THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KEVIN PINE, individually and on behalf of all others similarly situated, Plaintiff, v. A PLACE FOR MOM, INC., a Delaware corporation, Defendant.	Case No. 17-cv-1826 **PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS, AND SERVICE AWARDS TO THE PLAINTIFFS** **Noting Date: September 25, 2020**

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I. INTRODUCTION

Class Counsel's efforts created a $6,000,000 non-reversionary cash common fund, to be paid out to Class Members as cash payments. Class Counsel respectfully move the Court for an award of reasonable attorneys' fees of $1,500,000, which is 25 percent of the common fund created for the Class, and costs totaling $55,080.60. Class Counsel also request a $10,000 Service Award to the Named Plaintiff and a $2,500 Service Award to the former Plaintiff.

Class counsel submit that the requested fees and costs are fair, reasonable, and appropriate under applicable law. If granted, the fee would represent 25 percent of the common fund, which is consistent with Ninth Circuit's benchmark for common fund cases. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) (approving trial court's award of 31.9% of $96.885 million settlement for attorneys' fees and costs, including a 28% fee award and $3,825,497.86 in costs); *In re Intermec Corp. Sec. Litig.*, No. C90-783Z, 1992 WL 203800, at *1 (W.D. Wash. June 9, 1992) (awarding 25% of a $5,825,000 common fund, plus $109,223.73 in costs) (Zilly, J.). All of the considerations that courts typically evaluate in assessing fees support this request. The requested fee is also well-justified under the circumstances of this litigation. In addition to the $6 million common fund, Class Counsel obtained prospective practice changes designed to stop automated calls to cell phones without prior express consent. In light of the challenges and risks Class Counsel assumed in pursuing this matter on a purely contingent basis, the time and resources that Class Counsel expended prior to reaching a Settlement, and the market rate for similar class action settlements, the fee is reasonable. Class Counsel's request is also supported by a lodestar cross-check, if the Court chooses to perform an optional cross-check.

Class Counsel have expended reasonable and relevant out-of-pocket costs while prosecuting this matter, including fees for expert analysis, mediation expenses, and depositions. Reimbursement of these necessarily incurred expenses is appropriate.

Class Counsel respectfully submit that their fee request is appropriate well-supported.

For the reasons discussed below, Class Counsel respectfully request that the Court grant their fee and cost request in full, and approve the Plaintiff service awards.[1]

II. THE SETTLEMENT ACHIEVED

1. The Common Settlement Fund Achieved for the Class.

The Settlement provides that APFM will pay $6,000,000 into a Settlement Fund. Agreement ¶ 4.2. From this Fund, Class Members will receive a *pro rata* cash payment through either an automatic payment or upon submission of a valid and timeline claim form. *Id.* ¶ 4.3. If fees and costs are granted, Class Members will receive payment in the range of $34. Dkt. 151. The Settlement achieved by Class Counsel therefore provides exceptional monetary relief and is not contingent on Court approval of any award of attorneys' fees or costs. Agreement ¶ 5.3.

2. The Prospective Changes Benefit the Class.

The Settlement also provides core practice change relief, relief critical to Class Members. The alleged conduct driving this litigation is APFM's autodialed calls to cellular telephones without prior express consent. Time and again, Class Counsel heard from Class Members that the single most important thing to them is that such calls stop. Hutchinson Decl. ¶ 43. Accordingly, the Settlement ensures practice changes that are designed to secure prior express written consent and prevent claims of violations of the TCPA's provisions on dialing cell phones. Amended Settlement Agreement ("Agreement") (Dkt. 139-1) ¶ 4.1. These changes include changing the language on the website at issue and changing the dialer used at the start of the class period. While Class Counsel have not attempted to monetize the value of these practice changes, this relief was a key goal of Class Members and will prevent them from being subjected to the unwanted autodialed calls that are the entire basis for this litigation.

