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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BAERBEL MCKINNEY-DROBNIS, JOSEPH B. PICCOLA, and CAMILLE BERLESE, individually and on behalf of all others similarly situated

Plaintiffs,

v.

MASSAGE ENVY FRANCHISING, LLC, a Delaware Limited Liability Company,

Defendant.

Case No: 3:16-cv-6450 MMC

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES FOR THEIR MOTION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

Dated: November 1, 2019
Time: 9:00 am
Courtroom: 7 – 19th Floor
Judge: Hon. Maxine M. Chesney

UNREDACTED DOCUMENT FILED AS PER THE COURT'S ORDER [Dkt. No. 120]

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether an award of attorneys' fees in the amount of $3,214,582.86 is fair and reasonable under the relevant legal standard?

2. Whether Plaintiffs are entitled to be reimbursed $85,417.14 in costs expended by the litigation?

3. Whether Plaintiffs are each entitled to $10,000 incentive award for their contribution to and participation in the litigation?

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, Plaintiffs Baerbel McKinney-Drobnis, Joseph B. Piccola, and Camille Berlese (collectively, "Plaintiffs") respectfully move the Court for an Order awarding attorneys' fees and expenses and the proposed incentive awards for Plaintiffs' contributions to the litigation.

I. INTRODUCTION

After more than two years of litigation (that included successfully defeating Defendant's dispositive motion, a writ of mandamus, and prevailing on a challenge to Plaintiffs' class allegations), Plaintiffs achieved an outstanding settlement for the Class–a result not remotely guaranteed by trial. Class Counsel persisted in their efforts to advance the litigation despite the substantial financial risk given the contingent nature of the work and its uncertain outcome. As a result, Defendant Massage Envy Franchising LLC ("Defendant" or "MEF") has agreed to pay Plaintiffs' attorneys' fees and costs up to $3,300,000, in addition to and separate from the relief provided to the Class, plus the costs of notice and settlement administration.

The agreed fee and cost provision of Settlement Agreement[1] is inherently reasonable. Class Counsel have invested to date more than ,.5 hours of time and incurred more than $1,638,760.00 in attorneys' fees. Plaintiffs also request an award of the reasonable costs expended throughout the two years of litigating this case. The award of attorneys' fees and expenses will **not** affect the benefits provided to the Class.

[1] The Settlement Agreement is attached as Exhibit D to the Declaration of Jeffrey Krinsk, in support of Plaintiffs Motion for Preliminary Approval [ECF No. 103-1].

As set forth below, the settlement value is substantial and the requested fee amount would represent a modest 1.96 multiplier. This figure excludes the substantial work that Class Counsel must still perform, including preparing final approval documentation and overseeing the claims administration (which is currently in progress). In addition, the fees and costs requested are below the 25% benchmark fee award in the Ninth Circuit. As such, Class Counsel's fee request is lower than the prevailing standards.

Similarly, Plaintiffs have each expended significant time and effort prosecuting this action. Plaintiffs have been deposed, responded to written discovery, supervised Class Counsel's litigation decisions, reviewed the filings, and made themselves available during the parties' mediations and settlement negotiations. Plaintiffs have not only prosecuted the case on their and the class' behalf, but also defended their friends and family members from Defendant's discovery requests. In doing so, each Plaintiff has dedicated over one-hundred hours to this case. Accordingly, Plaintiffs respectfully request a reasonable incentive award in recognition of their contributions over the past two years that facilitated the successful prosecution of this case.

II. OVERVIEW OF LITIGATION[2]

The record leading up to this Settlement was well-documented in the motion for preliminary approval and attached declarations. The instant class action was originally filed by Plaintiffs on November 4, 2016. ECF No. 1. Since that date, the parties and their counsel have vigorously litigated their various claims and defenses.

A. The Parties' Early Dispositive Motions

On January 27, 2017, Plaintiffs filed a Motion to Strike Defendant's Affirmative Defenses. *See* ECF No. 24. The same day, MEF filed its Motion for Judgment on the Pleadings or, in the Alternative, to Strike Class Action Allegations. *See* ECF No. 26. MEF's Motion advanced two arguments: (1) that Plaintiffs' claims were released by previous settlements, and (2) that Plaintiffs' counsel were prohibited from representing a class of current Massage Envy members. *Id.*

[2] Counsel is aware of the Northern District's Procedural Guidance for Class Action Settlements which states "[t]he motion for attorneys' fees should refer to the history and facts set out in the motion for final approval." This Motion, however, precedes the motion for final approval. Plaintiffs will ensure that they do not repeat the case history and background facts in both motions.

MEF's various preclusion defenses asserted that Plaintiffs' claims were released by *Hahn v. Massage Envy Franchising, LLC* and related settlements. *Id*. *Hahn* was an earlier class action, filed by Class Counsel in 2012, which alleged that MEF improperly caused prepaid massages to be forfeited upon termination of a Membership. *See Hahn v. Massage Envy Franchising, LLC*, No. 3:12-cv-00153, 2014 WL 5099373, at *2 (S.D. Cal. Apr. 15, 2014) (explaining the "gravamen" of the *Hahn* litigation). At issue were the same Membership Agreements implicated in this case.

The Court granted Plaintiffs' Motion to Strike as to twenty-five of MEF's twenty-nine Affirmative Defenses. *See* Order Denying Defendant's Motion for Judgment on the Pleadings, ECF No. 49, at pp. 11-18. The Court also denied Defendant's Motion finding, in part, that the *Hahn* settlement could not have released the claims at bar under the "Identical Factual Predicate" doctrine. *Id.*, at pp. 4-9. MEF later moved this Court to certify the issue of whether Plaintiffs' claims were released by *Hahn* for interlocutory appeal, which was denied. *See* Order Denying Defendant's Motion for Certification of Order for Interlocutory Appeal, ECF No. 68.

B. MEF's Writ of Mandamus

Following the denial of their motion, MEF petitioned the Ninth Circuit for a Writ of Mandamus to vacate the Court's Orders on the Motions for Judgment on the Pleadings [Dkt. No. 49] and Interlocutory Appeal [Dkt. No. 68]. *Massage Envy Franchising, LLC v. United States District Court*, No. 17-71722, Dkt. No. 1 (9th Cir.). The Ninth Circuit ordered that the issue be fully briefed. *Id.*, Dkt. No. 2. MEF's petition was denied on procedural grounds. *Id.*, Dkt. No. 5.

C. The Parties' Discovery Efforts

The parties have engaged in significant and substantial discovery for this case. Plaintiffs have propounded fifty-five document requests, twenty-five interrogatories, and two document subpoenas. Declaration of Jeffrey R. Krinsk ("Krinsk Decl."), concurrently filed herewith, at ¶ 42. As a result, Plaintiffs have reviewed over 7,000 pages of documents, in addition to thousands of documents from the *Hahn* litigation. *Id.*, ¶ 47. Prior to the Settlement, both parties were discussing the protocol for ESI discovery, including MEF's email system and databases. *Id.*, ¶ 43. Additionally, Plaintiffs had scheduled depositions of MEF's key corporate officers and were preparing for their examination. *Id.*, ¶ 44.

