

1 KEMNITZER, BARRON, & KRIEG, LLP
BRYAN KEMNITZER Bar No. 066401
2 ELLIOT CONN Bar No. 279920
445 Bush St., 6th Floor
3 San Francisco, CA 94108
Telephone: (415) 632-1900
4 Facsimile: (415) 632-1901
bryan@kpklegal.com
5 elliot@kpklegal.com

6 EAST BAY COMMUNITY LAW CENTER
SHARON DJEMAL Bar No. 208461
7 1950 University Ave., Ste. 200
Berkeley, CA 94704
8 Telephone: (510) 269-6612
Facsimile: (510) 8490-1536
9 sdjema@ebcl.org

10 Attorneys for Plaintiff Winifred Cabiness and the putative class

11

12

13

UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION
16

17 WINIFRED CABINESS, individually and on
behalf of all others similarly situated,

18 Plaintiff,

19

20 v.

21 EDUCATIONAL FINANCIAL
SOLUTIONS, LLC dba CAMPUS DEBT
SOLUTIONS, BETA INVESTMENT
22 GROUP, INC.; EQUITY ACQUISITIONS,
LLC; VENTURETECH SOLUTIONS, LLC;
23 DEBT.COM, LLC; and HOWARD
DVORKIN

24 Defendants.
25 _____/

26

27

28

29

Case No. 3:16-cv-01109-JST

**NOTICE OF MOTION, MOTION, AND
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR ORDER
APPROVING SERVICE AWARD,
ATTORNEY'S FEES, AND COSTS**

**Date: November 15, 2018
Time: 2:00 p.m.
Dept.: Courtroom 9, 19th Floor
Hon. Jon S. Tigar**

1	<u>TABLE OF CONTENTS</u>		
2	NOTICE OF MOTION		1
3	MEMORANDUM OF POINTS & AUTHORITIES		1
4	I. INTRODUCTION		1
5	II. STATEMENT OF THE CASE		2
6	A. PROCEDURAL HISTORY		2
7	B. SUMMARY OF SETTLEMENT TERMS		4
8	III. ARGUMENT		5
9	A. CLASS COUNSEL’S REQUEST FOR AN AWARD OF ATTORNEYS’ FEES IS REASONABLE AND APPROPRIATE		5
10	1. The Fee Request is Reasonable Under the Percentage-of-the-Fund Method		6
11	2. Class Counsel Achieved an Excellent Result for the Class		7
12	3. Class Counsel Assumed a Significant Risk of No Recovery		8
13	4. Class Counsel’s Skill and Quality of Work Delivered an Excellent Recovery for the Class.		8
14	5. The Case Was Taken on a Contingent Basis		9
15	6. Awards in Similar Cases Show that the Requested Fee is Reasonable		10
16	7. A Lodestar Crosscheck Confirms that the Requested Fee is Reasonable		11
17	8. The Requested Reward of \$330,000 is Appropriate under the “Lodestar” Method		11
18	9. Class Counsel Expended a Reasonable Number of Hours Litigating the Case		11
19	10. The Hourly Rates for Class Counsel are Well Within the Range of Rates Charged by Lawyers with Similar Skills, Qualifications, and Experience		12
20	11. This Case Includes Many of the Factors Normally Warranting a Multiplier		13
21	B. CLASS COUNSEL ARE ENTITLED TO REIMBURSEMENT OF COSTS		14
22	C. CLASS COUNSEL RESPECTFULLY REQUESTS THAT THE COURT AWARD THE CLASS REPRESENTATIVE A SERVICE AWARD OF		14
23			
24			
25			
26			
27			
28			

1	\$5,000.00	
2	D. THE CLASS RESPONSE TO DATE SUPPORTS APPROVAL OF THE FEE AWARD	15

3 **IV. CONCLUSION** 16

4

5 **TABLE OF AUTHORITIES**

6 **STATUTES**

7	47 U.S.C. §227, <i>et seq.</i>	2
8	F.R.C.P. 23(h)	5,14
9	F.R.C.P. 54(d)(1)	14

10 **CASES**

11	Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)	5
12	Cellphone Termination Fee Cases (2010) 186 Cal.App.4th 1380	14
13	Chalmers v. City of Los Angeles, 796 F.2d 1205 (9th Cir. 1986)	12
14	Destefano v. Zynga, Inc., 2016 WL 537946 (N.D. Cal. Feb. 11, 2016)	9
15	Fischel v. Equitable Life Assur. Soc’y of U.S., 307 F.3d 997 (9th Cir. 2002)	5
16	Glass v. UBS Fin. Servs., Inc., 331 F. App’x 452 (9th Cir. 2009)	6
17	Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998)	6,11
18	Ikuseghan v. Multicare Health Sys., 2016 WL 4363198 (W.D. Wash. Aug. 16, 2016)	10
19	In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935 (9th Cir. 2011)	6,11
20	In re Capital One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781 (N.D. Ill. 2015)	10
21	In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 109 F.3d 602 (9th Cir. 1997)	6,10
22	In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454 (9th Cir. 2000)	14
23	In re Omnivision Techs., Inc., 559 F. Supp. 2d 1036 (N.D. Cal. 2008)	7,9
24	In re Online DVD-Rental Antitrust Litig., 779 F.3d 934 (9th Cir. 2015)	7,8,15
25	In re Wash. Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291 (9th Cir. 1994)	6,9
26	In re Yahoo Mail Litig., 2016 WL 4474612 (N.D. Cal. Aug. 25, 2016)	15
27	James v. JPMorgan Chase Bank, N.A., 2017 WL 2472499 (M.D. Fla. June 5, 2017)	10

