counsel prosecuted the claims at issue efficiently and effectively, making every effort to prevent the duplication of work that might have resulted from having multiple firms working on this case. The accompanying declarations of Class Counsel set forth the hours of work and billing rates used to calculate their lodestar. As described in those declarations, Class Counsel and their staffs have devoted a total of approximately 1,093.9 hours to this litigation, and have a total lodestar to date of approximately $664,245. Furthermore, the lodestar will grow before the hearing on this matter, reducing the multiplier, because these amounts do not include the additional time that Class Counsel will spend going forward in seeking approval of, and implementing, the Settlement, including assisting Class Members with

[5] This amount is the result of each of the firm's lodestar; Law Offices of Douglas J. Campion, APC for $296,700, BisnarChase LLP for $187,295 and Law offices of Michael Sousa, APC for $180,250.

claims and overseeing claims administration generally, tasks that can require substantial additional hours not reflected in a multiplier calculated on current lodestar. Class Counsel will continue to assist Class Members with individual inquiries, will oversee the claims resolution process, and will help resolve Class member challenges to the result of their claims submissions. Judging by previous experiences, these responsibilities will require a substantial number of hours of work by Class Counsel over the coming months.

Class Counsel's time was spent primarily on the following tasks: (1) investigating the claims of the Plaintiff and Class Members; (2) conducting legal research regarding and preparing opposition briefs opposing Defendants' motions to stay, renew the stay, and to dismiss; (3) conducting formal and informal discovery; (4) engaging in particularly difficult settlement negotiations that spanned many months, preceded by a full-day mediation and several follow-up telephone mediation conferences; (5) reviewing confirmatory discovery and data; (6) drafting the Settlement Agreement and all supporting documents and exhibits; (7) drafting the preliminary approval motion and supporting documents; (8) overseeing settlement administration; and (9) responding to Class Member inquiries. Thus, the hours incurred in litigating this case were reasonable.

2. Class Counsel's Hourly Rates Are Reasonable

In assessing the reasonableness of an attorney's hourly rate, courts consider whether the claimed rate is "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1994). Here, the hourly rates are $750 for Douglas J. Campion, Esq. of Law Offices of Douglas J. Campion, APC; $850 for Brian D. Chase, $600 for Jerusalem F. Beligan, and $200 for Javier R. Ruiz of BisnarChase LLP; and $500 for Michael P. Sousa, Esq. of Law Offices of Michael P. Sousa, APC. As set forth in their declarations filed herewith, Class Counsel here 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. As shown in those declarations, Class Counsel's customary rates used in calculating the lodestar here have been approved by courts in this District and other courts.

C. A Court May Enhance the Award by Using a Multiplier

1. A Multiplier Is Used to Provide A Reasonable Fee

Once the lodestar figure is determined, the court may take into consideration additional factors to enhance the lodestar, including:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the requisite legal skill necessary; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount at controversy 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.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975); *Hanlon*, *supra,* 150 F.3d at 1029; *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006). Plaintiff's counsel seek a multiplier of their lodestar of 1.3. The Court may enhance the lodestar with a multiplier to arrive at a reasonable fee. *See Kerr v. Screen Extras Guild, Inc*., 526 F.2d at 70; *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1051 (court found in a cross check of a common fund award that a lodestar multiplier of 3.65 was reasonable using the *Kerr* factors cited above, including "the complexity of this case, the risks involved and the length of the litigation," and the fact the case was taken on a contingency.); *Steiner v. Am. Broad. Co*., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (25% fee reasonable where effective multiplier was 6.85). [6] Upward adjustments may be appropriate based on the results obtained, the

[6] *See also, e.g., In re Merry-Go-Round Enterprises, Inc*., 244 B.R. 327 (Bankr. D. Md. 2000) (40% award of $71.2 million fund; cross-check multiplier of 19.6); In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706 (E.D. Pa. 2001) (25% award of

quality of representation, the complexity and novelty of the issues presented, the risk of nonpayment, and any delay in payment. Manual for Complex Litigation ("MCL") 4th § 14.122, at 261. As discussed below, a multiplier is also often applied where the case is litigated on a contingency basis. Courts have approved fee awards resulting in multipliers which are near or much higher than that requested here. *See, e.g., Vizcaino*, 290 F.3d at 1051 n.6 and Appendix (affirming 28% fee award where multiplier equaled 3.65; and citing cases approving multipliers in common fund cases going as high as 19.6); *Steiner v. Am. Broad. Co.*, 248 Fed. Appx. 780, 783 (9th Cir. Cal. 2007) (upholding 25% fee award yielding multiplier of 6.85, finding that it "falls well within the range of multipliers that courts have allowed"); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1125 (C.D. Cal. 2008) (approving 25% fee award yielding a multiplier of 5.2 and stating that "there is ample authority for such awards resulting in multipliers in this range or higher").