MEF also issued multiple document requests, interrogatories, and requests for admissions to Plaintiffs, which were answered. *Id*., ¶¶ 45. Defendant deposed each of the Plaintiffs, and subpoenaed several of Plaintiffs' family members and friends. *Id*., ¶¶ 46. Plaintiffs successfully moved to quash these subpoenas before Magistrate Judge Kandis A. Westmore. Order Regarding Joint Discovery Letter, Dkt. No. 87.

D. The Settlement and the Parties' Negotiations

Settlement discussions did not proceed in earnest, however, until late 2017. The parties' counsel originally met in October 2017 to discuss their respective settlement positions. Krinsk Decl., ¶ 48. The parties eventually agreed to mediation before David A. Rotman in February 2018. *Id*. While the parties made significant progress, the parties were unable to come to an agreement at the February mediation. *Id*., ¶ 50.

Over the following months, the parties' counsel engaged in direct negotiations. *Id*., ¶ 51. Through telephonic and email exchanges, the parties were able to slowly narrowed the points of disagreement concerning key material terms. While the parties initially scheduled a follow-up mediation for August, the parties came to a disagreement about certain preconditions to the mediation. *Id*., ¶ 52. This disagreement ultimately lead to the mediation being cancelled and the lifting of the interim stay. *Id*.; Order Lifting Stay of Case, Dkt. No. 96. At this time, counsel resumed their previous litigation efforts, focusing on additional discovery. Krinsk Decl., ¶ 53. Plaintiffs were preparing to conduct ESI discovery regarding Defendant's email system and internal databases. *Id*. The parties additionally rescheduled a number of outstanding depositions. It was also at this point in time that MEF filed its Motion for Relief regarding Judge Westmore's order on the parties' Joint Discovery Letter. Dkt. No. 97.

Plaintiffs were simultaneously preparing for class certification and the parties were preparing potential cross motions for summary judgment. Krinsk Decl., ¶ 54. The parties had previously represented to the Court that "MEF anticipates filing a motion for summary judgment prior to Plaintiffs' anticipated motion for class certification" and "Plaintiffs… may move for summary adjudication regarding Plaintiffs' contract." *See* Stipulation Re: Schedule for Briefing, Dkt. No. 70, at pp. 1-2; *see also* Order Lifting Stay of Case, Dkt. No. 96 (setting a May 17, 2019 deadline for

Plaintiffs to file their motion for class certification). However, the parties agreed to return to mediation on November 11, 2018 before David Rotman. Krinsk Decl., ¶ 56. It was at this second (initially postponed) mediation that the parties were able to reach agreement on certain material terms of the Settlement. *Id.*

In exchange for a release of the claims litigated in this case, MEF committed to not issue less than $10,000,000 in Vouchers that can be redeemed at any Massage Envy location for retail products, massage sessions, enhancements, and/or facial sessions. Settlement Agreement, at ¶ 11. These Vouchers are fully transferrable and may be aggregated. *Id.* Class Members will have sixteen months from the date the Vouchers are issued to redeem their Voucher. The only other limitations are that these Vouchers are not redeemable for cash and cannot be applied to satisfy monthly membership fees or pay employees tips. *Id.*

The Settlement also provides significant Injunctive Relief aimed at preventing future injury to consumers. MEF's new template Membership Agreement requires at least forty-five days' written notice before any monthly fee increase, if any. *Id.*, at ¶¶ 14-15; *see also* Settlement Agreement, at Exhibit 5 (for the proposed Membership Agreements). This concession is a substantial increase over the ten days' notice previously (and only purportedly) provided in preceding Membership Agreements. The forty-five day period is designed to allow a Member a reasonable opportunity to cancel his/her Membership before incurring any future price increase. Settlement Agreement, at ¶ 15.

III. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

A. Class Counsel Are Eligible to Recover a Reasonable Fee Based on the Result Achieved for the Class

Rule 23(h) provides, in relevant part, "In 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). The Settlement Agreement provides that that Defendant will separately pay Plaintiff's fees and litigation costs, up to $3.3 million. California law, similarly, allows for the recovery of attorneys' fees for class actions. *See, e.g.*, *Congdon v. Uber Techs., Inc.*, No. 16-CV-02499 YGR, 2019 WL 2327922, at *2 (N.D. Cal. May 31, 2019) (applying California

law to the determination of attorney fees in a national breach of contract/conversion class action) (*citing In re Sony PS3 "Other OS" Litig*., No. 10-CV-01811-YGR, 2018 WL 2763337, at *1 (N.D. Cal. June 8, 2018) & *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047 (9th Cir. 2002)); CAL. CODE CIV. PRO., § 1021.5.

The Ninth Circuit has historically used two methods for determining the proper amount of recoverable attorneys' fees, the lodestar and percentage of recovery methods. *See Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1029 (9th Cir. 1998); *In re Bluetooth Headset Prod. Liab. Litig*., 654 F.3d 935, 941-42 (9th Cir. 2011). The lodestar method of calculation is more appropriate in cases where "there is no way to gauge the net value of the settlement or any percentage thereof." *Hanlon,* 150 F.3d at 1029. By contrast, the percentage-of-recovery method is useful in cases where "the benefit to the class is easily quantified," and it is therefore worthwhile to forego the "often more time-consuming task of calculating the lodestar." *In re Bluetooth,* 654 F.3d at 942. The Court need not depart from these well-established analytical tools.

1. This Settlement is not a Coupon Settlement under CAFA

The plaintiff in the recently related and transferred *Lapa v. Massage Envy Franchising LLC* (No. 3:19-cv-02694) argued that this is a "coupon" settlement and that presumably attorney's fees should be examined pursuant to the Class Action Fairness Act of 2005 ("CAFA"). *See generally* Lapa's Administrative Motion [ECF No. 108] at p. 3. CAFA directs courts to apply heightened scrutiny to coupon settlements, providing that the "portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a).

CAFA "provides no definition of 'coupon,' so courts have been left to define that term on their own, informed by § 1712's animating purpose of preventing settlements that award excessive fees…" *In re Easysaver Rewards Litig*., 906 F.3d 747, 755 (9th Cir. 2018). In evaluating whether certain credits qualify as coupons, courts within the Ninth Circuit consider three factors: "(1) whether class members have to 'hand over more of their own money before they can take advantage of' a credit, (2) whether the credit is valid only 'for select products or services,' and (3) how much flexibility the credit provides, including whether it expires or is freely transferrable." *Id*. (*citing In*

re Online DVD-Rental Antitrust Litig., 779 F3d 934, 951-52 (9th Cir 2015)). Moreover, courts may consider "if a class member is willing to do business again with the defendant who has injured her in some way." *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015); *see also In re Easysaver*, 906 F.3d at 755.

