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DAVID GREENLEY AND THE
PUTATIVE CLASS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID GREENLEY, individually and on behalf of others similarly situated,
Plaintiffs,
v.
MAYFLOWER TRANSIT, LLC,
Defendant.

CASE NO. 21-cv-339-WQH-MDD

[Judge: Hon. William Q. Hayes]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR (1) ATTORNEY FEES;(2) REIMBURSEMENT OF LITIGATION EXPENSES; (3) APPROVAL OF SETTLEMENT ADMINISTRATION FEES; AND (4) APPROVAL OF CLASS REPRESENTATIVE SERVICE AWARD

Date Action Filed: February 25, 2021
Date: August 4, 2022 at 10:30 a.m.
Courtroom: 14B

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I. INTRODUCTION

Plaintiff David Greenley ("Greenley") submits this Memorandum of Points and Authorities in Support of Plaintiff's Motion for (1) Attorney's Fees; (2) Reimbursement of Litigation Expenses; (3) Approval of Settlement Claims Administration Expenses; and (4) Approval of Class Representative Service Award. In accordance with the terms of the Settlement Agreement and the Notice of Proposed Settlement to be sent to Class Members, Plaintiffs seek (1) attorney fees of $362,500, equal to twenty five percent (25%) of the settlement common fund; (2) reimbursement of litigation expenses in the aggregate amount of $30,874.12; (3) approval of Settlement Administration expenses of $12,500; and (4) a service award to Representative Plaintiff in the amount of $10,000. As set forth herein such an award is justified under the common fund theory because 25% represents the "benchmark" in the Ninth Circuit for an award of attorney fees based on creation of a common fund. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F. 2d 268, 272 (9th Cir. 1989) ("the 'bench mark' percentage for the fee award should be 25 percent. That percentage amount can then be adjusted upward or downward"). "However, in 'most common fund cases, the award exceeds that benchmark.'" *Amaraut v. Sprint/United Management Company*, No. 19-CV-411-WQH-AHG, 2021 WL 3419232, at *6 (S.D. Cal. Aug. 5, 2021) *quoting Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010). In the present case, although the exceptional results would readily justify an upward adjustment from the 25% benchmark, Plaintiff has agreed to limit the attorney fee request to the longstanding 25% benchmark.

Further, it is appropriate to approve Greenley's class representative service award in the amount of $10,000. "Incentive awards are 'fairly typical' discretionary awards 'intended to 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.'" *Hose v. Washington Inventory*

Serv., Inc., No. 14-CV-2869-WQH-AGS, 2020 WL 3606404, at *10 (S.D. Cal. July 2, 2020) *quoting Rodriguez v. W. Publ'g Corp.*, 563 F. 3d 948, 958-59 (9th Cir. 2009). This court has awarded similar service awards previously. *See Hose*, No. 14-CV-2869-WQH-AGS, at *12 (approving $20,000 service award); *Amaraut*, No. 19-CV-411-WQH-AHG, at *10 (approving $15,000 service award).

Moreover, the litigation expenses, which are detailed in the accompanying Declarations of Joshua B. Swigart and Peter F. Barry (jointly, "Class Counsel") are reasonable and appropriate and should be reimbursed. Finally, the Settlement Administration Costs are also fair and reasonable and should likewise be approved.

II. FACTS AND PROCEDURAL BACKGROUND

This action was filed on February 25, 2021. (Dkt. No. 1). Defendant filed an Answer to the Complaint on March 19, 2021. (Dkt. No. 4). After vigorous litigation, extensive discovery, and appropriate mediation proceedings, this Court ordered the Preliminary Approval of Settlement (ECF No. 41) on February 10, 2022. (Dkt. No. 42). The facts relating to the settlement, including the proceedings and mediation leading to the settlement, are discussed in more detail in the Motion for Approval of the Settlement and are incorporated herein by reference. (Dkt. No. 41-1).