28

1	<i>Jenson. v. First Tr. Corp.</i> , 2008 WL 11338161 (C.D. Cal. June 9, 2008)	8
2	<i>Kerr v. Screen Extras Guild, Inc.</i> , 526 F.2d 67 (9th Cir. 1975)	13
3	<i>Knight v. Red Door Salons, Inc.</i> , 2009 WL 248367 (N.D. Cal. Feb. 2, 2009)	9
4	<i>Lewis v. Anderson</i> , 692 F.2d 1267 (9th Cir.1982)	5,6,11
5	<i>Lofton v. Verizon Wireless (VAW) LLC</i> , 2016 WL 7985253 (N.D. Cal. May 27, 2016)	9
6	<i>Malta v. Fed. Home Loan Mortgage Corp.</i> , 2013 WL 444619 (S.D. Cal. Feb. 5, 2013)	7
7	<i>Melito v. Am. Eagle Outfitters, Inc.</i> , 2017 WL 3995619 (S.D.N.Y. Sept. 11, 2017)	10
8	<i>Miller v. Ghirardelli Chocolate Co.</i> , 2015 WL 758094 (N.D. Cal. Feb. 20, 2015)	15
9	<i>Moore v. Verizon Commc'ns Inc.</i> , 2014 WL 588035 (N.D. Cal. Feb. 14, 2014)	12
10	<i>Moreno v. City of Sacramento</i> , 534 F.3d 1106 (9th Cir. 2008)	11,12
11	<i>Nwabueze v. AT&T, Inc.</i> , 2014 WL 324262 (N.D. Cal. Jan. 29, 2014)	12
12	<i>Pelletz v. Weyerhaeuser Co.</i> , 592 F. Supp. 2d 1322 (W.D. Wash. 2009)	15
13	<i>Perkins v LinkedIn Corp.</i> , 2016 WL 613255 (N.D. Cal. Feb. 16, 2016)	8
14	<i>Rodman v. Safeway Inc.</i> , 2018 WL 4030558 (N.D. Cal. Aug. 23, 2018)	12
15	<i>Six (6) Mexican Workers v. Arizona Citrus Growers</i> , 904 F.2d 1301 (9th Cir. 1990)	6,7
16	<i>Spillman v. RPM Pizza, LLC</i> , 2013 WL 2286076 (M.D. La. May 23, 2013)	7
17	<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003)	6,14
18	<i>United Steelworkers v. Phelps Dodge</i> 896 F.2d 403 (9th Cir. 1990)	12
19	<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F.Supp.294 (N.D. Cal. 1994)	14
20	<i>Vincent v. Hughes Air W.</i> , 557 F.2d 759 (9th Cir. 1977)	14
21	<i>Vizcaino v. Microsoft Corp.</i> , 290 F.3d 1043 (9th Cir. 2002)	6,7,8,11,13
22	<i>Wehlage v. Evergreen at Arvin, LLC</i> , 2012 WL 4755371 (N.D. Cal. Oct. 4, 2012)	13
23	<u>OTHER AUTHORITIES</u>	
24	John Leubsdorf, <i>The Contingency Factor in Attorney Fee Awards</i> , 90 Yale L.J. 473 (1981)	10
25		
26		
27		
28		

1 **NOTICE OF MOTION**

2 **TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on November 15, 2018, at 2:00 pm, or as soon thereafter
4 as the matter may be heard in the courtroom of the Honorable Jon S. Tigar, in Courtroom 9, 19th
5 Floor of the United States District Court for the Northern District of California, located at 450
6 Golden Gate Avenue, San Francisco, California, Plaintiffs will and hereby does move for an
7 order granting preliminary approval of the class action settlement agreement, setting a final
8 approval hearing, and for certification of a settlement class.

9 Plaintiff moves for an order approving Service Award, Attorneys' Fees and Costs.

10 This motion is based on this Notice, the supporting Memorandum of Points &
11 Authorities, the Supporting Declarations of Bryan Kemnitzer, Sharon Djemal, Elliot Coon and
12 Winifred Cabiness, and any and all exhibits attached thereto, all pleadings and records filed
13 herein, and such oral and documentary evidence as may be presented at the hearing of this
14 motion.

15 **MEMORANDUM OF POINTS & AUTHORITIES**

16
17 **I. INTRODUCTION**

18 Plaintiff and Class Counsel have efficiently and effectively litigated this TCPA class
19 action against Defendants¹, engaged in mediation and extensive negotiations, and ultimately
20 achieved an exceptional result on behalf of the class. The Settlement is unique among approved
21 Telephone Consumer Protection Act ("TCPA") class action settlements in that it provides for
22 cash relief to class members via a direct distribution of settlement funds, without the need for a
23 claims process.²

24 For their efforts in achieving this result, Class counsel seek a fee award of \$330,000.00,
25

26 ¹ Defendants Educational Financial Solutions, LLC dba Campus Debt Solutions ("CDS") and its allegedly related
27 entities Beta Investment Group, Inc., Equity Acquisitions, LLC, Venturetech Solutions, LLC, Debt.com, LLC, and
Howard Dvorkin are collectively referred to as Defendants.

28 ² All Settlement Class Members that receive Class Notice by mail (approximately 81.6%) will not need to take any
further action to receive their pro rata portion of the settlement fund. The Settlement Class Members that only
receive email notice will simply be required to provide an updated mailing address on the Settlement website.