While the above factors are instructive, their application in prior decisions is more informative. In the Ninth Circuit's decision, *In re Online DVD*, the Court found class relief in the form of gift cards to Walmart (a defendant in the case) was not a "coupon settlement" within meaning of CAFA. *In re Online DVD*, 779 F.3d 934, 949. In doing so, the decisive factors were that the gift cards did not "require class members to hand over more of their own money before they can take advantage of the [gift card]" and that the gift card was not "only valid for select products or services." *Id.*, at 951. Thus, a "class member need not spend any of his or her own money and can choose from a large number of potential items to purchase." *Id.* And while the Court noted that the gift card was only for 12 dollars, "the settlement gives class members $12 to spend on any item carried on the website of a giant, low-cost retailer." *Id.* The *In re Online DVD* Court also noted that the "Walmart gift cards can be used for any products on walmart.com, are freely transferrable (though they cannot be resold on a secondary market) and do not expire." *Id.* Given these factors, the Ninth Circuit held that the Walmart gift cards were not coupons. *Id.*, at 951-52.

On the other hand, the Ninth Circuit's *In re Easysaver* opinion distinguished the factors that caused the non-coupon settlement in *In re Online DVD* to be considered a coupon settlement. *In re Easysaver* involved a settlement entitling class members to a $20 'credit' at defendants' online businesses, which sell flowers, chocolates, fruit baskets, and similar items. *Easysaver Rewards Litig.*, 906 F.3d 747, 752. The *Easysaver* Court noted that there were likely no products that could be purchased with the 'credits' without an additional payment by the class member. *In re Id.*, at 757. Moreover, "[t]he credits [were] also far less flexible than those available in *In re Online DVD*. Although freely transferrable, they expire one year after issuance and have a series of blackout periods, including during the days before Valentine's Day, Mother's Day, and other holidays on which consumers most often buy flowers and chocolates." *Id.*, at 757. These onerous restrictions engender all the concerns that the CAFA's coupon provisions were designed to address. *Id.*; *see also*

In re HP Inkjet Printer Litig., 716 F.3d 1173, 1176 (9th Cir. 2013) (describing "e-credits," which expired in six months, were non-transferable, and could not be used with other discounts or coupons, as being a "euphemism for coupons").[3]

This case is exceedingly more analogous to *In re Online DVD*, than *In re Easysaver*. Based on current redemption rates, Plaintiffs expect that Settlement Class Members will receive a **$50.34, $100.69, $151.03, $201.37, or $251.71 Voucher** (depending on the quantum of fee increase paid). Krinsk Decl., ¶ 64. The Vouchers can be used at any of the approximately 1,200 Massage Envy franchised locations to purchase retail products, massage sessions, enhancements, and/or facial sessions within sixteen months of issuance, are fully transferable, and may be aggregated. The only restriction provides that Vouchers may not be redeemed for cash or be used as payment for tips or monthly membership fees.

A review of Massage Envy's pricing reveals that the Vouchers can be used to purchase a wide number of items and services. For example, the overriding reason that individuals visit a Massage Envy franchised location is to purchase various spa services. Krinsk Decl., ¶ 70. Based on Defendant's most recent pricing, the most popular services range between *$20 and $46 for a thirty minute session*[4], *$40 and $80 for a sixty minute session*[5] and *$60 and $120 dollars for a ninety minute session*[6]. *Id.* (pricing varies based on geographic region). Additionally, individuals may purchase *enhancement or additional services that can be added to a massage or facial sessions for $10 to $30*, such as Enhanced Therapies, including Aroma Therapy, CyMe Boosts, Exfoliating Lip Treatment, Exfoliating Foot Treatment, Exfoliating Hand Treatment, Anti-Aging Eye Treatment, 10-min Percussion Therapy, or Enhanced Muscle Therapy. *Id*. Even the minimum estimated Voucher is sufficient to purchase a *thirty minute session* (as well as a sixty minute session at certain franchised locations). *Id*. The balance of the Class will be in a position to purchase most services

[3] While *In re Easysaver* noted that the *In re Online DVD* settlement offered a cash option, this distinction was not dispositive to its analysis. Under CAFA, section 1712, if the indicia of a coupon settlement were found *In re Online DVD*, the Ninth Circuit would have been required to find that it was a "Coupon" settlement regardless of whether a coupon only represented a portion of the settlement. 28 U.S.C. § 1712(b)-(c).

[4] A thirty-minute Total Body Stretch or Rapid Tension Relief Session.

[5] A sixty-minute Massage, Healthy Skin Facial, or Total Body Stretch.

[6] A ninety-minute Massage or Healthy Skin Facial.

that Massage Envy locations offer, even with additional enhancements. *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2013 WL 12308314, at *5 (N.D. Cal. July 22, 2013) (noting a $20 voucher was not a coupon because it could purchase at least two products from defendant's website.)

Yet Massage Envy franchised locations further offer 351 spa-related retail products (251 when different variations of the similar product are omitted), such as skin-care products, bath products, essential oils, and candles). Krinsk Decl., ¶ 60, Ex. B (a full list products offered by Massage Envy locations) (Filed Under Seal). Of these products, *69.7 percent (241 products) are sold for under $50.34*, *89.5 percent (314 products) are under $100.69*, *97.6 percent (339 products) are under $151.03*, *the same percent are under $201.37*, and *97.9 percent (340 products) are under $251.71*. *Id*. And these products are actually being purchased by the Settlement Class, representing over $43 million in sales in 2018. *Id*., ¶ 69. Of the aforementioned sales, 75 percent were under $50.34, 98.4 percent were under $100.69, and 100 percent were under $151.03. *Id*. Accordingly, Settlement Class Members can purchase the vast majority of the products and services offered with the Vouchers to be issued.

More importantly, that this is not a case where a plaintiff argues that defendants' products are defective, or that their service subpar. *See generally*, FAC. Nor is this a case where class members did not agree to do business with the defendants in the first place. The Court should rightfully be wary of a settlement that forces the class members to conduct business with a defendant under such circumstances. *Cf. In re Easysaver*, 906 F.3d at 752 (the court questioned requiring the class to "hand over their billing information again to the very company that they believe mishandled that information in the first place."); *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) ("[W]hy would former employees, who allegedly were forced to buy a great deal of unwanted Polo products, desire product vouchers so that they could purchase even more clothes?").

Plaintiffs, rather, complain that they overpaid for services they actually wanted. *Cf. Hendricks v. Ference*, 754 F. App'x 510, 512 (9th Cir. 2018) (unpublished) (noting vouchers for canned tuna to replace the allegedly under-filled product provided consumer with the exact product they wished to purchase). In this case, each Member of the Settlement Class entered into a term

contract at various Massage Envy franchised locations, and ***continued*** their membership following the expiration of the contracts "initial term."[7] Indeed, approximately 48 percent of the putative Class were still a Massage Envy member. Krinsk Decl., ¶ 71. It is highly likely that Settlement Class Members are interested in the products and services available at the approximately 1,200 Massage Envy locations. *See Reibstein v. Rite Aid Corp*., 761 F. Supp. 2d 241, 256 (E.D. Pa. 2011) ("In fact, because the class members are likely to shop at Rite Aid again, they may even prefer the $20 gift cards to the lesser value that would have been awarded had the parties opted to provide a cash award.").