In summary, this is an action for violations of the California Invasion of Privacy Act ("CIPA"). Based on discovery conducted by the parties, representations made by Mayflower, and as a material part of the settlement agreement, the class consists of approximately 159 individuals and approximately 691 telephone calls. The settlement provides for a common settlement fund of one million four hundred fifty thousand ($1,450,000 USD). The settlement fund is non-reversionary and will be distributed to class members on a pro rata basis after payment of attorney fees, litigation costs, service awards, and claims administration costs, as approved by this Court. Based on the agreed upon gross

amount of the settlement fund, the amount to be paid to each class member – prior to deduction of costs and fees identified above – is approximately $9,119 per class member. On a per class member basis, this is, in the opinion of counsel based on their collective experience, among the highest recoveries in a CIPA class action and is a fair resolution on behalf of the class.

The terms of the settlement are simple and straightforward. It is a purely cash settlement. Mayflower has agreed to pay the sum of one million four hundred and fifty thousand dollars ($1,450,000 USD) for the settlement of the claims asserted in the class action complaint. Mayflower has further agreed to certification of a settlement class and subclass as set forth above. The class consists of 159 individuals and 691 telephone calls. The parties agreed that an accurate class size was a material term to the negotiations and the class settlement agreement. Based on the agreed gross amount of the settlement fund, the amount to be paid to each class member – prior to deduction of costs and fees – is approximately $9,119 per class member.

The common settlement fund of $1,450,000 is non-reversionary. Class Counsel's attorneys' fees, litigation costs, and expenses, the class representative's service award, and the settlement administration costs will be paid from the common settlement fund. Class Counsel agreed to attorneys' fees of up to 25% of the settlement common fund, or $362,500, plus litigation related costs not to exceed $50,000. Class representative requests a service award of $10,000. CPT Group has proposed a flat fee for notice and claims administration of $12,500.

The payment to individual class claimants will be made on a pro rata basis pursuant to the following formula: Net Settlement Fund/Total Class Members Submitting Claims = Net Payment to Each Class Member. If the Court approves all requested fees, litigation costs, service awards and administration costs, the net settlement fund available for pro rata distribution to class members (exclusive of administrative costs) would be approximately $1,034,125. If 100% of the class

members submit claims, the payment to each class member would be approximately $6,504.

In summary, the settlement is a straight cash settlement with a common fund of $1,450,000. The 25% attorney fee requested is $362,500.

III. A PERCENTAGE ATTORNEY'S FEE AWARD IS PROPER IN A COMMON FUND CLASS SETTLEMENT

Rule 23(h) of the Federal Rules of Civil Procedure provides that, "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed.R.Civ.P. 23(h); *Grant v. Cap. Mgmt. Servs., L.P.*, No. 10-CV-2471-WQH BGS, 2014 WL 888665, at *5 (S.D. Cal. Mar. 5, 2014).

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir.2003) (*citing* FED. R. CIV. P. 23(e)). Accordingly, "to avoid abdicating its responsibility to review the agreement for the protection of the class, a district court must carefully assess the reasonableness of a fee amount spelled out in a class action settlement agreement." *Id.*; *see also Clark v. Michaels Stores, Inc.*, No. 05-CV-1678 WQH JMA, 2007 WL 4058373, at *1 (S.D. Cal. Nov. 15, 2007).

The proper methodology for determining the amount of such an award has been a matter of some debate and has essentially come full circle starting from the percentage method, evolving into a lodestar methodology, and eventually returning to the percentage method as ultimately the fairest method and the method which best emulates the private market for attorney fees.

"The 'lodestar method' is appropriate in class actions brought under fee-shifting statutes (such as federal civil rights, securities, antitrust, copyright, and patent acts), where the relief sought—and obtained—is often primarily

injunctive in nature and thus not easily monetized, but where the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F. 3d 935, 941 (9th Cir. 2011). However,

> [w]here a settlement produces a common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-recovery method. 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. Applying this calculation method, courts 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 a departure.

Id. at 942.

The percentage and lodestar methods can offer a cross check against each other to confirm the reasonableness of a fee award. "Just as the lodestar method can 'confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate[1],' the percentage-of-recovery method can likewise 'be used to assure that counsel's fee does not dwarf class recovery." *Id.* at 945 (*quoting In re Gen Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F. 3d 768, 821 n. 40 (3d Cir. 1995)).