1 which represents 30% of the Settlement Fund (or 76% of lodestar), reimbursement of actual out-
2 of-pocket costs of \$20,000.00, and a modest \$5,000.00 service award to Plaintiff.

3 **II. STATEMENT OF THE CASE**

4 **A. PROCEDURAL HISTORY**

5 This action was initially filed as an individual case by Winifred Cabiness in response to
6 numerous unwanted phone calls placed to her cellular telephone by, or on behalf of, Defendant
7 CDS. (*See* ECF No. 109 at 3-4 for detailed summary of alleged facts). The matter was filed on
8 March 4, 2016 alleging that CDS had violated the Telephone Consumer Protection Act
9 (“TCPA”), 47 U.S.C. §227, *et seq.* by placing unsolicited phone calls to Ms. Cabiness’s cellular
10 telephone, (ECF No. 1).

11 Defendants have mounted a vigorous defense. On June 6, 2016, Defendants filed
12 motions to dismiss and to stay the action, asserting that Plaintiff lacked standing because she had
13 not suffered the requisite injury or harm, that Plaintiff had failed to allege sufficiently that
14 Defendants had violated the TCPA, and that the case should be stayed pending a Ninth Circuit
15 decision in *Spokeo*. (ECF No. 24). Following further briefing (ECF Nos. 29, 36) and oral
16 argument (ECF No. 45), the motions were denied on September 1, 2016. (ECF No. 50).

17 Meanwhile, Plaintiff commenced written discovery. Through the litigation, Plaintiff
18 discovered that there were potentially thousands of other individuals in her situation that may
19 have also had received unwanted calls from Campus Debt Solutions and its affiliated entities.
20 (Declaration of Winifred Cabiness ¶ 8, filed herewith). As a result, on September 23, 2016,
21 Plaintiff filed a First Amended Complaint, alleging TCPA violations on behalf of a putative
22 class. (ECF No. 59). Again, on October 24, 2016, Defendants filed a renewed motion to dismiss
23 the amended complaint and a motion to stay the action, again asserting that Plaintiff lacked
24 standing because she had failed to allege that she had suffered the requisite harm and requesting
25 that the case be stayed pending a D.C. Circuit decision. (ECF No. 60). After further written
26 briefing (ECF Nos. 65, 70), the Court, on January 17, 2017, denied the motions without oral
27 argument. (ECF No. 73).

28 CDS answered the First Amended Complaint on January 31, 2017. (ECF No. 77). The

1 Parties continued to engage in extensive discovery practice. On February 14, 2017, Class
2 Counsel traveled to Fort Lauderdale, Florida, for two full days of depositions. During the
3 deposition, Class Counsel learned that CDS was in “wind-down mode” and no longer taking new
4 customers. (Declaration of Bryan Kemnitzer, ¶ 16, filed herewith). The Campus Debt Solutions
5 website is no longer active.

6 As a result of the information obtained at the depositions, on March 24, 2017, Plaintiff
7 filed a Second Amended Complaint seeking to add Beta Investment Group, Inc., Equity
8 Acquisitions, LLC, VentureTech Solutions, LLC, Debt.com, LLC, and Howard Dvorkin as
9 Defendants to the action, under a single business enterprise theory. (ECF No. 88, Kemnitzer,
10 Decl., ¶ 16).

11 On June 5, 2017, the Parties attended a full-day mediation at JAMS in Los Angeles,
12 California, before the Honorable Peter D. Lichtman (Ret.). (Kemnitzer Decl., ¶ 11) At the
13 mediation, the Parties agreed to a Memorandum of Understanding of Settlement, based off of an
14 assumed class size.

15 Following the mediation, challenges arose regarding the size of the settlement class and
16 the validity of Defendants’ purported “written consent” to call certain individuals. (*See e.g.* ECF
17 No. 104). Resolving these challenges required time-consuming analysis by Class Counsel’s
18 retained telecommunications expert, Jeffrey Hansen, and research and further negotiations
19 regarding the applicability of the Electronic Signatures in Global and National Commerce Act
20 (E-SIGN Act), 15 U.S.C. § 7001, *et seq.* to the TCPA. (*see id.*, Kemnitzer Decl., ¶¶ 17-19). At
21 the same time, as CDS was in “wind-down” mode, Class Counsel had to consider the very
22 serious possibility of not being able to collect after a judgment if settlement negotiations fell
23 through. (Kemnitzer Decl., ¶ 16). Ultimately, the Parties were able to re-negotiate the amount
24 of the Settlement Fund and execute a Class Action Settlement Agreement, providing substantial
25 relief to the members of the Settlement Class. (Kemnitzer Decl., ¶¶ 16-19)

26 On January 26, 2018, Plaintiff filed an unopposed Motion for Preliminary Approval of
27 Class Action Settlement. (ECF Nos. 109-112). On March 28, 2018, the Court requested
28 supplemental briefing (ECF No. 115) that was provided on April 9, 2018 (ECF No. 116). On

1 June 25, 2018 the Court granted preliminary approval of the class action settlement. (ECF No.
2 117).

3 Class Notice was sent on August 9, 2018 in the form of 21,844 emails and 18,975
4 postcard notices. (Kemnitzer Decl., ¶ 20) As of the date of this motion, there have been no
5 objections to the settlement and no exclusions by any Settlement Class Members. (*Id.*)

6 **B. SUMMARY OF SETTLEMENT TERMS**

7 The conditionally certified Settlement Class consists of:

8 [A]ll persons in the United States and its Territories:

9 (a) who received one of more telephone solicitation calls on their cellular
10 telephone advertising CDS' student loan consolidation and loan forgiveness
services, made by or on behalf of CDS;

11 (b) using an automated telephone dialing system, or artificial or prerecorded
12 voice;

13 (c) without providing prior express written consent to receive such phone calls;

14 (d) since October 16, 2013.