Nevertheless, even for those Settlement Class Members who may have no interest in returning to a Massage Envy location, the Vouchers are fully transferable and can be gifted or even sold. *In re Online DVD*, 779 F.3d at 949 *citing Fernandez v. Victoria Secret Stores, LLC*, No. 06–4149, 2008 WL 8150856, at *6 (C.D. Cal. July 21, 2008) (approving settlement where class members were awarded a freely transferrable gift card); *Reibstein*, 761 F.Supp.2d at 255–56 (same). Each of these factors weighs against characterizing the proposed Settlement as a "Coupon" settlement.

2. Even if the Settlement is a Coupon Settlement under CAFA, the Court can Adopt the Lodestar Approach in Determining Attorney's Fees

Even if the Court was to find that the Settlement is a "coupon" settlement under CAFA (which as discussed above, it should not), there is disagreement on the effect of this finding. "Nearly every federal court to consider § 1712 has agreed with Judge Richard Posner's observation, 'This is a badly drafted statute.'" *Galloway v. Kansas City Landsmen, LLC*, 833 F.3d 969, 973 (8th Cir. 2016) *citing Redman v. RadioShack Corp*., 768 F.3d 622, 633 (7th Cir. 2014). This has led to an apparent split among federal courts:

> When the district court ruled, a divided panel of the Ninth Circuit had recently held that § 1712(a) and (b) are not permissive; they provide that a district court must calculate attorneys' fees for coupon awards as a percentage of the redeemed value and must use the lodestar method to calculate fees for injunctive relief. *In re HP Inkjet Printer Litig*., 716 F.3d 1173, 1181-83 (9th Cir. 2013). […]

[7] Generally, Membership Agreements have an "initial term" during which the price cannot be changed and the member cannot cancel.

> Subsequently, a panel of the Seventh Circuit concluded that § 1712(a)–(c) is a permissive statute. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 707 (7th Cir. 2015). Rejecting the *Inkjet* majority's interpretation of "attributable to," the Seventh Circuit interpreted § 1712(a) as meaning that "if any portion of the fee is attributed to the coupon benefits, then that portion of the fee must be based on the coupons used, but that is not the only method available." *Id*. at 708; *accord HP Inkjet*, 716 F.3d at 1194 (Berzon, J., dissenting). Thus, "§ 1712 permits a district court to use the lodestar method to calculate attorney fees to compensate class counsel for the coupon relief obtained for the class," keeping in mind "the potential for abuse posed by coupon settlements." *Southwest*, 799 F.3d at 710. "Subsection (c) allows a combination of percentage-of-coupons-used and lodestar, but it does not require that any portion of the fee be based on the percentage of coupons used." *Id*.

Galloway, 833 F.3d at 974.

Since this split first developed, courts have widely adopted the Seventh Circuit's approach of *In re Southwest Airlines. See, e.g., Newberg on Class Actions* § 15:71 (5th ed.); *Galloway*, 833 F.3d at 974; *Blessing v. Sirius XM, Radio, Inc.*, 507 F. App'x 1, 2-3 (2d Cir. 2012) (unpublished); *In re Bisphenol-A (BPA) Polycarbonate Plastic Prod. Liab. Litig.*, No. 08-0309, 2011 WL 1790603, at *10 (W.D. Mo. May 10, 2011); *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591180, at *2 (S.D. Fla. Aug. 8, 2007). The Ninth Circuit itself has seemingly disavowed its original position. In *In re Easysaver*, the Ninth Circuit noted that:

> In particular, in a mixed settlement, a district court *may use the lodestar approach provided that it does so without reference to the dollar value of the settlement fund*—**or**, of course, *it may reference the dollar value of the settlement fund if it accounts for the redemption rate of the coupons in calculating that dollar value*…
>
> Here, the district court similarly went astray when it reverse-engineered the lodestar multiplier using a value of the settlement that included the full face value of all the $20 coupons. The court started with a lodestar fee of $4.3 million, calculated based solely on class counsel's billing rates and hours worked. But the court then worked backward from class counsel's proposed $8.7 million fee award, which the court had already deemed appropriate as a percentage of the total dollar value of the settlement fund. To do so, the court applied a multiplier of 2.1 to match the lodestar fee with the percentage-of-recovery fee. *Thus, although the $4.3 million figure was derived independently of any specific consideration of the coupons, it lost this independence when the district court used a multiplier to match the lodestar fee to the percentage-of-recovery fee—which was, by definition, a percentage of the full value of the settlement, including the face value of the coupons. The value of the coupon relief therefore impermissibly informed the district court's approval of the lodestar fee*.

In re Easysaver, 906 F.3d at 759-60 (emphasis added). Consequently, although the Ninth Circuit has not expressly overturned *In re HP Inkjet Printer Litig.*, its most recent decisions has brought the Circuit into uniformity with its sister courts. Despite prior Ninth Circuit case law to the contrary, where a settlement involves both coupons and injunctive relief, the Court can determine the proper

amount of fees using the lodestar approach—even in conformity with 28 U.S.C. § 1712.

B. Class Counsel's Fee Request is Reasonable under a Lodestar Method

A lodestar analysis compares counsel's request for fees to the actual hours spent on a case. Under the lodestar method, the court multiplies a reasonable number of hours by a reasonable hourly rate. *Class Plaintiffs v. City of Seattle*, 19 F.3d 1291, 1294 n. 2 (9th Cir. 1994). "The court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." *Id.* "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002). Additionally, courts often recognize that "the complexity of this case, the risks involved and the length of the litigation" should be considered when determining the equitable amount of payable fees. *See Vizcaino*, 290 F.3d at 1051. In this case, Class Counsel seeks an attorneys' fee award of $3,214,582.86, which reflects a modest 1.96 multiplier on their lodestar.

1. Class Counsel's Rates Are Reasonable

Class Counsel's rates are reasonable because they are consistent with, if not lower than, hourly rates charged by attorneys of comparable experience, reputation, and ability for similar litigation. Class Counsel's requested hourly rates ranging from $375 to $750 (averaging $725 for partners, $445 for associates):

Staff Member	Position	Years of Experience	Time	Rate	Total
Jeffrey R. Krinsk	Partner	43	457.8	$750.00	$343,350.00
Mark L. Knutson	Of Counsel	32	538.1	$700.00	$376,670.00
Joshua C. Anaya*	Associate	10	2.4	$500.00	$1,200.00
David J. Harris	Associate	7	120.0	$475.00	$57,000.00
Trenton R. Kashima	Associate	6	1328.1	$450.00	$597,645.00
Lauren R. Presser*	Associate	4	424.3	$425.00	$180,327.50
A. Trent Ruark*	Associate	4	145.1	$375.00	$54,412.50
Siobhán E. Murillo	Law Clerk	n/a	77.3	$150.00	$11,595.00
Rebecka A. Garcia	Paralegal	n/a	89.7	$150.00	$13,455.00
Carol L. Grace	Office Manager	n/a	11.9	$150.00	$1,785.00
Shelby M. Ramsey	Paralegal	n/a	8.8	$150.00	$1,320.00
			3203.5	**$511.55**	**$1,638,760.00**

Krinsk Decl., ¶ 77.[8]

Rates Other Courts Have Awarded. "[R]ate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of American v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). When similar cases are examined, Class Counsel's rates are consistent with the rates charged by firms practicing in this District. *See, e.g., Congdon*, 2019 WL 2327922, at *6 (finding that hourly rates of between $200 and $750, in a national breach of contract/conversion class action, were reasonable) *citing In re MagSafe Apple Power Adapter Litig*., No. 5:09-cv-01911 EJD, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) ("In the Bay Area, reasonable hourly rates for partners range from $560 to $800, for associates from $285 to $510[.]"); *In re High-Tech Employee Antitrust Litig*., No. 11-CV-02509 LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (awarding partners rates "from about $490 to $975" and non-partners "from about $310 to $800"); *Banas v. Volcano Corp*., No. 12–cv–01535 WHO, 2014 WL 7051682, at *5 (N.D. Cal. 2014) (finding rates ranging from $355 to $1,095 per hour for partners and associates were within the range of prevailing rates).