2. Class Counsel Achieved Meaningful Relief for the Class

The results achieved in the Settlement support Class Counsel's request of attorneys' fees. At mediation, it appeared that no favorable result would be obtained, due to the Defendants' financial problems and the public information available about those difficulties. However, after many months and creative approaches to the issues, Class Counsel were able to overcome those difficulties and obtain this Settlement with substantial benefits to the Class. Class Counsel negotiated a settlement where any Settlement Class Member who files an approved claim shall receive a certificate from the Claims Administrator. Each certificate shall be: 1) redeemable by the claimant for $75.00 in merchandise sold at any of Defendants' 145 U.S. Savers or Value Village stores; or alternatively, 2) at the sole discretion of the claimant, he or she may instead redeem the Certificate through the

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$193 million fund; multiplier of 4.5- 8.5); *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587 (E.D. Pa. 2005) (25% of $126,000,000 fund; multiplier of 6.96); *In re RJR Nabisco, Inc. Sec. Litig*, 1992 WL 210138 (S.D.N.Y Aug. 24, 1992) (25% of $72.5 million; multiplier of 6).

Claims Administrator for a check in the amount of $25.00, paid by Defendants. If all 747,635 Class Members submitted a claim and received a Certificate with $75.00 in value, that amount is an extraordinary $581,072,625.00. Alternatively, if all Class Members filed a claim and opted for the $25.00 check, that total value would still also be a very substantial $18,690,875.00. Separate and apart from the relief made available to the Settlement Class, Class Counsel was able to negotiate a fund of $900,000.00 to be paid separately by Defendants to cover reasonable attorneys' fees and costs, and a separate payment of the $5,000.00 Incentive Payment. Thus, the total relief made available to the Settlement Class is not diminished by attorneys' fees and costs, or the incentive payment, which could have diminished the total value of the Cash Awards.

Considering the strengths and weaknesses in each side's case throughout litigation over the past four years, and the financial difficulties demonstrated by Defendants before and at mediation, as detailed in the Preliminary Approval brief, the result obtained in the Settlement is exceptional, supporting a multiplier.

3. The Delay in Obtaining A Fee and Foregoing Other Work Supports a Multiplier

Furthermore, the Court should also consider the delay in obtaining any fee in its award of a multiplier. *Barjon v. Dalton*, 132 F.3d 496, 502-503, (9th Cir. 1997) ; *Vizcaino v. Microsoft Corp.*, 290 F.3d at 1050. Here, this case was filed in 2015, and any payment of fees and costs will likely be paid about four years and five months after the case was filed, a considerable delay that should justify adding to the multiplier here.

Moreover, because the representation has lasted for over four years, Class Counsel were required to forego work on other matters. *See In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 955 (9th. Cir. 2015) (noting that this factor considers "the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work)"). *See also* In re *Omnivision Technologies, Inc.,*

559 F. Supp. 2d 1036, 1047 (N.D.Cal. 2008), where Class Counsel had a "substantial outlay, when there is a risk that none of it will be recovered" finding such facts further supports the requested fee.

Those factors further justify a multiplier herein.

4. Class Counsel Undertook Significant Risks in This Contingency Case with Difficult Questions Presented

From the outset, Class Counsel undertook significant financial risk in prosecuting this case against well-represented Defendants. Class Counsel undertook this matter solely on a contingent basis with no guarantee of recovery and risked their time and resources to prosecute the Action. Class Counsel understood that, even if successful, they would not be paid, or reimbursed for any expenses, for years. To be sure, Class Counsel were capable of fronting the costs, but the financial risk of litigation was assumed by Class Counsel throughout the pendency of the Action.