15 Excluded from the Settlement Class are the following: (i) any trial judge that may
16 preside over this Action; (ii) any of the Defendants; (iii) any of the Released
Parties; (iv) Class Counsel and their employees; (v) the immediate family of any
17 of the foregoing persons; and (vi) any person who has previously given a valid
release of the claims asserted in this Action.

18 (ECF Nos. 117, 110-1, § 1.52)

19 The Settlement requires Defendants to pay \$1,100,000.00 into a non-reversionary
20 common fund. (ECF No. 110-1, §§ 1.55, 2.2) The fund is to be used for cash payments to
21 Settlement Class Members, costs of notice and settlement administration (capped at
22 \$125,000.00), a Court-approved Service award (requested at \$5,000.00), Court-approved
23 attorneys' fees (\$330,000.00), and reimbursement of actual out-of-pocket costs (up to
24 \$20,000.00) (*Id.*, §§ 1.48, 1.50, 2.3, 5.2(a), 8.1, 14.1, 15.1, 15.2) The Settlement provides for
25 direct payments to settlement class members, without the need for a claims process. (*Id.*, §§ 2.4,
26 2.5, 5.2, 5.3). However, Settlement Class Members have the option of providing an updated
27 mailing address via the Settlement website. (*Id.*) Each Settlement Class Member, for whom the
28 Settlement Administrator is able to obtain a valid mailing address, will receive a check, via direct

1 distribution, in the amount of at least \$20.00. (*Id.*, § 5.3(b)) Checks will be disseminated directly
2 to Settlement Class Members following Final Approval, without any requirement that Settlement
3 Class Members submit a claim form.

4 In addition to providing the monetary relief described above, Defendants have agreed to
5 be bound by an injunction under the terms set forth in the Settlement Agreement, to be entered
6 by the Court, prohibiting them from using an ATDS to place telemarketing calls on behalf of
7 CDS without obtaining prior express written consent. (*Id.*, §§ 2.7, 5.7)

8 **III. ARGUMENT**

9 **A. CLASS COUNSEL’S REQUEST FOR AN AWARD OF ATTORNEYS’ 10 FEES IS REASONABLE AND APPROPRIATE**

11 Pursuant to the Class Action Settlement Agreement, Class Counsel seek an award of
12 \$330,000.00 in attorneys’ fees and reimbursement of \$20,000.00 for actual out-of-pocket
13 litigation costs. At the present time, Class Counsel’s lodestar is \$435,022.50, the fee request
14 represents 76% of Counsel’s *current* lodestar, and does not include the significant additional
15 work that will be necessary to oversee the distribution of the funds, respond to class member
16 inquires, and in connection with the final briefing and hearing on final approval. The
17 \$330,000.00 fee request represents 30% of the total of the \$1,100,000.00 Settlement fund.

18 It is well established that in the Ninth Circuit, “[w]hen counsel recover a common fund
19 which confers a ‘substantial benefit’ upon a class of beneficiaries, they are entitled to recover
20 their attorney’s fees from the fund.” *Lewis v. Anderson*, 692 F.2d 1267, 1270 (9th Cir.1982)
21 (citing *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002)); *see*
22 *also* F.R.C.P. 23(h).

23 The “common fund” doctrine is a “well-recognized exception” to the American rule that
24 litigants must bear their own attorneys’ fees. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478
25 (1980). It is well settled that “a lawyer who recovers a common fund for the benefit of persons
26 other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a
27 whole.” *Id.* The “common fund” doctrine “rests on the perception that persons who obtain the
28 benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful

1 litigant's expense." *Id.* A court with jurisdiction over the fund can "prevent this inequity by
2 assessing attorney's fees against the entire fund, thus spreading fees proportionately among those
3 benefited by the suit." *Id.* "Ninth Circuit jurisprudence ... permits the application of common
4 fund principles where— as in the present case—the class of beneficiaries is identifiable and the
5 benefits can be traced in order to allocate the fees to the class." *Glass v. UBS Fin. Servs., Inc.*,
6 331 F. App'x 452, 457 (9th Cir. 2009). In such cases, "the common fund doctrine ensures that
7 each member of the winning party contributes proportionately to the payment of attorneys' fees."
8 *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003); *see also In re Wash. Pub. Power Supply*
9 *Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("those who benefit in the creation of a fund
10 should share the wealth with the lawyers whose skill and effort helped create it").

11 In a common fund case, the district court has the discretion to apply either the
12 "percentage-of-the-fund" method or the "lodestar" method in calculating a fee award. *Lewis v.*
13 *Anderson*, 692 F.2d 1267, 1270; *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.
14 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998). The method a district
15 court chooses to use, and its application of that method, must achieve a reasonable result. *See In*
16 *re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Though courts
17 have discretion to choose which calculation method they use, their discretion must be exercised
18 so as to achieve a reasonable result."). As the Ninth Circuit has instructed, "[r]easonableness is
19 the goal, and mechanical or formulaic application of either method, where it yields an
20 unreasonable result, can be an abuse of discretion." *In re Coordinated Pretrial Proceedings in*
21 *Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997).