Survey Data. Courts have frequently used survey data in evaluating the reasonableness of attorneys' fees. *Cleo D. Mathis & Vico Prods. Mfg. Co. v. Spears*, 857 F.2d 749, 755-56 (9th Cir. 1988). The *2016 Real RateReport in Brief* by Wolters Kluwer reflects the annual billing rates actually paid by clients. The Report indicates that partners billed, on average, $595; associates billed $400; and paralegals billed $172 in San Francisco. *See* Krinsk Decl., ¶ 80, Ex. D, at p. 5. The Report also notes the average rate for "Commercial, Litigation" in San Francisco was $544. *Id*. Similarly, *United States Consumer Law Attorney Fee Survey Report 2015-2016* found that that the median billing rate for "Attorneys Handling Class Action Cases" in California is $513. *Id*., 81, Ex. E at p. 43. For San Francisco, the survey found that attorneys' rates generally ranged from $350 (for the 25% median rate for attorneys) and $725 (for the 95% median rate for attorneys). *Id*.

Blended Rate. The reasonableness of Class Counsel's rates is further supported by the blended lodestar, calculated by taking the total lodestar and dividing it by the total hours of all

[8] Class Counsel have submitted the firm resume detailing its respective experience and qualifications. Krinsk Decl., ¶ 78, Ex. C.

attorney timekeepers and one staff person who will be in charge of assisting on this case post-Motion. The blended rate in this case for Class Counsel is **$511.55** ($1,638,760.00 divided by 3203.5 hours). Krinsk Decl., ¶ 83. This is in line with the average rate listed in recent surveys. *See id.*,¶ 83, Ex. D, at p. 5 (average commercial litigation rate was $544 in San Francisco); Ex. E, p. 43 (the median billing rate for class action litigation in California is $513). This blend hourly rate also supports the contention that Counsel reasonably staffed the case and did not overly rely on more expensive partners to complete tasks performed by junior attorneys. *See Hayes v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160-JST, 2016 WL 6902856, at *8 (N.D. Cal. Nov. 21, 2016) (After finding over reliance on the work of partners, the Court order that a blend rate of $600 more accurately reflects a reasonable rate.).

Class Counsel's hourly rates, clearly on par with the prevailing market rates of attorneys in this District, are reasonable, particularly given counsel's demonstrated skill, experience and reputation in the area of complex class action litigation.[9]

2. The Hours Expended by Class Counsel are Reasonable

"Beyond establishing a reasonable hourly rate, a party seeking attorneys" fees bears the burden to "document[ ] the appropriate hours expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) *accord Roberts v. Marshalls of CA, LLC*, No. 13-CV-4731-MEJ, 2018 WL 510286, at *15 (N.D. Cal. Jan. 23, 2018). Class Counsel, however, "is not required to record in great detail how each minute of his time was expended," but should "identify the general subject matter of his [or her] time expenditures." *Id*. at 437 n. 12.

Over the last approximate three years of litigation, Class Counsel expended a total of

[9] Class Counsel also seeks compensation for its support staff, such as paralegals and law clerks, which is permitted:

> The key … is the billing custom in the "relevant market." Thus, fees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is "the prevailing practice in a given community," … Indeed, even purely clerical or secretarial work is compensable if it is customary to bill such work separately…

Trustees of the Const. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1257 (9th Cir. 2006). Class Counsel's support staff's hourly rate is $150, well within the range of reasonableness. *In re Volkswagen "Clean Diesel" Mktg. Litig.*, No. 2672 CRB, 2017 WL 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (rates of $80 to $490 for paralegals are reasonable.).

3,176.30 attorney, law clerk, and paralegal/legal assistant hours (excluding the time to prepare the to-be-drafted Motion for Final Approval, its supporting declarations, and other post-application work, which will conservatively add at least 100 post-application hours). Krinsk Decl., ¶ 77. This case was particularly hard fought with Defendant filing numerous motions to stay the action [ECF Nos. 27, 53], a Motion for Judgment on the Pleadings [ECF No. 26], a Motion for Certification of Order for Interlocutory Appeal [ECF No. 52]. Plaintiff filed an Amended Complaint [ECF. No. 60], a Motion to Strike Defendant's Affirmative Defenses [ECF No. 24], and a Motion to Quash [ECF. No. 79]. Furthermore, the parties fully briefed a petition for mandamus. *See Massage Envy Franchising, LLC v. United States District Court for the Northern District of California*, No. 17-71722, ECF. Nos. 1-4 (9th Cir.). This does not include the numerous request for judicial notices [ECF No. 25, 26-1, 27-1, 43], motions to shorten time [ECF No. 29, 54], and other administrative matters. Krinsk Decl., ¶¶ 15-41. Class Counsel had largely drafted a motion for summary adjudication and was preparing the class certification motion at the time of settlement. *Id.*, ¶ 40.

Class Counsel likewise engaged in a significant amount of discovery, settlement negotiations, and communications with the Class, which is not reflected in the docket. The Settlement was only reached after the parties conducted focused discovery and after more than a year of extensive arm's-length negotiations, including two mediations before Mr. Rotman. *Id.*, ¶¶ 48-56. The parties' negotiations were informed by Class Counsel's review of several sets of written discovery responses (which involved significant meet and confer to secure), thousands of pages of documents, and Plaintiffs' depositions. *Id.*, ¶ 42-47. Even after the parties reached a settlement in principal, Class Counsel worked with Defendant to draft the Class Notices and has fielded numerous telephone calls and emails from the Settlement Class.