Class action lawsuits generally carry tremendous risks, including those on certification and liability. The public interest is served by rewarding attorneys who assume representation on a contingent basis with an enhanced fee to compensate them for the risk they might be paid nothing at all for their work. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994). Thus, the Court should award a multiplier in this case because the case was litigated on a contingency basis . *Id.* That is true especially if the case is of a type that would not be taken by counsel unless an expectation of a fee enhancement was expected, as here. Here, there is no fee shifting statute and no plaintiff would likely pay any attorney's hourly rate if the potential benefit is limited as under the TCPA to allow only $500.00 in damages for each incident if negligent or $1,500.00 if intentional. Thus, no attorney would likely take on such a case nor would the client likely be able to find any attorney to represent him in such a case. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711, 717- 719, 107 S.Ct.

3078 (1987); *Fadhl v. City and County of San Francisco*, 859 F.2d 649 (9th Cir. 1986) where a multiplier of 2 was awarded in a Title VII case as the amount expected by attorneys in the local San Francisco market. The court found that a multiplier was necessary when the case would not have been filed by counsel without an expectation of a multiplier in the local market. *Accord, Clark v. City of Los Angeles*, 803 F.2d 987, 991-992 (9th Cir. 1986) (multiplier of 1.5 confirmed on appeal as justified); *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945-946 (9th Cir. 2007); *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002) (1.5 multiplier allowed).

The risks of the case were apparent in that consent is always an issue in Telephone Consumer Protection Act ("TCPA") cases, as are issues of whether an automated telephone dialing system was used. Furthermore, the fact that Defendants were in a precarious financial position, perhaps leading to a bankruptcy filing at any time, compelled a different approach to this case, with the Class potentially obtaining no favorable result. Indeed, Class Counsel incurred attorney time and fees as well as litigation costs which they may have never recovered had they lost. In addition, if Class Counsel had been required to file a Motion for Class Certification, there was no guarantee the motion would have been granted. These risks were compounded by the robust opposition from Defendants and their precarious financial position. Accordingly, the risks attendant to maintaining this litigation weigh in favor of a multiplier.

5. Experienced Class Counsel Provided Skillful and High-Quality Work

As noted in the accompanying declarations, Class Counsel include lawyers who are experienced in litigating TCPA cases and complex class actions in both state and federal court. Class Counsel demonstrated skillful preparation and adept work. They performed significant factual investigation into the Defendants' relationship, how an agency theory might be used to expand liability, and the extent

to which the improper calls were made by researching internet complaints, all prior to bringing the Action. Class Counsel also engaged in motion practice, including opposing a motion to dismiss and motions to stay the litigation; engaged in formal written discovery and informal discovery; and participated in protracted negotiations with Defendants, including a full-day mediation and follow-up telephone sessions with a capable and experienced mediator, Hon. Edward A. Infante, (Ret.). It was at that mediation that Class Counsel were dissuaded from seeking their goal of a significant common fund and instead recognize the financial realities faced by the Defendants.

Class Counsel's ability to obtain a favorable settlement in the face of a robust opposition from Defendants reflects their superior work quality. Accordingly, this factor weighs in favor of an upward multiplier of 1.3.

D. Under a Common Fund Analysis, The Amount of Fees Requested Is Also Justified

The benchmark percentage fee in the Ninth Circuit is 25% of the common fund obtained for the Class. *See, e.g.*, *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007). Here the litigation did not result in a common fund but a potential maximum value of the settlement can be computed to compare the fee requested under the lodestar analysis to a percentage of the common fund analysis. If the Court multiplies the number of potential claimants (747,635) by either the value of the $25.00 cash payments if each claimant chose cash ($18,690,875) or the value of the $75.00 certificates exchanged for goods ($56,072,625), it is clear that the $900,000.00 in fees and costs requested is far less than would be awarded on a percentage basis seeking the benchmark 9th Circuit 25% fee under either scenario.

E. Defendants Do Not Contest the Requested Attorney's Fees

The United States Supreme Court explained, "A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Court

should give weight to the judgment of the parties and their counsel where, as here, the fees were agreed to though arms' length negotiations after the parties had agreed upon the other key deal terms. *See, e.g., In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist LEXIS 10195, at *12 (N.D.Ca. Nov. 5, 2008). Defendants agree not to oppose the requested fees and costs amount of $900,000.00, to be paid separately by them. Agreement, § 5.02. Courts generally encourage the parties to negotiate and agree to fees in order to avoid the costly and time-consuming process of applying to the Court. Assuming no evidence of collusion, agreed-upon fees should be given a presumption of fairness.