"The lodestar and the percentage of recovery methods each have distinct attributes suiting them to particular types of cases." *In re Gen. Motors*, 55 F. 3d

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[1] This seems primarily to be a concern in the "mega fund" cases, of which this is not one. "Thus, for example, where awarding 25% of a "megafund" would yield windfall profits for class counsel in light of the hours spent on the case, courts should adjust the benchmark percentage or employ the lodestar method instead." *In re Bluetooth*, 654 F.3d at 942. "In megafund cases, fees more commonly will be under the 25% benchmark in this Circuit. . . . In contrast, in cases under $10 million, the awards more frequently will exceed the 25% benchmark, and indeed go above 30%." *Aichele v. City of L.A.*, No. CV 12-10863-DMG (FFMx), 2015 WL 5286028, at *5 (C.D. Cal. Sep. 9, 2015).

at 821. "Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases. Because the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class." *Id*.

"Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class. Because these cases are not presumed to serve the public interest (as evidenced by the lack of a fee statute), there is no social policy reason that demands an adequate fee. Instead, the court apportions the fund between the class and its counsel in a manner that rewards counsel for success and penalizes it for failure." *Id*.

The present case is a prototypical common fund situation where the settlement has created a straight cash common fund for the benefit of the class. Thus, "this case presents a situation more closely aligned with the common fund paradigm than the statutory fee paradigm." *Id*. In such a case, application of the lodestar method has a "potential to exacerbate the misalignment of the attorneys' and the class's interests." *Id*. "[T]he Task Force concluded that the traditional common-fund case and those statutory fee cases that are likely to result in a settlement fund from which adequate counsel fees can be paid, should be treated differently . . . Accordingly, the Task Force recommends that in the traditional common-fund situation . . . the district court . . . should attempt to establish a percentage fee arrangement." *Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1986)(Third Circuit Task Force Report).

The percentage-of-the-fund method comports with the legal marketplace, where counsel's success is more frequently measured in terms of the result counsel has achieved, rather than focusing on the number of hours counsel has

expended. *See Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("[in common fund cases] the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award. That is, in the common fund case, if a percentage-of-the-fund calculation controls, inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them"). By assessing the amount of the fee in terms of the amount of the benefit conferred on the class, the percentage method "more accurately reflects the economics of litigation practice[,]" which "given the uncertainties and hazards of litigation, must necessarily be result-oriented." *Id*.

"Thus, '[i]n the years since the Third Circuit's report . . . federal and state courts alike have increasingly returned to the percent-of-fund approach [in common fund cases], either endorsing it as the only approach to use, or agreeing that a court should have flexibility to choose between it and a lodestar approach, depending on which method will result in the fairest determination in the circumstances of a particular case.'" *Lafitte v. Robert Half Internat. Inc*., 1 Cal. 5th 480, 494 (2016) (*quoting Strawn v. Farmers Ins. Co. of Oregon*, 353 Or. 210, 219 (2013)).

Because this a classic common fund settlement, application of the percentage method is preferred. Indeed, in the Ninth Circuit, the percentage-of-the-fund method is applied more frequently than the lodestar-plus-multiplier method for common fund cases. *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007) ("use of the percentage method in common fund cases appears to be dominant"); *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1050 (9th Cir. 2002) ("the primary basis of the fee award remains the percentage method"); *Lopez v. Youngblood*, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *11 (E.D. Cal. Sept. 1, 2011) ("[W]hile the Court has discretion to use either a percentage of the fund or a lodestar approach in compensating class counsel . . . the percentage of the fund is the typical method of calculating class fund fees"); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374-78 (N.D. Cal. 1998)

(discussing advantages of percentage of recovery method in common fund cases).

Accordingly, Plaintiff requests that this Court apply the standard percentage of the fund methodology to determine the proper attorney fees in this case.

IV. THE REQUESTED FEE IS FAIR AND REASONABLE

The 25% fee requested here is the benchmark for a percentage fee award. *See Paul, Johnson, Alston & Hunt*, 886 F. 2d at 272 ("the 'bench mark' percentage for the fee award should be 25 percent."); *In re Bluetooth*, 654 F.3d at 935; *Vizcaino*, 290 F. 3d at 1047 (approving 28 percent fee as justified by a benchmark of 25 percent adjusted according to specified case circumstances); *Amaraut*, No. 19-CV-411-WQH-AHG, at *6; *Vasquez*, 266 F.R.D. at 482. In the present case, although the exceptional results would readily justify an upward adjustment from the 25% benchmark, Plaintiff has agreed to limit the attorney fee request to the longstanding 25% benchmark.