III. ARGUMENT

In deciding whether the requested fee amount is appropriate, the Court's role is to

[1] Consistent with *In re Mercury Interactive Corp.*, 618 F.3d 988, 992 (9th Cir. 2010), and best practices in this District, Class Counsel have applied to the Court for an award of attorneys' fees *before* any class notice is issued and posted their full fee application on the settlement website.

determine whether such amount is "'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294-95 n.2 (9th Cir. 1994) (overriding principle is that the fee award be "reasonable under the circumstances").[2]

A. Application of the Percentage-of-the-Fund Method Is Warranted

The common fund doctrine rests on the understanding that attorneys should normally be paid by their clients. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole."). Courts prefer a percentage-of-the-fund model over a lodestar-multiplier approach in cases where it is possible to ascertain the value of the settlement through a common fund. *See 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."); *Vizcaino*, 290 F.3d at 1050 ("[T]he primary basis of the fee award remains the percentage method."); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) ("[U]se of the percentage method in common fund cases appears to be dominant.").[3]

B. A 25-Percent Award Is Reasonable under a Percentage-of-the-Fund Analysis.

Class Counsel's request for $1,500,000 in attorneys' fees—25 percent of the common

[2] Where counsel seek fees from a common fund, courts have discretion to use one of two methods to determine whether the request is reasonable: "percentage-of-the-fund" or "lodestar/multiplier." *Staton*, 327 F.3d at 963-64; *In re Mercury*, 618 F.3d at 992; *Hanlon v. Chrysler Group*, 150 F.3d 1011, 1029 (9th Cir. 1998). "Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011).

[3] By contrast, courts rely on the lodestar method under circumstances not applicable here, *i.e.*, when "there is no way to gauge the net value of the settlement or of any percentage thereof." *Hanlon*, 150 F.3d at 1029; *Bluetooth*, 654 F.3d at 941 (lodestar appropriate "where the relief sought—and obtained—is often primarily injunctive in nature and thus not easily monetized"). This limited use of the lodestar method relates in part to its potential deterrent effect: "[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." *Vizcaino*, 290 F.3d at 1050 n.5; *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (application of the lodestar method may encourage "abuses such as unjustified work" and therefore "does not achieve the stated purposes of proportionality, predictability and protection of the class").

fund—is fair and reasonable under the circumstances of this case. The Ninth Circuit has established a 25-percent benchmark to be used as the "starting point" for percentage-of-the fund analysis. *In re Online DVD Rental Antitrust Litig.*, 779 F.3d at 949, 955 (9th Cir. 2015); *Intermec*, 1992 WL 203800, at *1 (awarding 25% of common fund). "That percentage amount can then be adjusted upward or downward depending on the circumstances of the case." *de Mira v. Heartland Emp't Serv., LLC*, 12-cv-04092, 2014 WL 1026282, at *1 (N.D. Cal. Mar. 13, 2014). Courts have recognized that "'in most common fund cases, the award *exceeds* the benchmark.'" *Id.* (quoting *Omnivision*, 559 F. Supp. 2d at 1047; *accord Burnthorne-Martinez v. Sephora USA, Inc.*, No. 4:16-CV-02843-YGR, 2018 WL 5310833, at *2 (N.D. Cal. May 16, 2018). At bottom, the Ninth Circuit asks district courts to "consider[] all of the circumstances of the case" and "reach[] a reasonable percentage." *Vizcaino*, 290 F.3d at 1048.

Courts may consider the following factors: (1) whether counsel achieved exceptional results for the class; (2) whether the case was risky for class counsel; (3) whether the case was handled on a contingency basis; (4) the market rate for the particular field of law; and (5) the burdens class counsel experienced while litigating the case. *Id.* at 954-55. Each of these factors supports Class Counsel's request for a fee award of 25 percent of the common fund.

1. <u>Class Counsel Obtained A Substantial Result.</u>

In determining the amount of attorneys' fees to award, a court should examine "the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Omnivision*, 559 F. Supp. 2d at 1046 ("The overall result and benefit to the class from the litigation is the most critical factor in granting a fee award."); Federal Judicial Center, *Manual for Complex Litigation*, § 27.71, p.336 (4th ed. 2004) (the "fundamental focus is on the result actually achieved for class members"). The Settlement is a significant result for the Class, comprising both core prospective and monetary relief. As further described in the accompanying declarations, the litigation was hard-fought, difficult, contentious, and posed a series of case dispositive risks for Class Counsel. *See* Hutchinson Decl. ¶¶ 23-68; Klinger Decl. ¶¶ 11-45. The Settlement achieved reflects the

high quality of work by skilled and experienced Class Counsel throughout the *Kim* and *Pine* litigation, the classwide discovery efforts, the motion practice regarding APFM's potential defenses, and several rounds of settlement negotiation.

Monetary Relief: Class Counsel obtained a total payment by APFM of $6 million, out of which eligible Class Members will receive cash payments. *See* Agreement ¶ 4.2. The average payout is expected to be $34 per Class Member, which falls within the range of TCPA settlements routinely approved by courts across the country.[4] This is a substantial result for Class Members, particularly because TCPA damages are purely statutory in nature. That is, Class Members have not suffered any injuries to person or property, out-of-pocket losses, or other economic harm. Given the risks of ongoing litigation, discussed below, the Settlement's payment to Class Members is significant.