An agreed-upon award of attorneys' fees and expenses is proper in a class action settlement, so long as the amount of the fee is reasonable under the circumstances. *See* Fed. R. Civ. P. 23(h) (providing that in "an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by…agreement of the parties…."). In fact, courts have encouraged litigants to resolve fee issues by agreement, if possible. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (upholding district court's award of attorneys' fees where the court had approved attorneys' fees and costs of $5.2 million which were negotiated after final settlement was achieved); *Malchman v. Davis*, 761 F.2d 893, 905 n.5 (2d Cir. 1985) (recognizing "[a]n agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged"), *cert. denied*, 475 U.S. 1143 (1986)).

Each side gave up the possibility of the Court awarding more, or less, in agreeing to the proposed amount. As detailed above, the proposed amount is within the reasonableness range, there is no suggestion of collusion, and the Agreement should not be disturbed.

IV. CLASS COUNSEL'S REQUESTED COST REIMBURSEMENT IS FAIR AND REASONABLE

The costs incurred in the prosecution of the action as sought herein are recoverable. *See In re Immune Response Securities litigation,* 497 F.Supp.2d 1166, 1177-78 (S.D.Cal. 2007) Although the present case is not a common fund case as was *Immune Response*, the costs sought to be reimbursed are all "reasonable and necessary" to litigating the case. Like a common fund case, all Settlement Class members here will share the benefit of the settlement and such expense awards comport with the notion that the district court may "spread the costs of the litigation among the recipients of the common benefit." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1121 (9th Cir. 2002). In common-fund cases, the Ninth Circuit has stated that the reasonable expenses of acquiring the fund can be reimbursed to counsel who has incurred the expense. *See Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Acosta v. Frito-Lay, Inc.*, No. 15-CV-02128-JSC, 2018 WL 646691, at *11 (N.D. Cal. Jan. 31, 2018) ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of reasonable litigation expenses from that fund." (quoting *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014)).

Here, Class Counsel incurred out-of-pocket costs of $14,335.00. The incurred costs include court filing fees, service of process fees, mediation fees, legal research charges, travel costs including meals and lodging. (Campion Decl. ¶ 12.; Chase Decl. ¶ 15, Exh. 3; and Sousa Decl. ¶ 8, Exh.2.) These expenses were necessary to the prosecution of this litigation, were the sort of expenses normally billed to paying clients, and were made for the benefit of the Settlement Class. Accordingly, the Court should award Class Counsel $14,335.00 in unreimbursed litigation costs from the $900,000.00 fees and costs amount agreed upon by the Parties. [7]

V. THE CLASS REPRESENTATIVE INCENTIVE AWARD IS

[7] While recovery of those costs would be appropriate in its own right, Class Counsel are not seeking a separate award but including those costs in that $900,000 fees and costs request.

FAIR AND REASONABLE

The Class Representative was instrumental in achieving the Settlement in this case and requests a modest sum of $5,000.00. Incentive awards for class representatives are routinely provided to encourage individuals to undertake the responsibilities and risks of representing the class and recognize the time and effort spent in the case. In the Ninth Circuit, incentive awards "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). In evaluating whether class representatives are entitled to reasonable service awards, district courts "must evaluate their awards individually, using 'relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation and reasonable fears of workplace retaliation.'" *Staton*, 327 F.3d at 977 (alterations omitted) (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). *See also Van Vranken v. Atlantic Richfield Co.,* 901 F.Supp. 294 (N.D.Cal.,1995). [8]

Here, the named Plaintiff spent a significant amount of time and effort assisting the litigation of this case. As detailed in Declaration of Sean Hartranft In Support of Plaintiff's Unopposed Motion for Preliminary Approval and In Support of Motion for Attorneys' fees and Request for Incentive Award ("Hartranft Decl.") (Dkt. 99-7), filed with the Preliminary Approval motion and in support of this motion, he has been very active throughout this now four- year long litigation. (¶¶ 1-

[8] The National Association of Consumer Attorneys published an article, part of which was devoted to the status of incentive payments to class representatives. See, 1590 PLI/Corp 285 Practicing Law Institute NACA CLASS ACTION GUIDELINES-- REVISED March-May, 2007 finding that most recent decisions have approved incentive awards.