22 Under either approach, Class Counsel's request for fees is reasonable.

23 **1. The Fee Request is Reasonable Under the Percentage-of-the-Fund**
24 **Method**

25 When employing the percentage-of-the-fund method, the Ninth Circuit advises that the
26 district court should begin its analysis with a 25% "benchmark" figure. *Six (6) Mexican Workers*
27 *v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *see also In re Coordinated*
28 *Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997)

1 (“common fund fees commonly range from 20% to 30% of the fund created”) (citation omitted)

2 The 25% benchmark rate should be the “starting point for analysis, [thought it] may be
3 inappropriate in some cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).
4 “The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when
5 special circumstances indicate that the percentage recovery would be either too small or too large
6 in light of the hours devoted to the case or other relevant factors.” *Six (6) Mexican Workers*, at
7 1311.

8 The “relevant circumstances” include: (1) the results achieved for the class, (2) the risk
9 counsel assumed, (3) the skill required and the quality of the work, (4) the contingent nature of
10 the fee, and (5) awards in similar cases. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,
11 954-55 (9th Cir. 2015) (citation omitted); *Vizcaino*, 290 F.3d 1043, 1048-50. It is also helpful to
12 crosscheck the percentage-of-the-fund against the lodestar. *Vizcaino*, 290 F.3d 1043, 1050.

13 Consideration of the “circumstances” of the case, *Id.* at 1048, confirm that an award at
14 30% of the settlement fund is appropriate.

15 **2. Class Counsel Achieved an Excellent Result for the Class**

16 Class Counsel have achieved an excellent settlement on behalf of the class. *See In re*
17 *Omnivision*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (“The overall result and benefit to the
18 class from the litigation is the most critical factor in granting a fee award.”). Somewhat unique
19 to TCPA settlements, this Settlement provides for a direct cash benefit to each Settlement Class
20 Member, *with no mandatory claims process*. As set forth in Plaintiff’s motion for preliminary
21 approval, each Settlement Class Member with an obtained mailing address (estimated at between
22 81.6% and 96.6% of the class members) will be directly issued a check for at least \$20.00. (ECF
23 No. 109, at 8).

24 This result is truly outstanding when compared to other approved TCPA class settlements
25 that provide for similar levels of monetary relief, but only with a claims made process. *See*
26 *Malta v. Fed. Home Loan Mortgage Corp.*, 2013 WL 444619, at *7 (S.D. Cal. Feb. 5, 2013)
27 (granting preliminary approval of TCPA class action settlement where, if all eligible claimants
28 filed claims, they would receive approximately \$2 each); *Spillman v. RPM Pizza, LLC*, 2013 WL

1 2286076, *4 (M.D. La. May 23, 2013) (granting final approval of TCPA settlement where class
2 members received less than \$20 each). This settlement will provide a higher benefit, via direct
3 distribution *without a claims process*.

4 Furthermore, given the facts of this case, the ability of Class Counsel to obtain *any*
5 *settlement* for the class is an excellent result. After the litigation commenced, CDS went into
6 “wind down” mode, is no longer accepting new clients, and no longer has an active website.
7 While the complaint was amended to add related parties under a single-business enterprise
8 theory, Class Counsel was cognizant of the real possibility that Plaintiff could prevail at class
9 certification, trial, and obtain a judgment, and still be able to provide no recovery to the class due
10 to a defunct Defendant. (Kemnitzer Decl., ¶¶ 13-16). Courts recognize that classes benefit from
11 early resolution when “further litigation would have delayed any potential recovery for the Class
12 and have been costly and risky.” *Perkins v LinkedIn Corp.*, No. 13-cv-04303-LHK, 2016 WL
13 613255, at *2 (N.D. Cal. Feb. 16, 2016). It would be entirely possible that after years of
14 litigation, Class Counsel could prevail, and still obtain nothing for the class.

15 **3. Class Counsel Assumed a Significant Risk of No Recovery**

16 Due to CDS’s “wind down” status, Class Counsel had a real risk of no recovery for
17 themselves and for the class. Any fee award should take into account this risk. *In re Online*
18 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954-55 (9th Cir. 2015); *Vizcaino*, 290 F.3d at 1048;
19 *see also Jenson. v. First Tr. Corp.*, No. CV 05-3124 ABC, 2008 WL 11338161, at *12 (C.D. Cal.
20 June 9, 2008) (“Uncertainty that *any* recovery ultimately would be obtained is a highly relevant
21 consideration. Indeed, the risks assumed by Counsel, particularly the risk of non-payment or
22 reimbursement of expenses, is important to determining a proper fee award.” (internal citation
23 omitted)).

24 **4. Class Counsel’s Skill and Quality of Work Delivered an Excellent**
25 **Recovery for the Class.**

26 Despite the challenges involved and the vigorous defense mounted, Class Counsel were
27 able to litigate this case efficiently and effectively because of their skill and experience in
28 litigating consumer class action cases. “The prosecution and management of a complex national

1 class action requires unique legal skills and abilities. *In re Omnivision Techs., Inc.*, 559 F. Supp.
2 2d 1036, 1047 (N.D. Cal. 2008) (internal quotation and citation omitted). Here, Class Counsel
3 engaged in significant investigation and contested discovery practice, and overcame two motions
4 to dismiss and motions to stay. This put Class Counsel in a position to be able to resolve this
5 matter relatively early.