Equitable Relief: Courts "should consider the value of the injunctive relief obtained as a 'relevant circumstance' in determining what percentage of the common fund Class counsel should receive as attorneys' fees." *Staton*, 327 F.3d at 974; *Vizcaino*, 290 F.3d at 1049 (affirming enhanced fee award where "counsel's performance generated benefits beyond the cash settlement fund"). Class Counsel obtained *over 200* declarations from Class Members who received telephone calls from APFM and confirmed that making calls made to them without their prior express consent stop was the single most important thing to Class Members. Hutchinson Decl. ¶ 43. The Settlement furthers that goal by changing the disclosure language on the website at issue in a manner designed to secure prior express written consent and by changing the dialer used at the start of the class period. *See* Agreement ¶ 4.1.

2. The Risk Involved with the Litigation Supports the Fee Request.

"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."

[4] *See, e.g.*, Hutchinson Decl. ¶ 7(c)-(g); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (approving fee application and noting that payment of $34.60 per class member "falls within the range of recoveries in other TCPA actions").

1 *Omnivision*, 559 F. Supp. 2d at 1046-47; *see also Vizcaino*, 290 F.3d at 1048 (risk of dismissal or
2 loss on class certification is relevant to evaluation of a requested fee). Class Counsel confronted
3 significant hurdles to obtaining any recovery. To prevail in any ongoing litigation, Class
4 Counsel would be required to successfully litigate a number of quickly evolving legal issues. A
5 fee award of 25 percent is appropriate when considered against such risks.

6 First, the action presented risks on the merits. APFM presented a series of case-
7 dispositive legal defenses, including that it did not place the calls using an automatic telephone
8 dialing system ("ATDS"), that its calls did not constitute telemarketing, and that it obtained
9 consumers' prior express consent. The FCC has been very active on each of these issues and the
10 legal landscape is changing quickly. While this action was pending, the D.C. Circuit vacated
11 part of an FCC declaratory ruling and undid the FCC's prior ruling on what constituted an ATDS
12 under the TCPA. *ACA Int'l v. FCC*, 885 F.3d 687, 695 & 706 (D.C. Cir. 2018); *see also* Minute
13 Order, Dkt. 75 (requesting supplemental briefing on *ACA International* and subsequent district
14 court decision interpreting it). If the FCC issued an adverse ruling on the meaning of ATDS,
15 telemarketing, and/or prior express consent, Plaintiff's class claims could have been eviscerated.
16 The risk of further protracted litigation—and ultimately of no recovery at all—was therefore
17 particularly high in this case, given various defenses potentially available to APFM.

18 Second, there was an acute risk that the Court would decline to certify this case as a class
19 action. "Courts are split" on the question whether the issue of prior express consent is an
20 individualized issue that precluded class certification. *See, e.g.*, *Chapman v. First Index, Inc.*,
21 No. 09-5555, 2014 WL 840565, at *2 (N.D. Ill. March 4, 2014) (citing cases), *aff'd in part,*
22 *vacated in part, remanded*, 796 F.3d 783 (7th Cir. 2015). Plaintiff faced the very same issue in
23 this matter. If APFM was able to present convincing facts to support its position, the Court
24 might decline to certify the class, leaving only Plaintiff's individual claim.

25 Finally, there is the risk of losing a jury trial. And, even if Plaintiff and the Class did
26 prevail, any recovery could be delayed for years by an appeal. The Settlement provides

1 substantial relief to Class Members without further delay.

2 Class Counsel believe they could have prevailed on these issues, but success was by no
3 means assured. Litigating these issues would risk recovering nothing for the Class, and would
4 require significant additional expenditure of time, money, and resources for which Class Counsel
5 would not be compensated should they lose on summary judgment or fail to certify a class.
6 Indeed, success was not assured. Class counsel lost a number of TCPA class actions without any
7 recovery for the proposed class or any fees for their work on behalf of the proposed class.
8 Hutchinson Decl. ¶ 72; Klinger Decl. ¶ 60. Such cases underscore the risk faced by Class
9 Counsel. Given all of the above risks, all of which were present when Class Counsel undertook
10 the case on a contingency fee basis, Class Counsel's fee award request is reasonable.