The factors in assessing a request for attorneys' fees, calculated using the percentage-of-recovery method, are (1) the extent to which class counsel achieved exceptional results for the class, (2) whether the case was risky for class counsel, (3) whether counsel's performance generated benefits beyond the cash settlement, (4) the market rate for the field of law, (5) the burdens class counsel experienced while litigating the case, and (6) whether the case was handled on a contingency basis. *In re Online DVD-Rental Antitrust Litig.*, 779 F. 3d 934, 954–55 (9th Cir. 2015). These factors support the fee request herein.

First, Class Counsel achieved exceptional results for the class. California Penal Code Section 637.2(a) allows for statutory damages of $5,000 for each violation, where a person has been injured by the violation. Here, the class consists of 159 individuals and 691 telephone calls. Based on the agreed gross amount of the settlement fund, the amount to be paid to each class member – prior to deduction of costs and fees – is approximately $9,119 per class member. On a per call basis, the amount is $2,098 per call. This represents 41.9% of the allowed

statutory recovery that could have been obtained if Plaintiff prevailed on every claim and recovered for every call at trial. By any standard, that is an exceptional result to be obtained through pretrial settlement.

Second, the case was risky for Class Counsel. CIPA cases have been vigorously litigated with varying results. While many courts have certified classes in such cases, many have not. *See*, e.g., cases certifying classes (*Reyes v. Educational Credit Management Corporation*, 322 F.R.D. 552 (2017) *vacated and remanded on other grounds* 773 Fed. Appx. 989 (2019); *Ades v. Omni Hotels Management Corp.*, 46 F. Supp. 3d 999, 1009 (C.D. Cal. 2014); *Zaklit v. Nationstar Mortgage LLC*, No. 5:15-CV-2190-CAS (KKx), 2017 WL 3174901, at *14 (C.D. Cal. July 24, 2017); *Raffin v. Medicredit, Inc.*, No. CV 15-4912-GHK (PJWx), 2017 WL 131745, at *10 (C.D. Cal. Jan. 3, 2017); *Romero v. Securus Techs., Inc.*, 331 F.R.D. 391, 415 (S.D. Cal. 2018); *Ronquillo-Griffin v. TransUnion Rental Screening Sols., Inc.*, No. 17cv129 JM (BLM), 2019 WL 2058596, at *3 (S.D. Cal. May 9, 2019)); *but see*, e.g., cases denying class certification or even decertifying already certified classes (*Hataishi First Am Home Buyers Prot. Corp.*, 223 Cal. App. 4th 1454 (2014); *Kight v. Cash Call, Inc.*, 231 Cal. 4th 112 (2014); and *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates, Inc.*, No. 12-cv-01685-BAS (JLB), 2016 WL 2610107 (S.D. Cal. May 6, 2016)(order decertifying the class)). Here, Defendant vigorously opposed class certification and a favorable result for the class was by no means certain.

The third factor, whether counsel's performance "generated benefits beyond the cash settlement fund," is not applicable here because the settlement is a straight cash settlement.

The fourth through sixth factors—the market rate for the particular field of law, the burdens counsel experienced while litigating the case, and whether the case was handled on a contingency basis—further support the fee requested. The three factors are, in practice, conflated, and therefore are addressed collectively.

"Class Counsel's fee request of one-third of the common fund is in line with the market rate for similar representation. Attorneys with comparable skill and experience, and who litigate class actions on a contingency basis routinely charge one-third of the recovery, or 40% or more if the case goes to trial." *Beaver v. Tarsadia Hotel,* Case No. 11-cv-01842-GPC-KSC*,* 2017 WL 4310707 at *12 (S.D. Cal. Sept. 28, 2017) (*citing In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 (2009) (a fee award should be "within the range of fees freely negotiated in the legal marketplace in comparable litigation"); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-4149-MMM (SHx), 2008 WL 8150856, at *16 n. 59 (C.D. Cal. 2008) ("fees representing one-third of the recovery are justified based on study showing that standard contingency fee rates are 33% if the case settles before trial, 40% if a trial commences, and 50% if trial is completed")).