6 “The quality of opposing counsel is also relevant to the quality and skill that class
7 counsel provided,” *Destefano v. Zynga, Inc.*, No. 12-CV-04007-JSC, 2016 WL 537946, at *17
8 (N.D. Cal. Feb. 11, 2016). Defendants’ counsel aggressively defended this matter, as
9 demonstrated by the lengthy docket. Class Counsel’s ability to negotiate a favorable settlement,
10 despite the quality of work down by Defendants’ counsel supports their fee request. *See, e.g.*,
11 *Lofton v. Verizon Wireless (VAW) LLC*, No. C 13-05665 YGR, 2016 WL 7985253, at *1 (N.D.
12 Cal. May 27, 2016) (the “risks of class litigation against an able defendant well able to defend
13 itself vigorously” support an upward adjustment in the fee award); *Knight v. Red Door Salons,*
14 *Inc.*, No. 08-01520, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009) (where defense counsel
15 “understood the legal uncertainties in this case[] and were in a position to mount a vigorous
16 defense,” the favorable settlement was a “testament to Plaintiffs’ counsel’s skill”).

17 **5. The Case Was Taken on a Contingent Basis**

18 Class Counsel represented Plaintiff and the class entirely on a contingency basis. “With
19 respect to the contingent nature of the litigation—the fourth factor—courts tend to find above-
20 market-value fee awards more appropriate in this context given the need to encourage counsel to
21 take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees.”
22 *Destefano*, 2016 WL 537946, at *18 (citing *In re Wash. Public Power Supply Sys. Sec. Litig.*, 19
23 F.3d 1291, 1299 (9th Cir. 1994). *See* Richard A. Posner, *Economic Analysis of Law* 783 (8th ed.
24 2011) (“A contingent fee must be higher than a fee for the same legal services paid as or after
25 they are performed. The contingent fee compensates the lawyer not only for the legal services he
26 renders but for the loan of those services. The implicit interest rate on such a loan is high because
27 the risk of default (the loss of the case, which cancels the client's debt to the lawyer) is much
28 higher than in the case of conventional loans, and the total amount of interest is large not only

1 because the interest rate is high but because the loan may be outstanding for years—and with no
 2 periodic part payment, a device for reducing the risk borne by the ordinary lender.”); *see also*
 3 John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473, 480 (1981)
 4 (“A lawyer who both bears the risk of not being paid and provides legal services is not receiving
 5 the fair market value of his work if he is paid only for the second of these functions. If he is paid
 6 no more, competent counsel will be reluctant to accept fee award cases.”).

7 The contingent nature of the case justifies Class Counsel’s request for an award of 30%
 8 of the common fund.

9 **6. Awards in Similar Cases Show that the Requested Fee is Reasonable**

10 Not only is Class Counsel’s request for a fee award of 30% of the common fund within
 11 the range of normally approved percentage-of-the-fund awards, (*See In re Petroluem*, 109 F.3d
 12 602, 607 *supra*), but it is also consistent with fee awards in other TCPA class settlements both in
 13 this circuit and federal courts across the country.

14 In 2016, in another TCPA action, a District Court for the Western District of Washington
 15 determined “that 30% of the settlement fund represents a fair and reasonable fee award.”
 16 *Ikuseghan v. Multicare Health Sys.*, No. C14-5539 BHS, 2016 WL 4363198, at *2 (W.D. Wash.
 17 Aug. 16, 2016)

18 As part of its analysis, the *Ikuseghan* court examined a survey of fee awards in TCPA
 19 Settlements and found that “the base rate for attorneys’ fees in a typical TCPA class action is
 20 30% for the first \$10 million recovered.” *Id* at 2* (citing *In re Capital One Tel. Consumer Prot.*
 21 *Act Litig.*, 80 F. Supp. 3d 781, 804 (N.D. Ill. 2015). *See also Melito v. Am. Eagle Outfitters, Inc.*,
 22 No. 14-cv-2440 (VEC), 2017 WL 3995619, at *17 (S.D.N.Y. Sept. 11, 2017) (awarding a fee of
 23 30% settlement fund plus litigation costs); *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-cv-
 24 2424-T-23-JSS, 2017 WL 2472499, at *2 (M.D. Fla. June 5, 2017) (awarding a fee of 30% of
 25 total settlement fund plus litigation costs).

26 Class Counsel’s request is directly in line with this base rate.

27 //

28 //

1 7. **A Lodestar Crosscheck Confirms that the Requested Fee is**
 2 **Reasonable**

3 The requested 30% percentage is especially modest when the fee request is compared to
 4 Class Counsel’s lodestar, set forth in detail below. This is not a case in which a “megafund”
 5 would yield windfall profits for class counsel.” *In re Bluetooth Headset Prod. Liab. Litig.*, 654
 6 F.3d 935, 942 (9th Cir. 2011). Rather, in order to ensure an excellent benefit for the settlement
 7 class members, Class Counsel have agreed to accept a fee award that represents only 76% of
 8 actual current lodestar. Accepting an amount less than lodestar provides further evidence of the
 9 reasonableness of the request. *Vizcaino*, 290 F.3d at 1050 (“[W]hile the primary basis of the fee
 10 award remains the percentage method, the lodestar may provide a useful perspective on the
 11 reasonableness of a given percentage award.”).