11 **3. <u>Class Counsel Faced Substantial Risk of Non-Payment.</u>**

12 The requested fee is also justified by the financial risks undertaken by Class Counsel in
13 representing the Class on a contingency basis. *See Vizcaino*, 290 F.3d at 1050 (finding that class
14 counsel's representation of the class on a contingency basis is relevant to the assessment of the
15 fee). The public interest is served by rewarding attorneys who assume representation on a
16 contingent basis with an enhanced fee to compensate them for the risk they might be paid
17 nothing at all for their work. *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d
18 1291, 1299 (9th Cir. 1994). Class Counsel have devoted substantial resources to the prosecution
19 of this case with no guarantee that they would be compensated for their time or reimbursed for
20 their expenses. *See* Hutchinson Decl. ¶¶ 69-72 (detailing 23 similar TCPA cases where Class
21 Counsel did not receive any recovery for the proposed classes of for counsel); Klinger Decl. ¶¶
22 58-59; Hussin Decl. ¶ 12. In spite of the substantial risk of nonpayment, Class Counsel
23 zealously represented the interests of the Class.

24 **4. <u>Fees in Similar Actions.</u>**

25 Courts may refer to awards made in other settlements of comparable size when
26 determining whether an award is reasonable. *See Vizcaino*, 290 F.3d at 1050 n.4. The requested

fee is consistent with the fees and costs awarded in similar TCPA cases. *See e.g., Ikuseghan v. Multicare Health Sys.,* No. C14-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash. Aug. 16, 2016) (awarding 30% in TCPA class settlement and "find[ing] that 30% of the settlement fund represents a fair and reasonable fee award").[5] As part of Judge Settle's analysis in *Ikuseghan*, the court surveyed fee awards in TCPA settlements in the Ninth Circuit and discovered that more than half of the awards (14 of 25) were at the 25 percent benchmark *or higher*. *Ikuseghan*, 2016 WL 4363198, at *3. The requested percentage is even less than other out-of-Circuit TCPA settlements—including the Northern District of Illinois—where a substantial portion of this action was litigated before transfer to this District.[6] The fee is also in line with fees awarded by this Court in cases of similar size. *See Intermec*, 1992 WL 203800, at *1. In short, Class Counsel's fee request is reasonable under the "percentage of the fund" method.

5. <u>The burdens faced by Class Counsel support the fee request.</u>

The Ninth Circuit instructs district courts to consider the burdens class counsel experienced while litigating the case (e.g., cost, duration, and foregoing other work). This litigation has been pending for three years across two district courts. Class Counsel has advanced time and out-of-pocket costs—and foregone other work while litigating this case. *See In re Infospace, Inc. Sec. Litig.*, 330 F. Supp. 2d 1203, 1212 (W.D. Wash. 2004) (noting that "preclusion of other employment by the attorney due to acceptance of the case" is a factor to consider when determining an appropriate fee award).

[5] *See also Cabiness v. Educ. Fin. Sols., LLC*, No. 16-CV-01109-JST, 2019 WL 1369929, at *8 (N.D. Cal. Mar. 26, 2019) (awarding 30% of the settlement fund in TCPA class action); *Gergetz v. Telenav, Inc.*, No. 16-CV-04261-BLF, 2018 WL 4691169, at *7 (N.D. Cal. Sept. 27, 2018) (awarding 30% of settlement fund in TCPA class settlement); *Lofton v. Verizon Wireless (VAW) LLC*, No. C 13-05665 YGR, 2016 WL 7985253, at *1 (N.D. Cal. May 27, 2016) (awarding 30% of the common fund in TCPA class action); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014) (finding "a 33% award of fees and costs is warranted"); *Dakota Med., Inc. v. RehabCare Grp., Inc.*, No. 1:14-cv-02081, 2017 WL 4180497, at *9 (E.D. Cal. Sept. 21, 2017) (approving "an award of one-third of the $25 million settlement fund, or $8,333,333").

[6] *See, e.g.*, *Kolinek v. Walgreen Co*., 311 F.R.D. 483, 501 (N.D. Ill. 2015) (awarding 36% of net settlement fund in TCPA case); *Martin v. JTH Tax, Inc.,* No. 13-cv-6923, Dkt. 85 (N.D. Ill. Sept. 16, 2015) (awarding 38% of net settlement fund in TCPA case).