The Ninth Circuit has long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all for their work. With respect to the contingent nature of litigation, courts tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees. *See In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F. 3d 1291, 1299 (9th Cir.1994). Moreover, when counsel takes cases on a contingency fee basis, and litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award. *Id*. Thus, that Class Counsel had significant experience in this field and took on this matter on a contingent fee basis indicates that the 25 percent benchmark fee request is reasonable. *Sanchez v. Frito-Lay, Inc.*, No. 1:14-CV-00797 AWI, 2015 WL 4662636, at *14 (E.D. Cal. Aug. 5, 2015), *report and recommendation adopted*, No. 1:14-CV-797-AWI-MJS, 2015 WL 5138101 (E.D. Cal. Aug. 26, 2015); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F. 3d at 1299 ("contingent fees that may far exceed the market value of the

services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for Plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose"); *Vizcaino*, 290 F. 3d at 1051 (courts reward successful class counsel in contingency cases "for taking risk of nonpayment by paying them a premium over their normal hourly rates").

Class Counsel prosecuted this matter on a purely contingent basis while agreeing to advance all necessary expenses and knowing that Class Counsel would only receive a fee if there was a recovery. In pursuit of this litigation, Class Counsel both committed the resources of their firms to litigate this matter through all motion and discovery issues, and through trial, if necessary, not knowing a relatively early settlement would occur. In any event, Class Counsel have spent considerable time and money by, among other things, (1) investigating the action; (2) conducting legal research relating to the alleged claims; (3) conducting discovery; (4) litigating disputed discovery issues through contested motions; (5) preparing and filing a class certification motion; (6) negotiating the settlement over a period of months; (7) preparing the preliminary approval brief and supporting documents, (8) assisting in the administration of the Settlement; and (9) responding to class members' inquiries.

Class Counsel expended these resources despite the risk that Class Counsel would never be compensated at all. From the outset, Class Counsel risked non-payment by taking on this case and risked receiving zero compensation for potential years of work and out-of-pocket expenses had this case proceeded to trial. *See generally Beaver*, No. 11-CV-01842-GPC-KSC. Also, a commitment to this case necessarily requires foregoing other opportunities. Common sense dictates that time spent on this matter was time not spent on another equally as important and complex matter(s).

Further, the 25% requested fee is similar to those awarded in similar cases. Indeed, 25% represents the "benchmark" in the Ninth Circuit for an

award of attorney fees based on creation of a common fund. *Paul, Johnson, Alston & Hunt*, 886 F. 2d at 272 ("the 'bench mark' percentage for the fee award should be 25 percent"). "However, in 'most common fund cases, the award exceeds that benchmark.'" *Amaraut*, No. 19-CV-411-WQH-AHG, at *6 *quoting Vasquez*, 266 F.R.D. at 491.

Here, the creation of a common cash fund supports application of the percentage-of-the-recovery method of calculating attorney fees. Further, the exceptional recovery obtained and the other factors clearly justify an award of the "benchmark" 25% fee requested.

V. A LODESTAR CROSS CHECK SUPPORTS REQUESTED FEE

A court may also cross-check its percentage-of-recovery figure against a lodestar multiplier calculation. *In re Online DVD-Rental Antitrust Litig.*, 779 F. 3d at 955 *citing* to *Vizcaino*, 290 F.3d at 1050. "[W]hen the lodestar is used as a cross-check for a fee award, the Court is not required to perform an 'exhaustive cataloguing and review of counsel's hours.'" *Munoz* v. *Giumarra Vineyards*, No. 1:09-CV-00703-AWI-JLT, 2017 WL 2665075, at *16 (E.D. Cal. June 21, 2017) (*quoting Schiller v. David Bridal, Inc.*, No. 1:10-CV-006160AWI-SKO, 2012 WL 2117001, at *20 (E.D. Cal. June 11, 2012) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F. 3d 294, 306 (3d Cir. 2005))).

Where Class Counsel diligently achieved an excellent result for Class Members, the lodestar method is a less effective tool for determining the reasonableness of an attorney's fee award. Even still said, cross-check supports Class Counsel's demand since Class Counsel has expended a significant amount of time to date to achieve the current settlement.