12 8. **The Requested Reward of \$330,000 is Appropriate under the**
 13 **“Lodestar” Method**

14 As an alternative to the percentage-of-the-fund recovery, Class Counsel are entitled to
 15 fees under the “lodestar” method. *See Lewis*, 692 F.2d 1267, 1270. In applying the lodestar
 16 method, “a district court must start by determining how many hours were reasonably expended
 17 on the litigation, and then multiply those hours by the prevailing local rate for an attorney of the
 18 skill required to perform the litigation.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th
 19 Cir. 2008) (citation omitted). Once the “lodestar” is determined, “[t]he district court may then
 20 adjust upward or downward based on a variety of factors.” *Id.* These factors include “the quality
 21 of the representation, the benefit obtained for the class, the complexity and novelty of the issues
 22 presented, and the risk of nonpayment.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th
 23 Cir. 1998)

24 9. **Class Counsel Expended a Reasonable Number of Hours Litigating**
 25 **the Case**

26 The time expended by Class Counsel was reasonable and necessary to achieve the very
 27 successful final outcome in this case. “By and large, the court should defer to the winning
 28 lawyer’s professional judgment as to how much time he was required to spend on the case; after

1 all, he won, and might not have, had he been more of a slacker.” *Moreno* 534 F.3d 1106, 1112.
 2 Class Counsel have provided the Court with detailed billing records. The reasonableness of time
 3 actually expended in this case is apparent from the entries themselves.

4 Class Counsel have billed a total of 810.6 hours in litigating and settling this case. Prior
 5 to submitting this fee application, Class Counsel audited their billing records and made
 6 reductions for reasonableness and have removed any entries that could be considered excessive,
 7 duplicative, or administrative. (Kemnitzer Decl., ¶¶ 69-73, Djemal Decl., ¶¶ 9-12). Class
 8 Counsel’s total lodestar is \$435,022.50.

9 **10. The Hourly Rates for Class Counsel are Well Within the Range of**
 10 **Rates Charged by Lawyers with Similar Skills, Qualifications, and**
 11 **Experience**

12 As this Court has recognized, “the reasonable hourly rate must be based on the
 13 ‘experience, skill, and reputation of the attorney requesting fees’ as well as ‘the rate prevailing in
 14 the community for similar work performed by [comparable] attorneys....” *Rodman v. Safeway*
 15 *Inc.*, No. 11-CV-03003-JST, 2018 WL 4030558, at *6 (N.D. Cal. Aug. 23, 2018) (citing
 16 *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1986))

17 The prevailing market rate can be determined by the declarations of the claimant’s
 18 attorneys, other attorneys, and/or orders from other courts confirming counsel’s rates. *United*
 19 *Steelworkers v. Phelps Dodge* 896 F.2d 403, 407 (9th Cir. 1990).

20 The qualifications and experience of Class Counsel who performed work in this matter
 21 are described in the Kemnitzer and Djemal declarations filed herewith. As attested therein, the
 22 hourly rates on which the lodestar is based are well within the range of rates charged by lawyers,
 23 law students, and staff with similar skills, qualifications, and experience in California; the
 24 requested rates have previously been approved and awarded by both federal and state courts.

25 Class Counsel’s rates are also consistent with those approved by courts in this district in
 26 awarding fees in other cases. *See Moore v. Verizon Commc’ns Inc.*, No. C 09-1823 SBA, 2014
 27 WL 588035, at *14 (N.D. Cal. Feb. 14, 2014) (approving partner rates ranging from \$550 to
 28 \$825 as “reasonable given the geographic location and experience of counsel”); *Nwabueze v.*
AT&T, Inc., No. C 09-01529 SI, 2014 WL 324262, at *2 (N.D. Cal. Jan. 29, 2014) (finding that

1 partner rates of \$625 and \$825, listed in ECF No. 248 ¶ 11, were reasonable); *Wehlage v.*
 2 *Evergreen at Arvin, LLC*, No. 4:10-cv-05839-CW, 2012 WL 4755371, at *2 (N.D. Cal. Oct. 4,
 3 2012) (approving senior partner rates of \$750 and \$900, listed in ECF No. 116).

4 **11. This Case Includes Many of the Factors Normally Warranting a**
 5 **Multiplier**

6 The fee award sought by Class Counsel represents 76% of lodestar, or a voluntary
 7 negative .76 multiplier. While Class Counsel have voluntarily agreed to a reduction of fees in
 8 order to guarantee a positive result for the class, the factors of the case would normally warrant
 9 an upward adjustment via lodestar multiplier. *see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043,
 10 1051 n.6 and Appendix (9th Cir. 2002) [multipliers in common fund cases range from 0.6 to
 11 19.6, with most in the 1.0-4.0 range];

12 Courts may consider the following when considering assessing a multiplier: “(1) the time
 13 and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite
 14 to perform the legal service properly, (4) the preclusion of other employment by the attorney due
 15 to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7)
 16 time limitations imposed by the client or the circumstances, (8) the amount involved and the
 17 results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the
 18 ‘undesirability’ of the case, (11) the nature and length of the professional relationship with the
 19 client, and (12) awards in similar cases.” *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th
 20 Cir. 1975)

21 Application of these factors would justify a positive multiplier. Class Counsel assumed
 22 all of the risk of the litigation, which was undertaken solely on a contingent basis with no
 23 guarantee of recovery. Although the parties agreed to settle relatively early in the proceedings,
 24 the complexity of the issues is demonstrated by the fact that the parties required several months
 25 and additional negotiation in order to finalize all the terms of the settlement. The case settled
 26 relatively quickly and efficiently due to Class Counsel’s high degree of expertise in both the
 27 substantive issues and the litigation of consumer class actions generally.