C. A Lodestar-Multiplier Cross-Check Confirms the Requested Fee.

The Ninth Circuit has encouraged, but not required, courts to conduct a lodestar cross-check when assessing the reasonableness of a percentage fee award. *See Bluetooth*, 654 F.3d at 944 (stating "we have also encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method" of determining fees). 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. *Hanlon*, 150 F.3d at 1029. At that point, "the resulting figure may be adjusted upward or downward to account for several factors including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* (citing *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)); *see also In re Bluetooth*, 654 F.3d at 942. The lodestar-multiplier method confirms the propriety of the requested fee here.

1. Class Counsel's lodestar is reasonable.

Through June 11, 2020, Class Counsel devoted 1361.6 hours to the investigation, litigation, and resolution of this complex case, thereby incurring more than $871,507 in lodestar. Hutchinson Decl. ¶ 78; Klinger Decl. ¶¶ 65-66; Hussin Decl. ¶ 14.[7] As detailed in their respective declarations, counsel's time was spent investigating the claims of the Settlement Class Members, conducting discovery, researching and analyzing legal issues, engaging in settlement negotiations, and litigating multiple motions brought by APFM. Hutchinson Decl. ¶¶ 23-68; Klinger Decl. ¶¶ 11-56; Hussin Decl. ¶¶ 7-14.[8]

[7] Class Counsel anticipate spending an additional hours seeing this case through its final resolution, including by overseeing the claims process and attending the final approval hearing.

[8] Class Counsel's efforts to secure a settlement before expending even more lodestar further support the fee, as Class Counsel obtained a reasonable resolution prior to the filing of summary judgment motions that could have significantly weakened or eliminated Plaintiff's claims. *See, e.g.*, *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 539 (W.D. Wash. 2009) (approving prompt settlement after thorough pre-filing negotiations). Awarding Class Counsel a reasonable percentage of the common fund promotes the public policy of encouraging timely settlements. *Vizcaino*, 290 F.3d at 1050, n.5 (noting "it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief"). In providing this general overview, Class Counsel do not waive and, in fact, specifically reserve all protections afforded by the attorney-client privilege and work product doctrine.

The time Class Counsel devoted to this case 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. Hutchinson Decl. ¶ 76-77; Klinger Decl. ¶¶ 63-64; Hussin Decl. ¶ 13. Throughout the litigation and mediation process, Class Counsel faced defense counsel at the top of their profession from one of the most highly respected law firms in Seattle. *See DeStefano v. Zynga, Inc.*, 12-cv-04007, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) ("The quality of opposing counsel is also relevant to the quality and skill that class counsel provided.").

Class Counsel's hourly rates are reasonable and have been approved by this Court and by other courts in the Ninth Circuit and throughout the country.[9] 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). Class Counsel are experienced, highly regarded members of the bar with extensive expertise in complex class actions involving consumer claims like those at issue here. *See* Hutchinson Decl. ¶¶ 5-22; Klinger Decl. ¶¶ 1-8; Hussin Decl. ¶¶ 4-6.

2. <u>A multiplier is warranted.</u>

The fee requested by Class Counsel reflects a multiplier of 1.72. In *Vizcaino*, the Ninth Circuit noted that multipliers have ranged from 0.6 to 19.6, and upheld an award with a 3.65

[9] *See Arthur, et al. v. Sallie Mae, Inc.*, No. C10-0198 JLR, Dkt. No. 265 (W.D. Wash. Sept. 17, 2012) (approving LCHB's hourly rates and awarding requested attorneys' fees); *Carideo v. Dell*, No. 06-cv-1772, at 4 (W.D. Wash. Dec. 17, 2010) (concluding that LCHB's "hourly rates used to calculate the requested fee are reasonable"); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1326 (W.D. Wash. 2009) (approving hourly rates for work performed in Seattle); *Grays Harbor Adventist Christian School v. Carrier Corp.*, No. 05-5437, 2008 WL 1901988 (W.D. Wash. Apr. 24, 2008), at *6 (approving LCHB's hourly rates following a reasonableness review, and rejecting objections); *see also* Hutchinson Decl. ¶¶ 83-84 (listing federal courts specifically approving LCHB's rates as reasonable). In *Pelletz*, Judge Coughenour found that Mr. Selbin and LCHB's rates were "reasonable for the work performed in each of [Counsel's] respective communities by attorneys of similar skill, experience, and reputation." 592 F. Supp. 2d at 1326-27; *accord Buchanan v. Sirius XM Radio, Inc.*, Case 3:17-cv-00728-D (N.D. Tex. Jan. 28, 2020) (approving LCHB's Mr. Selbin's and Mr. Hutchinson's current rates, which have increased over those approved in the earlier cases in this District to reflect market rates and their additional years of experience); *Dunn v. Wells Fargo Bank, N.A.*, Case: 1:17-cv-00481 (N.D. Ill. Dec. 10, 2019) (same).