Collectively, these tasks have taken a substantial amount of Counsel's time and resources:

Task	Hours	Fee
Administrative task: Including filing, scheduling, and other necessary tasks to ensure the proper management of the case.	45.3	$10,440.00
Appeal: Preparing Plaintiff's opposition to Defendant's Petition for Writ of Mandamus.	117.9	$59,665.00
Client and Class Communications: Telephone calls and correspondence with Plaintiffs and other class members.	85.3	$40,200.00

Discovery - Depositions: Preparing to take and defending depositions. Including travel to the deposition location.	108.8	$50,000.00
Discovery - Document Review: Review documents produced by Defendants and other third parties in response to Plaintiffs' document requests.	188.0	$89,152.50
Discovery - Experts: Investigating potential experts for the litigation.	19.7	$10,872.50
Discovery - Meet and Confer: Telephone calls and correspondence with opposing counsel and third parties regarding discovery requests.	72.5	$34,385.00
Discovery: Requests and Responses: Preparing Plaintiffs' discovery requests, responding to discovery request by Defendant, and reviewing discovery responses.	165.8	$81,280.00
Litigation Strategy and Analysis: Meeting between counsel to develop strategies and assign the staffing of the case, the development of trial plans, creating damages models, and preparation for various hearings	292.6	$162,440.00
Mediation: Preparation of mediation briefs, attending mediation, and communications with the mediator. Including travel to the mediation location.	256.9	$147,607.50
Legal Research: Legal research regarding various issues arising from the case.	149.0	$81,220.00
Motion to Strike Affirmative Defenses: Preparing and replying to Plaintiff's Motion to Strike	163.4	$82,740.00
Motion for Judgment on the Pleading: Preparing the opposition to Defendant's dispositive Motion for Judgment on the Pleadings.	185.7	$80,272.50
Motion for Certification of Order for Interlocutory Appeal: Preparing the opposition to Defendant's requested appellate review of the Court's order on Motion to Strike and Motion for Judgment on the Pleadings.	98.2	$51,380.00
Motion for Class Certification: Counsel's preparations for the anticipated filing of Class Certification.	39.7	$25,357.50
Miscellaneous Motions and Orders: Attending case management conferences, preparing various stipulations, preparing and responding to administrative motions (including motions to stay, shorten time, and requests for judicial notice), and review of various orders of the Court.	404.2	$206,745.00
Motion for Summary Judgment: Counsel's preparations for the anticipated filing of Plaintiff's Motion for Summary Adjudication, as well and Defendant's anticipated Motion for Summary Judgment.	187.2	$107,582.50
Motion for Preliminary Approval: Preparing Plaintiffs' Motion for Preliminary Approval and related documents.	102.5	$48,555.00
Pleadings: Preparing the Complaint and First Amended Complaint, investigations regarding the same, interviews with clients regarding their experiences at Massage Envy, and legal research regarding Plaintiffs' causes of action.	192.4	$86,777.50
Settlement: Direct settlement negotiations with Defense Counsel, drafting and editing the Settlement Agreement and related documents, selecting the Claims Administrator, development of class notice and the settlement website.	328.4	$182,087.50
	3203.5	**$1,638,760.00**

Krinsk Decl., Ex. F. The 3203.5 total hours expended by Class Counsel on this case is not excessive when compared to the necessary effort.[10]

[10] Class Counsel provides billing summaries for the Court. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001) ("If counsel submit bills with the level of detail that paying clients find

3. The Request Multiplier is Warranted

The lodestar calculation is not limited to hours expended and the hourly rate. The Court normally further applies a "multiplier" to Class Counsel's lodestar to determine the appropriate fee award. *Class Plaintiffs*, 19 F.3d at 1294 n. 2. To determine whether the lodestar multiplier is reasonable, such factors may be considered: (1) the amount involved and the results obtained, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, and (10) awards in similar cases. *See Fischel*, 307 F.3d at 1006–07. Applying these factors warrant the 1.96 multiplier requested by Class Counsel.

Plaintiffs have achieved substantial relief on behalf of the Class. As discussed in connection with the motion to preliminarily approve the Settlement, Plaintiffs estimate that the average Voucher provided to the Settlement Class members will be between **$50.34 and $251.71**, enough to purchase a majority of the goods or services offered at Massage Envy franchised locations. Krinsk Decl., ¶ 64. Additionally, it is more likely that the Voucher provided to participating Class Member Settlement will *provide approximately 67 to 89 percent of the amount of alleged additional monthly membership fees paid by Class Members, if not more*. *Id*., ¶ 66. This is a substantial value achieved if compared to similar settlements. *C.f. In re Toys R Us-Delaware, Inc.--Fair & Accurate Credit Transactions Act Litig*., 295 F.R.D. 438, 454 (C.D. Cal. 2014) (finding a $5 or $30 [voucher] that represents 5% to 30% of the total liability represented a fair settlement).[11]

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satisfactory, a federal court should not require more."); *In re HPL Techs., Inc. Sec. Litig*., 366 F. Supp. 2d 912, 920 (N.D. Cal. 2005) ("The Sidener declaration breaks out the hours expended by lead counsel into five categories... This is an especially helpful compromise between reporting hours in the aggregate (which is easy to review, but lacks informative detail) and generating a complete line-by-line billing report (which offers great detail, but tends to obscure the forest for the trees)."). To the extent that the Court requires Counsel's individual time entries, Counsel is prepared to provide such documentation. (*See* N.D. Cal. Procedural Guidance for Class Action Settlements.)

[11] Even under 28 U.S.C. § 1712, a review of the individual recovery when determining a proper multiplier is appropriate. Although *In re Easysaver* counsels the Court that the aggregate value of "coupons" should not be used to justify lodestar based fees, it recognizes that "a district court may be able to determine an appropriate lodestar fee and whether a departure is called for by assessing how fully an individual class member is compensated for his or her injuries, without reference to the size of the class or the size of the settlement fund." *In re Easysaver*, 906 F.3d at 759 (9th Cir. 2018).

Furthermore, as noted previously (*see, supra,* Section II), this litigation has been demanding. The parties have collectively filed numerous motions, amended their pleadings, propounded over a hundred sets of discovery requests, briefed a writ petition for mandamus, taken three depositions, issued multiple subpoenas, and attended numerous in person and telephonic settlement discussion (including two full day mediations). *See generally* Krinsk Decl., ¶ 15-56. Plaintiffs had drafted their Motion for Summary Adjudication and were preparing the Motion for Class Certification at the time the parties finally agreed to terms. *Id.* Therefore, it is not surprising that Class Counsel have devoted an enormous amount of time vigorously prosecuting this litigation on behalf of the Class.

Although, at first blush, the First Amended Complaint represents a relatively simple contract claim, this litigation is complex both in its scope and the legal issues involved. The Settlement Class includes approximately 1.7 million members, with numerous contractual variations, who executed their Membership Agreements over a span of more than ten years. The case also involved the business practices of Defendant and its approximately 1,200 franchised clinics and numerous price increases (which occurred at different times, in different amounts, in different regions). Given the number of variables, even the most straight-forward claims and defenses become difficult to investigate and present to the trier of fact.

This lawsuit also transcends normal breach of contract cases. First, the parties contested the identity of the contracting parties to the Membership Agreement. *See* Defendant's Amended Answer [ECF No. 69]. This dispute arises from Defendant's franchise business model. Each of the individual Massage Envy franchised locations are independent entities having separate ownership. Defendant asserts that it is their franchised locations that contract with the consumers. Of course, Plaintiffs disagreed. Nonetheless, it was an issue that would need to be addressed at trial and would undoubtedly complicate the case. *See, e.g.*, Defendant's Amended Answer [ECF No. 69], at p. 22 (asserting a defense for "Failure to Join Indispensable Parties" regarding the franchised locations).