13.) As set forth therein in detail, he has been involved in this case since its inception, subjected to written discovery, reviewed Defendants' responses to discovery, was willing to be deposed if necessary and was available by telephone throughout the mediation session. And had the matter gone to trial, he would have been willing to testify. He worked with counsel throughout, discussed the proposed settlement terms, and reviewed the Settlement Agreement, In addition, Plaintiff turned down a Rule 68 Offer of Judgment whereby he could have settled his claim individually but instead refused, pressing forward with the claims on behalf of the Class. (*Id*. ¶ 7.) The amount of the Class Representative Incentive Award was negotiated after the settlement terms were resolved, and Defendants do not contest the award.

The service award of $5,000.00 for the named plaintiff is in line with persuasive precedent, and is appropriate when measured against the factors for determining a reasonable enhancement award. *See e.g.*, *Taylor v. FedEx Freight, Inc*., Case No. 1:13-cv-01137-DAD-BAM, 2016 WL 6038949, at *8 (E.D. Cal. Oct. 13, 2016) (awarding $15,000.00 enhancement award for 80 hours of work); *Emmons v. Quest Diag. Clinical Lab., Inc.*, Case No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018 at *8 (awarding $8,000.00 in enhancement awards to each named plaintiff for "approximately 30-40 hours assisting [their] attorneys in the prosecution of this lawsuit"); *Ontiveros v. Zamora*, 303 F.R.D. 356, 366 (E.D. Cal. 2014) (approving $15,000.00 service award); *Lindell v. Synthes USA*, Case No. 1:11-CV-02053-LJO-BAM, 2016 WL 7368274 at *3 (E.D. Cal. Dec. 20, 2016) ("average distribution of [service awards is] over $17,000.00"); *Syed v. M-I, LLC*, Case No. 1:12-cv-01718-DAD-MJS, 2017 WL 714367 at *13 (E.D. Cal. Feb. 22, 2017) (preliminarily approving "class representative payment of $20,000.00 … and $15,000.00 to plaintiff[s] … [] which represent[ed] approximately .3% and .2% of the gross settlement fund, respectively").

In addition to the work he performed, Plaintiff risked potential judgment

against him if this case had been unsuccessful. Plaintiff could have been deemed the losing party and could have been liable for Defendants' costs. Few individuals are willing to undertake that risk, particularly since courts have recently entered judgments against class representatives. *See e.g. Whiteway v. Fedex Kinkos Office & Print Services, Inc.*, 2007 U.S. Dist. LEXIS 95398 (N.D. Cal. 2007) (a wage and hour misclassification case lost on summary judgment, after the case was certified, the named plaintiff was assessed costs in the sum of $56,788.00). In fact, the *Whiteway* court summed up the substantial risks associated with agreeing to act as a class representative:

> [T]he class representatives' dilemma – they must balance the risk of liability against their potential recovery…. While imposition of the entire cost burden on the named plaintiffs may have a chilling effect on the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the potential recovery. All potential litigants must weigh costs of suit against likelihood of success and possible recovery before deciding to file suit. Those who choose to take the risks of litigation should be the ones to bear the costs when they are unsuccessful [citation omitted].

Whiteway, *supra*, at *6. This risk alone weighs in favor of awarding Plaintiff a modest sum of $5,000.00.

VI. THE SETTLEMENT ADMINISTRATOR'S COSTS ARE FAIR AND REASONABLE

The Court-approved CPT Group as the Settlement Administrator for the Settlement Class. All settlement administration costs are to be paid directly to CPT Group by Defendants. At the time of the final approval hearing, CPT Group will detail the work performed by CPT Group in in providing notice and administration of the Settlement. Its projected costs to complete administration of the Settlement as set forth in Exhibit B to the Declaration of Julie N. Green on Behalf of CPT Group,

Inc. In Support of Plaintiff's Motion for Preliminary Approval, is $421,000.00. (*See*, Dkt. 99-5, p. 31) The amount requested is reasonable based on the scope of the work anticipated and will be further detailed in the declaration filed by CPT in support of final approval.

VII. CONCLUSION

For the foregoing reasons, Plaintiff and Class Counsel respectfully request the Court to award:

- $900,000.00 in Attorneys' Fees, inclusive of Costs, including $885,665.00 in attorneys' fees and $14,335.00 in litigation costs;
- $421,000.00 in third-party administration costs for the administration of the Settlement provided by CPT Group pursuant to the Court's order, or such amount as they may seek and justify at final approval; and
- $5,000.00 to Plaintiff as a Class Representative Incentive Award.

Dated: June 17, 2019

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