"Class Counsel has not provided detailed time records, but instead provides general summaries of each firm's billing time. (. . .) The summaries and declarations provide a sufficient showing of the hours counsel performed on this case." *Morey v. Louis Vuitton N. Am., Inc.*, No. 11CV1517 WQH (BLM), 2014 WL 109194, at *10 (S.D. Cal. Jan. 9, 2014).

Upon lodestar cross-check, the 25% fee requested by Class Counsel currently reflects a multiplier of approximately 1.16, based upon Class Counsel's lodestar of $312,132.50 compared to the 25% fee requested of $362,500.00. Of important note, the district courts within the Ninth Circuit regularly approve fee awards resulting in multipliers which are much higher than the requested multiplier in this matter. *See, e.g.*, *Reed v. 1- 800 Contacts, Inc.*, No. 12-CV-02359 JM BGS, 2014 WL 29011, at *9 (S.D. Cal. Jan. 2, 2014)(approving 25% fee award where multiplier was approximately 2.9 in CIPA class action; *Vizcaino*, 290 F. 3d at 1051 (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.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. 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"); *In re UnitedHealth Group, Inc.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009) (finding a lodestar cross-check multiplier of 6.5 reasonable); and, *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-CV-1290-BEN-NLS, 2013 WL 12095060, at *1 (S.D. Cal. June 21, 2013) (awarding fees in Telephone Consumer Protection Act class action litigation with a lodestar cross-check multiplier of 5.58).

Accordingly, the lodestar cross check validates the benchmark 25% fee request.

VI. THE REQUESTED LITIGATION EXPENSE REIMBURSEMENT IS REASONABLE

"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." *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (C.D. Cal. 2014). Class Counsel has submitted a summary list of itemized costs relating to

the litigation, including, without limitation, court fees, discovery related costs, deposition costs and other litigation related costs. Class Counsel's itemized costs are only $30,874.12, which is drastically lower than the agreed upon maximum costs of $50,000. These costs are fair and reasonable and should be approved by the court.

Accordingly, the lodestar cross check properly validates the requested 25% benchmark attorney fees request.

VII. THE REQUESTED SETTLEMENT CLAIMS ADMINISTRATION IS REASONABLE

Plaintiff requests reimbursement of Settlement Administration Costs in the amount of $12,500. This is the amount that was approved in the Preliminary Approval, and represents a fair and reasonable amount. The amount of the settlement administration cost is reasonable in light of the work to be performed. *See Jimenez v. Allstate Ins. Co.*, No. LA CV10-08486 JAK (FFMx), 2021 WL 4316961, at *9 (C.D. Cal. Sept. 16, 2021). "Courts regularly award administrative costs associated with providing notice to the class. The Court therefore concludes that [the settlement administrator's] costs were reasonably incurred for the benefit of the class and awards the full amount." *Bellingham v. Tractor Supply Co.*, 306 F.R.D. 245, 265 (N.D. Cal. 2015) (*citing Odrick v. UnionBancal Corp.*, No. C 10-5565 SBA., 2012 WL 6019495, at *7 (N.D. Cal. Dec. 3, 2012)).

The settlement administrator will be providing valuable services including (1) case setup, (2) direct mail notification, (3) processing of returned undeliverable mail, (4) direct email notification, (5) claims processing administration, (6) distribution services, and (7) settlement conclusion and tax reporting. The claims administrator's expenses are fair and reasonable in light of the services provided and should be approved.

VIII. THE REQUESTED SERVICE AWARD IS FAIR AND REASONABLE

"Incentive awards are 'fairly typical,' discretionary awards, 'intended to 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.'" *Vasquez v. Kraft Heinz Foods Co*., No. 3:16-CV-2749-WQH-BLM, 2020 WL 1550234, at *9 (S.D. Cal. Apr. 1, 2020) (*quoting Rodriguez v. W. Publ'g Corp.*, 563 F. 3d 948, 958-59 (9th Cir. 2009)). "[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton v. Boeing Co.*, 327 F. 3d 938, 977 (9th Cir. 2003).

In assessing the reasonableness of an incentive award, several district courts in the Ninth Circuit have applied the five-factor test set forth in *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal.1995), which analyzes (1) risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; (5) the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *Grant v. Cap. Mgmt. Servs., L.P.*, No. 10-CV-2471-WQH BGS, 2014 WL 888665, at *7 (S.D. Cal. Mar. 5, 2014) .