1 multiplier in that case. *Vizcaino*, 290 F.3d at 1050-51 and n.6; *accord In re Infospace, Inc.*, 330
2 F. Supp. 2d 1203, 1216 (W.D. Wash. 2004) (Zilly, J.) (finding that a lodestar multiplier of 3.5
3 adequately compensates counsel's risk of nonpayment); *Steiner v. Am. Broad. Co, Inc.*, 248 F.
4 App'x. 780, 783 (9th Cir. 2007) (finding a multiplier of approximately 6.85 to be "well within
5 the range of multipliers that courts have allowed"); *Craft v. Cnty. of San Bernardino*, 624 F.
6 Supp. 2d 1113, 1123 (C.D. Cal. 2008) (multiplier of 5.2).

7 Courts in the Ninth Circuit use similar factors in determining the reasonableness of a
8 percentage-of-the-fund-award as they do in determining an adjustment of lodestar when
9 conducting a lodestar-multiplier cross check, namely: results achieved, risks stemming from the
10 complexity of the case, and the risk of nonpayment. *See Hanlon*, 150 F.3d at 1029*; see MCL 4th*
11 § 14.122, at 261. Class Counsel refer the Court to the above discussion of those factors.[10] The
12 multiplier of 1.72 is therefore comfortably within the spectrum of multipliers identified in
13 *Vizcaino*, and is in line with the multipliers awarded in other courts within the Ninth Circuit.
14 The lodestar-multiplier cross check thus supports the fee request here.

15 **D. <u>The Costs Sought Are Appropriate, Fair and Reasonable</u>**

16 In addition to their fees, Class Counsel also seek reimbursement of their costs incurred in
17 prosecuting this purely contingency action on behalf of the Class. It is well-established that
18 recovery of costs, in addition to fees, is appropriate in its own right. "Reasonable costs and
19 expenses incurred by an attorney who creates or preserves a common fund are reimbursed
20 proportionately by those class members who benefit [from] the settlement." *In re Media Vision*
21 *Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Class Counsel incurred out-of-
22 pocket costs totaling $55,080.60 primarily to cover expenses related to expert analysis, travel,
23 deposition and mediation fees, legal research, investigation, and administrative costs such as

24 [10] By way of summary, the multiplier here is reasonable given the outstanding result of $6 million and practice
25 changes that Class Counsel have achieved for the Class through their skill, experience, and effort; the risks involved in this litigation, particularly given APFM's substantial opposition and the numerous issues of law that are complex
26 and truly novel; and the fact that counsel agreed to represent the Class on a contingent basis, thereby risking their own resources with no guarantee of recovery. *See Hanlon*, 150 F.3d at 1029.

copying, mailing, and messenger expenses. Hutchinson Decl. ¶¶ 86-87; Klinger Decl. ¶ 69; Hussin Decl. ¶ 15. 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, 1177-78 (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 a class action litigation).

E. Service Awards for the Plaintiffs are Reasonable.

Service awards compensate plaintiffs for work done on behalf of the Class, account for financial and reputational risks associated with litigation, and promote the public policy of encouraging plaintiffs to undertake the responsibility of representative lawsuits. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Hartless v. Clorox Co*., 273 F.R.D. 630, 646-47 (S.D. Cal. 2011) ("Incentive awards are fairly typical in class actions."). The Settlement is not contingent on the Court's granting of such an award. Agreement ¶¶ 5.2-5.3.

The requested service awards of $10,000 and $2,500 are modest under the circumstances, and well in line with awards approved by federal courts in Washington and elsewhere. *See Pelletz*, 592 F. Supp. 2d at 1329-30 & n.9 (approving $7,500 service awards and collecting decisions approving awards ranging from $5,000 to $40,000); *Lofton*, 2016 WL 7985253, at *2 (awarding $15,000 incentive fee in TCPA class action). These awards will compensate Plaintiffs for their time and effort in stepping forward to serve as proposed class representatives, assisting in the investigation, keeping abreast of the litigation, and reviewing and approving the proposed settlement terms after consulting with Class Counsel. Indeed, without Plaintiffs litigating this matter, the Class would not have been able to recover anything.

IV. CONCLUSION

Class Counsel respectfully request that this Court grant their motion and award the requested attorneys' fees and costs and Plaintiff service award in full.

Dated: June 11, 2020

By: */s/ Daniel M. Hutchinson*
One of his Attorneys

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