Moreover, Class Members paid their monthly membership amount to their "Home Clinic." In turn, each Massage Envy franchise paid a modest share of their revenue to Defendant under the applicable Franchise Agreements. Defendant has, therefore, consistently argued that any liability in this case is limited to its share of these revenues. *See, e.g.*, Defendant's Amended Answer [ECF No.

69]. Again, the multiple parties involved in Defendant's franchise business model muddled legal issues attendant to the case.[12]

These complexities also engender increased risk for both the Class and Class Counsel. Such a risk is particularly acute as Counsel has taken this case on a contingent basis. Krinsk Decl., ¶ 72. "It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases." *Fischel*, 307 F.3d at 1008. "This provides the 'necessary incentive' for attorneys to bring actions to protect individual rights and to enforce public policies." *Id.* Indeed, "[o]ne of the most common fee enhancers ... is for contingency risk. 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." *See Browne v. Am. Honda Motor Co.*, No. CV 09-06750, 2010 WL 9499073, at *11 (C.D. Cal. Oct. 5, 2010) *citing Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 579-80 (2004), *as modified* (Jan. 12, 2005).

Class Counsel's risk was multiplied by the fact that Counsel has a relatively limited number of attorneys (between five and six attorneys during the litigation of this case) and the aggressive litigation required that Class Counsel periodically dedicate the vast majority of their staff to this case. Krinsk Decl., ¶ 74. This constricted Class Counsel's ability to take on other matters. *Id.*

Class Counsel faced dogged opposition in both the litigation and settlement negotiations. Defendant was represented by experienced lawyers from two well-respected law firms (Sacks Ricketts and Case LLP and Gibson, Dunn & Crutcher, LLP), each of which have a deserved reputation for vigorous advocacy. *Id.*, ¶ 15. Class Counsel's ability to obtain this Settlement with such formidable opposition confirms the quality of Class Counsel's representation of the Class. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F.Supp. 1303, 1337 (C.D. Cal. 1977). The Class also benefited from Class Counsel's extensive experience with class action litigation, particularly

[12] These 'trial' issues do not include Defendant's novel argument regarding the abridgment of the "Identical Factual Predicate" Rule that was the subject of Defendant's Petition of Mandamus and likely any appeal in this case.

against this Defendant and its counsel. *See Hahn v. Massage Envy Franchising, LLC*, No. 12CV153 DMS, 2014 WL 5100220 (S.D. Cal. Sept. 25, 2014) & *Hahn v. Massage Envy Franchising, LLC*, No. 12CV153 DMS, 2014 WL 5099373 (S.D. Cal. Apr. 15, 2014). Such expertise was invaluable in resourcefully litigating the Class's claims, as well as negotiating the Settlement.

Indeed, the resulting multiplier sought by Plaintiffs is 1.96, a relatively unexceptional amount in comparison to multipliers frequently approved by the Ninth Circuit. *See, e.g., Vizcaino*, 290 F.3d at 1051(upholding multiplier of "3.65"); *In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. & Sales Practices Litig.*, No. 5:09-MD-02015-JF, 2011 WL 1877630, at *7 (N.D. Cal. May 17, 2011) (multiplier of 2.2 "is well within the acceptable range"); *In re Mercury Interactive Corp. Sec. Litig.*, No. 5:05-CV-03395-JF, 2011 WL 826797, at *2 (N.D. Cal. Mar. 3, 2011) (multiplier of 3.08 "is within the acceptable range"); *Thieriot v. Celtic Ins. Co.*, No. C-10-04462-LB, 2011 WL 1522385, at *7 (N.D. Cal. Apr. 21, 2011) (multiplier of 1.94 is "within the customary range"); *City of Roseville Employees' Ret. Sys. v. Micron Tech., Inc.*, No. 06-CV-85-WFD, 2011 WL 1882515, at *7 (D. Idaho Apr. 28, 2011), *aff'd sub nom.*, 484 F. App'x 138 (9th Cir. 2012) (multiplier of 2.72 "is relatively standard"). The length and complexity of the work performed by Counsel warrants the award of the amount fees of requested.

C. Class Counsel's Fee Request is Reasonable under the Percentage of the Fund Method of Evaluation

Class Counsel's fees are also appropriate when cross-checked under a "Percentage of the Fund" analysis.[13] "Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund[.]" *In re Online DVD*, 779 F.3d at 949. In the Ninth Circuit, "courts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award." *In re Bluetooth*, 654 F.3d at 942. However, federal courts in California have previously found 20% to 40% of the common fund to be a reasonable award of attorneys' fees and cost in a class action. *See Class Plaintiffs*, 19 F.3d at 1297; *See Vizvaino*, 290 F.3d 1043, 1050 n.4, Appendix A (conducting a survey of attorneys' fees in class cases and finding that courts awarded between 3-40

[13] The 'Percentage of the Fund' crosscheck can used at this juncture, assuming 28 U.S.C. § 1712 is inapplicable (which it is). *In re Easysaver*, 906 F.3d at 759-60. Otherwise, the Court should focus it analysis on the lodestar method. *Id.*

percent of the settlement). This variation reflects that the "benchmark percentage should be adjusted…, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

To calculate an appropriate percentage, the Ninth Circuit examines the "gross" settlement benefit (and not the "net" common fund—deducting litigation, notice, and claims administration expenses). *See In re Online DVD*, 779 F.3d at 953 (affirming attorney fee award "as a percentage of the total settlement fund, including notice and administrative costs, and litigation expenses") (*citing Powers v. Eichen*, 229 F3d 1249, 1258 (9th Cir 2000) (rejecting the requirement to base an award on a percentage of the net recovery) & *Staton v. Boeing Co.*, 327 F.3d 938, 974-75 (9th Cir. 2003) ("The district court also did not abuse its discretion by including the cost of providing notice to the class ... as part of its putative fund valuation.... We have said that 'the choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable.'")).

In re Online DVD-Rental Antitrust Litig. is instructive. Under the *In re Online DVD* settlement agreement, defendant "agreed to pay a total amount of $27,250,000, comprising both a 'Cash Component' and a 'Gift Card Component,' in exchange for dismissal with prejudice of all claims asserted in the complaint." *In re Online DVD*, 779 F.3d at 940. From this fund, defendant would also agree to pay class counsel's fees and expenses, costs of notice and administration, and incentive payments to class representatives. *Id.* The Ninth Circuit upheld the District Court's decision to award class counsel 25% of the "overall" settlement fund of $27,250,000, not just the "net" fund. *Id.*, at 949, 953. In doing so, the Ninth Circuit counselled "that the reasonableness of attorneys' fees is not measured by the choice of the denominator." *Id.*, at 953.