28 Despite this, Class Counsel only request an award of \$330,000.00, significantly less than

1 lodestar.

2 **B. CLASS COUNSEL ARE ENTITLED TO REIMBURSEMENT OF COSTS**

3 Class Counsel are also entitled to recover the costs incurred in the action. (F.R.C.P.
4 54(d)(1) [“costs other than attorneys’ fees shall be allowed as of course to the prevailing party
5 unless the court otherwise directs; F.R.C.P. 23(h) [in a certified class action, “the court may
6 award ... nontaxable costs that are authorized by law or by the parties’ agreement”]). Attorneys
7 who create a common fund are entitled to reimbursement of their out-of-pocket expenses so long
8 as they are reasonable, necessary and directly related to the work performed on behalf of the
9 class. *Vincent v. Hughes Air W.*, 557 F.2d 759, 769 (9th Cir. 1977).

10 Class Counsel request reimbursement for costs of \$20,000.00. These costs are itemized
11 by category in the accompanying exhibits and declarations of counsel, and are clearly
12 reasonable. (Kemnitzer Decl. ¶ 4, Exh. A., Djemal Decl., ¶ 13). In fact, the requested cost
13 reimbursement is less than actual \$35,033.10 in costs incurred.

14 **C. CLASS COUNSEL RESPECTFULLY REQUESTS THAT THE COURT**
15 **AWARD THE CLASS REPRESENTATIVE A SERVICE AWARD OF**
16 **\$5,000.00**

16 The Settlement Agreement provides for a Service Award, subject to the Court’s approval,
17 of up to \$10,000.00 for Ms. Cabiness to be paid in addition to any relief that she may be entitled
18 to as a class member. In light of the concerns raised by the Court in its June 26, 2018
19 Preliminary Approval Order (ECF No. 109), Ms. Cabiness and Class Counsel request that Ms.
20 Cabiness be awarded \$5,000.00 as a service award.

21 It has long been established that courts have discretion to approve such service or
22 “incentive” awards to representative plaintiffs in class actions as compensation for their having
23 expended time and effort for the benefit of others and for having undertaken the risks inherent in
24 serving as a named plaintiff. (*See, e.g., Staton, supra*, 327 F.3d at 977; *In re Mego Fin. Corp.*
25 *Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000); *Van Vranken v. Atlantic Richfield Co.*, 901
26 F.Supp.294, 299 (N.D. Cal. 1994); *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th
27 1380, 1393-1395.) The contributions of the class representative to the resolution of this action is
28 described in the Declaration of Winifred Cabiness filed herewith.

1 The requested \$5,000 service award is reasonable and normally approved by courts in
2 this circuit. *See In re Yahoo Mail Litig.*, No. 13-CV-4980-LHK, 2016 WL 4474612, at *11 (N.D.
3 Cal. Aug. 25, 2016) (“The Ninth Circuit has established \$5,000.00 as a reasonable benchmark
4 [for service awards.]”); *Miller v. Ghirardelli Chocolate Co.*, No. 12-CV-04936, 2015 WL
5 758094, at *7 (N.D. Cal. Feb. 20, 2015) (awarding \$5,000 service awards to plaintiffs who
6 searched personal records, were deposed, responded to interrogatories and requests for
7 production, provided declarations, and attended or consulted during mediation); *Pelletz v.*
8 *Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (approving \$7,500
9 incentive awards where the plaintiffs assisted class counsel, responded to discovery, and
10 reviewed settlement terms, and collecting decisions approving service awards ranging from
11 \$5,000 to \$40,000); *see also In re Online DVD*, 779 F.3d at 942 (rejecting argument that a
12 \$5,000 incentive award created a conflict of interest between the plaintiff and class members
13 who received payments of \$12 from the settlement fund).

14 As set forth in the Declaration of Winifred Cabiness, Plaintiff has spent considerable time
15 and effort in the prosecution of this action, which included multiple meetings and discussions
16 with counsel, reviewing pleadings, responding to discovery and gathering the information
17 required to respond, and reviewing the Settlement. (Cabiness Decl., ¶¶ 8-14)

18 **D. THE CLASS RESPONSE TO DATE SUPPORTS APPROVAL OF THE**
19 **FEE AWARD**

20 On or about August 10, 2018, the Settlement Administrator sent Notice via mail and
21 email to the Settlement Class. 18,975 Postcard Notices were mailed and 21,844 Notices were
22 emailed. (Kemnitzer Decl., ¶ 20). The Notice sent to the Settlement Class informed them that
23 Class Counsel would request a fee award of up to \$330,000.00, reimbursement of out-of-pocket
24 costs of up to \$20,000.00, and a service award of up to \$10,000.00. (*Id.*)

25 To date, zero Settlement Class members have excluded themselves from the Settlement.
26 And there are zero objections to the Settlement, whatsoever, let alone any objections to the
27 attorneys’ fees and costs requests, or the incentive award request. (*Id.*) That no member of the
28 Class has objected supports the reasonableness of the requests.

1 **IV. CONCLUSION**

2 For all of the reasons discussed above, Plaintiff and the Class respectfully submit that this
3 unopposed motion should be granted, and ask the Court to enter an order awarding Plaintiff's
4 service fee, and awarding Class Counsel their attorneys' fees and reimbursement of out-of-
5 pocket costs as requested.

6 Dated: September 7, 2018

KEMNITZER, BARRON & KRIEG, LLP

7

8

By: /s/ Elliot Conn
ELLIOT CONN

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28