Applying this five factor test, this Court has approved incentive awards of $20,000 (*Hose*, No. 14-CV-2869-WQH-AGS, at *11) and $15,000 (*Amaraut*, No. 19-CV-411-WQH-AHG, at *8). In *Amaraut*, No. 19-CV-411-WQH-AHG, at *8, this Court approved a $15,000 award to Plaintiff Amaraut plus an additional $10,000 to each of the other five named Plaintiffs for a total of $65,000 in incentive awards. In *Van Vranken*, 901 F. Supp. at 299–300, "[a]fter evaluating the time Van Vranken committed to this case, the Court [found] that an incentive award of $50,000 is just and reasonable."

Plaintiff David Greenley reviewed various pleadings in the case, met with Class Counsel to review and respond to written discovery, spent several hours in preparation for his deposition, and appeared for a full eight-hour deposition. Plaintiff Greenley spent several hours reviewing and assisting Class Counsel in accurately responding to written discovery requests. In addition, Plaintiff Greenley listened to the hours of recordings provided by Defendant in order to confirm that he was not given a recording disclosure.

Defendant inquired into numerous specific historical facts about Plaintiff Greenley's personal background which exposed him to reputational harm and, at a minimum, was a significant intrusion into his personal privacy. This exposure was not merely theoretical. Indeed, in the Opposition to the Motion for Class Certification, Defendant directly attacked Plaintiff Greenley's reputation arguing that "Plaintiff's litigation history calls into question his ability to protect the interests of class members as a fiduciary" and wrongly accused Plaintiff of "taking payoffs at the expense of class members." Defendants Opposition to Plaintiff's Motion for Class Certification at 2. (Dkt. No. 36). *See*, *Amaraut*, No. 19-CV-411-WQH-AHG, at *8. ("The named Plaintiffs agreed to a general release and undertook "significant reputational risks ... by publicly affiliating themselves with litigation against their employer"); *Rodriguez*, 563 F. 3d at 958-59 (incentive awards are intended to "to make up for financial or reputational risk undertaken in bringing the action"); *Van Vranken*, 901 F. Supp. at 299 (factors 1 and 2: (1) risk to the class representative in commencing a class action, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative).

Moreover, Plaintiff Greenley, as a condition of the settlement was required to sign a general release of all claims. This general release signed by Plaintiff Greenley is broader than the release applicable to class members, the latter of which is a limited release pertaining only to claims raised in the Complaint and relating to claims of unlawful recording. The Memorandum of Understanding specifically provided "[t]he named Plaintiff will provide a

general release. Class members will release Defendant from all claims relating to the facts described in the operative complaint." The broader release required of Plaintiff Greenley is another factor supporting the service award. *See Amaraut*, No. 19-CV-411-WQH-AHG, at *8.

The requested service award also represents less than 1% of the Settlement Fund. *See Hose*, No. 14-CV-2869-WQH-AGS, at *11 ("[t]he proposed awards combined represent less than 0.4% of the Hose Total Settlement Amount"). "No Class member has objected to the Class Representative's requested incentive payment." *Morey*, No. 11CV1517 WQH (BLM), at *11; *Hunter v. Nature's Way Prod., LCC*, No. 3:16-CV-532-WQH-AGS, 2020 WL 71160, at *9 (S.D. Cal. Jan. 6, 2020); *Amaraut*, No. 19-CV-411-WQH-AHG, at *8; *Hose*, No. 14-CV-2869-WQH-AGS, at *11.

The requested service awards "incentive awards are within the acceptable range of approval and [are not] the result of collusion." *Hose*, No. 14-CV-2869-WQH-AGS, at *11; *More*, No. 11CV1517 WQH (BLM), at *11; *Hunter*, No. 3:16-CV-532-WQH-AGS, at *9. Accordingly, Plaintiff Greenley respectfully requests that the court approve the requested service award in the amount of $10,000.

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IX. CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court enter an order:

1) approving attorney fees of $362,500 equal to twenty five percent (25%) of the settlement common fund:

(2) approving reimbursement of litigation expenses in the aggregate amount of $30,874.12;

(3) approving Settlement Administration expenses of $12,500; and

(4) approving a service award to Representative Plaintiff Greenley in the amount of $10,000.

Date: March 7, 2022

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