The amount requested by Class Counsel equals *24.16 percent* of the "total" settlement benefit (the settlement including class counsel's fees and expenses and the costs of notice and administration) and *32.14 percent* of the "net" settlement benefit (only the 10 million in vouchers provided to the Class). Both of these numbers are easily within the range of reasonableness accepted by this Circuit. *See, e.g., Vizvaino*, 290 F.3d 1043 at 1052-54 (finding that courts have awarded

between 3 and 40 percent of the settlements in class actions); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993) (reaffirming 25% benchmark); *Wren v. RGIS Inventory Specialists, No.* C-06-05778 JCS, 2011 WL 1230826, at *29 (N.D. Cal. Apr. 1, 2011) (awarding 42%). An upward departure from the 25% benchmark (assuming the Court considers the "net" settlement benefit) is warranted for the same reasons provided in the previous section. *See, supra*, section III(B)(3) (auguring for the use of a lodestar multiplier); *Vizcaino*, 290 F.3d at 1048-50 (Factors relevant to a determination of the percentage ultimately awarded include: (1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases.)

The Court can verify under both a lodestar analysis and/or a percentage-recovery methodology that the amount requested as fees is reasonable. Class Counsel, therefore, requests that the Court award a total of $3,214,582.86 as recoverable attorneys' fees. *See Hayes*, 2016 WL 6902856, at *8 (awarding a fee that represents 25 percent of the settlement benefit and a 2.54 lodestar multiplier.)

IV. THE COURT SHOULD AWARD THE REQUESTED EXPENSES

This Court may award reasonable expenses as provided for by the Settlement Agreement. FED. R. CIV. P. 23(h). The Ninth Circuit allows the recovery of litigation costs for class action settlements. *See Staton*, 327 F.3d at 974; *see also Newberg on Class Actions*, §14:2 at 511-513 (4th ed.). "Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1048 (N.D. Cal. 2008) (*citing Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)).

Class Counsel requests reimbursement for routinely reimbursed expenses in the amount of $85,417.14. As more fully detailed in the Krinsk Declaration, Class Counsel's litigation expenditures include: Transportation and Meals: $16,443.69 (Class Counsel's travel and meal expenses to defend depositions, to meet with witnesses and/or opposing counsel, and attend mediations and hearings); Photocopying: $1,219.48; Filing and Service of Process Fees: $2,247.50; Document Hosting and Discovery: $6,552.34 (These expenses have been paid to attorney service firms to host and process electronic discovery); Court Hearings, Deposition Reporting, and

Transcripts: $6,024.60; Mediation: $25,500; Claims Administration: $26,724.74; Online Research Expenses: $97.85; and Mail and Courier Expenses: $596.94. Krinsk Decl., ¶ 84, Ex. G. These expenses were both necessary and reasonable in bringing this case to a successful resolution.

In total, Plaintiff's costs are proportionate to the needs of the litigation relative to the benefit received by the Settlement Class. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1041 (N.D. Ill. 2011) ("The Court also observes a 2004 empirical study, which found that '[c]osts and expenses for the sample as a whole were, on average 4 percent of the relief for the class[.]'") (*citing* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 70 (2004)). Thus, Plaintiffs' request is reasonable and should be approved.

V. THE COURT SHOULD AWARD THE REQUESTED INCENTIVE AWARDS

Finally, Class Counsel respectfully requests that the Court approve an award of $10,000 to each of the three plaintiffs. "Incentive awards are fairly typical in class action cases." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). "Plaintiffs in class and collective actions play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny." *Castillo v. Noodles & Co.*, No. 16-CV-03036, 2016 WL 7451626, at *2 (N.D. Ill. Dec. 23, 2016). "Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *Linney v. Cellular Alaska Partnership*, Nos. C–96–3008, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997) ("Incentive fees for class representatives serve much the same function as attorneys' fees do in the class action context: they provide the economic incentive necessary to ensure that meritorious actions are prosecuted.").

In considering whether an incentive award is reasonable, the Court should use "'relevant factors includ[ing] 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 reasonabl[e] fear[s of]… retaliation .'" *Staton*, 327 F.3d at 977 (*citing Cook*, 142 F.3d at 1016); *Rodriguez*, 563 F.3d at 958–59 (Incentive awards "are 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.").

Each Plaintiff made meaningful contributions to the litigation. Plaintiffs identified the increases to their monthly membership fees and contacted a law firm that had experience litigating class claims against Defendant. *See generally* Declaration of Baerbel McKinney-Drobnis ("McKinney Decl."), Declaration of Joseph B. Piccola ("Piccola Decl."), and Declaration of Camille Berlese ("Berlese Decl."), concurrently filed herewith. Plaintiffs produced documents and provided information so that Counsel could develop the class's claims. *Id.* Each Plaintiff has been deposed and responded to written discovery requests. *Id.* Plaintiffs have also been actively and consistently involved in every part of this lawsuit: collecting and producing documents; regularly supervising and directing Class Counsel's litigation decisions, reviewing the numerous filings in this case, and making themselves available during mediations and settlement sessions. *Id.* When aggregated, the time Plaintiffs committed to this case is not insignificant. For example, Mr. Piccola's records confirm that he has spent 120 hours prosecuting this case, and the other Plaintiffs have had similar levels of involvement. Piccola Decl., at ¶ 21; Krinsk Decl., at ¶ 89.

As a result of Plaintiffs' commitment, the Settlement Class was able to benefit from the Settlement as outlined above. Further, Plaintiffs' participation in this case was not without personal risk. Not only did Plaintiffs have to defend themselves in the discovery process, Plaintiffs also had to shield their friends and family members from the broad and intrusive discovery requests. Defendant subpoenaed the wife of Mr. Piccola (Kathleen "Kay" Piccola), the husband of Ms. McKinney-Drobnis (Burton Drobnis), and the husband (Robert Berlese), daughters (Lia Berlese and Angela Berlese), son (Christopher Berlese) and an acquaintance (Michael Damiani) of Ms. Berlese. McKinney Decl.; Piccola Decl.; Berlese Decl.; *see also* Motion to Quash Subpoenas [ECF No. 79]; Joint Letter Regarding Discovery Dispute [ECF No. 83]. These discovery requests were a source of strain to Plaintiffs' families and friends, requiring Plaintiffs' additional time and resources. McKinney Decl.; Piccola Decl.; Berlese Decl.

The requested incentive payments to Plaintiffs are reasonable, appropriate, and should be awarded. While a $10,000 incentive award is admittedly on the "high end" of the amount

reasonably awarded in similar cases, Plaintiffs' significant involvement in this case, combined with the risks they bore, warrants the requested incentive awards. *See Chu v. Wells Fargo Invs., LLC*, Nos. C 05–4526 MHP, 2011 WL 672645, at *5 (N.D. Cal. Feb. 16, 2011) (approving a $10,000 incentive award, which was "perhaps somewhat on the high end of the acceptable range for the size of the class [approximately 2,700 members] and the amount of the settlement [$6.9 million]."); *Black v. T-Mobile USA, Inc*, No. 17-CV-04151-HSG, 2019 WL 3323087, at *7 (N.D. Cal. July 24, 2019) (approving a $10,000 incentive award, when plaintiff spent approximately 90 to 100 hours on this case.).

VI. CONCLUSION

For the foregoing reasons, Class Counsel respectfully requests that the Court grant Plaintiffs' motion for an award of $3.3 million in attorneys' fees and expenses and award each named Plaintiff $10,000 ($30,000 cumulatively) for their time and effort in successfully prosecuting this action.

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Respectfully submitted,

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